IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2009-CA-01601-COA

Deutsche Bank National Trust Company — PLAINTIFF/APPELLEE

v.

Angela L. Turner — DEFENDANT/APPELLANT

REPLY BRIEF OF APPELLANT

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ANGELA L. TURNER

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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 Justices of this Court may evaluate possible disqualification or recusal:

1. Deutsche Bank National Trust Company, Plaintiff/Appellee;
2. American Home Mortgage Company;
3. Cynthia L. Cohly, Attorney for Plaintiff/Appellee;
4. J. Gary Massey, Substituted Trustee;
5. Shapiro & Massey, L.L.P.;
6. Chancellor Vicki Roach-Barnes, Chancery Court Judge, Warren County;
7. Chancellor Jane Weathersby, Chancery Court Judge, Sunflower County;
8. Angela L. Turner, Defendant/Appellant;
9. John Richard May, Jr., Attorney for Defendant/Appellant.

RESPECTFULLY SUBMITTED,

ANGELA L. TURNER

BY: _____
John Richard May, Jr.
HER ATTORNEY

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ARGUMENT IN REPLY

I. PLAINTIFF DEUTSCHE BANK NATIONAL TRUST COMPANY'S ARGUMENT THAT ITS FAILURE TO FILE THE REQUIRED AFFIDAVIT OF DILIGENT INQUIRY PRIOR TO ATTEMPTING TO SERVE DEFENDANT TURNER BY PUBLICATION IS CONTRARY TO MISSISSIPPI LAW.

As stated in ***Caldwell v. Caldwell***, 533 So.2d 413, 415 (Miss. 1988), the Mississippi Supreme Court clearly and definitively stated:

> Where notice by publication is resorted to as a basis for the jurisdiction of the court, in lieu of personal summons, all the requirements of the [service by publication rules] as to such notice must be strictly complied with, and it being a jurisdictional matter, it cannot be cured by a recital in the decree.

Id. (quoting ***Griffith, Mississippi Chancery Practice, Bobbs-Merrill Company, Inc. § 236 (1925)***).

In ***Young v. Sherrod***, 919 So.2d 145, 148 (Miss. 2005), the Mississippi Supreme upheld this principle of Mississippi jurisprudence asserting: "The rules on service of process are to be strictly construed." Hence, unlike Plaintiff in the case **sub judice**, the Mississippi Supreme Court does not consider the rules for service of process as "a technicality in process." ***See Brief of Appellee at 6.*** To the contrary, the Mississippi Supreme Court in ***Caldwell*** not only clearly expressed its reservations concerning a party's choice to effect service of process by publication, but admonished any party choosing to use such methods that "all requirements" as to such notice "must be" complied with strictly. ***Caldwell*** at 415 (Emphasis Added). Moreover, in ***Caldwell***, the Court answered Plaintiff's further argument that the lower court recited that it had both personal and subject matter jurisdiction as follows: "Notice [by publication] must be strictly complied with, and it being a jurisdictional matter, it cannot be cured by a recital in the decree." ***Id.*** Simply put, improper service of process prevents a trial court from entering judgment against a defendant. ***Sanghi v. Sanghi,*** 759 So.2d 1256, 1257 (Miss. Ct. App. 2000).

Further, Plaintiff makes "much adieu about nothing" concerning filings made by Defendant Turner in her attempt to have the default judgment set aside: "On November 12, 2008, Appellee filed an answer to the Chancery motion and mailed the answer to Ms. Turner at the address listed in her motion, i.e., 6727 Paxton Road, Vicksburg, MS 39180; however, the answer was returned undeliverable." ***Brief of Appellee at 2.*** That fact has absolutely nothing to do with Plaintiff's failed attempt to serve Defendant Turner by publication on July 31, August 07 and August 14, 2008. The actual sale of Defendant's land took place on or about August 21, 2008, about three (3) weeks before Plaintiff's attempts to serve Defendant with a response to Defendant's motion to set aside the default judgment. Likewise, the fact that Defendant listed an alternate address in Houston, Texas adds nothing to the resolution of this matter. ***Brief of Appellee at 7.***

