

IN THE SUPREME COURT OF MISSISSIPPI  
THE COURT OF APPEALS

LOUIS HOWARD,

Appellant

v.

No. 2009-CA-01587

JOHNNY JOE GUNNELL, D/B/A  
4-S COMPANY

Appellee

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BRIEF OF APPELLANT LOUIS HOWARD

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On Appeal from the Chancery Court of  
Lincoln, County Mississippi  
No. 2005-0164

***ORAL ARGUMENT REQUESTED***

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**IN THE SUPREME COURT OF MISSISSIPPI**

**LOUIS HOWARD,**

**APPELLANT**

**v.**

**No. 2009-CA-01587**

**JOHNNY JOE GUNNELL, D/B/A  
4-S COMPANY**

**APPELLEE**

**CERTIFICATE OF INTERESTED PERSONS**

Pursuant to Miss. R. App. P. 28(a)(1), 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:

1. Louis Howard, Appellant
2. Johnny Joe Gunnell d/b/a 4-S Company
3. Wayne Dowdy, Trial Counsel for Appellant
4. Drew M. Martin, Appellate Counsel for Appellant
5. Melissa Selman Martin, Appellate Counsel for Appellant
6. Mark R. Holmes, Counsel for Appellee
7. The Honorable Edward E. Patten, Jr, Chancellor, Lincoln County Chancery Court
8. Copiah Bank, Leinholder in subject property

So CERTIFIED, this the 14<sup>th</sup> day of July, 2010.

Respectfully submitted,



Drew M Martin, MSB No. [REDACTED]

Melissa Selman Martin, MSB No. [REDACTED]

*Attorney for Appellant Louis Howard*

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### **Statement of the issues**

This appeal presents three main issues. First, whether the Chancellor's enforcement of an agreed order that violates the established rules and laws applicable to tax sales is void. Second whether the Agreed Order enforced by the Chancellor was an enforceable contract as it is both illusory and unconscionable. And finally, whether tender of the principal amount contemplated by an Agreed Order constitutes substantial performance of the agreement when other amounts remain in dispute.

### **Statement of the Case**

This case involves an Agreed Order that, on its face, violates Mississippi law regarding the sale of property for delinquent taxes. The Appellee seeks to enforce, and the trial court entered an Order purporting to enforce this void judgment and/or contract, affecting a taking of the Appellant's property without the due process of law. Aggrieved Mr. Howard appeals that decision.

### **Procedural History and Relevant Facts**

On or about May 7, 1996, the Plaintiff and Appellant, Louis Howard ("Mr. Howard"), received title to a piece of real property located in Lincoln County Mississippi (the "subject property"). R. at 4. The Special Warranty Deed in favor of Mr. Howard was recorded in book 967 at page 393 in the office the Chancery Court of Lincoln County Mississippi. *Id.* On March 16, 1998, Mr. Howard gave a deed of trust in favor of Copiah Bank, pledging the subject property as collateral to secure Mr. Howard's indebtedness to the bank. R. at 5. Unknown to Mr. Howard, the Lincoln County tax assessor's office continued to assess the subject property in the name of State Street Bank and Trust Company rather than in the name of Mr. Howard. *Id.* On August 30, 1999, the subject property was sold for delinquent ad valorem taxes to Merritt Tax Service, Inc. ("Merritt"). R. at 8. On February 15, 2002, the Chancery Clerk of Lincoln County,

Mississippi issued a tax deed conveying the subject property for delinquent 1998 taxes to Merritt. R. at 5, 9. Neither Mr. Howard nor Copiah Bank received notice of the tax sale or the expiration of the redemption period, as required by state law. R. at 5. On March 22, 2002, Merritt purported to convey the subject property acquired through the void tax sale to the Defendants and Appellee 4-S Company (4-S). *Id.*

After learning of the invalid tax sale, on March 31, 2005, Mr. Howard filed a Complaint to Removed Cloud on Title against 4-S. R. at 4. 4-S answered on April 22, asserting that the tax sale was valid or in the alternative that it be granted a lien against the subject property. R. at 10. 4-S amended its answer and counterclaim on May 16, 2006, asserting that the subject property was sold a second time for delinquent ad valorem taxes assessed State Street Bank and Trust Co. on August 25, 2003 and purchased this time by 4-S. R. at 30. 4-S subsequently received a tax deed from the Chancery Clerk on September 28, 2005. *Id.* Neither Mr. Howard nor Copiah Bank received notice of the 2003 tax sale or expiration of the redemption period in 2005. R. at 33.

