

**IN THE SUPREME COURT OF MISSISSIPPI**

**CASE NO. 2009-CA-01191** 

**REBUILD AMERICA, INC.**

**APPELLANT**

**VERSES**

**TIM A. NORRIS**

**APPELLEE**

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**BRIEF OF APPELLEE**

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**APPEAL FROM THE CHANCERY COURT OF  
HINDS COUNTY, MISSISSIPPI**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel for Appellee 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.

1. Rebuild America, Inc., Appellant;
2. Tim A. Norris, Appellee;
3. Kimberly P. Turner, Esq. and the law firm of Henry, Barbour, DeCell & Bridgeforth, Attorneys for Appellant;
4. Stephen G. Younger, Attorney for Appellee;
5. Delta Foundation, Inc.

Respectfully submitted,

TIM A. NORRIS

BY: Stephen G. Younger  
STEPHEN G. YOUNGER (MSB )

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### **STATEMENT OF THE ISSUES**

- I. WHETHER A TAX SALE SHOULD BE SET ASIDE UNDER MISS. CODE ANN. §27-43-3 WHEN THE REPUTED OWNER DOES NOT RECEIVE REQUISITE NOTICE PURSUANT TO THE STATUTE.
2. WHETHER A TAX SALE SHOULD BE SET ASIDE UNDER MISS. CODE ANN. §27-43-5 AND §27-43-7 WHEN THE LIEN HOLDER DOES NOT RECEIVE REQUISITE NOTICE PURSUANT TO THE STATUTES.
3. WHETHER APPELLANT'S APPEAL IS FRIVOLOUS AND DAMAGES SHOULD BE AWARDED PURSUANT TO RULE 38 M.R.A.P.

### **STATEMENT OF THE CASE**

This appeal is taken from Summary Judgment entered by the Chancery Court of Hinds County rendered on July 20, 2009. The Honorable Patricia D. Wise confirmed title to real property subject to this litigation in Defendant, Tim A. Norris, and declared void the conveyance by Tax Deed dated September 10, 2007 to Sass Muni and the Quitclaim Deed and Assignment from Sass Muni to Rebuild America, Inc. (R. at 141-142).

Rebuild America, Inc. initiated the lower court action by the filing of its Complaint to quiet and confirm its title acquired from Sass Muni. Tim A. Norris, the land owner, filed his Answer, Affirmative Defenses and Counter-Claim to Set Aside Tax Sale, Remove Cloud and Confirm Title. (R. at 30, 32-36). Tim A. Norris filed his Motion for Summary Judgment, along with supporting memorandum and Itemization of Undisputed Facts. (R. at 65-85). Rebuild America filed its Response, with supporting memorandum and Itemization of Undisputed Facts. (R. at 86-131). Following oral argument the lower court granted the Motion for Summary Judgment of Tim A. Norris on July 20, 2009. (R. at 142). Rebuild America filed its Amended Notice of Appeal on July 27, 2009. (R. at 144).

## **STATEMENT OF FACTS**

On or about December 22, 2005, Tim A. Norris was conveyed and became the owner of commercial property, known as Collins Dream Kitchen, by virtue of a Warranty Deed from his mother, Ms. Sylvester Collins. The deed was recorded in the office of the Chancery Clerk of Hinds County, Mississippi in Book 6406 at Page 324. Mr. Norris and his family had operated the family restaurant at this location for the last 11 years. (R. at 77).

On August 28, 2006 a tax sale was held on subject property (Tax Parcel #167-7) wherein Sass Muni was the purchaser at said tax sale for year 2005 taxes. The Hinds Chancery Clerk mailed the Owner's Notice of Forfeiture to Mr. Norris at his residence, 5026 Raintree Drive, Byram, Mississippi, which he received on June 6, 2008, as evidenced by his signature on the certified receipt. (R. at 11). However, the summons (Sheriff's Notice of Forfeiture) was never served on Mr. Norris. Instead, it was posted on a door at his residence. (R. at 9). Mr. Norris never received the Sheriff's Notice of Sale. (R. at 78).

At the time of the tax sale and issuance of the tax deed, the property was secured by three (3) Deeds of Trust, which were recorded in the Hinds Chancery land records. The Chancery Clerk did not provide statutory notice of forfeiture to the lien holder, Delta Foundation, Inc., prior to expiration of the redemption period. (R. at 82).

