IN THE SUPREME COURT OF MISSISSIPPI

HOLLY SPRINGS REALTY GROUP, LLC — APPELLANT

v. — CAUSE NO.2009-CA-00923

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

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

Holly Springs Realty Group, LLC, Appellant Holly Springs Realty Group LLC
Frank M. Hurdle, Attorney for Appellant Holly Springs Realty Group LLC
William F. Schneller, Attorney in bankruptcy for Appellant Holly Springs Realty Group LLC
Christopher C. Stephenson, managing member, Holly Springs Realty Group, LLC
Kada C. Stephenson, member, Holly Springs Realty Group, LLC
Sidney L. Hurdle, creditor, Holly Springs Realty Group, LLC
BancorpSouth, Appellee
John J. Crow, Jr., Attorney for BancorpSouth
Daniel Myles Martin, Attorney for BancorpSouth
Rhea Tannehill, Attorney for BancorpSouth
Matthew S. McKenzie, Attorney for BancorpSouth
Les Alvis, former Attorney for BancorpSouth
Norma S. Bourdeaux, Langston Oxford Properties, L.P., Susan M. Bryan, Lynn M. Grenfell, and John Albriton, Co-defendants and Appellees
Lynn Albriton, unjoined co-tenant of John Albriton
Dana E. Kelly, Attorney for Appellees Bourdeaux, Langston Properties, Bryan, Grenfell and Albriton
Shane Langston, manager and co-counsel for Langston Oxford Properties, L.P.
Van Buren Property Owners Association
James B. Grenfell, spouse and co-counsel of Lynn Grenfell, of counsel for Van Buren Property Owners Association
Robert Crumpton, defendant
Shelby K. Brantley, defendant
G. Todd Burwell, attorney for Brantly and Crumpton
Van Buren Group, LLC, defendant subject to $1,214,533 judgment by default
Claiborne Frazier, defendant, defendant subject to $1,214,533 judgment by default

Austin Frazier, defendant, defendant subject to $1,214,533 judgment by default
C.E. Frazier, defendant, defendant subject to $1,214,533 judgment by default
Mathena Wetlands, LLC, charged with payment of the judgment
Ergon-Frazier Development I, LLC, charged with payment of the judgment
W. Robert Jones III, attorney and/or managing member and/or organizer Ergon-Frazier Development I, LLC
Frazier Development, LLC, charged with Payment of the judgment

ATTORNEY OF RECORD FOR APPELLANT

FRANK M. HURDLE

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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.

STATEMENT OF ISSUES

1. 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?

2. 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?

3. Did the Chancellor err 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, even though a tax title is a perfect title bestowed by the Sovereign free and clear of any equitable burden to any other property?

4. Where Plaintiff secretly gave several Defendants in an *in rem* equity action permission not to file an answer until told to do so, and these parties then misled Appellant about this Mary Carter-type agreement, thus harming Appellant, did the chancellor err in refusing to estop Plaintiff from recovery against Appellant?

5. Did the chancellor err when he denied a Appellant's motion to dismiss case because five necessary and indispensable 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?

6. Did the chancellor err when he denied Appellant's motion to enter a docket entry of default against five Co-defendants who intentionally did not file an answer in an *in rem* action for more than one year, when such failure was apparently a matter of trial strategy?

7. Did the Chancellor, by allowing Plaintiff to unilaterally grant enlargement of time by which certain favored parties might answer, show such bias in favor of Plaintiff that Appellant was not assured of receiving a fair hearing?

8. 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?

9. Where Plaintiff and Appellant entered into an agreed order over a property sold at a tax sale, where Appellant agreed to recognize Plaintiff's lien and Plaintiff agreed to reimburse Appellant for all taxes paid, and Plaintiff did not reimburse Appellant and began foreclosure on Defendant prior to repaying the agreed amount, did the chancellor err in not finding that

the Plaintiff's actions were a material breach of the Agreed Order which resulted in there being no lien on the property?

10. Where the Chancellor stated that he was basing his decision to order foreclosure of Appellant's property in large part on the fact that five non-answering Defendants had purchased their property in an "arm's length transaction," and there was no evidence to support this finding of fact, did the Chancellor err in granting summary judgment and foreclosure against Appellant?

11. A person such as Appellant who owns property subject to a mortgage with no personal liability on the debt is in effect a surety up to the value of his property. Did the chancellor err in failing to find that Plaintiff's dishonest behavior and bad faith towards Appellant released Appellant from its duty as a surety and thus acted to estop Plaintiff from foreclosing on Appellant?

12. In a foreclosure action, did the Chancellor err in ordering that the property be partitioned in foreclosure when Appellant, the only property owner that filed an answer, requested that the property be sold as a whole or not at all?

STATEMENT OF THE CASE

This case involves Appellant, Holly Springs Realty Group, LLC, which purchased a condominium at the August, 2005 City of Oxford municipal tax sale. The condominium was one of 30 that had been developed by Van Buren Group LLC, which was managed by Claiborne Frazier. The project was financed by BancorpSouth Bank, which held a mortgage on the project (for simplicity's sake, Appellant treats trust deeds as mortgages and refers to them as such, which is especially appropriate as this case deals with a judicial rather than power of sale foreclosure).

Van Buren Group, LLC defaulted in its payments to BancorpSouth. BancorpSouth, while preparing to foreclose on six properties it believed to be owned by its debtor and mortgagor, found that four of these properties had apparently been deeded out without being released from the mortgage while two appeared to remain under the ownership of Van Buren Group. Defendant John Albriton was believed to have an equitable interest one of these units. As it failed to check the tax sale list recorded in the Chancery Clerk's office, BancorpSouth was unaware that Holly Springs Realty Group, LLC was the owner of record of the final unit subject to the mortgage, Unit 309, which BancorpSouth believed to still be owned by Van Buren Group (R299).

BancorpSouth filed a complaint seeking declaratory judgment and judicial foreclosure on all six units on October 1, 2007, naming as Defendants Van Buren Group, its managing member Claiborne Frazier, the loan's guarantors, Austin Frazier, C.E. Frazier, Shelby K. Brantley, Robert Crumpton, and the five other owners of property subject to the mortgage (R001). On October 18, 2007, it filed an Amended Complaint (R042). Although BancorpSouth sought relief from all parties, it chose to prosecute its case in stages. The Guarantors Frazier, Claiborne Frazier, and Van Buren Group were all served and failed to file an answer to the complaint. On Jan. 24 and 29, 2008, BancorpSouth sought and obtained default judgments against these Defendants (R100, 109, 110,

121, 123, 125) prior to obtaining service on property owners Norma S. Bourdeaux, Langston Oxford Properties, L.P., Susan M. Bryan, Lynn M. Grenfell, and John Albriton, hereinafter the "Five Other Owners."[1]

On February 7, 2008, 129 days after the filing of the original complaint, the Five Other Owners were served with the summons and complaint (R126-34). These defendants later sought and received from Plaintiff permission not to file an answer until told to do so, although there is nothing on the court record to reflect this agreement (R265-267, T20 Kelly). Both Plaintiff and the Five Other Owners would later take steps to conceal or mislead Appellant as to the existence of this agreement (R279 #8, R224-232).[2] These defendants never filed an answer to the complaint prior to summary judgment and had not filed one at the time this brief was filed.

During the week of February 10, 2008, Holly Springs Realty Group requested its deed to Unit 309 of the Van Buren and recorded the same. The Oxford City Clerk issued a tax deed, conveying what Appellant maintains is a perfect, virgin title free and clear of any and all encumbrances of any nature save for unpaid taxes. After recording the deed, Holly Springs Realty Group redeemed the property from subsequent tax sales by paying delinquent taxes in the amount of $21,533.69. (R272).

Following the recording of its tax deed, Holly Springs Realty Group attempted to contact the former owner of Unit 309 in an effort to negotiate a return of the property. (R252) When these efforts failed Appellant brought an action to have its title confirmed, and it was confirmed (R247). At no time was there any allegation that the rights of the former owner were not fully and

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[1] Appellant has chosen not to address the propriety of entering a final judgment against one defendant before all necessary and indispensable parties have been joined, other than to express disapproval.

[2] Appellant notes that attorneys John Crow and Daniel Myles Martin were not active in the case at the time this took place.

completely protected in either the sale or the confirmation process.

On March 28, 2008, BancorpSouth and Holly Springs Realty Group entered into an Agreed Order whereby BancorpSouth agreed to reimburse Appellant for all taxes paid, both at the 2005 tax sale and in redeeming the property from subsequent sales, plus 18 percent interest for the time said money was outstanding. Holly Springs Realty Group agreed to set aside the tax sale as to the lienholder only. It was agreed that title was to remain vested in Appellant (R136). Appellant was not a party to the suit at the time this Agreed Order was entered.

Appellant was to be reimbursed for its tax expenditures after the court approved the Agreed Order; however BancorpSouth, through counsel, informed Appellant that prior to making payment it wished to have it joined in this suit for the purpose of validating BancorpSouth's lien. After some disagreement because the wording of Plaintiff's Petition to Join was not what had been orally agreed upon, Appellant agreed to be joined provided that the issue of title to Unit 309 not be a subject of the suit (R273 #8). The Court agreed, with the language of the order stating: "Holly Springs Realty Group, LLC, is joined as a necessary and indispensable party, for the purposes of validating BancorpSouth's lien, and not for the purposes of determining title" (R157).

Prior to being joined, Holly Springs Realty Group's counsel twice asked counsel for Plaintiff BancorpSouth if it had any knowledge about why the Five Non-responding Co-defendants had not filed an answer. Plaintiff's counsel responded in the negative or gave a non-committal answer. At no time did Plaintiff inform Appellant of its secret agreement with the Five Other Owners (R272, T12, L28-29; T13, L1-4; T19, L4-7; T41, L18-20, Hurdle).

On May 23, 2008, Plaintiff petitioned and received from the Court an order charging certain LLC interests of Claiborne Frazier, Austin Frazier and C.E. Frazier, with the payment of the unsatisfied default judgment Plaintiff received in January 2008 (R150). Although Plaintiff has

provided no accounting to the court as to the value of these interests, based on discovery Appellant believes it is substantial (R281 #12).

Shortly after Holly Springs Realty entered into the Agreed Order it made several attempts to negotiate a release from the mortgage (R252, top of page; R273). These efforts were unsuccessful, and Plaintiff eventually responded to Appellant's efforts to negotiate a release by informing it through counsel that it was the bank's intention to bring an action to foreclose only on Unit 309. On being informed of this, Appellant, through counsel informed Plaintiff that such action would be in bad faith, and that such action would be vigorously defended (R273, R287).

In anticipation of service of Plaintiff's complaint Appellant, as a courtesy, informed Plaintiff that it had not been paid the money due under the Agreed Order. Appellant further stated that it believed that the terms of the Agreed Order were such that the lien was not valid until the funds were paid (R273, R287). For whatever reason, Plaintiff served Appellant with the summons and complaint prior to the payment of the funds due under the Agreed Order. (R273-74)

The Amended Complaint which was served on Appellant was the Oct. 18, 2007, complaint. It did not list Holly Springs Realty as a party, make any claim against Holly Springs Realty, or contain any operative facts to tie Holly Springs Realty to the case (R42). Appellant's counsel, unwilling for trial strategy reasons to seek a dismissal without prejudice, suggested to Plaintiff that it amend its complaint. Plaintiff informed Appellant that it was Appellant's duty to answer (R288), and so Appellant did so, stating as its first defense the failure to state a claim upon which relief can be granted, along with numerous other defenses (R161).[3] Appellant also filed a counterclaim against

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[3] Given that Appellant had actually told Plaintiff that it would seek a dismissal if the complaint was filed before the funds were paid, Appellant can't help but wonder if the failure to pay and the deficient complaint was an effort to goad Appellant into seeking a dismissal. Appellant was originally joined under the condition that its title not be questioned, but had it won a dismissal this provision would not have applied once the complaint was re-filed.

Plaintiff, charging, among other things, breach of contract, breach of duty to a surety, bad faith and because Appellant suspected a secret and collusive agreement, abuse of process (R171).

On July 31, 2008, after Appellant had filed its Answer, Plaintiff tendered the funds due under the Agreed Order. Maintaining that Plaintiff was in material breach of the contract, Appellant deposited said funds in the registry of the court (R180).

On September 19, 2008, Plaintiff filed a Motion for Leave of Court to File a Second Amended Complaint to Add Defendants Holly Springs Realty Group and Lynn Albriton as defendants. This motion was granted on September 23, 2008. This Second Amended Complaint was never filed with the court or served on Appellant.[4]

On October 23, 2008, Plaintiff filed a motion with the court requesting summary judgment and foreclosure and an order of sale against Appellant (R234). Appellant responded in opposition to the motion and filed a motion requesting summary judgment against Plaintiff requesting dismissal and granting of its counterclaim (R246, 270). A hearing was scheduled for Dec. 3, however the parties were not first up and could not be heard.

On Dec. 8, 2008, Attorney Dana E. Kelly, representing the Five Other Owners, requested a Subpoena Ducas Tecum to be served on John W. Lee, Jr. The Subpoena asked for all information concerning Lee's purchase of Units 305, 306 and 307 at the Van Buren, copies of Lee's correspondence with Attorney General Jim Hood, Van Buren Group, Claiborne Frazier, BancorpSouth and other parties. (R290)

As a result it was soon learned that in Feb. 19, 2004, Lee had purchased and apparently paid for two units, 305 and 306, which had not been released from BancorpSouth's mortgage. Obviously

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[4] Although not a matter of lower court record, Appellant did not receive notice of this motion or hearing. Appellant certainly would not have objected to the amendment.

some pressure was brought to bear, because the bank granted a gratuitous release to both of these units on May 15, 2004. On June 8, 2004 Lee closed on an additional unit, 307, which the bank released a week later for $50,000 (R340).

BancorpSouth had not revealed this information in any of its former pleadings. It informed Appellant and later informed the Court as part of its Memorandum filed with the Court on January 27, 2009, in which it stated that the sales to Lee had taken place without the bank's knowledge (R339).

On Jan. 27, 2009 the parties again were scheduled for a hearing, but again were not first up and could not be heard. The hearing was rescheduled for May 6.

On Feb. 13, 2009, Appellant filed a Motion Requesting a Docket Entry of Default and Other Relief against the Five Other Owners (R373). The Co-defendants filed a Motion to Strike and objected strongly to Appellant's language in its motion (R379).[5]

In reviewing the court file, Appellant discovered that the Five Other Owners had not been served with the summons and complaint within the 120-day period from its filing as required by M.C.R.P Rule 4(h). Appellant then filed a Motion to Dismiss with Prejudice for Plaintiff's Failure to Fully Prosecute its Action and Failure To Join All Necessary and Indispensable Parties (R385).