What Plaintiff is apparently inviting this court to do is overturn Mississippi jurisprudence concerning strict compliance with the rules for proper service of process and the disfavored nature of default judgments. See ***McCain v. Dauzat***, 791 So.2d 839, 842 (Miss. 2001). In support of this invitation, Plaintiff has cited no dispositive or persuasive authority. Moreover, Plaintiff has provided this court with no persuasive analysis. Rather, Plaintiff simply argues that some jurisdictions do not require strict compliance with the service by publication rules and asks that this court join them. In that the entry and order of default are not adjudications on the merits, this Court should decline that invitation. In ***Rebuild America, Inc. v. Norris***, the Mississippi Supreme Court reiterated; "We must strictly construe the notice statutes in favor of the landowners." ***Rebuild America, Inc. v. Norris***, No. 2009-CA-01191-COA (September 14, 2010).

Moreover, there was never any finding by the lower court that a diligent inquiry had been conducted in the first place, the failure to file an affidavit of diligent inquiry

notwithstanding. Contrary to Plaintiff Deutsche Bank National Trust Company's assertion, there is no evidence whatsoever of Judge Barnes' having even considered the issue. The only evidence of the basis for her ruling is her order, and it simply recited that she found that she had jurisdiction over the subject matter and over the parties. As stated earlier, that boiler plate language, which was subsequently relied upon by Judge Weathersby in making her final ruling on this matter, is insufficient evidence of jurisdiction. ***Caldwell*** at 415. "A court must have jurisdiction [and] proper service of process in order to enter a default judgment against a party. Otherwise, the default judgment is void". ***Johnson v. Lee***, 17 So.3d 1140 (Miss. App. 2009). Consequently, this Court should set Judge Barnes' order of default judgment aside, as well as the subsequent judgments by Judge Weathersby based thereon.

Because default judgment was entered, no discovery was allowed, and Defendant Turner was not presented with an opportunity to defend this matter. Plaintiff however was allowed to change the Deed of Trust to add the mobile home as part of its security. For its part, Plaintiff argues that since Defendant Turner admits that the mobile home stood as security for the loan, there was no harm to her. Plaintiff, however, conveniently omits that Defendant contests any and all allegations that it was the intent of the parties to have the land itself stand as security for the loan. In fact, Defendant brought to the court's attention that the Deed of Trust given to her and which she signed was different from the one filed by Plaintiff over 127 days after the date of the closing.

Moreover, the HUD-1 states the sales price as $80,000.00; however, Plaintiff apparently contends the sales price was $58,480.00 as stated in the Deed of Trust. ***Brief of Appellee at 5.*** Further questions of fact are presented by Plaintiffs contradictory assertions. Plaintiff states in its brief: "Deutsche Bank was not the holder for the benefit of Ameriquest Mortgage and Citi Residential Mortgage as state in Turner's brief; it holds the trust under the

pooling and servicing agreement...and... is a third party beneficiary." However, in accordance with law, only the owner of the note has the right to foreclose in accordance with the Deed of Trust. If in fact Plaintiff is not the owner of the note or has a properly endorsed assignment of the note, then Plaintiff had no right or authority to foreclose on the subject property. [R. at 8 (¶10)]. Further, in the default judgment order presented to Judge Barnes, Plaintiff clearly stated that Plaintiff is the holder of the original note and that the loan was sold, transferred, and assigned to Plaintiff. Now, Plaintiff claims to be a third party beneficiary.

All of these questions remain unanswered because Plaintiff short-circuited a full adjudication of this matter on the merits by presenting altered and fraudulent documents to the lower court. Therefore, both law and equity demand that the default judgment in this case be vacated. As such, the deed of trust should not be reformed and Plaintiff's sale should be rendered void.

