IN THE SUPREME COURT
FOR THE STATE OF MISSISSIPPI

WAYNE SCARBOROUGH — APPELLANT

V. — CAUSE NO. 2009-CA-01431

CITY OF PETAL, MISSISSIPPI — APPELLEEE

TABLE OF CONTENTS

TABLE OF CASES

STATEMENT OF THE CASE

The Appellant Wayne Scarborough, and his father Percy Scarborough are co-owners of the property at issue in this suit, which is located inside the City of Petal. Between the years of 2000-2006, both Percy Scarborough and Wayne Scarborough were individually provided notice of violation of various city code ordinances regarding the state of dis-repair of the property. After no substantial action was taken to comply with the city's ordinances, the matter was relinquished to the Mayor and Board of Alderman for final abatement. On March 23, 2006 a final notice was served to co-owner Percy Scarborough, affording him the opportunity to appear at a hearing scheduled for April 18, 2006. Notice of the hearing was then provided to Wayne Scarborough by Percy Scarborough on March 27, 2006.

On April 18, 2006 the City of Petal adopted a Resolution finding the property to be a menace to public health and the safety of the community; that proper notice was provided to the owners of the property; and allowing the owners forty-five (45) days to remove the structure or comply with the city's ordinance. On June 7, 2006 the City of Petal, by and through its employees removed the burned structure. Although the Appellant filed a Complaint in the Circuit Court of Forrest County Mississippi, seeking damages for the building, no formal appeal from the official action of the Mayor and Board of Alderman was accomplished or commenced by the Plaintiff.

On or about July 29, 2009 the Forrest County Circuit Court granted summary judgment to the City of Petal, and dismissed the case. The Appellant, Wayne Scarborough has now filed this appeal.

STATEMENT OF FACTS

As early as February 2000, the City of Petal's Building Inspection Department served its notice regarding the hazardous condition of the property upon co-owner Percy Scarborough. (See Correspondence dated February 21, 2000 at Appellant's Record Excerpts Bates Nos. (hereinafter "RE") 38-39). Thereafter, on March 14, 2000, an affidavit of the City of Petal's Assistant Inspector Wesley Hughes was provided holding that the conditions of the property were unsanitary and a violation of a city ordinance. (See Affidavit of Wesley Hughes, dated March 14, 2000 at RE 40).

Subsequently in 2005, John Thomsen, Code Enforcement Officer of the City of Petal personally spoke with co-owner Wayne Scarborough on two separate occasions regarding various violations and need to comply with the city's ordinances. (See Notes recorded on January 26, 2005 and May 16, 2005 at RE 41-43; See also Plaintiff's Memorandum of Law in Support of Response to Defendant's Motion for Summary Judgment, at RE 73, which states in part "Plaintiff admits that he talked with various city officials over the course of several years concerning the subject property.")

Thereafter, on May 24, 2005 a second notice was issued declaring the property in violation of a city ordinance. (See Correspondence dated May 24, 2005 at RE 44). At that time Percy Scarborough requested an extension of time to begin demolition and clean-up. (See Correspondence dated July 19, 2005 at R45).

Afterwards, on or about January 18, 2006, a third notice was hand delivered to Percy Scarborough, deeming the property "dilapidated," a "safety hazard" and "in such a state of disrepair as to be a menace to the public health and safety of the community," pursuant to the provisions of §21-19-11 of the Mississippi Code of 1972, as amended. (See Correspondence, dated January 17, 2006, at RE 46).

When no substantial action was taken to comply with the city's ordinances or state law, on March 7, 2006 the matter was relinquished to the Mayor and Board of Aldermen for final abatement. (See Correspondence dated March 7, 2006, at RE 47). On March 23, 2006 a final notice was served on co-owner, Percy Scarborough affording him the opportunity to appear at a hearing scheduled for April 18, 2006. (See Correspondence dated March 23, 2006 at RE 48). Notice of the hearing was then provided to Wayne Scarborough by Percy Scarborough on March 27, 2006. (See Plaintiff's sworn Response to Defendant's Interrogatory No. 5, at RE 51).

On April 18, 2006, the City of Petal adopted a resolution finding the property to be a menace to public health and safety of the community; that proper notice was provided to the owners of the property; allowing the owners forty-five (45) days to remove the structure or comply with the city's ordinance; and held that without compliance the City of Petal would remove the structure. (See Resolution, dated April 18, 2006 at RE 55). On June 7, 2006, the City of Petal by and through its employees removed the burned structure. Wayne Scarborough was aware of the April 18, 2006 hearing and resolution before the action taken by the City on June 7, 2006. (See Plaintiff's Response to Defendant's Request for Admission No. 5 at RE 57).

Until the filing of the complaint in the Forrest County Circuit Court on August 31, 2007 no formal appeal from the actions of the City of Petal was commenced by the Plaintiff. (See Plaintiff's Response to Defendant's Request for Admission No. 13, at RE 58).