Both of Appellant's motions and the Motion to Strike were heard on March 26, 2009. Both of Appellant's motions were denied. The Five Non-responding Co-defendants' Motion to Strike was granted (R422, R433, R434).

On March 13, 2009 a summons was issued to Lynn Albriton, co-tenant to one of the units

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[5] Appellant regrets the use of the word "illegal" in its motion, which connotes criminal behavior. Appellant maintains that it believes the behavior of the Five Other Owners was an unlawful (tortuous, or at the least outside the rules of civil proceedure) abuse of process. As to whether the answers of the Five Other Owners to Appellant's Request for Admission were false and misleading, members of the Court are welcome to decide that issue for themselves, should they wish.

subject to the mortgage (R400). On April 7, 2009, a Waiver of Service of Process signed by Lynn Albriton was filed with the court. It had been signed on March 20, 2009, 179 days after the Court granted permission for her to be joined, and 533 days after the filing of the original complaint (R427).

On May 6, 2009, the Court heard BancorpSouth's request for Summary Judgment. Appellant did not set its request for Summary Judgment for hearing, choosing instead to await the outcome of the May 6 hearing. Plaintiff's request for Summary Judgment was granted, and the portion of the property covered by the deed of trust owned by Appellant was ordered sold (R437).

On May 6, 2009 the Court entered an Order of Sale to take place on June 12, 2009. Due to publication scheduling problems this order was amended on May 19, 2009 and the sale date was rescheduled to June 19, 2009 (R442).

On June 3, 2009 Appellant filed its notice of appeal of both its pre-trial motions and the summary judgment (R449).

On June 12, 2009, Appellant filed for Chapter 7 bankruptcy protection under the United States Bankruptcy Code. As a result of the automatic stay, the sale of the property was postponed. On August 13, 2009, Appellant's adversary proceeding was dismissed and the stay was lifted.

On September 24, 2009, the Court held a hearing to set a new sale date for the condominium. The property was ordered to be sold on Friday, October 23, with a confirmation hearing to be held on Thursday, October 29.

On September 24, 2009, The Court also heard Appellant's request for a stay of the Court's order without supersedeas bond. The request was denied and supersedeas was set at $200,000. Appellant was unable to post supersedeas, and so the foreclosure sale will have been held by the time this brief is received by the Court, or shortly thereafter.

SUMMARY OF THE ARGUMENT

When a mortgaged property is sold at a tax sale, Section 27-43-5 of the Mississippi Code provides that the lienholder must receive notice of the expiration of the redemption period of the tax sale. If the lienholder shall fail to receive such notice, then Section 27-43-11 provides "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, and such purchaser shall be entitled to a refund of all such taxes paid the state, county or other taxing district after filing his claim therefor as provided by law."

Holly Springs Realty Group was such a tax sale purchaser. BancorpSouth was a lienholder who claimed not to have received notice. Holly Springs Realty agreed to the reinstatement and/or the recognition of that lien upon the reimbursement of the taxes paid.

Holly Springs Realty Group purchased a piece of real property at the tax sale. Title transferred and vested on that day. It was a perfect title, free and clear of any liens and encumbrances of any kinds, save only for the lien of the Plaintiff, provided that it did not receive notice. Appellant did not purchase an equity of redemption, and its right to its property does not require it to beg at the altar of equity. It owns its property as a matter of law.

BancorpSouth and Appellant reached an agreement to have the tax sale set aside as to the lienholder only and put it into the form of an Agreed Order which required Plaintiff to reimburse Appellant for the taxes it had paid. The record would indicate that both parties may not have fully understood the mechanics of Section 27-43-11, but that is not uncommon when parties enter into an Agreed Order.[6] There was a benefit to Plaintiff in having the issue settled with no further objection from Appellant, and Appellant benefitted from an assurance that its tax expenditures

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[6] Appellant's counsel clearly misstated a portion of the law in oral argument before the Chancellor. Statutes can be confusing, and the simplicity of the Agreed Order is what makes it so useful in settling legal disputes by reducing them to contract form.

would be reimbursed.

Appellant insists that this Agreed Order is a settlement agreement and a contract, and that by breaching the contract by failing to pay the funds due, Plaintiff lost its benefit, i.e. the recognition and reinstatement of the lien.

Assuming Plaintiff did not get notice, its lien remained valid right up until it signed the Agreed Order. At that point its lien was extinguished. Appellant also lost the right to raise the issue of notice – even if it could prove that Plaintiff did, in fact, receive notice. In exchange for the certainty of an Agreed Order BancorpSouth made the restoration of its lien conditional on its reimbursement of Appellant's tax expenditures. This was not a bad deal for the Plaintiff, as it was going to have to come up with this money at some point, anyway. For whatever reason, Plaintiff did not pay the money due, and then, after being warned that Appellant did not consider its lien to be in effect, began foreclosure proceedings. Why would a Plaintiff do this, and is there any judicial utility in protecting Plaintiffs who behave in this manner?

The Amended Complaint received by Appellant had not been amended to contain Appellant's name or any operative facts connecting Appellant to the case. It asked for no relief from Appellant. Appellant's counsel contacted Plaintiff and suggested the complaint be amended; he was told his duty was to answer, and answer he did, the first defense being Failure to State a Claim. Why would a Plaintiff do this, and is there any judicial utility in protecting Plaintiffs who behave in this manner?

There were numerous other violations of the M.R.C.P., and Appellant asks the Court to not only reverse the Chancellor's decision, but rule in such a way that will bar any recovery by Plaintiff. It does not do so lightly. In applying the rules, Appellant would ask that the Court do so in light of M.R.C.P 1:

RULE 1. SCOPE OF RULES

These rules govern procedure in the circuit courts, chancery courts, and county courts in all suits of a civil nature, whether cognizable as cases at law or in equity, subject to certain limitations enumerated in Rule 81; however, even those enumerated proceedings are still subject to these rules where no statute applicable to the proceedings provides otherwise or sets forth procedures inconsistent with these rules. *These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.* [emphasis added].

A review of the record will show that Appellant repeatedly pointed out Plaintiff's errors in such a way that Plaintiff could have, if it wished, easily have cured them. Appellant's efforts were frequently done in a cooperative rather than adversarial manner. Plaintiff chose to ignore Appellant's suggestions. Appellant may be wrong, of course; perhaps this Court will agree with Plaintiff and rule that a civil complaint need not name nor make a claim against a defendant and that a judge may order foreclosure out of the blue; but Appellant cannot believe that will be the case.

Finally, Appellant makes a great deal of the agreement between Plaintiff and the Five Other Owners, whereby the Five Other Owners were secretly given permission not to file an answer while Plaintiff sought recovery against non-favored defendants. These parties find absolutely nothing wrong with this agreement; Appellant maintains that such an agreement in an equity action is a tortuous abuse of process, and further points out that there is no provision in the rules of civil procedure for a Plaintiff to unilaterally give a defendant permission not to file an answer. Appellant further believes that by granting unto Plaintiff the unilateral authority to enlarge the period in which favored parties may file an answer – knowing that this authority was being used to the detriment of other parties in the suit – the Chancellor evidenced a bias in favor of the Plaintiff that resulted in Appellant not being assured of receiving a fair hearing.

Do defendants who fail to file an answer for more than a year for trial strategy reasons, being aware for most of this time that a co-defendant objects strongly to this arrangement, have any right

not to be placed in default? In fact, does not the aggrieved co-defendant have the right to insist that a docket entry of default be entered against these parties? If the rules are to be followed, the co-defendants absolutely may not file an answer as their default was intentional and malicious. Certainly a refusal to note their default is an abuse of discretion.

What Appellant would urge the Court to consider is the flagrancy of the violations of the rules of civil procedure. If the Chancellor's grant of summary judgment and foreclosure is allowed to stand, there truly is no need for any rules at all.

Appellant will present what it views as an interesting analysis of tax sales and the relationship of tax sale properties to those purchased subject to the Inverse Order of Alienation Rule. Appellant will also discuss briefly some public policy issues concerning tax sales.

For those interested in studying the theory behind the law, these are interesting topics that can make for lively debate. But before Plaintiff can reasonably be allowed to debate these issues, it ought to be required to identify and make a claim against Appellant, join all interested parties and demand that they answer. Then, and only then, should it ask the Court to hear and apply its theory of the law to the case at bar.

ARGUMENT

STANDARD OF REVIEW

The court applies a de novo standard of review when examining a trial court's grant or denial of summary judgment. All that is needed for a nonmoving party to survive a motion for summary judgment is to demonstrate that a genuine issue of material fact exists. PPG Architectural Finishes, Inc. v. Lowery, 909 So.2d 47, 49 (Miss. 2005); Lowery v. Guar. Bank & Trust Co., 592 So.2d 79, 81 (Miss. 1991); Galloway v. Travelers Ins. Co., 515 So.2d 678, 682 (Miss. 1987). The evidence is viewed in the light most favorable to the nonmoving party. McKinley v. Lamar Bank, 919 So.2d 918, 925 (Miss. 2005).

I. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT AND FORECLOSURE AGAINST APPELLANT WHERE APPELLANT WAS SERVED WITH A COMPLAINT THAT DID NOT CONTAIN APPELLANT'S NAME, MAKE ANY CLAIM AGAINST APPELLANT OR CONTAIN ANY OPERATIVE FACTS TO CONNECT APPELLANT TO THE CASE.

The backbone of any civil case is the complaint. The M.R.C.P. 15(b) states in part, "The court is to be liberal in granting permission to amend when justice so requires."

Plaintiff chose to serve Holly Springs Realty Group with a complaint that did not contain the defendant's name or any operative fact connecting defendant to the ownership of Unit 309 of the Van Buren (R42). Although a truly diligent Plaintiff should have discovered Holly Springs Realty's ownership of Unit 309 before initiating its lawsuit, the mistake is a perfectly understandable one for which the M.R.C.P. allows a cure. Plaintiff merely needed to amend its complaint to name Holly Springs Realty Group as a defendant and update the facts. That is what Appellant asked Plaintiff to do in an email, and what Plaintiff declined to do (R288).

In Penn Nat. Gaming, Inc. v. Ratliff, this Court held that a complaint should "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 Miss. R. Civ. P. 8(a)," 954 So.2d 427, 432 (Miss. 2007). This court went on to state:

> A majority of federal circuits have held that "even under the liberal pleading requirements of Rule 8(a), a Plaintiff must set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." United States ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 240 (1st Cir. 2004); see also Varljen v. Cleveland Gear Co., 250 F.3d 426, 429 (6th Cir.2001) ("To survive a motion to dismiss under Fed. R.Civ.P. 12(b)(6), a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory."); Carl Sandburg Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co., 758 F.2d 203, 207 (7th Cir.1985) ("A complaint must state either direct or inferential allegations concerning all of the material elements necessary for recovery under the relevant legal theory.").

954 So.2d at 432.

The language used by the Mississippi Court of Appeals in affirming the dismissal of a slander action on the grounds that the complaint did not specify the actual words used is instructive:

> We are mindful that the promulgation of Rule 8 was intended to lessen the pleading requirements so that a Plaintiff's rights "are not lost by poor drafting skills of counsel." M.R.C.P. 8 cmt. However, we must also remember that "[a]lthough Rule 8 abolishes many technical requirements of pleadings, it does not eliminate the necessity of stating circumstances, occurrences, and events which support the proffered claim." M.R.C.P. 8 cmt. While the use of discovery tools becomes helpful to a defendant in developing his defense, a defendant must be able to ascertain from the outset of the litigation the circumstance(s), occurrence(s) and event(s) of his conduct that form the basis of the suit against him.

Chalk v. Bertholf, 980 So.2d 290, 296 (Miss. Ct. App. 2007).

It goes without saying that a complaint that does not contain a defendant's name, does not connect defendant to the case in any way and asks for no relief from a defendant is one under which no relief may be granted. Plaintiff apparently realized it had a problem and later sought and received permission from the Court to amend its complaint to include Appellant and another necessary and indispensable party as defendants (R213). It never got around to filing or serving this complaint. Perhaps Plaintiff thought about filing this amended complaint and serving Appellant, but Service by Telepathy is not considered valid under the M.R.C.P. 5(b)(1).

Plaintiff's complaint fails to meet the due process requirements of the Fifth Amendment to the United States Constitution and Article 3, Section 14 of the Mississippi Constitution and as such deprives Appellant of its due process rights.

Plaintiff's complaint did not name Holly Springs Realty in its complaint and asked for no relief from it. Defendant properly defended in its answer:

> "First Defense – Failure to State a Claim: Plaintiff's Amended Complaint fails to state a claim against Holly Springs Realty Group upon which relief can be granted, and the same should be dismissed pursuant to Rule 12 (b)(6) of the Mississippi Rules of Civil Procedure." (R161)

If this ruling is allowed to stand, then in the future Plaintiffs will be able to successfully serve defendants with nothing more than blank sheets of paper. This isn't the standard this Court has demanded and violates both our state and national Constitutions; therefore the Chancellor's order of summary judgment and foreclosure should be reversed.

II. THE CHANCELLOR ERRED BY 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 DEFENDANT OR DEFENDANTS PRESENTED THEIR CLAIMS TO THE COURT WITHOUT INTERFERENCE FROM THE PLAINTIFF.

III. 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, EVEN THROUGH A TAX TITLE IS A PERFECT TITLE BESTOWED BY THE SOVEREIGN FREE AND CLEAR OF ANY EQUITABLE BURDEN TO ANY OTHER PROPERTY.

Plaintiff, in its request for summary judgment, espoused the view that it could foreclose on any party it wished for any reason it wished. "It is the BancorpSouth Bank's opinion that they have a right to choose which property they are to foreclose." (R235). Its view was identical to that held by the Mississippi Valley Title Insurance Company in the case of Pongetti v. Bankers Trust Savings and Loan Ass'n, 368 So.2d 819 (Miss. 1979). It is a view this Court expressly rejected.

In Pongetti, Mississippi Valley had made an error and missed a mortgage on a title exam. Id. at 820. To correct their error they paid under the policy and purchased the mortgage, which covered two properties, their insured, which was the second aliened by the mortgagor, and the property first aliened or sold. Id. They released their insured and began foreclosure proceedings against the remaining property owner. Id.

This Court held their actions were unjustified and that the Inverse Order of Alienation Rule applied. Id. at 823. Whether or not the Inverse Order Rule applies in this case is not paramount; what is important is the concept that a proper order of charging must be established, and this Court has ruled that it is the province of the trial court, and not the mortgagee, to decide how properties are to be charged with the payment of a common debt. Once the Plaintiff brings its claim before the court it has no further role to play other than to provide evidence. By allowing otherwise the Court has, intentionally or unintentionally, allowed the Plaintiff to usurp the role of Chancellor and deprived Appellant of its right to a fair hearing.