An Agreed Order was entered on December 10, 2007, in which the court announced that at all relevant times Louis Howard was the owner of the subject property and that 4S was entitled to reimbursement for funds expended in the amount of \$8,075.26 plus interest at 8%. R. at 38-39. The Agreed Order then goes on to state that if Mr. Howard tenders the lump sum payment of \$8075.26 plus interest as of October 1, 2007, on or before October 1, 2008, then the cloud upon Mr. Lewis's title would be cleared; however, if he failed to pay this amount on or before October 1, 2008 the property would be conveyed to 4-S. R. at 39.

On or about September 18, 2008, prior to the time designated in the agreed order, Mr. Howard tendered a certified check in the amount of \$8075.26 to 4-S. Ex. 1. A full week after the designated date in the agreed order, and almost 3 weeks after the check was tendered, 4-S indicated its intent to reject Mr. Howard substantial completion of his duty under the agreed

order. *Id.* 4-S instead demanded an additional payment, not contemplated by the agreed order, to satisfy the matter between Mr. Howard and 4-S. *Id.* Being unable to resolve the disputed amount with 4-S, Mr. Howard deposited with the Chancery Court a certified check in the amount of \$8,075.26 on January 7, 2009. R. at 51.

On January 20, 2009, 4-S filed a Petition to Enforce the Court's Prior Order and to Adjudicate Ownership of Real Property claiming that Mr. Howard had failed to tender the sum due to 4-S. R. at 42. Mr. Howard answered on February 19, 2009 asserting that he had attempted to tender all sums due to 4-S, but that same has been refused. R. at 49. On July 7, 2009, the Chancery Court of Lincoln County held that Mr. Howard's failure to tender the interest amount of \$646.02 rendered Mr. Howard's interest in the subject property null and void and adjudicated 4-S the owner of the property, entering an order to that effect on July 20, 2009. Tr at 12; R. at 57-60. Mr. Howard filed a motion for reconsideration on July 21, 2009, and brought to the court's attention the error of law in confirming title to the property in 4-S when the statutory requirements regarding tax sales were not pleaded or proven. R. at 74-78, 115-116. The Chancery Court denied Mr. Howard's motion on September 2, 2009, and entered an order accordingly on September 14, 2000. R. at 87. Mr. Howard, after obtaining new counsel, filed a Motion for Relief from Judgment on the basis that the December 7, 2007 Agreed Order is void as it runs afoul of Mississippi law regarding tax sales and therefore could not be approved by the court and to the extent the order is a contract its terms are illusory and unconscionable. R. at 93-99. This Motion was denied and Mr. Howard now appeals to this Court. R. at 91.

### **Standard of Review**

Whether the Agreed Order, as both judgment and contract, transcends the law applicable to tax sales in Mississippi is question of law to be reviewed by this Court *de novo*. *Barrett v. Ballard*, 483 So. 2d 304 (Miss. 1985); *C.F.P. Properties, Inc. v. ROLEH, Inc.*, 2010 WL

2403106 (Miss. Ct. App. 2010). Questions of contract construction are also reviewed *de novo*. *Julvanna, LLC v. Economy Inns, Inc.*, 24 So. 3d 391, 393 (Miss. Ct. App. 2009). While the question of whether Mr. Howard's payment of the principal amount agreed to constitutes substantial performance of the agreement is a question of fact, subject to review in this Court of the chancellor's manifest error. 17A Am. Jur. 2d Contracts §620 (2010); *Julvanna*, 24 So. 3d at 393.

### **Summary of the Argument**

Whether viewed as a judgment or contract, the December 10, 2007, Agreed Order violates Mississippi law is therefore void along with any subsequent order seeking to enforce it. The trial court did not have the legal authority to enter or approve the Agreed Order transferring Mr. Howard's property to 4-S for Mr. Howard's failure to tender a interest payment, which constituted mere 7% of the total amount due 4-S for 4-S's failure to secure good title to Mr. Howard's property at an invalid tax sale.

### **Argument**

#### **I. December 10, 2007 Agreed Order Runs Afoul Of Mississippi Law Regarding Tax Sales And Is Therefore Void.**

When the statutory requirements for the relief requested are not satisfied a judgment subsequently entered is invalidated and void. *Barrett v. Ballard*, 483 So. 2d 304, 306 (Miss. 1985). "A judgment must be according to establish modes governing the class to which the case belongs, and . . . not transcend, in the extent and character of its judgment, the law which is applicable to it." *Id.* (internal citations and quotations omitted). There is no legal difference between a consent judgment and a judgment entered after trial. *Starling v. Sorrell*, 100 So. 10, 11 (Miss. 1924).