II. IN THAT DEFAULT JUDGMENT WAS ENTERED AGAINST DEFENDANT TURNER I HER ABSENCE, THERE STILL EXIST GENUINE ISSUES OF MATERIAL FACT WHICH JUSTICE DICTATES BE RESOLVED IN DETERMING WHAT REMEDY, IF ANY, PLAINTIFF IS ENTITLED.

In this default judgment case, Defendant Turner has not been allowed to conduct any discovery. As such there are many material questions of fact which must be resolved prior to any substantive determination of this matter.

DISPUTED ISSUES of FACT

1. Plaintiff states that Defendant Turner admitted that she intended to pledge the mobile home as collateral for the loan. ***Brief of Appellee at 1, 5, and 11***. However, Plaintiff conveniently ignores Defendant Turner's assertion that the intention of the parties was that the mobile home, but not her land, serve as collateral for the loan. No finding of fact has

been made on this issue.

2. There is a question of fact concerning who owns and who holds the debt. In the default judgment Order executed (and presumably drafted by Plaintiff), Plaintiff was deemed the owner of the debt and the holder of the initial promissory note. However, in its brief, Plaintiff states that it is a third party beneficiary. ***Brief of Appellee at 5***. If Plaintiff is not the owner of the note, then it had no right to foreclose on Defendant Turner's property.

3. Plaintiff asserts that the initial amount of the loan was "$58, 480.00 not $80,000.00 as alleged by Turner in her statement of facts." ***Brief of Appellee at 5.*** However, the HUD-1 contains a forged signature which is not that of Ms. Turner

4. Plaintiff alleges that the proper way of pledging the mobile home as collateral was to file an UCC-1; however, Plaintiff itself failed to perform such a filing to place a lien on the mobile home. Moreover, Defendant Turner is not an attorney and certainly not a secured transactions attorney. ***See Brief of Appellee at 5.***

5. Plaintiff states that, "Citi Residential [the loan servicer] attempted to work with [Defendant Turner] to help her save her home." ***Brief of Appellee at 6.*** In support of this assertion Plaintiff refers this court to the record [Court Reporter's Transcript at 13 (lines 16-24)(February 11, 2009, Honorable Jane. R. Weathersby, presiding). ***Id.***, see also Brief of Appellee at 10. No such statement appears in the record. Citi Residential's so called attempt to help Defendant Turner save her home was to recommend a "Short Sale". See ***Brief of Appellant at 5***. Rather than help, Citi Residential informed Ms. Turner that no partial payments were acceptable. ***Id.***

6. Plaintiff alleges that it was unable to locate a recent address for Ms. Turner "by any means

[and therefore] sought service by publication." ***Brief of Appellee at 7.*** This statement is patently false in that the very courthouse where Plaintiff filed its complaint contained the address for Ms. Turner for all relevant times stated in all pleadings herein. If Plaintiff had simply checked the record at the Tax Assessor's office, Plaintiff would have "found" Ms. Turner.

7. Plaintiff alleges that "if the judgment is set aside, the final result will be the same, i.e., her property will be foreclosed upon". ***Brief of Appellee at 12***. However, Plaintiff skipped over the fact that the reformation of the deed of trust would be null and the parties will have to litigate the issue concerning what property secured the loan. Therefore, setting aside the default judgment (as this court should) would do far more than merely force Plaintiff to start the foreclosure process over.

8. There is a genuine issue of material fact concerning the Deed of Trust filed 127 days after the closing and presented to Judge Barnes as a basis for Plaintiff's reformation complaint. ***Brief of Appellant at 6 and 7***. That deed of trust contains a legal description of Defendant Turner's property. [R. at 11]. Hence Judge Barnes made a decision without being advised that Plaintiff had made changes to the deed of trust after Defendant Turner had signed it and then entered that altered document into the land records. See [R. at 100].

III. PLAINTIFF COMES INTO THIS COURT WITH UNCLEAN HANDS AND NOT ONLY SHOULD THIS COURT NULLIFY THE DEFAULT JUDGMENT AGAINST DEFENDANT BUT IT SHOULD DENY PLAINTIFF ANY RELIEF WHATSOEVER.