SUMMARY OF THE ARGUMENT

The Judgment of the Circuit Court of Forrest County, Mississippi should be upheld as this matter was not properly before that Court, and the underlying action constituted an impermissible collateral attack.

The Appellant Wayne Scarborough claims he was never a party to the action by the City of Petal, and therefore had no standing to appeal. However, Mississippi standing requirements are quite liberal and this Court has been permissive in granting standing to parties who seek review of governmental action. *See City of Jackson, et al. v. Greene, et al.*, 869 So. 2d 1020 (Miss. 2004).

The Appellant also argues that his suit before the Forrest County Circuit Court should be considered a mandamus action. This argument is flawed. There is already an adequate remedy found in Miss. Code Ann. §11-51-75 which provides for the right to appeal from a judgment or decision of the Mayor and Board of Aldermen, precluding a suit for mandamus. *See City of Jackson v. McPherson*, 158 Miss. 152, 130 So. 287 (Miss. 1930).

Finally, the Appellant argues he was not provided with notice as he did not receive notice via United States Mail or by service of notice by a police officer at least two (2) weeks before the hearing date.

However, between the years of 2000-2006, both Percy Scarborough and Wayne Scarborough were individually provided notice of violation of various city code ordinances regarding the state of dis-repair of the property at issue in this litigation. After no action was taken to comply with the city's ordinances a final notice was served on co-owner Percy Scarborough, affording him the opportunity to appear at a hearing scheduled for April 18, 2006. In the case of *Bray v. City of Meridian*, 723 So. 2d 1200 (Miss. 1998)

notice to one co-owner was deemed sufficient notice to both co-owners. Additionally, Wayne Scarborough has admitted that he had notice from Percy Scarborough of the April 18, 2006 hearing on March 27, 2006 and was aware of the resolution at that hearing before the action taken by the City on June 7, 2006. A person having within his knowledge facts which would put him on inquiry as to his personal rights should be charged with notice of such information as such facts and the exercise of ordinary diligence would disclose. *King Lumber Industries v. Cain*, 209 So. 2d 844, 848 (Miss. 1968). As the Appellant, Wayne Scarborough clearly had notice, the judgment of the Forrest County Circuit Court should be upheld.

ARGUMENT

Standard of Review

Appellate courts review errors of law which include summary judgments and motions to dismiss, de novo. *Rankin Group, Inc. v. City of Richland*, 8 So. 3d 259, 260 (Miss. App. 2009)(internal citations omitted).

I. Whether the Circuit Court erred in its ruling that the Plaintiff's suit is time barred under 11-51-75.

The Judgment of the Circuit Court of Forrest County, Mississippi should be upheld as this matter was not properly before that Court. The Appellant Wayne Scarborough (hereinafter "Scarborough") argues that due to his alleged lack of notice of the hearing, the Plaintiff was never a party to the action, and therefore had no standing to appeal, thus rendering his failure to timely file an appeal irrelevant and moot. (See Appellant's Brief p. 7).

However, according to Mississippi case law, Plaintiff did in fact have standing to challenge the city's decision and was subject to the requirements of Mississippi Code

Annotated § 21-19-11(4). Mississippi's standing requirements are "quite liberal" and "this Court has been more permissive in granting standing to parties who seek review of governmental action." *City of Jackson, et al. v. Greene, et al.*, 869 So.2d 1020 (Miss. 2004) (quoting *Burgess v. City of Gulfport*, 814 So.2d 149 (Miss. 2002). It has repeatedly been held that parties may sue where they have a "colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the defendant, or as otherwise authorized by law." *Id.* (action in which parents of school age children initiated appeal pursuant to Miss. Code Ann. § 11-51-75 of the City of Jackson's appointment of members on the Jackson Public Schools Board of Trustees).

Scarborough also argues that his case before the Forrest County Circuit Court should "at the least, be considered a mandamus action under Miss. Code Ann. §11-41-1." (See Brief of Appellant, p.7) At no time in his Complaint does the Plaintiff state that this is a suit for mandamus.(See Plaintiff's Complaint, at RE 6-9) Furthermore, where a statute gives the right of appeal from a decision of the board, such is ordinarily deemed an adequate remedy so as to preclude issuance of mandamus. *City of Jackson v. McPherson*, 158 Miss. 152, 130 So. 287 (Miss. 1930). In this instance, Miss. Code Ann. §11-57-75 provides for the right of appeal from a judgment or decision of the municipal authorities of a city, precluding a suit for mandamus. Since there was an adequate remedy available to Scarborough, albeit one that he failed to take advantage of, the Forrest County Circuit Court was correct in ruling that the Plaintiff's suit was time barred. *See Hood v. Perry County*, 821 So. 2d 900 (¶¶ 5-6)(Miss. App. 2002)(affirming dismissal of action for declatory judgment as "an attempt to make an end-run around the judicial processes of the State of Mississippi" and "a collateral attack that will not be maintained."); *See also McPhail v. City of Lumberton*, 832 So. 2d 489 (Miss. 2002);

Rankin Group v. City of Richland, 8 So. 3d 259 (¶¶ 4, 12)(Miss. App. 2009); *Bray v. City of Meridian*, 723 So. 2d 1200 (¶28)(Miss. App. 1998)(applying §11-51-75 and finding actions procedurally barred).