Mississippi law requires that notice be given to the property owner and any lienholder of a tax sale before a valid tax deed may be issued to a tax sale purchaser. Miss. Code Ann. §§ 27-43-3 and 5. Service of this notice must be made by the sheriff and also sent by registered or certified mail. *Id.* This statute must be given a strict construction and its requirements fully satisfied. *C.F.P. Properties, Inc. v. ROLEH, Inc.*, 2010 WL 2403106, \*3 (Miss. Ct. App. 2010) (internal citations and quotations omitted). The failure of the chancery court clerk to follow the statutory procedure for service of notice by the sheriff, service of notice by registered certified mail, or the failure to file the required affidavit showing the clerks search and inquiry to ascertain the location of the property owner renders any tax deed issued by the chancery clerk void. *Id.* This court has held that even if a property owner is properly served by mail and publication but not personal service the statutory requirements are not met rendering any tax deed void. *Rebuild America, Inc. v. Wright*, 27 So. 3d 1202, 1204-1205 (Miss Ct. App. 2010).

The purchaser at a tax sale is deemed to know the existence of every defect in the proceedings and any neglect or default in those proceedings is considered to be due to the want of proper care and diligence on the part of the purchaser. *Rebuild America, Inc. v. Johnson*, 2010 WL 1445191,\*5 (Miss. Ct. App. 2010). "The rule of law is that no remedy exists to the purchaser in an invalid tax sale unless a remedy is specifically created by statute." *Id.* If the purchaser fails to secure a good title to the property because of the invalidity of a tax sale he cannot recover the amount paid at the sale either from the taxing authorities or from the owner of the land unless some statute in terms provides such a remedy. *Id.* at\*4. Miss. Code Ann §27-45-27 provides the only remedy to such a purchaser, a lien on the land in favor of the purchaser which may be enforced by obtaining a decree for the sale of the land. This statute does not allow for the property sold at an invalid tax sale to be transferred to the purchaser under any circumstances. *Id.*

In the instant case the tax sales through which 4-S claims to have acquired an interest in the subject property are invalid and in the subsequently issued tax deed is void. It is undisputed that Mr. Howard acquired the property in 1996. It is undisputed that the 1998 taxes, the 2003 taxes, and presumably all taxes in between, will incorrectly assessed by the Lincoln County tax assessor/collector to State Street Bank & Trust Co. It is undisputed that Mr. Howard, the record owner of the subject property, did not receive notice of the delinquent 1998 taxes or the delinquent 2003 taxes or resulting tax sales. As he never received the required statutory notice any tax sale of his property was invalid any tax deed issued to any third party is void. By statute, 4-S was only entitled to a lien on the property for the amounts it paid and while it could have forced a sale of the property to satisfy its lien, it could not force a transfer of the property. Therefore the trial court was without authority to approve or enter any order that adjudicated the ownership of the subject property in any party other than Mr. Howard. The December 10, 2007 agreed order transcends in extent and character the laws applicable to tax sales in Mississippi.

**II. To The Extent That The Agreed Order Constitutes A Contract It Is Unenforceable As It Is Both Illusory And Unconscionable.**

An agreed order in settlement is both a judgment and a contract. *Askew v. Askew*, 699 So. 2d 515, 518 n.2 (Miss. 1997).

**A. The December 10, 2007, Agreed Order Lacks Consideration In That Any Promises Made By 4-S Were Illusory.**

“If what appears to be a promise is an illusion, there is no promise; like the mirage of the desert with its vision of flowing water which yet lets the traveler die of thirst, there is nothing there. By the phrase “illusory promise” is meant words in promissory form that promise nothing; they do not purport to put any limitation on the freedom of the alleged promisor, but leave his future action subject to his own future will, just as it would have been had he said no words at all.” *Krebs v. Strange*, 419 So. 2d 178, 182 (Miss. 1982)( citing Corbin, *Contracts* § 145 at p.

211 (1 Vol. Ed. 1952)). Such an illusory promise is not operative as a consideration for a return promise. *Id.*

The Agreed Order by its terms directs that if Mr. Howard paid to 4-S “\$8,075.26 as of October 1, 2007, together with interest accrued thereon at the rate of 8% on or before October 1, 2008, then any and all interest acquired by Johnny Joe Gunnell, D/B/A 4-S Company shall be null and void.” In other words, the Agreed Order in fact was a one-sided agreement whereby Mr. Howard could compensate 4-S for its payments at an admittedly invalid tax sale, or he would lose his property. 4-S provided no mutual consideration, as its “promise” was to give away that which it did not possess, so long as Mr. Howard made the agreed-upon payments. A promise to give up that which one does not possess is no promise at all. Accordingly, the December 10, 2007 Agreed Order and all subsequent Orders enforcing it must be set aside.