After Appellant pointed out the error of BancorpSouth's claim that it could foreclose on any property it chose, Plaintiff then argued that it was proper to foreclose on Holly Springs Realty Group under the Inverse Order of Alienation Rule because it was a tax sale purchaser. It cited as support for this argument the 129-year-old Illinois case of Erlinger v. Buols, 7 Ill. App. 40 (Ill.App.Ct.1880). In Erlinger, the Court held that a mortgagee could not be forced to proceed against its mortgagor before proceeding against a person who purchased an equity of redemption at a tax sale. Appellant doesn't believe this case should apply on numerous grounds.

First, Erlinger is a 129-year-old case from a lower Illinois appeals court. The modern trend has been to give greater deference to the taxing authorities in their efforts to collect revenue through tax sales, and appellant finds it doubtful that many courts would find today that the rights of a

deadbeat taxpayer outweigh the right of the Sovereign to collect taxes. The notion that a defaulting taxpayer can force a mortgagee to foreclose on a property owned by the Sovereign or its assigns before turning to the mortgagor for payment is just mind-boggling. Such a holding could easily result in their being no penalty to a defaulting taxpayer for simply refusing to pay his taxes on an encumbered property. As judgment creditors are not protected by statute, it is quite possible that in jurisdictions where a taxing authority is known not to do a lienholder search, a taxpayer could intentionally refuse to pay his taxes and thus thwart the judgment creditor, even where the judgment creditor's lien was superior to that of the mortgage lienholder.

Second, Erlinger makes a great deal out of the fact that the equity of redemption owner did not file a cross-bill against the mortgagor. Where co-defendants do not answer, a cross-bill or claim is not necessary. By not filing an answer, the Five Other Owners were conceding that BancorpSouth should be allowed to foreclose on their property and apply the proceeds against the mortgage. A cross-bill or claim, if required, would only be necessary should these parties actually defend the suit. However, it is worthy of note that had Plaintiff provided Appellant with an honest response when it was asked why the Five Other Owners had not filed an Answer, it is highly likely Appellant would have filed a cross-claim to force them to come into the suit. Appellant should not be penalized for Plaintiff's collusive, dishonest and possibly tortuous behavior.

Third, the tax sale purchaser in Erlinger purchased a mere equity of redemption at the tax sale. It is clear from the language of the decision that in Illinois title to a mortgaged property rests with the mortgagee, and that the Court decided that since the redemption right was purely equitable the mortgagee did not have to honor that equity of redemption for a tax sale purchaser if it felt equity was best served otherwise. "The latter acquires simply the equity of redemption under circumstances imposing no such equitable duty upon the mortgagor." Erlinger, 7 Ill. App. 40.

Holly Springs Realty Group did not purchase an equity of redemption. It purchased an actual piece of real estate. Title transferred and vested on the day of the tax sale. Appellant makes no equitable claim. Appellant demands the rights to which it is entitled as a matter of law.

While Defendant agreed to a settlement in which Plaintiff's lien was to be reinstated and recognized upon the reimbursement of taxes paid, in all other respects the title enjoyed by Appellant is a "perfect title." Miss. Code Ann. 27-41-79, 27-45-23. "A tax title in Mississippi is a perfect title. It is a perfect fee simple title and indefeasible so far as any collateral attack is concerned." Davis v. Biloxi, 183 Miss. 340, 342-43; 184 So. 76, (1938). This perfect title, incidentally, is deemed to have vested in purchaser on the date of the sale, without possession and subject to redemption. The actual deed issued by the Chancery Clerk is "simply evidence of right of possession and that the redemption period has expired." Mississippi State Highway Comm'n v. Casey, 253 Miss. 685, 692, 178 So.2d 859, (1965), citing Stockstill v. Bennett, 215 Miss. 417, 426, 61 So.2d 154 (1952).

A perfect title, of course, is one that is free of liens or encumbrances of any kind. Thus Mississippi courts have held that deed restrictions or equitable servitudes are removed when land is sold for taxes. City of Jackson v. Ashley, 189 Miss. 818, 199 So. 91 (1940). Certainly the Ashley rule would also apply to equitable burdens. The Court has found a limited exception to this rule in the case of easements, on the grounds that they add to the value of the dominant estate, which has thus effectively paid taxes on the easement through increased property assessments. Hearn v. Autumn Woods Office Park Prop. Owners Ass'n, 757 So.2d 155 (Miss.1999). Another exception exists for subdivision restrictions which clearly provide benefits for all owners in a subdivision, including the owner against whom the restriction is being applied. Alexander v. Wardlow, 910 So.2d 1141 (Miss. 2005).

Clearly having its property sold for the benefit of others does not benefit Defendant, and as

such no exception should apply. Defendant took perfect title on the day of the tax sale free and clear of all equitable burdens. Since the Inverse Order of Alienation Rule is based on the theory that those properties with the greatest equitable burdens should be sold first to the benefit of those properties less burdened, it follows that Defendant's property, which carries with it no equitable burden at all, must be sold last. Each of the Five Other Owners have titles that are equitably burdened to both defendant Holly Springs Realty Group and to any property that was conveyed prior to their own.

It should be noted that the right to have property sold in the Inverse Order of Alienation is a defense that is to be asserted by a defendant, not the Plaintiff. "The burden of demonstrating conditions justifying application of the Inverse Order of Alienation doctrine is upon the party seeking the benefit of the doctrine," Am. Jur. 2nd § 50, citing as support Decatur County Bldg. & Loan Ass'n v. Thigpen, 173 Ga. 363, 160 S.E. 387 (1931). Furthermore, the role of the Plaintiff is to be one of indifference as the defendant or defendants decide whether or not to assert an Inverse Order of Alienation defense:

> 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...*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 debt and prior rights, where his mortgage is a blanket one on the land as an entire tract... [emphasis added, portions omitted],

Biswell V. Gladney et al., 182 S.W. 1168 (Tex. App. 1916).

Even if this court should reject defendant's argument that it possession of perfect title entitles it be charged last for the payment of mortgagor's debt, the fact remains that two properties were conveyed after Defendant's purchase of Unit 309 – one of them after the commencement of this suit. For purposes of the Inverse Order rule, a conveyance is deemed to have taken place on the date it is recorded in such a manner that it satisfies legal notice requirements. For a case dealing with the rights of an owner against another owner with an unrecorded equity or deed, see Bode v. Rhodes,

119 Wash. 98, 204 Pac. 802 (1922).

> Anderson took his deed without knowledge of the contract held by Appellants, and the Appellants did not receive their deed until several years later, which leaves the equities with Anderson. The enforcement of an execution against several mortgaged parcels of property in the inverse order of alienation has been approved by this court and, with the exception of two or three states, is recognized as the correct rule. [citations omitted].

Id. at 100.

Defendant's purchase of the property was recorded in the Chancery Clerk's office shortly after the August 29, 2005 tax sale. Albriton's "Exchange Deed" purports to have been written on an unknown day in February, 2003 but was not recorded until November 11, 2007, well after this suit was filed (R299). The sale to Norma Bourdeaux did not take place until September 14, 2005 and was not recorded until September 23, 2005, almost a month after defendant Holly Springs Realty Group purchased its property (R341). Thus, if the concept of equitable burden is completely ignored and the properties are merely sold in reverse order of their recording, Appellant's property should be the third charged and sold, not the first, and even in this case, only after all parties have answered.

A. IF BANCORPSOUTH FAILS TO ASSERT ITS RIGHTS AGAINST PROPERTY OR PROPERTIES SERVING AS PRIMARY SECURITY, THE MARKET VALUE OF THAT PROPERTY OR PROPERTIES MUST BE APPLIED TO THE MORTGAGE.

When several different parties own properties that are owned "subject to" the mortgage of another, each property owner serves as a surety on that mortgage, up to the value of his property. The owner of the property that is most equitably burdened and subject to sale first to satisfy the mortgage is the primary surety. The secondary surety is the owner of the property carrying the second-greatest equitable burden, and so forth.

BancorpSouth maintains that it chose not to proceed against the Five Other Owners and that it was its prerogative not to do so (R235). BancorpSouth is correct that it may choose not to proceed

against property or properties that have a paramount obligation to be sold to satisfy the debt due to their greater equitable burden. What it fails to understand is that it is well established law that in such a case it must credit the full market value of the properties against which it chooses not to proceed against the mortgage. If BancorpSouth chooses to be magnanimous, it must finance its generosity from its own purse, not the money or equity of others.

It should be noted that the decision not to proceed against the primary surety's property does not have to be voluntary. A mortgagee may, due to mal- or misfeasance, wavier, negligence or other causes be estopped from foreclosing on a property; Huntington Land Co. v. Meadows, 163 S.E. 842 (W.Va., 1932), Pongetti v. Bankers Trust Savings and Loan, 368 So.2d 819 (Miss. 1979). In such a case the debt is not simply thrown onto the remaining property owners. Instead, the mortgagee must credit the full market value of the property against which it is estopped from proceeding against towards the balance of the mortgage before proceeding against the remaining property owners. There is no need to go into the convoluted facts of Huntington Land Co., but the facts, which deal with purportedly fraudulent releases that were kept secret by the mortgagee, certainly illuminate the current case to a remarkable degree, as BancorpSouth also apparently knew of fraudulent behavior by its borrower but kept it secret.

The general rule governing the equitable rights of defendant is stated in 110 A.L.R. 67 (1937) as follows:

> It is the general rule, subject to certain qualifications set out in succeeding subdivisions, that where a mortgagor or other lienee has alienated a portion of the mortgaged premises, and the mortgagee or other lienor, having notice of such alienation, releases the mortgage or other lien as to the portion retained by the mortgagor or lienee, such mortgagee or lienor must deduct from the debt, before enforcing his lien against the property alienated, the value of the property released.

This general rule is cited in the case of Pongetti v. Bankers Trust Savings and Loan Ass'n,

368 So.2d at 823, in which the court also quotes extensively from the early case of Dillon v. Bennett, 22 Miss. 171, 14 S&M (1850).

In this case BancorpSouth should have been required to seek out the uncontested legal remedy at hand, a default judgment against these other Defendants, before levying on Holly Springs Realty Group's property. As a practical matter, Appellant discovered that BancorpSouth engaged in a collusive conspiracy with the Five Other Owners in which they were told they did not have to file an answer until BancorpSouth told them to do so. In fact, BancorpSouth does not have the authority to suspend the Mississippi Rules of Civil Procedure and allow certain Defendants to file more a year late; certainly no justification can be made for allowing these defaulting Defendants to do so. If it chooses not to seek this default judgment, it must credit the full value of these properties against the mortgage.

B. TAX SALES ARE A MEANS FOR THE SOVEREIGN TO LEVY TAXES, AND AS SUCH PUBLIC POLICY DEMANDS THAT ONCE TITLE VESTS IN A TAX SALE PURCHASER HE BE AFFORDED FULL PROTECTION OF THE LAW

Appellant cannot help but note that there seems to be some notion advanced that, even though the rights of the landowner were never in question in this case, any excess equity Appellant might have should be used to solve the problems of the world, or at least to salve any lingering business dissatisfaction parties might have with the former owner. This is unjustified and poor public policy.

Tax sales have as their purpose coercion of negligent and unwilling citizens to pay their taxes. 85 CJS, Taxation, § 744. Thus, protection of the rights of purchasers of real estate sold for delinquent and forfeited general taxes is in the public interest. City of Chicago v. City Realty Exchange, 127 Ill. App.2d 185, 262 N.E.2d 230, (1970).

In Simon v. Rambo, 863 A.2d 1078, 1081 (N.J., 2005), the New Jersey Court described the

reasons bidders arrive in droves eager to pay the taxes that others refuse to pay:

> The law provides two incentives for purchase of such municipal tax sale certificates. If the certificate is redeemed, the purchaser is reimbursed and receives interest accruing at the rate established by the bid. If the certificate is not redeemed within two years of the sale, the purchaser may file a complaint to foreclose the right of redemption and, if the certificate is not redeemed by a party before the date set in the court's order of redemption and entry of final judgment, obtain an absolute, indefeasible estate in fee simple. *Quite obviously, the real incentive for participation in a tax sale is the potential to secure marketable title in a foreclosure action* [citations omitted and emphasis added].

Plaintiff argues that tax titles received by patent from the Sovereign are somehow inferior, and that any profits made by investing in them must be used as a salve to heal the wounds of others. Such an argument is completely outside the law and would be dangerous to the functioning of government if implemented. The Sovereign has overriding interest in the collection of revenue, and the grants of title made by the Sovereign in furtherance of this aim must not be relegated to second-class status.

The Court should reject Plaintiff's argument. As such, the Chancellor's grant of summary judgment and order of foreclosure was in error and should be reversed.

IV. WHERE PLAINTIFF ENTERED INTO A SECRET, MARY CARTER-TYPE OF AGREEMENT WITH FIVE FAVORED *IN REM* DEFENDANTS WHEREBY THEY DIDN'T HAVE TO FILE AN ANSWER UNTIL TOLD TO DO SO, AND AFFIRMATIVE STEPS WERE TAKEN TO MISLEAD APPELLANT AS TO THE EXISTENCE OF THIS AGREEMENT SO AS TO HARM APPELLANT, IT WAS AN ABUSE OF DISCRETION NOT TO ESTOP PLAINTIFF FROM PROCEEDING AGAINST APPELLANT.

The Five Other Owners sought permission from Plaintiff not to file an answer, and were told they did not have to file an answer until told to do so. This agreement was not noted on the Court record, and Plaintiff took affirmative steps to keep Appellant from learning of this agreement. Some or all of these Defendants are believed by Appellant to have potentially valid estoppel defenses against Plaintiff, making it mutually beneficial for both Plaintiff and the Five Other Owners for them

not to file an answer (T13, L20-23 Hurdle). The benefit to the Plaintiff is that these estoppel defenses are hidden from other defendants, the Court and from the public. The benefit for the Five Other Owners is that other defendants can be drained of assets for their benefit before they settle down to fight their case with the Plaintiff, should it ever come to that.

Thus Plaintiff told the colluding Defendants they did not have to file an answer until told to do so. As Appellant explained to the trial court, both orally and in its memorandum, the Five Other Owners solicited a unilateral offer which they then accepted through performance or forbearance. There was an implied covenant against Plaintiff not to seek a default judgment against them for not filing. Both parties benefitted. This is what is known, to everyone who speaks English save for the Plaintiff and these defendants, as an agreement (R328, T13 L16-29, T14 L1-8 Hurdle).