Mr. Norris and his entire family suffered tragedies during the two years after the tax sale and leading up to issuance of the tax deed. His sister, who helped with the restaurant business, was diagnosed with cancer and was undergoing treatment; his brother, who also helped with the restaurant business, was murdered in April 2008. (R. at 78).

On September 10, 2008 the Chancery Clerk issued a Tax Deed to Sass Muni, recorded in the office of the Chancery Clerk of Hinds County, Mississippi in Book 6941 at page 879. (R. at

8). Sass Muni then conveyed the property to Rebuild America, Inc. by Quitclaim Deed and Assignment recorded in the aforesaid clerk's office in Book 6953 at Page 899. (R. at 6).

Rebuild America instituted this action by filing its Complaint to Quiet and Confirm Tax Title on October 22, 2008.<sup>1</sup> No lien holder was made a defendant. (R. at 1-12). On January 7, 2009, Tim A. Norris entered his appearance and filed his Answer, Affirmative Defenses, and Counter-Claim to Set Aside Tax Sale, Remove Cloud, and Confirm Title. (R. at 30, 32-36).

### **SUMMARY OF THE ARGUMENT**

Tim A. Norris, as owner, did not receive the requisite statutory notice pursuant to Miss. Code Ann. §27-43-3. The statute requires redemption notice be given by personal service, by mail, and by publication in an appropriate newspaper. The summons was never delivered to Mr. Norris, but rather was posted on a door. The failure to properly serve Mr. Norris renders the tax sale and Chancery Clerk's conveyance to Sass Muni and subsequent deed to Rebuild America, Inc. null and void.

The Chancery Clerk failed to provide the requisite statutory notice to the lien holder, Delta Foundation, Inc., pursuant to Miss. Code Ann. §27-43-5 and §27-43-7. This failure also renders the tax sale null and void.

The appeal by Rebuild America, Inc. is frivolous and reasonable attorney fees should be awarded pursuant to Rule 38 M.R.A.P. Rebuild America acknowledges that it is aware of Mississippi precedent on the issues before this Court. Further, Rebuild America was the appellant in a case, which was decided before this appeal, which contained similar facts and

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<sup>1</sup> Prior to filing the complaint, Rebuild America tried to get Mr. Norris' mother to sign a contract to purchase the property back for \$127,900.00. (R. at 78).



declaring a tax sale void for failing to provide notice to the owner and lien holder. Therefore, Rebuild America had no hope of success in filing this appeal.

### ARGUMENT

I. WHETHER A TAX SALE SHOULD BE SET ASIDE UNDER MISS. CODE ANN. §27-43-3 WHEN THE REPUTED OWNER DOES NOT RECEIVE REQUISITE NOTICE PURSUANT TO THE STATUTE.

A. Standard of Review.

This Court will not reverse the decision of a chancery court unless that decision was manifestly wrong, clearly erroneous, or if the chancellor applied an incorrect legal standard. *Nichols v. Funderburk*, 883 So.2d 554, 556 (¶ 7) (Miss. 2004). When an appeal concerns property sold in a tax sale, this Court has held: "Statutes dealing with land forfeitures for delinquent taxes should be strictly construed in favor of the landowners. *Brown v. Riley*, 580 So.2d 1234, 1237 (Miss.1991). Any deviation from the statutorily mandated procedure renders the sale void." *Roach v. Goebel*, 856 So.2d 711, 716(¶ 29) (Miss. 2003) (citing *Hart v. Catoe*, 390 So.2d 1001, 1003 (Miss. 1980)).

B. The Deputy Sheriff failed to properly serve Mr. Norris as required by Miss. Code Ann. §27-43-3 and therefore, the tax deed is void.

#### NOTICE TO REPUTED OWNER

The notice requirements for tax sales to the reputed owner are set forth in Miss. Code Ann. §27-43-3. The statute states that the notice of the redemption period is to be accomplished three (3) ways. Specifically, §27-43-3 states, in pertinent part, as follows:

The clerk shall issue the notice to the sheriff of the county of the reputed owner's residence, if he be a resident of the State of Mississippi, and the sheriff shall be required to serve personal notice as summons issued from the courts are served, and make his return to the chancery clerk issuing same. The clerk shall also mail a copy of same to the reputed owner at his usual street address, if same can be ascertained after diligent search and inquiry, or to his post office address if only

that can be ascertained, and he shall note such action on the tax sales record. The clerk shall also be required to publish the name and address of the reputed owner of the property and the legal description of such property in a public newspaper of the county in which the land is located, or if no newspaper is published as such, then in a newspaper having a general circulation in such county. Such publication shall be made at least forty-five (45) days prior to the expiration of the redemption period.