**B. December 10, 2007 Agreed Order Is An Unconscionable Contract As It Violates State Law On Its Face.**

Mississippi law imposes the obligation of good faith and fundamental fairness in the performance of every contract. *Covenant Health & Rehabilitation of Picayune, LP v. Moulds*, 14 So. 3d 695, 705 (Miss. 2009) (internal citation and quotations omitted). A contract that is unconscionable will not be enforced. *Id.* A contract made in violation of law or in contravention of the public policy of this state is unconscionable and may be declared void and unenforceable. *Smith v. Simon*, 224 So. 2d 565, 566 (Miss. 1969); *Telephone Man, Inc. v. Hinds County*, 791 So. 2d 208, 211 (Miss. 2001)(setting aside agreed order because endorsing the contract as valid would authorize the unauthorized practice of law in contravention of public policy); *Entergy Mississippi, Inc. v. Burdette Gin Co.*, 726 so.2d 1202, 1208 (Miss. 1998)(finding an indemnity clause that violated Mississippi law unconscionable); *Pitts v. Watkins*, 905 So.2d 553 (Miss.

2005)(finding a contract that attempted establish a statute of limitations in contravention to that set forth by Mississippi law unconscionable).

A contract is unconscionable when “no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other”. *Entergy Mississippi, Inc.*, 726 So. 2d at 1207 (internal citations and quotations omitted). In regards to tax sales, Mississippi public policy favors and protects landowners from the sale of their land for taxes. *C.F.P. Properties, Inc.*, 2010 WL 2403106, \*3.

December 10, 2007 Agreed Order violates Mississippi law regarding the validity tax sales as discussed *supra*. It is undisputed that the notice and service requirements set out by Miss. Code Ann. § 27-43-3, were not met in the conduct of the 1998 or 2003 tax sales. Those tax sales are therefore invalid and the resulting tax deed void. 4-S acquired no interest in the subject property. The sole remedy available to 4-S is a lien on the property for the amount paid. No man in his right mind would agree to sale his property for the amount of back taxes, a fraction of its value. Any attempt by the trial court to give any ownership interest in the subject property to 4-S is in direct contravention of Mississippi law and public policy which favors and protects landowners from the sale of their land for taxes.

**III. The trial court committed manifest error in failing to find Mr. Howard's substantial completion of his duties under the Agreed Order sufficient performance.**

Whether a contract has been substantially performed depends on (1) the amount of performance rendered compared to that not preformed, (2) whether the contract’s purpose has been frustrated, (3) the willfulness of the default and (4) the extent to which the promisee received substantial benefit of the promised performance. 17A Am. Jur. 2d §620 (2010). Accordingly, substantial performance is shown when a party has made an honest endeavor in good faith to perform his part of the contract. *Id.*

Mr. Howard substantially complied with the Order by paying the principle amount of \$8,075.26 prior to the deadline in the Agreed Order and sought through his trial counsel in good faith to obtain the amount of interest owed. He failed only to pay the interest, an amount which was not explicitly calculated in the Order and which was in dispute as between the parties. 4-S's own calculation of the interest amount of \$646.02 is a mere seven percent 7% of the total amount 4-S claims due. 4-S on the other hand, showing its lack of good faith in this transaction, waited until the deadline passed to demand from Mr. Howard not only interest but an additional \$898.52 not contemplated by the Agreed Order and refuse to accept Mr. Howard's tender of \$8,075.26. Mr. Howard tendered the principle amount to 4-S and substantially complied with the Order. 4-S refused to accept Mr. Howard's tender. The trial court committed manifest error in failing to recognize these events as substantial performance with the December 10, 2007 Agreed Order.

### **Conclusion**

Whether viewed as a judgment or contract, the December 10, 2007, Agreed Order violates Mississippi law is therefore void along with any subsequent order seeking to enforce it. The trial court did not have the legal authority to enter or approve the Agreed Order transferring Mr. Howard's property to 4-S for Mr. Howard's failure to tender a interest payment, which constituted mere 7% of the total amount due 4-S for 4-S's failure to secure good title to Mr. Howard's property at an invalid tax sale. The judgment of the Chancery Court of Lincoln County adjudicating an ownership interest of 4-S in the subject property should be reversed.

Filed this the \_\_\_\_ day of July, 2010.

Respectfully submitted,

*Attorneys for Appellant Louis Howard*



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Melissa Selman Martin, MSB No. [REDACTED]

**CERTIFICATE OF SERVICE**

I, the undersigned attorney, do hereby certify that I have served by United States mail, postage prepaid, or via hand delivery, a true and correct copy of the above and foregoing document, to the following persons at these addresses:

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THIS the 14<sup>th</sup> day of July, 2010

  
Melissa Selman Martin