BancorpSouth's implicit agreement with the Five Other Owner defendants is similar to some extent to a Mary Carter Agreement, so named because of the 1967 case of Booth v. Mary Carter Paint Co., 182 So.2d 292 (Fla.Dist.Ct.App. 1966). Although no two Mary Carter agreements are alike, typical elements, as cited by Frier's, Inc. v. Seaboard Coastline Railroad Co., 355 So.2d 208, 210 (Fla.Dist.Ct.App. 1978), cert. dism'd, 360 So.2d 1250 are:

- secrecy;
- the agreeing defendants remain as party defendants in the lawsuit;
- the agreeing defendants' liability is decreased in direct proportion to the non-agreeing defendants increase in liability;
- the agreeing defendant guarantees to the Plaintiff a certain amount of money if Plaintiff does not receive a judgment against any of the defendants or if the judgment is less than a specified sum.

The last element of a Mary Carter agreement does not appear to be present in BancorpSouth's agreement with the Five Other Owners. This is in large part because the Mary Carter agreement, always controversial and banned in many states, was intended to be used against tortfeasors and those who indemnify them. Defendant has not been able to find any authority in any

jurisdiction that permits the use of a Mary Carter-type of agreement against persons who are not culpable in tort or breach, or their indemnifiers. Appellant maintains that its use in an equity action against non-culpable parties is tortuous and constitutes abuse of process.

During the March 26, 2009, hearing, Attorney Dana Kelly, representing the Five Other Owners, said that their agreement was not an agreement: (T20, Kelly)

> MR. KELLY: Your honor, I just want to point out to the Court, Mary Carter agreements are agreements that are designed to suppress testimony.[7] That's not what we have here. We have an extension of time to file a responsive pleading. That's it. There is nothing that's been hidden from this Court. This is merely an extension of time to file a responsive pleading. There is no formal written agreement. It's simply an extension of time to file a responsive pleading. Thank you.

Appellant's argument has never been that the agreement in question was a proper Mary Carter agreement but rather a Mary Carter-type agreement. Appellant has repeatedly argued that the use of a collusive agreement against a non-culpable party in an *in rem* action is far worse. Kelly's argument is much like a criminal defendant claiming innocence on a charge of manslaughter on the grounds that the crime he committed was murder.

The Request for Admission to which Kelly's clients responded with a flat denial did not limit itself to a written agreement. It reads as follows:

> 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)

Appellant finds it hard to believe that any party which had received permission to delay

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[7] Appellant would hope Kelly misspoke, as the use of a Mary Carter agreement to suppress testimony is highly questionable. They are typically used to discover and develop testimony, and to have evidence presented in the most favorable light to Plaintiff. In states where secrecy is allowed, they are often used in an "ambush" by a co-defendant.

Appellant further notes that an answer is essentially the first testimony presented by the defense in a civil case, and so the agreement in which Kelly participated did, in fact, suppress the testimony of his clients.

filing an answer for an indefinite period of time while Plaintiff sought to drain the assets of other defendants for their benefit could deny such a statement and consider it an honest response.

Plaintiff also took steps to conceal the fact that this indefinite enlargement of time to answer had been granted. Prior to Appellant being joined in the case, Plaintiff's counsel twice gave negative or non-committal answers when asked if it knew why these defendants had not filed an answer. Plaintiff later provided the following answer to an Interrogatory (R279):

> INTERROGATORY NO. 8: The Five Other Owners who are defendants to this action have not filed an answer. Ordinarily under these circumstances a Plaintiff would have asked for a default judgment. You have not done so. Please explain why. If your answer includes the fact that there is any sort of agreement between you and the Five Other Owners, either explicit or implicit, written or oral, please include all of the terms of this agreement as part of your answer. Please include in support of your answer any writings, whether email, internal memoranda or formal or informal agreements which exist that would support or disprove the existence of such an agreement.
>
> RESPONSE NO. 8: [BOILER PLATE OBJECTION OMITTED] ...the Plaintiff has been directed by counsel not to move forward based on their own reasoning. There is no agreement, whether implicit or explicit, and/or oral or written, between the Plaintiff and the Five Other Owners.

Again, given the facts which were later discovered, these do not appear to be honest statements, and evidence a real effort on the part of all of the beneficiaries of the Mary Carter-type of agreement to which Appellant objects to conceal that agreement from both Appellant and the Court.

This concealment is especially troublesome in light of Ethics Opinion 161 of the Mississippi Bar Association, rendered March 17, 1989:

> One of two defendants proposes to enter into a so-called "Mary Carter Agreement" with the Plaintiff. This agreement would provide that the defendant would pay the Plaintiff a fixed sum and would cooperate with the Plaintiff in proving the Plaintiff's case. In exchange, the Plaintiff would agree not to execute upon any judgment rendered against the defendant. The defendant would remain a party in the case.
>
> There are many legal issues concerning the validity and propriety of Mary Carter

> Agreements which this Committee is precluded from addressing, and we do not express an opinion on the legality of these agreements. However, there are also several rules of professional conduct which affect an attorney's participation in consummating agreements of this nature. Rules 3.3 and 4.1 of the Mississippi Rules of Professional Conduct prohibit attorneys from making statements that are false or failing to disclose material facts, when disclosure is necessary to avoid assisting a fraudulent act by a client. The failure to disclose the existence and terms of a Mary Carter Agreement could be misleading and deceptive to opposing counsel and to the Court. See ABA Informal Opinion 1386. Therefore, it is our opinion that to comply with the intent of the ethical rules an attorney has a duty to disclose the existence and terms of a Mary Carter Agreement to opposing counsel and the court, regardless of whether or not it has been requested in discovery. If this is done, participation in consummating a Mary Carter Agreement would generally not be prohibited by the Mississippi Rules of Professional Conduct.

For opposing counsel to claim that an agreement is not an agreement and a denial is not a denial shows all too well that many attorneys have learned that it is acceptable to engage in legal legerdemain to the point of arguing over what the definition of "is" is. When such actions contribute to a party's property being taken away and sold on the courthouse steps it is an outrage.

Three Mississippi cases mention Mary Carter agreements. Lanier v. State, 635 So.2d 813 (Miss. 1994), is of little value as it is a criminal case in which the dissent, without specifying a case, says the majority has ruled a sentencing agreement void based on a ruling in a domestic case involving a Mary Carter agreement. In Smith v. Payne, 839 So.2d 482, 489 (Miss. 2002) the Court ruled that the existence of a Mary Carter agreement must be revealed to a jury, but the amount of any settlement pursuant to that agreement should be excluded from evidence. In Mississippi Farm Bureau Mut. Ins. Co. v. Walters, 908 So.2d 765 (Miss. 2005), the Court makes reference to a Mary Carter agreement reached at trial without commenting on its legality.

Based on these three mentions, true Mary Carter Agreements – cloaked in secrecy – would seem to be against public policy in Mississippi. Agreements which have been revealed to the trier of fact and the other parties are presumably allowed, although the record would show that the Court has not given the issue a great deal of consideration. There is no suggestion that the type of secret, collusive agreement between BancorpSouth and the Five Other Owners is permissible.

In most states, Mary Carter agreements are rarely addressed by the courts. In reported decisions, the majority of the courts in the United States which have considered the validity of Mary

Carter agreements have allowed them to stand provided the agreement is disclosed to the parties and to the Court. See General Motors v. Lahocki , 286 Md. 714, 410 A.2d 1039 (1980); Ratterree v. Bartlett, 707 P. 2d 1063 (Kan. 1985); and City of Tucson v. Gallagher, 493 P. 2d 1197 (Ariz. 1972). In Appellant's view, Mary Carter agreements are less objectionable in cases where joint and several liability is allowed; it is logical under these rules that where a Plaintiff might choose from which tortfeasor to collect he might also work in concert with one defendant against another. Under the more modern rules of several liability demanded by Miss. Code Ann. 87-5-7, Mary Carter agreements simply don't make sense, and in an equity action they are simply an abomination.

Florida, Nevada, New Mexico, Oklahoma, Texas, and Wisconsin have declared Mary Carter agreements to be contrary to public policy and do not permit them under any circumstances. See Dosdourian v. Carsten, 624 So.2d 241 (Fla. 1993); Lum v. Stinnett, 87 Nev. 402, 488 P.2d 347 (1971); Watson Truck & Supply Co. v. Males, 111 N.M. 57, 801 P.2d 639 (1990); Cox v. Kelsey-Hayes Co., 594 P.2d 354 (Okla. 1978); Elbaor v. Smith, 845 S.W.2d 240 (Tex. 1992); Trampe v. Wisconsin Tel. Co., 214 Wis. 210, 252 N.W. 675 (1934).

It is worthwhile to note the criticisms against Mary Carter Agreements:

> The reasons for their rejection are sound. Courts are not merely arenas where games of counsel's skill are played. Even in football we do not tolerate point shaving. It is perhaps because the trial is adversary that each side is expected to give its best, without secret equivocation. Counsel have no duty to seek ultimate truth in a system where the lawyer's duty is primarily to represent his client. But even if the lawyer has no duty to disclose the whole truth, he does have a duty not to deceive the trier of fact, an obligation not to hide the real facts behind a Facade.

Daniel V. Penrod Drilling Co., 393 F.Supp. 1056 at 1060-61 (E.D.La. 1975)

> The search for the truth, in order to give justice to the litigants, is the primary duty of the courts. Secret agreements between Plaintiffs and one or more of several multiple defendants can tend to mislead judges and juries, and border on collusion.

Ward v. Ochoa, 284 So.2d 385 (Fla., 1973).

> Remedial measures cannot overcome nor sufficiently alleviate the malignant effects that Mary Carter agreements inflict upon our adversarial system. No persuasive public policy justifies them, and they are not legitimized simply because this practice may continue in the absence of these agreements. The Mary Carter agreement is simply an unwise and champertous device that has failed to achieve its intended purpose. See Lum, 488 P.2d at 351 (Mary Carter agreements essentially champertous because settling defendant retains financial interest in Plaintiff's success against non-settling defendant); cf. Monjay v. Evergreen School Dist., 13 Wash.App. 654, 537 P.2d 825, 830 (1975). ....

> Equalizing peremptory strikes, reordering proceedings, thoroughly disclosing the true alignment of the parties, and revealing the agreement's substance cannot overcome collusion between the Plaintiff and settling defendants who retain a financial interest in the Plaintiff's success. In fact, Mary Carter agreements may force attorneys into questionable ethical situations under Rule 3.05 of the Texas Disciplinary Rules of Professional Conduct, which is titled "Maintaining the Impartiality of the Tribunal."

Elbaor v. Smith, 845 S.W.2d 240, at 250 (Tex. 1992).

> Mary Carter agreements, by their very nature, promote unethical practices by Florida attorneys. If a case goes to trial, the judge and jury are clearly presuming that the Plaintiff and the settling defendant are adversaries and that the Plaintiff is truly seeking a judgment for money damages against both defendants. In order to skillfully and successfully carry out the objectives of the Mary Carter agreement, the lawyer for the settling parties must necessarily make misrepresentations to the court and to the jury in order to maintain the charade of an adversarial relationship. These actions fly in the face of the attorney's promise to employ "means only as are consistent with truth and honor and [to] never seek to mislead the Judge or Jury by any artifice or false statement of fact or law." Oath of Admission to The Florida Bar, Florida Rules of Court 977 (West 1993).

Dosdourian v. Carsten, 624 So.2d 241 (Fla. 1993).

The secret agreement between Plaintiff and the colluding defendants – allowing an indefinite delay in filing an answer – may seem but a small concession, but by its very nature it was designed to reward the colluding parties at the expense of the non-colluding parties. While this type of collusion may have been permissible against Van Buren Group and Claiborne Frazier, both being accused of intentional wrongdoing, it is impermissible, against public policy and arguably tortuous to use such an agreement against the interests of non-culpable defendants.

In the instant case BancorpSouth kept its collusive agreement secret and gave negative or non-committal responses to Appellant's inquiries as to why the Five Other Owner defendants had not filed an answer (During discovery, Plaintiff finally did admit that it had given the Five Other Owner defendants permission not to file an answer, but denied that it was an agreement [R265-267]. Appellant maintains that semantics aside, this clearly was an agreement). The sole purpose of this agreement was to benefit Plaintiff and certain defendants at the expense of other defendants who were not culpable in any way of either tort or breach.

The mischief an agreement such as this one can play on a court of equity is obvious. In the instant case, had the Five Other Owner defendants been required to file a bona fide defense against BancorpSouth's action they would have revealed information and raised defenses that, if successful,

might have estopped Plaintiff from foreclosing on them. If such defenses were successfully raised it could affect other defendants as well, as BancorpSouth might be required to credit the value of all property it was estopped from foreclosing to the mortgage for the benefit of these other defendants.

For example, Austin Frazier and C.E. Frazier were guarantors of Van Buren Group's note to BancorpSouth. They were not accused of any culpable conduct. For whatever reason they did not file an answer to BancorpSouth's Amended Complaint and Plaintiff obtained a default judgment against them. Perhaps their reason for not filing an answer was that they saw their case as hopeless and without any legitimate defense.

Had the Five Other Owners filed an Answer, citing as an estoppel defense the information that they apparently knew and revealed by way of their Subpoena Ducas Tecum, that BancorpSouth had granted two gratuitous releases and one release for a nominal sum, and that BancorpSouth was on notice in early 2004 that its mortgagor was behaving in a fraudulent manner, this information could have been used by other defendants as well.

We cannot know what the response of guarantors Austin Frazier and C.E. Frazier would have been if they had been served a copy of a bona fide answer from the Five Other Defendant owners in which those defendants presented a valid estoppel defense based on negligence or misfeasance on BancorpSouth's part. In such a case, defendant guarantors Austin Frazier, C.E. Frazier, Shelby K. Brantley Jr. and Robert Crumpton would have a potentially valid defense against any claim that BancorpSouth would have against them. Under those circumstances, the Guarantors Frazier might have found it worthwhile to mount a defense insisting that their obligations as sureties be limited to the extent of Plaintiff's misfeasance. Even after the Guarantors Frazier received their docket entries of default, they still could have appeared to argue the issue of damages; however they were denied this opportunity because Plaintiff took affirmative steps to ensure that they would not learn of these defenses until long after a judgment was enrolled against them.

Plaintiff argued that Appellant could have obtained information through exhaustive discovery, and failure to do so is its own fault (T55L20-27, Crow). Yet the first step in the

discovery process is the reading of the initial pleadings. Appellant could not reasonably be expected to start serious discovery until these answers were filed. (It should be noted that the Five Other Owners simply refused to answer Appellant's one set of Interrogatories, despite numerous requests (R329)).

Perhaps Appellant is overly idealistic, but it is its view that a Chancery action should be about settling questions of law, and that each party is obliged to voluntarily bring its version of the facts to the bar. Plaintiff seems to believe it is perfectly acceptable to encourage the concealment of facts, and any defendant who declines to play its game of Twenty Questions blindfolded automatically loses. Plaintiff's vision of our justice system is a warped one, indeed.