....Should the clerk inadvertently fail to send notice as prescribed in this section, then such sale **shall be void**. . . ." *Emphasis added*.

"Mississippi's long-standing public policy is to protect landowners from loss by sale of their land for taxes." *Carmadelle v. Custin*, 208 So. 2d 51, 55 (Miss. 1968). The Mississippi Supreme Court held in *DeWeese Nelson Realty, Inc. v. Equity Services Co.*, 502 So. 2d 310 (Miss. 1986), that "[s]ection 27-43-3 requires redemption notice to be given by personal service, by mail, and by publication in an appropriate newspaper." *Id.* at 312. Therefore, in order for notice to be complete and in accordance with the statute, all three (3) requirements must be met.

In *Lawrence v. Rankin*, 870 So. 2d 673, 676 (Miss. 2004), the Court of Appeals affirmed the lower court, which set aside the chancery clerk's tax sale conveyance for failing to follow the notice requirements. The clerk had failed to file an affidavit certifying that search was made in specific places, such as phone directory, city tax directory, sectional index rolls, etc. The Court held that "The statute involved in the present case must be given a strict construction, and its requirements fully satisfied. Such was not the case here. The failure of the supporting affidavit renders the tax deed to Lawrence void. The lower court was indeed correct in canceling the tax deed and, therefore, the judgment of the chancellor is affirmed." *Id.* at ¶14.

*Viking Investments, LLC v. Addison Body Shop, Inc.*, 931 So. 2d. 679 (Miss. 2006) is the controlling case that clearly shows the lower court applied the correct legal standard and was

correct in setting aside the tax deed and confirming title to Mr. Norris. In *Viking* the subject property was deeded by tax deed from the chancery clerk to Viking after the redemption period had expired. Viking then filed a complaint to confirm tax title. Addison, the property owner, objected on the grounds that even though it had received notice of the tax sale by certified mail and publication, the sheriff failed to perfect personal service of the redemption notice because the deputy sheriff posted it to Addison's property. The chancery court found that posting the notice was not adequate notice of the expiration of the redemption period as contemplated by Miss. Code Ann. §27-43-3 and declared the tax sale void.

The *Viking* Court held that having two of the three redemption notice requirements, by mailing a copy of the notice to Addison via certified mail and by publishing the notice in the newspaper, but failing to personally serve Addison with notice did not meet the statutory requirements. The Court stated as follows:

According to section 27-43-3, the sheriff is required to serve personal notice as summons issued from the courts are served. Rule 4 of the Mississippi Rules of Civil Procedure dictates how summons issued from the courts are to be served....Here, the record indicates that the deputy sheriff posted the notice to Addison's business when he was unable to successfully locate Addison on the premises. Posting a notice to the property when the intended recipient cannot be located is clearly not one of the methods for perfecting personal service under Rule 4. *Id.* at 682.

The *Viking* facts are identical to the case at bar. It is un-contradicted that Mr. Norris was not delivered the sheriff tax notice as required by statute and pursuant to Rule 4 of the Mississippi Rules of Civil Procedure. Instead, in violation of the statute the notice was posted on a door. (R. at 9). This failure to perfect personal service of process renders the tax sale and subsequent tax deed void as a matter of law.

*Viking* was cited and followed in *Moore v. Marathon Asset Management, LLC*, 973 So. 2d 1017 (Miss. 2008). In *Moore* the Court of Appeals reversed the chancery court and rendered the tax sale void. The record owner did not receive the requisite notice by certified mail and was not personally served with the tax notice by the sheriff.