Contrary to Plaintiff's assertion, it was not Defendant Turner, but rather Plaintiff who sought relief in equity. "On February 08, 2008 a Complaint to Reform Deed of Trust, Confirm Title and Authorize Non-Judicial Foreclosure was filed with the Chancery Court of Warren

County, Mississippi." ***Brief of Appellee at 1, 5, 9, and 11.*** At the time of the filing of this Complaint, Plaintiff presented to the lower court an altered Deed of Trust, which contained a legal description for Defendant's property when the deed of trust provided to her at closing did not have such a description. See [R. at 100]; see for Comparison [R. at 11]. In Defendant's absence, Plaintiff obtained a default judgment altering the closing documents to allow Plaintiff to take as security for its loan, not only the mobile home but also Defendant's land. By using this altered document to obtain reformation of the deed of trust, Plaintiff committed fraud upon Defendant, the court, and society as a whole. Consequently, this Court should nullify the orders obtained by Plaintiff by such behavior and close the Court doors for any further trickery by the Plaintiff. ***See Brief of Appellant at 4, 6, 7, 15, and 16.***

None of the cases cited by Plaintiff even remotely state or stand for the proposition that being delinquent in paying one's mortgage constitutes willful misconduct, "unclean hands." Moreover, being current on one's mortgage, similarly, is not a prerequisite at law or in equity to responding to a default judgment with a motion to set aside. And clearly, Defendant's inability to post a supersedeas bond when appealing erroneous judgment does not constitute "willful misconduct"/"unclean hands." These arguments by Plaintiff are simply designed to muddy the waters and deflect attention from the fraud Plaintiff committed, which most certainly constitutes "unclean hands." ***Thigpen v. Remedy***, 238 So.2d 744, 746 (Miss. 1970).

IV. PLAINTIFF FORECLOSED ON PROPERTY NOT COVERED BY ITS SECURITY INSTRUMENT AND AS SUCH SHOULD NOT BE ALLOWED TO RETAIN THE PROPERTY.

Plaintiff has cited several cases stating that a mortgagee in possession, after breach of the mortgage, has a right to hold possession until the mortgage is paid. However, Plaintiff has failed to mention the caveat to this principle: "The indebtedness secured by the mortgage [must

be] a valid lien against the land." ***Wirtz v. Gordon***, 184 So. 798 (Miss. 1738). That is the case ***sub judice***. Defendant Turner contests and has consistently contest the validity of Plaintiff's lien. Moreover, Defendant contends and has consistently contended that her land was taken by Plaintiff through fraud. ***See Romig v. Gillett***, 187 U.S. 111 (1902). Therefore, in accordance with ***Wirtz and Romig,*** Plaintiff cannot retain possession of Defendant's property. Since a determination as to what constitutes security for Plaintiff's note is in question, Plaintiff can offer this Court no basis for retaining possession of Defendant's land. Consequently, Plaintiff should be forced to relinquish possession of the property.

CONCLUSION

Service of process is a jurisdictional matter. Without jurisdiction, no valid judgment can issue from the court. Here, service of process failed, robbing the lower court of jurisdiction. Therefore, the judgment issued by that court based thereon is null and void. This honorable Court should so declare. Moreover, Plaintiff's demonstrated "unclean hands" should cause justice to close the courthouse doors on this Plaintiff and prevent it from doing any further injustice in this matter.

RESPECTFULLY SUBMITTED, this the 22nd day of September, 2010.

ANGELA L. TURNER

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CERTIFICATE OF SERVICE

I, John Richard May, Jr., do hereby certify that I have caused a true and correct copy of the foregoing DEFENDANT ANGELA TURNER'S APPELLANT'S BRIEF to be delivered by U.S. Mail, postage prepaid, to the following:

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This the 22nd day of September, 2010.

John Richard May, Jr.