Appellant would ask this Court to find, as a matter of law and judicial policy, that the use of a Mary Carter or any other type of secret, collusive agreement between a Plaintiff and a defendant or defendants against the interest of other defendants who are not culpable of any wrongdoing in tort, or their indemnifiers, constitutes abuse of civil process which works to estop Plaintiff from any recovery from any non-colluding party. In other words, any type of Mary Carter or collusive agreement of any kind in a chancery or equity action should be prohibited and actionable.

It should be obvious to the Court that Mary Carter-type agreements have no place in any equity action. Appellant would encourage the Court to review the court decisions of those states that have banned them entirely and consider doing likewise. These agreements are basically unjust, promote unethical behavior and have no place in Mississippi jurisprudence.

V. 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

A. IN A JUDICIAL FORECLOSURE ACTION, ALL PARTIES WHICH OWN PROPERTY SUBJECT TO THE MORTGAGE ARE NECESSARY AND INDISPENSABLE PARTIES

As a power of sale state, Mississippi has few cases dealing with failure to join necessary and indispensable parties in a foreclosure action. However, the Mississippi Supreme Court has held that in any dispute involving real estate, all interested parties must be joined.

> This Court has held that failure to join interested parties in a real estate dispute under M.R.C.P. 19(a) justifies reversal and remand as a violation of fundamental due

> process. Aldridge v. Aldridge, 527 So.2d 96, 98 (Miss.1988); see also Magnolia Textiles, Inc. v. Gillis, 206 Miss. 797, 807, 41 So.2d 6, 8 (1949) ("as a general rule all persons who are materially interested in the event or subject matter, without whom no effective judgment or decree can be rendered, should be made parties, in a suit to quiet title"). Although the Board did not raise this issue until after the chancellor entered judgment in the case, failure to join necessary parties may be raised on appeal and even by the appellate court sua sponte. Shaw v. Shaw, 603 So.2d 287, 293-94 (Miss.1992) (following federal precedents applying federal counterpart to our Rule 19).

Bd. of Education of Calhoun Cty. v. Warner, 853 So.2d 1159 at 1170 (Miss. 2003).

See also Craft v. Johnson, 405 So.2d 128 (Miss. 1981), where Plaintiff failed to join daughter as defendant when daughter was a co-tenant accused of taking advantage of her infirmity in concert with lender.

Appellant and the Five Other Owners own property that is subject to a common mortgage. As such, BancorpSouth is engaged in an *in rem* action against six properties in an effort to collect a debt owed by the former owner of these properties. In a bona fide action of this sort, the rights and obligations of the defendants are inexorably linked. Each defendant would ordinarily make his best argument on why he should be able to keep his property while his co-defendants should lose theirs. In other words an action of this type is to determine, in common language, whose ox is to be gored. As such, clearly every person facing liability under the mortgage is a necessary and indispensable party.

Appellant repeatedly raised the issue that at least two owners at The Van Buren, probably through a scrivener's error, have not had their interests in the common areas released from the deed of trust. So long as these property interests remain subject to the dead of trust, these parties are also necessary and indispensable parties.[8]

The law is clear and straightforward on this issue. All persons owning property subject to

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[8] Appellant did not raise the issue of the failure to add and serve Lynn Albriton at the March 26 hearing, as it believed, based on filings made by Plaintiff, that the amended complaint had been served on her (R344). In fact, no amended complaint was ever filed. On Sept. 19, 2008 Plaintiff sought permission to amend its complaint to include Lynn Albriton and Appellant Holly Springs Realty Group as defendants and this permission was granted on September 23, 2008 (Appellant had been joined as a defendant through a Motion to Join for the purpose of affirming the validity of Plaintiff's lien, but was not included as a party in the complaint). This complaint was never filed with the Court, never served on Appellant and it is unknown if it was served on Mrs. Albriton. Lynn Albriton signed a Waiver of Service of Process on March 20, 2009, 179 days after the Court granted permission to amend the complaint.

the mortgage must be joined. There appear to be no exceptions.

B. PLAINTIFF HAS ONLY 120 DAYS TO SERVE ALL PARTIES

Mississippi Rules of Civil Procedure, Rule 4(h) requires that all parties be served with the summons and complaint within 120 days of their issuance. Rule 4(h) reads as follows:

> Summons: Time Limit for Service. 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.

The rules further state that the 120-day period is to be calculated as to all known parties from the date of the filing of the original complaint. M.R.C..P. 15(c) states as in pertinent part:

> Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. . .

In the case of Schiavone v. Fortune, 106 S.Ct. 2379, 477 U.S. 21, (1986), the United States Supreme Court ruled that the 120-day period must be measured from the filing of the original complaint, and that the fact that defendants had actual notice was of no consequence in providing relief from the rule.

Said the court: "We do not have before us a choice between a 'liberal' approach toward Rule 15(c), on the one hand, and a 'technical' interpretation of the Rule, on the other hand. The choice, instead, is between recognizing or ignoring what the Rule provides in plain language. We accept the Rule as meaning what it says." 106 S.Ct. 2379 at 2384, 477 U.S. 21 at 30.

The U.S. Congress was not pleased with the outcome of the Schiavone case, and following that case amended the Federal Rules insofar as misnamed defendants are concerned. Although the wording of the Mississippi Rules did not change, the Mississippi Supreme Court has chosen not to follow the rigid Schiavone line of reasoning and allows for the service of process beyond the 120-day limit in cases involving a misnamed defendant or on good cause shown. Brown v. Winn-Dixie Montgomery, Inc., 669 So.2d 92 (Miss. 1996).

BancorpSouth, citing Raines v. Gardner, 731 So.2d 1192 (Miss. 1999), argued that Appellant did not have standing to bring its motion, and that it lost its right to bring the motion by not bringing it before or in its initial pleadings. The Court in Raines did, in fact, state that only the party deficiently served could bring such a motion: "The last three words 'or on motion' logically apply to the party upon whom process is not timely had. Such party is the only party to have standing to make such motion." Raines, 731 So.2d at 1195.

Other courts have found that a co-defendant has standing to question service on a fellow co-defendant where the defectively served party is a necessary and indispensable party. See, for example, Tropic Builders v. Naval Ammunition Depot, 402 P.2d 440, 444 (Haw. 1965), where a defendant was allowed to challenge service of a necessary and indispensable co-defendant at the beginning of trial, citing Brandow v. Vroman, 51 N.Y.S. 943, 944 (N.Y. 1898), where the holder of an equity of redemption was allowed to insist that proper service be made on the prior mortgagor.

Appellant would respectfully ask the Court to review its logic in this case, because in a case where each and every necessary indispensable party must be served, one party hasn't really been fully served until all are served. Unless all interested parties are joined, the suit cannot go forward. Thus any defendant which has been harmed by the Plaintiff's failure to serve within 120-days should be able to raise the issue on motion and have the case dismissed – provided the deficiently served party does not waive the deficiency by the filing of a timely answer.

The Court's decision in Raines is simply completely at odds with the plain wording of the rules. Rule 4(h) says that if the Court learns that a party has not been served within 120 days and has not waived the deficiency by the filing of a timely answer, it "shall" dismiss the action unless good cause can be shown. A number of cases have suggested that the use of the word "shall" make dismissal for a failure to timely serve mandatory, Wei v. Hawaii, 763 F2d 370 (9th Cir. 1985); Norlock v. Garland, 768 F2d 654 (5th Cir. 1985). "This rule mandates dismissal upon a finding that service has not been made within the specified time period and that good cause to extend the time does not exist. We need not here consider whether the command is unconditional and without exception. No reason has been advanced in this case to qualify its requirements," Norlock, 768 F2d

at 657.

Appellant would suggest the Court make two exceptions to the Raines doctrine. First, it would argue that any necessary and indispensable party should be allowed to challenge service on any other necessary and indispensable party unless that other party waives deficient service by the filing of a timely answer. Second, it would argue that any defendant should be allowed to challenge deficient service on another defendant if such deficient service carries with it the possibility of extraordinary delay in the conclusion of the lawsuit.

Both of these conditions were met in the instant case, and Appellant would argue that the interest of justice, the spirit and the plain wording of Rule 4(h) may only be met by allowing a co-defendant's challenge of service under these circumstances.

C. WHAT CONSTITUTES WANT OF PROSECUTION?

Appellant argued that this case should have been dismissed for want of prosecution. It is freely admitted that Plaintiff was most diligent in the prosecution of its case against Appellant.

However, Plaintiff is or should be aware that in a suit seeking foreclosure that all persons owning property subject to the mortgage must be joined as necessary and indispensable parties. Not only did Plaintiff fail to serve these the Five Other Owners within the 120-day limit required by the M.R.C.P., but Plaintiff, unaware of its failure of service, did not seek a default judgment against them for not filing an answer. In fact, Plaintiff actually induced these necessary and indispensable parties not to file an answer and thus join the case.

Appellant maintains that Plaintiff's failure to fully and fairly prosecute its claim against all necessary and indispensable parties constitutes want of prosecution. While the law favors a trial of issues on the merits, what constitutes failure to prosecute, for purposes of dismissal for failure to prosecute, depends on the facts of the particular case. Hensarling v. Holly, 972 So.2d 716, 720

(Miss.Ct.App. 2007).

It is hard to envision a fact situation more deserving of a dismissal for failure to prosecute. Plaintiff not only failed to prosecute its claim against all necessary and indispensable parties, but took active measures to prevent these parties from joining. As such, Plaintiff's case should have been dismissed with prejudice as against appellant, and failure to do so was an abuse of discretion.

VI. 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 IN FOR MORE THAN ONE YEAR, WHEN SUCH FAILURE WAS APPARENTLY A MATTER OF TRIAL STRATEGY.

VII. 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

The secret agreement between Plaintiff and five favored defendants has been described above. As a result of this agreement, and the permission received by Plaintiff not to file an answer, the Five Other Owners did not file an answer to Plaintiff's complaint. The reason for not filing an answer was to benefit Plaintiff and the colluding defendants at the expense of non-colluding defendants.

While it is customary for Plaintiffs to grant short periods of additional time for the filing of an answer with no notice on the court record, it is not normal for such additional time to last for years, particularly over the objection of a co-defendant or co-defendants who are harmed by such actions. Generally it is a grant of time of 30 days or less. It is not normal for Plaintiffs and colluding defendants to mislead other defendants about these agreements. It is not normal for Plaintiffs to continue to prosecute their case against non-favored defendants while favored defendants haven't even answered.

In fact, the M.R.C.P. make no provision for the Plaintiff to be able to grant additional time

at all. This is the province of the Court, and by abdicating its duty and allowing Plaintiff to dictate the terms of when each party is required to answer, the Court has, by this act alone, engaged in an act of impartiality and bias which denied Appellant a fair hearing. Essentially, a Plaintiff who agrees to allow additional time to file an answer is really agreeing to join with defendant, if necessary, in arguing to the court that the delay was the result was excusable neglect. For the Court to turn a blind eye to a failure to file that is obviously not excusable neglect is an abuse of discretion.

Appellant would note that there is a great difference between a traditional tort or breach action where a Plaintiff seeks relief from a culpable defendant and the instant action, where Plaintiff in an *in rem* action is asking the court to determine whether and how properties belonging to non-culpable defendants should be charged. In the latter action, the rights of the defendants are pitted against each other, so clearly it is improper for the Plaintiff to grant one defendant additional time to answer, since the defendants are asserting their rights against each other as well as the Plaintiff.

The terms under which a party may be given additional time to file an answer are instructive:

> M.R.C.P 6(b) Enlargement. When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), 59(d), 59(e), and 60(b), except to the extent and under the conditions therein stated.

There are, therefore, only two ways that an enlargement of time to answer may be granted. The first is in response to a request for additional time made prior to the expiration of the filing period. The second is in response to a request made after the expiration of the filing period on a showing of "excusable neglect." An intentional decision not to file an answer in order to enrich oneself and harm another defendant simply does not qualify as "excusable neglect."

The Five Other Owners argued that Appellant did not have a claim against then and therefore had no standing to request a docket entry of default. This is incorrect for two reasons.

First, the Court may enter a docket entry of default against any party on its own motion, and those things that may be done on the Court's own motion may also be requested by any adversely affected party to the suit. Appellant argues that where a party has failed to file an answer for more than a year, and such a delay was clearly a matter of trial strategy as part of an improper scheme to harm defendant, then it is an abuse of discretion to deny a motion requesting a docket entry of default against such parties, particularly when that party may not, according to the rules, be granted permission to file an answer.

Second, by the very nature of an *in rem* action of this type Appellant did have a claim against the Five Other Owners even if it had not been filed as such. In an in rem action to determine which of many properties is to be charged with the payment of a debt, each defendant who answers has an implicit claim against every other defendant, that claim usually being that some or all of the other properties should be charged before his own. Therefore, any *in rem* defendant should be allowed to seek a docket entry of default against any other *in rem* defendant. Those wishing to avoid such a default entry need only obey the rules and file their answer instead of participating in secret and illicit schemes. It is not an unreasonable burden.

VIII. IT WAS 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 TO PLAINTIFF'S COMPLAINT

In an in rem action where multiple properties are charged with the payment of a debt, the Court is required to evaluate the defenses of each *in rem* defendant and then reach a decision on how the debt is to be paid. Needless to say, all defendants must have either filed their answer or have been declared in default before the Court can render a fair and impartial verdict.

Plaintiff in its pleadings made claims that certain nebulous acts of fraud had taken place against the Five Other Owners. Appellant denied this claim on the grounds that fraud must be pled with particularity[9] M.R.C.P. 9(b). No further evidence of fraud was ever presented, and no evidence was ever presented that the Five Other Owners were bona fide purchasers for value without notice of a defect in title, or even that they were purchasers for value.[10]

There are any number of estoppel defenses that the Five Non-responding Defendants could present that would also inure to the benefit of Appellant. They could present as a defense of accord and satisfaction, that is, that they had proof the bank had agreed to a release and it had not been properly granted. They could plead impairment of mortgage; any gratuitous release after the tax sale should have to be credited dollar for dollar against the mortgage for Appellant's benefit.

Since the Court is obliged to consider requests for summary judgment in the light most favorable to the non-moving party, Palmer v. Anderson Infirmary Benevolent Ass'n, 656 So. 2d 790, 794 (Miss. 1995), the Court is required to assume that the Five Non-answering Co-defendants did not file an answer because they never intend to. Given that there have already been three default judgments in this case, it is not an unlikely assumption that their answer might force them to reveal things they would rather keep secret . Appellant notes that the Chancellor is required to demand a showing of excusable neglect before he may accept an answer from these parties – something that simply can't be done. Thus if these parties were never to be allowed to come into the case in the future, they would eventually have to be declared in default and thus Appellant's claim would be

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[9] While Appellant believes it quite possible that one or more of the Five Other Owners may have been defrauded by Claiborne Frazier, it finds it incomprehensible that five wealthy, sophisticated people would all buy expensive properties without any assurance of good title, and then be unwilling to reveal the details of the so-called fraud.