The strict requirement to follow the statute is further illustrated in *Norwood v. Moore*, 932 So. 2d 63 (Miss. 2006). *Norwood* involved property in Rankin County, Mississippi in which the addresses on the deed were mistakenly reversed. Consequently, the purchaser/owner was never mailed notice of the taxes due and instead the notices were sent to the seller's address. The chancery clerk failed to file the second affidavit as required under the statute. Because the chancery clerk neither contacted the attorney who prepared the deed nor sent a letter to the address listed as the grantor on the deed, the chancellor found that she had not taken sufficient steps to comply with the statute and thus set aside the tax deed. The Court of Appeals affirmed the decision stating "...while the chancery clerk filed the first necessary affidavit required by Section 27-43-3, she failed to file the second required affidavit. Her failure to strictly adhere to the statute renders the tax deed void." *Id.* at ¶8. The Court also quoted previous decisions stating "In Mississippi, it is public policy to favor and protect landowners from [sale of their land] for taxes. *Lawrence v. Rankin*, 870 So.2d 673, 676 (¶13) (Miss. 2004) (citing *Carmadelle v. Custin*, 208 So.2d 51, 55 (Miss. 1968)). Further, we must strictly construe sections 27-43-1 and 27-43-3 (Rev. 2002). *Lawrence*, 870 So.2d at 676 (¶14). Failure of the chancery clerk to file the requisite affidavits renders a tax deed void." *Id.* ¶7.

Appellant suggests that it was unnecessary to issue additional notice or make further attempt at personal service upon Mr. Norris, and that by the filing of the Chancery Clerk's Affidavit, it somehow rendered the tax sale valid. However, to the contrary, §27-43-3 states, in pertinent part:

Notice by mail shall be by registered or certified mail. In the event the notice by mail is returned undelivered and the personal notice as hereinabove required to be served by the sheriff is returned not found, then the clerk shall make further search and inquiry to ascertain the reputed owner's street and post office address. If the reputed owner's street or post office address is ascertained after the additional search and inquiry, the clerk shall again issue notice as hereinabove set out. If personal notice is again issued and it is again returned not found and if notice by mail is again returned undelivered, then the clerk shall file an affidavit to that effect and shall specify therein the acts of search and inquiry made by him in an effort to ascertain the reputed owner's street and post office address and said affidavit shall be retained as a permanent record in the office of the clerk and such action shall be noted on the tax sales record. *Emphasis added.*

Appellant's suggestion is simply wrong, as the statute establishes in unambiguous fashion that notice shall be issued again to Mr. Norris, which did not happen.

- II. WHETHER A TAX SALE SHOULD BE SET ASIDE UNDER MISS. CODE ANN. §27-43-5 AND §27-43-7 WHEN THE LIEN HOLDER DOES NOT RECEIVE REQUISITE NOTICE PURSUANT TO THE STATUTES.
  - A. The Chancery Clerk failed to properly notice Delta Foundation, Inc. as required by Miss. Code Ann. §27-43-5 and therefore, the tax deed is void.

#### NOTICE TO THE LIEN HOLDER

The notice requirements for tax sales to the lien holder are set forth in Miss. Code Ann. §27-43-5. The statute states as follows:

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." *Emphasis added.*

Miss. Code Ann. §27-43-7 states as follows:

The notice shall be mailed to said lienors, if any, to the post-office address of the lienors, if such address is set forth in the instrument creating the lien, otherwise to the post-office address of said lienors, if actually known to the clerk, and if unknown to the clerk then addressed to the county site of the said county.

It is un-contradicted that Delta Foundation, Inc. was the lien holder and had loans secured by the property, with its Deeds of Trusts recorded in the Hinds Chancery Clerk land records. (R. at 87-88.) This information was readily available for the Clerk; however, Delta Foundation, Inc. never received notice of the tax sale.<sup>2</sup> (R. at 82). Thus, failure to comply with §27-43-5 and §27-43-7 also renders the tax sale void.

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<sup>2</sup> Cindy Ayers, CEO of Delta Foundation, Inc., states in her Affidavit attached to Norris' Motion For Summary Judgment that Delta Foundation never received notice of the tax sale, that the Deeds of Trusts were valid and had not been satisfied, and that funds were still owing.

Appellant also suggests, erroneously, that each Deed of Trust appeared to have expired, which justified the lien holder not being provided notice. The Deeds of Trusts were due and payable on September 1, 2007. (R. 87-88). Miss. Code Ann. §75-3-118 states, in pertinent part:

Except as provided in subsection (e), an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six (6) years after the due date or dates stated in the note or, if a due date is accelerated, within six (6) years after the accelerated due date.

The Deeds of Trusts were clearly not barred by the statute of limitations, as suggested by Appellant. Therefore, Delta Foundation should have received notice from the chancery clerk. If Rebuild America had any basis for maintaining the Deeds of Trusts had expired, it should have done so at the lower court. It did not do so, because they simply had not expired.