II. Whether the Circuit Court erred in its ruling that the City of Petal did not have to give actual notice to the Plaintiff, Appellant herein.

Scarborough claims that he was not provided with notice as he did not receive notice via United States mail two (2) weeks before the date of a hearing or by service of notice by a police officer at least two (2) weeks before the date of a hearing. (See Appellant's Brief p. 10).

The Plaintiff, however, received actual notice of the April 18, 2006 meeting on March 27, 2006 from co-owner Percy Scarborough and admittedly had conversations with city officials over the course of several years regarding the subject property. Additionally, he was aware of the April 18, 2006 hearing and resolution prior to the June 7, 2006 demolition of the structure situated on the property. The Mississippi Supreme Court has held that "A person having within his knowledge facts which would put him on inquiry as to his personal rights should be charged with notice of such information as such facts and the exercise of ordinary diligence would disclose." *King Lumber Industries v. Cain*, 209 So. 2d 844, 848 (Miss. 1968) *see also Crawford v. Brown*, 215 Miss. 489, 61 So. 2d 344, 350 (Miss. 1952).

Scarborough attempts to distinguish the case of *Bray v. City of Meridian*, 723 So. 2d 1200 (Miss. 1998), which held that notice provided to one co-owner was sufficient notice to both co-owners, by stating that because the Plaintiffs in Bray were married co-owners, the situation is somehow different. Appellant interprets Bray to require co-ownership in addition to other facts such as spousal relationship or ratification through acceptance of past actions. Based on a literal reading of *Bray*, the court made no such requirement that

co-ownership be coupled with any other factor. The Court clearly stated that "[a]s the spouse of Samuel Bray *and* as co-owner of the property" Ms. Bray was vested with the apparent authority to accept service. *Bray* at 1203 (emphasis added.) It was never implied that both the spousal relationship and the co-ownership together were required. Additionally, there was no indication by the Court that the mere fact the Brays resided at the same address played any role in reaching its ultimate decision.

In *Bray*, the Court looked at the totality of the events occurring between 1991 and the date of hearing, including the fact that notice was served on the co-owner of the property and that Mr. Bray himself was notified of the continued substandard condition of the property through numerous conversations and correspondence with building officials. The Court stated that the sequence of events, considered together, provided reasonable notice to Bray to remedy the condition of the property and left no question that Bray had notice of the City's intention to demolish the building. *Id.* at 1204-5.

Comparably, in the instant matter as in *Bray*, a co-owner of the property, Percy Scarborough, was served with notice of the city's April 18, 2006 meeting; Wayne Scarborough received timely actual notice of the April 18, 2006 meeting by Percy Scarborough on March 27, 2006; Wayne Scarborough was aware of the city's intent regarding the property due to various conversations with city officials' and considering all the events from 2000 to the date of demolition there is no question that Wayne Scarborough had actual notice of the property's hazardous condition and the city's intent to remedy the situation.

Next, Scarborough cites *Williams v. Kilgore*, 618 So. 2d 51 (Miss. 1992) for the continued argument that co-ownership alone is not sufficient, but must be coupled with another factor. While the *Bray* court cited *Williams*, it did not cite *Williams* for the

proposition that service was proper solely because Dorothy Bray had repeatedly accepted service for her husband in the past. The Court plainly stated that Dorothy Bray's authority to accept service was based upon her relationship to Plaintiff *and also* based upon her status as a co-owner of the subject property in dispute. Either circumstance or factor was sufficient in itself for the effectiveness of process. It should also be noted that, Percy Scarborough accepted service of several notices from the city over a period of years, with no complaint regarding his lack of authority to do so by the Appellant, Wayne Scarborough.

CONCLUSION

The Judgment of the Circuit Court of Forrest County, Mississippi should be upheld as this matter was not properly before that Court, and the underlying action constituted an impermissible collateral attack on the City of Petal's April 18, 2006 Resolution.

Respectfully submitted,
City of Petal, Mississippi
Appellee

By: _____
COUNSEL FOR APPELLEE

Of Counsel:

Thomas W. Tyner, MSB[redacted]
S. Beth Windham, MSB[redacted]
Aultman, Tyner & Ruffin, Ltd.
315 Hemphill Street
P. O. Box 750
Hattiesburg, MS 39401-0750
Ph: (601) 583-2671
Fax: (601) 583-2677

CERTIFICATE OF SERVICE

I, undersigned counsel for the Appellee, do hereby certify that I have caused a true and correct copy of the foregoing to be delivered via U.S. Mail, postage prepaid to:

Al Shiyou
Shiyou Law Firm
P.O. Box 310
Hattiesburg, MS 39403-0310

Honorable Bob Helfrich
Circuit Judge, Forrest County
P.O. Box 309
Hattiesburg, MS 39403

This the 15th day of February, 2010.

COUNSEL FOR APPELLEE