[10] Plaintiff made claims that the Five Other Owners were purchasers for value in its pleadings. Appellant denied this on the grounds that the recording patterns of the deeds gave the appearance that deeds might have been used as debt instruments.

treated as paramount.

Summary judgment should simply never be granted while there are undetermined facts. When five out of six property-owning defendants in an *in rem* action have not even filed their answer, virtually none of the facts are known. Ultimately, it is not even determined whether each of these defendants intends to mount a defense, which is in itself a material fact.

Therefore, for the court to grant summary judgment while one or more *in rem* defendants have not answered or been declared in default is clearly reversible error.

IX. WHERE PLAINTIFF ENTERED INTO AN AGREED ORDER TO REPAY TAXES IN ORDER TO SET ASIDE TAX SALE, AND DID NOT PAY FOR MORE THAN FOUR MONTHS AND BEGAN FORECLOSURE PRIOR TO PAYMENT, THE CHANCELLOR ERRED IN FAILING TO FIND THAT PLAINTIFF'S ACTIONS WERE A MATERIAL BREACH OF THE AGREED ORDER WHICH RESULTED IN THERE BEING NO LIEN ON THE PROPERTY

A. BANCORPSOUTH'S BAD FAITH AND BREACH OF CONTRACT INVALIDATED ITS LIEN ON UNIT 309

It is common for parties with legal differences to reach a settlement that is reduced to contract form and approved by the court. BancorpSouth and Appellant Holly Springs Realty Group reached such an Agreed Order concerning the reinstatement of BancorpSouth's lien on Unit 309. In this case, the purpose of this Agreed Order was to give and reserve to each of the parties, in writing, certain of the rights available to them under Mississippi law.

With this said, once the Agreed Order was entered, it became a contract between the parties, obligating the parties under the principles of contract law, not the underlying statutes on which the Agreed Order was based. An Agreed Order offers a quick and easy way for parties to resolve their differences, and thus they offer great benefit. They also present one danger: If breached, the breaching party may not fall back on the protection of the underlying statutes, but must instead rely on a resolution using principals of contract law.

The Agreed Order between BancorpSouth and Holly Springs Realty Group was a settlement agreement intended to avoid litigation. It is well established that settlement agreements are contracts. See McManus v. Howard, 569 So.2d 1213, 1215 (Miss.1990); East v. East, 493 So.2d 927, 931-32 (Miss.1986). Furthermore, as a remedy for material breach of an Agreed Order the aggrieved party may be relieved of its duties under the Order. See, for example, Brent Towing Company, Inc. v. Scott Petroleum Corporation, 735 So.2d 355 (Miss. 1999) in which this Court discusses the right of the non-breaching party to an Agreed Order to demand recession or to refuse to perform. In Brent, Scott Petroleum had agreed to pay a certain sum to Brent, with the agreement being in the form of an Agreed Order. Id. at 357. Scott breached by failing to pay all of the money due, although it eventually paid. Id. at 358 Brent accepted the tender but then sought to avoid its duty to perform on the grounds that Scott had breached. Id. The court ruled that Brent had lost its right to rescind the contract by accepting the money from Scott, because it had waived Scott's breach by accepting its belated tender. Id. at 359. Had Brent not accepted the money, the court said, it would have had a valid claim for the rescission of the contract. Id. at 360.

In the instant case, Appellant, like Brent, sought recession of the Agreed Order contract based on BancorpSouth's failure to tender the money due under the contract. Unlike Brent, Appellant declined to accept Plaintiff's belated tender and instead deposited the funds into the registry of the court. Using the reasoning of the Court in Brent, Appellant should be entitled to have its contract with BancorpSouth rescinded due to Plaintiff's breach and Appellant's refusal to accept Plaintiff's belated tender, which did not arrive until after Plaintiff had served a complaint to foreclose the mortgage on Appellant and Appellant had filed an answer.

All contracts have an implied condition of fair dealing and good faith. BancorpSouth intentionally led Plaintiff to believe that its desire to have its lien reinstated was purely a desire to protect its mortgage. At no point prior to entering into the Agreed Order was Appellant informed of Plaintiff's intention to attempt to use the entire equity in Appellant's property to pay on the mortgage for the benefit of itself and the Five Other Owners. Furthermore, immediately after the signing of the Agreed Order Appellant made serious efforts to negotiate a release of unit 309 and

Plaintiff refused to negotiate in good faith.

Plaintiff's actions constitute bad faith and render its lien void. Plaintiff may not simply roll back the clock and claim the protections offered it by the Mississippi Code. It gave up these protections when it sought the benefits offered by a legal settlement. When it breached the contract, it forfeited its right to have the tax sale set aside.

B. PLAINTIFF'S FILING OF A CAUSE OF ACTION PRIOR TO THE PERFECTION OF ITS LIEN RENDERS ITS LIEN INVALID.

Plaintiff's bad faith and unfair dealing alone make this contract unenforceable and thus render Plaintiff's lien void. Yet there is more. Plaintiff never paid the money required under the Agreed Order to have its lien reinstated until three weeks after serving defendant with the Amended Complaint that served as the beginning of this foreclosure action.

Whether or not Plaintiff's failure to pay renders its lien invalid is determined by the rule of conditions in contracts. Was it intended that both Plaintiff's obligation to reimburse Appellant for taxes owed existed entirely independent of the agreement to reinstate Plaintiff's lien? If so, Plaintiff could have its lien reinstated without paying Appellant. Defendant's only recourse would be to bring a cause of action for non-payment against Plaintiff. This clearly was not the intention of the parties, the Court or the wording of the contract.

Instead, the Agreed Order was nothing more nor less than a bilateral contract between Plaintiff and Appellant. The setting aside of the tax sale and reinstatement of Plaintiff's lien was conditioned on its reimbursement to Appellant for all taxes paid, plus interest. If Plaintiff had paid the money due under the Order, then its lien would have been reinstated. Prior to payment, there was no lien. By waiting almost four months to pay the money due under the Agreed Order, engaging in acts of bad faith, and in not paying this money until more than three weeks after the serving of the Amended Complaint, Plaintiff breached the Agreed Order and lost the right to have its lien reinstated. Even if Plaintiff could somehow salvage its right to have its lien reinstated, the fact remains that the money due under the Agreed Order had not been paid at the time the Amended Complaint was served on defendant. A cause of action may not be perfected after the serving of the

complaint, and as such Plaintiff's actions (and inactions) rendered its lien void.

X. THE CHANCELLOR ERRED IN FINDING THAT THE FIVE NON-ANSWERING DEFENDANTS HAD PURCHASED THEIR PROPERTY IN AN "ARM'S LENGTH TRANSACTION" WHEN IN FACT THERE WAS NO EVIDENCE TO SUPPORT THIS FINDING

Throughout the proceedings Plaintiff made claims that the Five Other Owners were the victims of some type of ill-defined fraud. This fraud was never explained, and in fact the notion that five wealthy, sophisticated investors were all defrauded beggars belief. Since M.R.C.P. 9(b) requires that fraud be pled with particularity, these allegations were repeatedly denied. Furthermore, Appellant maintained throughout its pleadings and at hearings that it believed it was possible based on the recording patterns that some of the deeds might have been used as debt instruments; it also suspected some owners might have received discounts on their units in exchange for accepting a delay in getting good title, making them no more than unsecured creditors. Thus Appellant denied that the Five Other Owners were purchasers for value, much less purchasers in an arm's length transaction:

> Defendant denies that the Five Other Owners are "purchasers for value," defendant believes it is also possible that one or more of them may have either purchased their units at a reduced price in exchange for accepting good title at a future date or possibly that one or more might be mere creditors who accepted a pocket deed in lieu of a proper mortgage. This would explain the long delay in the recording of some of the deeds (R248).

In spite of this, the Court, with no supporting evidence, made a finding that the Five Other Owners purchased their units in "arms-length transactions," and that it was basing its ruling against Appellant in large part on this fact.

> THE COURT: Here is something that is troubling me, is that these other units, these were purchasers, arms-length transaction with the Van Buren Group. And so anytime you have an arms-length transaction that puts it on a higher scale.
>
> Unit 309 is a buyer beware action. You buy it at a tax sale as a buyer beware. You buy whatever you get. It's not an arms-length transaction. And under that theory, unit 309 was the only piece of property that Van Buren owned. And if BancorpSouth was going to start foreclosure that would be the piece of property they would have to go first (T42 at L24).

A Chancellor may not make a finding of fact not supported by the evidence. See, for example, In re E.C.P., 918 So.2d 809 (Miss.Ct.App. 2006), where a Chancellor's finding of fact

against a father with no supporting evidence was overturned. "We find that there is simply no evidence to support the chancellor's finding. Indeed, there is no direct or indirect evidence that Father knew of or had any part in E.C.P.'s refusal to return to Mother's custody," E.C.P., 918 So.2d at 822.

The Court's standard of review regarding a chancellor's determinations is well established. The chancellor's findings of fact shall not be disturbed on appeal unless the findings are "manifestly wrong, clearly erroneous, or not supported by substantial credible evidence." City of Picayune v. S. Reg'l Corp., 916 So. 2d 510, 518 (Miss. 2005) (citing Brown v. Miss. Dep't of Human Servs., 806 So. 2d 1004, 1005 (Miss. 2000)).

In this case, as in E.C.P., there was nothing in the record to support the Chancellor's finding, and given his statement that he was basing his ruling against Appellant in large part on this fact, the Chancellor's finding of fact is in error and the order of summary judgment and foreclosure must be reversed. Compounding the Chancellor's error was the fact that this was a summary judgment hearing; the evidence was to be heard in the light most favorable to the non-moving party, Palmer v. Anderson Infirmary Benevolent Ass'n, 656 So. 2d 790, 794 (Miss. 1995). To reach a finding of fact against Appellant based on no evidence and then grant summary judgment based in large part on that "fact" is simply not acceptable.

XI. A PERSON SUCH AS APPELLANT WHO OWNS PROPERTY SUBJECT TO A MORTGAGE WITH NO PERSONAL LIABILITY ON THE DEBT IS IN EFFECT A SURETY UP TO THE VALUE OF HIS PROPERTY. 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

One who owns property subject to the debt of another is a surety up to the value of his property.

A surety is released from his obligation by any misrepresentation or concealment amounting to misrepresentation of a material fact on the part of the creditor. Principles of Contract: Being a Treatise on the General Principles, Frederick Pollock, Franklin Strawn Dickson (1888).

Even if BancorpSouth believed that defendant's property should serve as paramount security on its mortgage, it had a duty to treat it on an equal basis to all other defendants in any legal

proceedings. Plaintiff failed to do so. It had a duty to refrain from entering into any collusive agreement with other sureties in order to throw the burden of the debt solely on defendant. It breached this duty. It had a duty to insist that all sureties submit to the authority of the court in determining each party's priority of obligation; instead it encouraged some favored sureties to absent themselves from the legal proceedings solely to cause the burden of the debt to fall on unfavored sureties.

In all suretyship relations, the creditor owes to the surety a duty of continuous good faith and fair dealing. Sumitomo Bank of Cal. v. Iwasaki 70 Cal.2d 81, at 85 (1968), citing the following in support: Hamlen v. Rednalloh Co., 197 N.E. 149, 153 (Mass. 1935); First Citizens Bank & Trust Co. of Utica v. Sherman's Estate 294 N.Y.S. 131, 139 (1937); Stearns, The Law of Suretyship (5th ed. 1951) § 2.11, at p. 22; 1 Story, Equity Jurisprudence (14th ed. 1918) § 448, at p. 430. BancorpSouth has clearly breached this duty of good faith and fair dealing.

BancorpSouth's actions constitute a clear breach of its duty to a surety. As a result of its actions, Appellant and its property should be released from all obligation as surety to Van Buren's debt, and BancorpSouth should be required to compensate defendant for any other losses that have resulted from this breach. BancorpSouth actively misled Appellant and colluded with other sureties against Appellant. Plaintiff has attempted to throw off the whole debt onto Appellant instead of collecting according to established equitable principals. Under the law of sureties, Appellant is discharged. As such, the Chancellor's grant of summary judgment and order of foreclosure should be reversed.

XII. IN A FORECLOSURE ACTION, THE CHANCELLOR ERRED IN ORDERING THAT THE PROPERTY BE PARTITIONED IN FORECLOSURE WHEN APPELLANT, THE ONLY PROPERTY OWNER THAT FILED AN ANSWER, REQUESTED THAT THE PROPERTY BE SOLD AS A WHOLE OR NOT AT ALL

Although Appellant was adamantly opposed to having its property sold at foreclosure, it insisted that if it must be sold, it wanted the entire parcel covered by the deed of trust to be sold. That is, it wanted all six units to be sold as a whole (T49, Hurdle).

No other defendant had filed an answer, so no answering defendant objected to Appellant's

proposal. In short, answering defendants were unanimous in their support for selling the property as a whole, yet the Chancellor insisted on selling only Unit 309.

Appellant also pointed out to the Court that there is a strong argument that piecemeal foreclosures are not permitted (without discharging the mortgage) in Mississippi unless the property is located in two or more counties. The common law rule and holding in most states is that a mortgage may not be foreclosed piecemeal, and that the first foreclosure sale satisfies the mortgage. It is a rule the Mississippi Supreme Court seems to recognize in the case of Lee v. Magnolia Bank; 48 So.2d 515 (Miss. 1950).

In Lee, the court said the mortgage in question was not limited to a single order of sale, but only because Mississippi statutes expressly provided otherwise in cases where properties covered by a single deed of trust were located in two or more counties. Id. at 517. The Lee decision left open the possibility that a partial foreclosure might discharge the mortgage where the properties were located in a single county. "The effect of this is that the statute as well as the contract does authorize a sale by piecemeal *to the extent of selling it in the two counties*, and to that extent the lien is not entire and indivisible and could not be foreclosed in one proceeding in one county alone." Id. [emphasis added].

Note that the court said that a contract can authorize a sale by piecemeal "to the extent of selling it in the two counties." It would seem clear from the court's wording that its intention was not to completely reject the common law rule against piecemeal foreclosures, but rather to allow such sales only in the limited circumstances where the properties covered by a common deed of trust or mortgage are located in two or more counties.

In the instant case, all of the properties are located in a single county and therefore the exception to the common law rule articulated in Lee does not apply. If the Court wishes to expand on its ruling in Lee and expressly permit piecemeal foreclosures in all cases, it is of course free to do so, but Appellant would argue that the instant case illustrates the mischief that allowing piecemeal foreclosures can cause, and why the Court was wise to suggest in its earlier ruling that they should be limited to cases where the property was located in two or more counties.