The recent case of *Rebuild America, Inc. v. Milner*, 7 So. 3<sup>rd</sup> 972 (Miss. 2009) is directly on point with the case at bar. *Rebuild America, Inc.* involved two owners, husband and wife, who failed to pay taxes on the subject property. The property was also secured by a deed of trust. The chancery clerk sent notice by certified mail to the husband only, and to the lien holder, First Union National Bank, by certified mail. However, the lien holder's notice was mailed to the wrong address, one contained in the third assignment instead of the address in the seventh and last assignment. *Rebuild America, Inc.* upheld the chancellor's ruling setting aside the tax sale for failure to properly notice the wife, failure to properly notice the lien holder, and lack of a sheriff's return on the notice. The Court stated:

Section 27-43-7 clearly states that the notice should be mailed to the address set forth in the instrument creating the lien. At the time notice was sent, the Deed of Trust had been assigned the seventh time to First Union National Bank with an address in Tampa, Florida. Under section 27-43-7, the notice should have been mailed to that address of the current lien holder. *Id.* at ¶18.

As the Supreme Court held in *Brown*:

the most important safeguard involving any person who stands to suffer from some official action is prior notice. This gives the recipient an opportunity to prepare himself and be heard. Notice, therefore, by far is the paramount factor and purpose of all process. This, however, is not the entire story. Certain statutory formalities attend every process. . . . *Id.* at ¶19.

Therefore, the failure to notify the lien holder, Delta Foundation, also clearly renders the tax sale void.

### III. APPELLANT'S APPEAL IS FRIVOLOUS AND DAMAGES SHOULD BE AWARDED PURSUANT TO RULE 38 M.R.A.P.

Appellee respectfully submits that Appellant's appeal is frivolous and damages and attorney fees should be awarded pursuant to Rule 38 M.R.A.P. An action is frivolous when, "objectively speaking, the pleader or movant has no hope of success." *Stevens v. Lake*, 615 So.2d 1177, 1184 (Miss.1993).

Appellee understands that a sanction is for extraordinary abuse of the process, but this case presents just such a scenario. Appellant admits in its brief before this Court that Mr. Norris did not receive requisite notice and admits that "posting" is insufficient, as illustrated by the following excerpts:

- a. "Well aware that 'posting' the Sheriff Notice upon the door of Mr. Norris' residence was insufficient to establish the personal service required by §27-43-3, Miss. Code Ann., the Chancery Clerk..." (Brief at p.9);
- b. "Though this Court has held that 'notice must be given by personal service, mail, and publication before a landowner's rights are fully extinguished by the maturing of a tax deed' ..." (Brief at p. 12);
- c. "Well aware of Mississippi precedent..." (Brief at p.6).

It is this last quote, which ironically appears at the beginning of Appellant's Summary of Argument, which proves that the appeal is frivolous. Appellant is definitely



“well aware of Mississippi precedent” as it is the very litigant in *Rebuild America, Inc. v. Milner*, 7 So. 3<sup>rd</sup> 972 (Miss. 2009) previously cited and discussed herein. *Rebuild America, Inc.* was decided on March 31, 2009; Appellant filed this appeal on July 17, 2009, just 3 ½ months later. Appellant could not possibly have had any hope of success in filing this appeal when it had actual knowledge of the facts and rulings as set out *Rebuild America, Inc.* Yet, Appellant went forward with this appeal anyway. As a result, Appellee has been penalized by having to incur attorney fees in opposing the appeal. Hence, Appellee respectfully requests that this Court order Appellant pay attorney fees to Appellee.

### CONCLUSION

Appellee, Tim A. Norris, respectfully requests that the Summary Judgment by the lower court be affirmed and all costs of this appeal be assessed to Appellant. Appellee further respectfully requests that Appellant pay reasonable attorney fees for defending this appeal, due to it being frivolous.

Respectfully submitted, this the 25<sup>th</sup> day of January 2010.

TIM A. NORRIS

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**CERTIFICATE OF SERVICE**

I, Stephen G. Younger, do hereby certify that I have this day mailed, by U.S. mail, postage prepaid, a true and correct copy of the aforesaid Brief of Appellee to the following:

Henry, Barbour, Decell & Bridgeforth, Ltd.  
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Hon. Patricia D. Wise  
Chancellor, Hinds County  
P.O. Box 686  
Jackson, MS 39205-686

DATED this the 25<sup>th</sup> day of January, 2010.

  
STEPHEN G. YOUNGER