Appellant had an equitable interest in having the property sold as a whole. All of the answering defendants requested that the property be sold as a whole. It should have been sold as a whole and any excess equity distributed pursuant to a later court decree. An order of a partial foreclosure over the objection of the only answering defendant was error, and therefore the chancellor's grant of summary judgment and order of foreclosure should be reversed.

CONCLUSION

Appellant is aware that a tax sale purchaser is often not looked on sympathetically by the public or even the courts. These investors are often seen as getting something for nothing. BancorpSouth frequently mentioned the fact that Appellant received a valuable condo for very little money.

BancorpSouth failed to mention to the Court the millions of dollars that are lost by tax sale purchasers each year through the purchase of worthless properties – properties that are frequently kept on the tax roll by unscrupulous tax collectors. BancorpSouth failed to mention that without the revenue raised from these tax sale purchasers local and county governments could not function: schools could not teach, firemen could not put out fires, hospitals could not treat the sick.

Holly Springs Realty Group is performing a needed service assigned to it by the State of Mississippi. It asks for no thanks, but it does expect to be treated fairly and honestly. BancorpSouth has done neither.

There is precedent in Mississippi law to the effect that a mortgagee who chooses an unwise course of action following a tax sale may be stripped of its right to collect under its mortgage. In Hancock Bank v. Ladner, 727 So.2d 743, 744 (Miss. 1998), Hancock Bank accepted a deed of trust on a property which, unbeknownst to the bank, had been sold at a tax sale but was still within the redemption period. The tax deed matured, having been purchased at the tax sale by the City of Gulfport. Id. One-and-one-half years later, the Bank paid the taxes and instructed the city to deed the property back to Ladner, the former owner. Id. Ladner then quit-claimed the property to his ex-wife. Id.

The court, without mentioning whether Ladner's ex-wife knew of the lien, ruled that the

bank could not levy against the property because "the bank (1) accepted the deed of trust after a tax sale had already taken place, and (2) actually orchestrated the transaction by which the parcels were ultimately regained. On those facts, there has not been, nor could there be, any allegation of fraud on the part of Ladner, the corporation, or his former wife." Id. at 746. The court ruled that the bank's lien had been extinguished at the time the tax deed matured and that having the city reconvey the property to the mortgagor did not revive the bank's mortgage. Id. The court went on to state that "Hancock Bank had countless opportunities during the course of these events to protect its lien and failed to act prudently at each turn. We therefore hold each of the bank's assignments of error to be without merit." Id.

Like Hancock Bank, BancorpSouth has certainly had every opportunity to protect its lien. Unlike Hancock Bank, its behavior has been more than imprudent. It has been arguably tortuous and in bad faith. As such its lien should be declared invalid.

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that this Court will reverse the Chancellor's grant of summary judgment and order of foreclosure and render judgment in favor of Appellant. As this ruling was plain error and involved misconduct on the part of Plaintiff, Appellant further prays that this Court award it costs of this appeal as well as all costs and attorneys fees incurred in defending this action. Appellant prays Chancellor's denial of Appellant's Motions for Entry of Default and Motion to Dismiss be reversed.[11]

Appellant's property has been ordered sold at foreclosure and Appellant was unable to post Supersedeas bond. If BancorpSouth is unable to restore Appellant to ownership of Unit 309, Appellant prays that BancorpSouth be required to compensate Appellant by purchasing on its behalf a property of equal or greater square footage with an equal or better location and value, that BancorpSouth be required to compensate Appellant for all damages, and that BancorpSouth be enjoined from further proceedings against Holly Springs Realty Group, LLC and for all additional relief.

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[11] Appellant recognizes the contradictory nature of these motions and the impossibility of granting both of them. Appellant is merely exercising its right to advance contradictory defenses.

Respectfully submitted, this the 22st day of October, 2009.

HOLLY SPRINGS REALTY GROUP, LLC
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Appendix
Mississippi Code

27-41-79. Sales of land for taxes; certified lists of lands sold.

The tax collector shall on or before the second Monday of May and on or before the second Monday of October of each year, transmit to the clerk of the chancery court of the county separate certified lists of the lands struck off by him to the state and that sold to individuals, specifying to whom assessed, the date of sale, the amount of taxes for which sale was made, and each item of cost incident thereto, and where sold to individuals, the name of the purchaser, such sale to be separately recorded by the clerk in a book kept by him for that purpose. All such lists shall vest in the state or in the individual purchaser thereof a perfect title to the land sold for taxes, but without the right of possession for the period of and subject to the right of redemption; but a failure to transmit or record a list or a defective list shall not affect or render the title void. If the tax collector or clerk shall fail to perform the duties herein prescribed, he shall be liable to the party injured by such default in the penal sum of twenty-five dollars, and also on his official bond for the actual damage sustained. The lists hereinabove provided shall, when filed with the clerk, be notice to all persons in the same manner as are deeds when filed for record. The lists of lands hereinabove referred to shall be filed by the tax collector in May for sales made in April and in October for sales made in September, respectively.

Sources: Codes, 1942, § 9935; Laws, 1934, ch. 188; Laws, 1968, ch. 361, § 43, eff from and after January 1, 1972.

27-43-5. Notice to lienors.

It shall be the duty of the clerk of the chancery court to examine the record of deeds, mortgages and deeds of trust in his office to ascertain the names and addresses of all mortgagees, beneficiaries and holders of vendors liens of all lands sold for taxes; and he shall, within the time fixed by law for notifying owners, send by certified mail with return receipt requested to all such lienors so shown of record the following notice, to-wit:

"State of Mississippi,

To _____,

County of _____

"You will take notice that _____ (here describe lands) assessed to, or supposed to be owned by _____ was on the _____ day of _____, 2 _____, sold to _____ for the taxes of _____ (giving year) upon which you have a lien by virtue of the instrument recorded in this office in _____ Book _____, page _____, dated _____, and that the title to said land will become absolute in said purchaser unless redemption from said sale be made on or before the _____ day of May of 2 _____.

"This _____ day of _____, 2 ____.

"_____

"Chancery Clerk of _____ County, Miss."

Sources: Codes, 1930, § 3259; Laws, 1942, § 9943; Laws, 1922, ch. 241; Laws, 1988, ch. 478; Laws, 1995, ch. 468, § 13; Laws, 1995, ch. 381, § 1, eff from and after July 1, 1995.

27-43-11. Liens; fees of clerk; failure to give notice.

For examining the records to ascertain the names and addresses of lienors, the chancery clerk shall be allowed a fee of Seven Dollars ($7.00) in each instance for each lien where a lien is found of record, and said fees shall be taxed against the owner of said land, if same is redeemed, and if not redeemed, then said fees are to be taxed as part of the cost against the purchaser. 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, and such purchaser shall be entitled to a refund of all such taxes paid the state, county or other taxing district after filing his claim therefor as provided by law.

Sources: Codes, 1930, § 3262; Laws, 1942, § 9946; Laws, 1922, ch. 241; Laws, 1946, ch. 244, § 1; Laws, 1995, ch. 468, § 14, eff from and after passage (approved March 27, 1995).

27-45-23. Conveyances to purchasers at tax sales.

When the period of redemption has expired, the chancery clerk shall, on demand, execute deeds of conveyance to individuals purchasing lands at tax sales. Which conveyances shall be essentially in the following form to wit:

"State of Mississippi, County of _____

Be it known, that _____, tax collector of said county of _____, did, on the _____ day of _____, A.D. _____, according to law, sell the following land, situated in said county and assessed to _____ to wit:

_____ (here describe the land) _____ for the taxes assessed thereon (or when sold for other taxes it should be so stated) for the year A.D. _____, when _____ became the best bidder therefor, at and for the sum of _____ dollars and _____ cents; and the same not having been redeemed, I therefore sell and convey said land to the said _____ Given under my hand, the _____ day of _____, A. D. _____

"_____

Chancery Clerk."

Such conveyance shall be attested by the seal of the office of the chancery clerk and shall be recordable when acknowledged as land deeds are recorded, and such conveyance shall vest in the purchaser a perfect title with the immediate right of possession to the land sold for taxes. No such

conveyance shall be invalidated in any court except by proof that the land was not liable to sale for the taxes, or that the taxes for which the land was sold had been paid before sale, or that the sale had been made at the wrong time or place. If any part of the taxes for which the land was sold was illegal or not chargeable on it, but part was chargeable, that shall not affect the sale nor invalidate the conveyance, unless it appears that before sale the amount legally chargeable on the land was paid or tendered to the tax collector.

Sources: Codes, Hutchinson's 1848, ch. 8, art. 2 (15); 1857, ch. 3, arts. 36, 38; 1871, §§ 1698, 1700; 1880, §§ 523, 525; 1892, §§ 3816, 3817; Laws, 1906, §§ 4331, 4332; Hemingway's 1917, §§ 6965, 6966; Laws, 1930, § 3273; Laws, 1942, § 9958; Laws, 1908, ch. 200.

87-5-7. Surety or indorser, when sued alone, must notify principal and make defense.

A surety or indorser shall not suffer judgment or a decree to be rendered against him by confession or default, without the consent of the principal debtor. And a surety or indorser who shall be sued alone, shall give notice of the suit to the principal debtor, if resident in this state, and if he have knowledge or information of any defense to the action which the principal debtor has, he shall make such defense; and if a surety or indorser, when sued alone, fail to give such notice to the principal debtor, in case he be a resident of this state, or to make such defense in the action of which he has knowledge or information, he shall be barred of all recovery against the principal debtor in case the principal debtor have at the time a good defense to the action of the creditor.

Sources: Codes, 1857, ch. 46, art. 4; 1871, § 2260; 1880, § 1000; 1892, § 3278; Laws, 1906, § 3734; Hemingway's 1917, § 2910; Laws, 1930, § 2960; Laws, 1942, § 256.

RULE 1. SCOPE OF RULES

Including all amendments through March 24, 2009

These rules govern procedure in the circuit courts, chancery courts, and county courts in all suits of a civil nature, whether cognizable as cases at law or in equity, subject to certain limitations enumerated in Rule 81; however, even those enumerated proceedings are still subject to these rules where no statute applicable to the proceedings provides otherwise or sets forth procedures inconsistent with these rules. These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.

Comment

The purpose of Rule 1 is to state the scope and applicability of the Mississippi Rules of Civil Procedure and the basic philosophical principle for their judicial construction.

Rule 1 must be considered together with Rule 81 to determine the applicability of the Mississippi Rules of Civil Procedure to civil practice in Mississippi. Generally, all civil actions in the circuit, chancery, and county courts are subject to the application of the rules; exceptions are listed in Rule 81. The excepted civil actions are governed by procedures stated in the statutes pertaining to those actions.

It is intended that these rules be applied as liberally to civil actions as is judicially feasible, whether in actions at law or in equity. However, nothing in the rules should be interpreted as abridging or modifying the traditional separations of jurisdiction between the law courts and equity courts in Mississippi.

The rules apply irrespective of the nature of the parties to the action, including the state of Mississippi or any political subdivision thereof. It is established law in Mississippi that where a statute permits the state or a subdivision thereof to be brought into court as a litigant, it is subject to the same procedural rules as is any other party. Humphreys County v. Cashin, 128 Miss. 236, 90 So. 888 (1922), Bolivar County v. Bank of Cleveland, 170 Miss. 555, 561, 155 So. 176, 177 (1934) (Ethridge, J., dissenting).

The salient provision of Rule 1 is the statement that "These rules shall be construed to secure the just, speedy, and inexpensive determination of every action." There probably is no provision in these rules more important than this mandate: It reflects the spirit in which the rules were conceived and written and in which they should be interpreted. The primary purpose of procedural rules should be to promote the ends of justice; these rules reflect the view that this goal can be best accomplished by the establishment of a single form of action, known as a "civil action," thereby uniting the procedures in law and equity through a simplified procedure that minimizes technicalities and places considerable discretion in the trial judge for construing the rules in a manner that will secure their objectives.

Properly utilized, the rules will tend to discourage battles over mere form and to sweep away needless procedural controversies that either delay a trial on the merits or deny a party his day in court because of technical deficiencies. The mandate in the final sentence of Rule 1 is only one of a number of similar admonitions scattered throughout the rules directing that the rules be interpreted liberally in order that the procedural framework in which litigation is conducted promotes the ends of justice and facilitates decisions on the merits, rather than determinations on technicalities. See,

e. g., Miss. Code Ann. § 11-5-13 (1972) (statute setting forth requirements of bill of complaint). Perhaps the most important of these statements is the provision of Rule 61 which directs that "the court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The keystone to the effective functioning of the Mississippi Rules of Civil Procedure is, obviously, the discretion of the trial court. The rules grant considerable power to the judge and only provide general guidelines as to the manner in which it should be exercised. Accordingly, judges must view the rules with a firm understanding of the philosophy of the rules and must exercise a wise and sound discretion to effectuate the objective of the simplified procedure. The rules will remain a workable system only so long as trial judges exercise their discretion intelligently on a case-by-case basis; application of arbitrary rules of law to particular situations will have a debilitating effect on the overall system.

RULE 4(h). SUMMONS

(h) Summons: Time Limit for Service. 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.

[Amended effective May 1, 1982; March 1, 1985; February 1, 1990; July 1, 1998; January 3, 2002.]

Advisory Committee Historical Note

Effective March 1, 1985, a new Rule 4 was adopted. 459-462 So. 2d XVIII (West Miss. Cas. 1985).

Effective May 1, 1982, Rule 4 was amended. 410-416 So. 2d XXI (West Miss. Cas. 1982).

Comment

The original version of Rule 4, effective as of January 1, 1982, was amended by the Mississippi Supreme Court on March 5, 1982. The amending order deleted the entire text of Rule 4 and substituted the prior statutory procedure for service of the summons. On December 28, 1984, the Supreme Court adopted a new Rule 4, effective March 1, 1985. Forms applicable to the new Rule 4 were adopted on May 2, 1985. This comment pertains to new Rule 4 and its forms.

...

Rule 4(h) provides that service upon a defendant must be made within 120 days after the filing of the complaint or the cause will be dismissed without prejudice as to that defendant unless good cause can be shown as to why service could not be made.

[Comment adopted effective March 1, 1986; amended effective February 1, 1990; July 1, 1998 April 13,2000 .]

RULE 5(b). SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(b) (1) Service: How Made. Whenever under these rules service is required or permitted to

be made upon a party who is represented by an attorney of record in the proceedings, the service shall be made upon such attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him; or by transmitting it to him by electronic means; or by mailing it to him at his last known address, or if no address is known, by leaving it with the clerk of the court, or by transmitting it to the clerk by electronic means. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no on one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by electronic means is complete when the electronic equipment being used by the attorney or party being served acknowledges receipt of the material. If the equipment used by the attorney or party being served does not automatically acknowledge the transmission, service is not complete until the sending party obtains an acknowledgment from the recipient. Service by mail is complete upon mailing.

Comment

The purpose of Rule 5 is to provide both an expedient method of exchanging written communications between parties and an efficient system of filing papers with the clerk. This rule presupposes that the court has already gained jurisdiction over the parties. A "pleading subsequent to the original complaint" which asserts a claim for relief against a person over whom the court has not at the time acquired jurisdiction must be served upon such person not a party along with a copy of a summons in the same manner as the copy of the summons and complaint is required to be served upon the original defendants. See Miss. Code Ann. § 11-5-37 (1972) (answer may be made a cross-bill). However, where a plaintiff has settled his case, the service on him of a notice and motion to intervene is ineffectual to bring him back into court. This is consistent with Mississippi practice, although past procedure did not recognize intervention. See Hyman v. Cameron, 46 Miss. 725 (1872).

Rule 5(b) has no application to service of summons; that subject is completely covered by Rule 4.

For general discussions of the federal rule analogous to M.R.C.P. 5, see 1 Wright & Miller, Federal Practice and Procedure, Civil §§71-82 (1969), and 2 Moore's Federal Practice ¶¶ 5.01-5.11 (1975).

RULE 6(b). TIME

(b)

Enlargement. When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), 59(d), 59(e), and 60(b), except to the extent and under the conditions therein stated.

[Amended effective March 1, 1989; amended effective June 24, 1992.]

Comment

Under Rule 6(b), the court is given wide discretion to enlarge the various time periods both before and after the actual termination of the allotted time, certain enumerated cases being expected. Accord, e. g., Rogers v. Rogers, 290 So.2d 631 (Miss.), cert. denied 419 U.S. 837 [95 S. Ct. 65, 42 L.Ed.2d 64] (1974); Grand Lodge Colored K.P. v. Yelvington, 111 Miss. 352, 71 So. 576 (1916).

Importantly, such enlargement is to be made only for cause shown. If the application for additional time is made before the period expires, the request may be made ex parte; if it is made after the expiration of the period, notice of the motion must be given to other parties and the only cause for which extra time can be allowed is "excusable neglect." Excusable neglect is discussed and illustrated in 4 Wright & Miller, Federal Practice and Procedure, Civil § 1165 (1969).

[Amended effective August 11, 2005.]

RULE 8(a). GENERAL RULES OF PLEADING

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counter-claim, 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.

Comment

The purpose of Rule 8 is to give notice, not to state facts and narrow the issues as was the purpose of pleadings in prior Mississippi practice. Consequently, the distinctions between "ultimate facts" and "evidence" or conclusions of law are no longer important since the rules do not prohibit the pleading of facts or legal conclusions as long as fair notice is given to the parties. 5 Wright & Miller, Federal Practice and Procedure, Civil §§ 1202, 1218 (1969); 2A Moore's Federal Practice ¶¶ 8.12, 8.13 (2d ed. 1968); contra, Pigott v. Boeing Co., 240 So.2d 63 (Miss.1970); and King v. Mississippi P. & L. Co., 244 Miss. 486, 142 So.2d 222 (1962) (it is not sufficient to allege negligence as a mere conclusion of the pleader, but facts must be pleaded showing actionable negligence); see also Bennett v. Hardwell, 214 Miss. 390, 59 So.2d 82 (1952); McLemore v. McLemore, 173 Miss. 765, 163 So. 500 (1935) (ultimate essential facts upon which action is based must be averred, but not the items of evidence by which ultimate facts are to be proved); and Barnes v. Barnes, 317 So.2d 387 (Miss.1975) (where issue of possession of property was not presented by the pleadings in divorce action and no proof as to possession appeared in record, that portion of decree awarding possession of land to complainant was not substantiated by proof and was not valid).

Although Rule 8 abolishes many technical requirements of pleadings, it does not eliminate the necessity of stating circumstances, occurrences, and events which support the proffered claim. Averments of residency are no longer required unless needed by the claim, as in divorce proceedings. See Miss. Code Ann. § 93-5-5 (1972). The rule allows the claims to be stated in general terms so that the rights of the client are not lost by poor drafting skills of counsel.

RULE 9(b). PLEADING SPECIAL MATTERS

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.

Comment

The purpose of Rule 9 is to permit the pleading of special matters with maximum emphasis on the substance of the pleading rather than on form.

Rule 9(b) is well-established in common law and past Mississippi practice. McMahon v. McMahon, 247 Miss. 822, 157 So.2d 494 (1963) (fraud will not be inferred or presumed and cannot be charged in general terms; the specific facts which constitute fraud must be definitely averred); Griffith, supra, §§§§ 176, 589. "Circumstances" refers to matters such as the time, place, and contents of the false representations, in addition to the identity of the person who made them and what he obtained as a result. See 5 Wright & Miller, Federal Practice and Procedure, Civil §§ 1297 (1969). The so-called "textbook" elements of fraud may be pleaded generally, i. e., (1) false representation of a material fact, Sovereign Camp, W.O.W. v. Boykin, 182 Miss. 605, 181 So. 741 (1938); (2) knowledge of or belief in its falsity by the person making it, H. D. Sojourner Co. v. Joseph, 186 Miss. 755, 191 So. 418 (1939); (3) belief in its truth by the person to whom it is made, Pilot Life Ins. Co. v. Wade, 153 Miss. 874, 121 So. 844 (1929); (4) intent that it should be acted upon, McNeer & Dodd v. Norfleet, 113 Miss. 611, 74 So. 577 (1917); (5) detrimental reliance upon it by the person claiming to have been deceived, Clopton v. Cozart, 21 Miss. 363 (1850).

Conditions of mind, such as intent and malice, are required to be averred only generally. Cf. Benson v. Hall, 339 So.2d 570 (Miss.1976), and Edmunds v. Delta Democrat Pub. Co., 230 Miss. 583, 93 So.2d 171 (1957) (charge in a libel suit that defendant published libelous material "falsely and maliciously or with reckless disregard of the truth" without alleging any facts, were mere conclusions of the pleader and were not admitted on demurrer).

[Comment amended effective April 13, 2000.]

RULE 15 (b) (c) AMENDED AND SUPPLEMENTAL PLEADINGS

(b) Amendment to Conform to the Evidence. When issues not raised by the pleadings are tried by expressed or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the maintaining of the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence. The court is to be liberal in granting permission to amend when justice so requires.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An

amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by Rule 4(h) for service of the summons and complaint, the party to be brought in by amendment:

(1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining the party's defense on the merits, and

(2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. An amendment pursuant to Rule 9(h) is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original pleading.

[Amended effective July 1, 1998; amended effective April 17, 2003 to allow amendments on dismissal under Rule 12(b)(6) or judgment on the pleadings under Rule 12(c) where the court determines that justice so requires.]

Advisory Committee Historical Note

Effective July 1, 1998, Rule 15(c) was amended to state that the relation back period includes the time permitted for service of process under Rule 4(h).

Comment

"It is an invariable principle of practice that the admissible proof in any case must come within the allegations of the pleadings and that it avails nothing to prove what is not charged. But courts are organized for the purpose of hearing and determining causes on their actual merits; and, although it is true that good faith and a reasonable diligence are expected of parties in equity and of their solicitors, and that every party when he comes into court will in the first instance unfold his whole case or defense in accordance with the rules that govern the pleadings and proceedings therein, nevertheless it would be a hopelessly visionary and impractical expectation that every party in every case could always successfully communicate at once to his solicitor all the material facts with complete accuracy, or that any solicitor, although having all the facts, may reach such a height of professional perfectibility as to stand above the possibility of error or omission in pleading them -- as a consequence of which there would sometimes be a failure of full justice on the actual merits unless amendment and correction in the pleadings, and in other procedural steps, were seasonably and judiciously allowed." V. Griffith, Mississippi Chancery Practice, § 388 (2d ed. 1950).

The preceding statements state well the theory underlying Rule 15 and demonstrate that amended pleadings have been liberally permitted throughout Mississippi legal history. See Miss. Code Ann. §§ 11-5-45, 11-5-57, 11-5-59, 11-5-61, 11-5-63, 11-7-55, 11-7-59(3), 11-7-115, and 11-17-117 (1972); See also, Grocery Co. v. Bennett, 101 Miss. 573, 58 So. 482 (1912) (courts are organized for the purpose of trying cases on their merits and only in exceptional cases should trial courts refuse to permit amendments to pleadings or proceedings); Field v. Middlesex Bkg. Co., 77 Miss. 180, 26 So. 365 (1899) (the presentation of a case on its merits should not be defeated by reason alone of any formal rules of pleading and practice, if within the legitimate powers of a court of conscience to avoid it).

Under M.R.C.P. 15(b), when evidence is introduced or an issue is raised with the express or implied consent of the other party, the pleadings shall be treated in all respects as if they had been amended to conform to such evidence. If the opposing party objects but fails to persuade the court that such party will be prejudiced in maintaining the party's claim or defense, the court must then

grant leave to amend the pleadings to allow the evidence on the issue. If the objecting party can show prejudice, the court may grant a continuance to meet the evidence, but should again allow amendment of the pleadings. 6 Wright & Miller, supra, Civil § 1495.

Under Rule 15(c) the first test for whether an amendment relates back, is merely whether the amended claim or defense arose from the same "conduct, transaction, or occurrence" as the original. The remaining tests are whether the new party to be added by the amendment (if any) is served before expiration of the period provided by Rule 4(h) for service of a summons and complaint. An intended defendant who is notified of an action within the period allowed by Rule 4(h) for service of a summons and complaint may not defeat the action on account of a defect in the pleading with respect to the defendant's name, provided that the requirements of clauses (1) and (2) have been met. If the notice requirement is met within the Rule 4(h) period, a complaint may be amended at any time to correct a formal defect such as a misnomer or misidentification. In allowing a name-correcting amendment within the time allowed by Rule 4(h), this rule allows not only the 120 days specified in that rule, but also any additional time resulting from any extension ordered by the court pursuant to that rule, as may be granted, for example, if the defendant is a fugitive from service of the summons.

Amendments pursuant to Rule 9(h) (fictitious parties) are not considered as changing parties and do relate back.

[Amended effective September 1, 1987; amended August 21, 1996; amended July 1, 1998; amended effective April 17, 2003.]

RULE 19. JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

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

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

(2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant or, in a proper case, an involuntary plaintiff.

Comment

The purpose of Rule 19 is to permit a court to balance the rights of all persons whose interests are involved in an action.

Compulsory joinder is an exception to the general practice of giving the plaintiff the right to decide who shall be parties to a law suit; although a court must take cognizance of this traditional prerogative in exercising its discretion under Rule 19, plaintiff's choice will have to be compromised when significant countervailing considerations make the joinder of particular absentees desirable.

There are at least four main questions a court must consider when deciding a question of joinder under Rule 19: First, the plaintiff's interest in having a forum; second, the defendant's wish to avoid multiple litigation, inconsistent relief, or sole responsibility for a liability he shares with another; third, the interest of an outsider whom it would have been desirable to join; fourth, the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. This list is by no means exhaustive or exclusive; pragmatism controls.

There is no precise formula for determining whether a particular nonparty must be joined under Rule 19(a). The decision has to be made in terms of the general policies of avoiding multiple litigation, providing the parties with complete and effective relief in a single action, and protecting the absent persons from the possible prejudicial effect of deciding the case without them. Account also must be taken of whether other alternatives are available to the litigants. By its very nature Rule 19(a) calls for determinations that are heavily influenced by the facts and circumstances of individual cases.

The structure of Rule 19 reflects the analytical sequence that a court should follow in deciding a party joinder problem. Once an issue of compulsory joinder is raised, the court initially must determine whether the absent person's interest in the litigation is sufficient to satisfy one or more of the tests set out in the first sentence of Rule 19(a). When it does, the second sentence of the subdivision states that if he has not been joined, "the court shall order that he be made a party." If the absent person should be regarded as a plaintiff but refuses to join, the court may join him as a defendant or, in a proper case, as an involuntary plaintiff.

Difficulties arise only if the absentee cannot be effectively joined because he is not subject to service of process, if his joinder will deprive the court of subject matter jurisdiction, or if he makes a valid objection to the court's venue after joinder. When joinder of someone described in Rule 19(a) is not feasible, the court must examine the four considerations described in Rule 19(b) to determine whether the action may go forward in his absence or must be dismissed, "the absent person being thus regarded as indispensable." By proceeding in this orderly fashion, the court would be able to avoid grappling with the difficult question of indispensability whenever it initially decides that the absentee's interest is not sufficient to warrant compelling his joinder. The first joinder standard, which is described in Rule 19(a)(1), is designed to protect those who are already parties by requiring the presence of all persons who have an interest in the litigation so that any relief that may be awarded will effectively and completely adjudicate the dispute. The second test set out in Rule 19 (a) relates the situations in which the action cannot be effectively adjudicated because the absentee claims an interest in the subject matter of the action, and disposing of the case in his absence may prejudice either those already before the court or the absentee himself. See 7 Wright & Miller, Federal Practice and Procedure, Civil § 1604 (1972).

Generally, Rule 19 comports with traditional Mississippi practice; however, the rule effectuates at least one significant modification. Under M.R.C.P. 19, a person needed for just adjudication must be joined and may be joined as a defendant if, although properly a plaintiff, he refuses to join the suit voluntarily. Under prior practice the suit must be dismissed if a necessary party cannot be joined. Comment, Procedural Reform in Mississippi: A Current Analysis, 47 Miss.L.J. 33, 5859 (1976), citing Terry v. Unknown Heirs of Gibson, 108 Miss. 749, 67 So. 209 (1915); Gates v. Union Naval Stores Co., 92 Miss. 227, 45 So. 979 (1908); Borroughs v. Jones, 78 Miss. 235, 28 So. 944 (1900); Lemmon v. Dunn, 61 Miss. 210 (1883); See also V. Griffith, Mississippi Chancery Practice §§ 137-150 (2d ed. 1950); 7 Wright & Miller, supra, §§ 1601-1625;

3A Moore's Federal Practice ¶¶ 19.01-.20 (1974).

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 *Brief of Appellant* by United States mail with postage prepaid on the following persons at these addresses:

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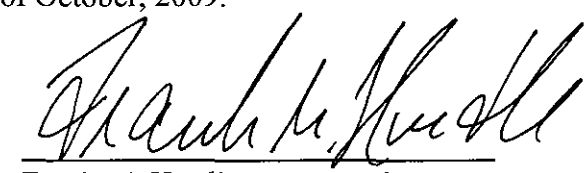
Signed this the 22nd day of October of October, 2009.



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