

**IN THE SUPREME COURT OF MISSISSIPPI**

**CASE NO. 2009-CA-01703**

**WACHOVIA BANK, N.A., SUCCESSOR  
IN INTEREST TO FIRST UNION NAT'L  
BANK, AS INDENTURE TRUSTEE and  
MID-STATE TRUST VII**

**APPELLANTS**

**VS.**

**REBUILD AMERICA, INC.**

**APPELLEE**

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**BRIEF OF APPELLEE**

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

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**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.

1. Wachovia Bank, N.A., as Successor in Interest to First Union National Bank, Appellant;
2. Mid-State Trust VII, Appellant;
3. Rebuild America, Inc., Appellee;
4. Robison & Holmes, PLLC, inclusive of attorneys W. Stewart Robison and Jose' B. Simo, Attorneys of Record for Appellants;
5. Kimberly P. Turner, PLLC, inclusive of attorney Kimberly P. Turner, Attorney of Record for Appellee;
6. Derrick Whitlock; and

7. Honorable Franklin C. McKenzie, Jr., Chancellor, Jones County,  
Mississippi.

Respectfully submitted,  
REBUILD AMERICA, INC.

By:   
Kimberly P. Turner (MBN )

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### **STATEMENT OF THE ISSUES**

- I. The Lower Court Neither Abused Its Discretion Nor Committed Manifest Error in Finding Proper Notice Afforded To First Union National Association in Compliance With § 27-43-5, Miss. Code Ann.
- II. If Notice is Found Deficient, Tax Title is Void Only As To The Lienor.

### **STATEMENT OF THE CASE**

This action was initiated by the filing of a Complaint to Set Aside Tax Sale, Tax and Subsequent Deeds by Florence Easterling and Wachovia Bank, N.A., as successor in interest to First Union National Bank, as Indenture Trustee (hereinafter "Wachovia Bank") on October 30, 2006. On March 9, 2007, Rebuild America, Inc. (hereinafter "Rebuild America") filed its Motion to Dismiss, Answer with Affirmative Defenses to Plaintiffs' Complaint and Counterclaim in Unlawful Entry and Detainer, seeking dismissal based upon the absence of any ownership interest in and to the property the subject of said action by Florence Easterling<sup>1</sup>, and the absence of a proven interest in and to the Deed of Trust which encumbered the property the subject of this action by Wachovia Bank.

Following a Motion for Time to Respond to Counterclaim, Florence Easterling filed her Answer to the Counterclaim in Unlawful Entry and Detainer on or about May 2, 2007.

On or about June 15, 2007, Mid-State Trust VII filed its Motion to Substitute Party-Plaintiff, Realign Wachovia Bank, N.A., Successor in Interest to First Union National Bank, as Indenture Trustee as Party-Defendant, and Dismiss Florence Easterling as Party-Plaintiff. On or about July 5, 2007, Mid-State Trust VII, together with Wachovia Bank, filed

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<sup>1</sup> According to the land records of the Jones County Chancery Clerk, Derrick M. Whitlock was the record title owner of the property the subject of said action at the time of the 2002 tax sale. In addition, it was Derrick Whitlock and wife, Sonja Whitlock who executed a Deed of Trust in favor of Jim Walter Homes, Inc., said instrument subsequently assigned to Wachovia Bank, N.A.

their Motion to Amend the Complaint so as to add Mid-State Trust VII as a Party-Plaintiff, and dismiss Florence Easterling as Party-Plaintiff, admitting therein that Derrick Whitlock, as opposed to Florence Easterling, was, in fact, the owner of the property the subject of this action at all relevant times, and further, that Mid-State Trust VII, as opposed to Wachovia Bank, held the beneficial interest in and to the Deed of Trust.

On October 15, 2007, Mid-State Trust VII and Wachovia Bank, Appellants herein, were granted leave to amend the Complaint, the same filed on October 19, 2007. Rebuild America filed its Motion to Dismiss and Answer with Affirmative Defenses on November 9, 2007.

Following an *ex parte* conference with the Court, the parties agreed to submit a Stipulation to the Court, which specifically identified those issues dispositive of the action, together with correspondence, memoranda and case law supportive of each party's respective position and argument. The Stipulation was filed and provided to the Court on August 15, 2008, with correspondence, memoranda and case law provided by each party to the Court within thirty (30) days thereafter.

On January 14, 2009, the Court entered its Decree Confirming Tax Sale.

On January 23, 2009, Wachovia Bank and Mid-State Trust VII filed their Motion for a New Trial/ To Amend Findings of Fact and Conclusions of Law and/or To Alter or Amend a Judgment based upon the Court's inadvertent failure to consider a second dispositive issue raised within the Stipulation submitted by the parties previously on August 15, 2008.

Following a hearing upon the Motion for New Trial, the Court suggested and the parties agreed to again submit correspondence, memoranda and case law supporting each party's respective position and argument with regard to this second dispositive issue as set



forth in the Stipulation. Wachovia Bank and Mid-State Trust VII provided correspondence comprising an informal memorandum of authorities to the Court on or about dated April 14, 2009, to which Rebuild America responded on or about July 13, 2009. In rebuttal, Wachovia Bank and Mid-State Trust VII provided additional correspondence, including case law and argument, on or about July 16, 2009, to which Rebuild America likewise responded on August 6, 2009.

On September 21, 2009, the Court entered its Order Overruling Motion for a New Trial/ To Amend Findings of Fact and Conclusions of Law and/or To Alter or Amend a Judgment based upon its review and consideration of the facts, case law, statutory authority and argument provided by the parties in its exchange of correspondence prior thereto.

It is from this second Order of the Court, which denied the Motion of Wachovia Bank and Mid-State Trust VII, that Appellants have brought the instant appeal.

### **STATEMENT OF THE FACTS**

This case arises from the 2003 sale of certain real property located in Jones County, Mississippi for unpaid and delinquent county taxes for the year ending 2002, which resulted in a Chancery Clerk's Conveyance dated September 27, 2005 to Wachovia Bank, N.A., as custodian for Magnolia Investors, LLC (hereinafter "Magnolia Investors"). Rebuild America acquired said property from Magnolia Investors on October 18, 2006 by virtue of a Quitclaim Deed and Assignment, filed in the office of the Chancery Clerk of Jones County, Mississippi on October 28, 2006 in Book 1520 at Page 38. Derrick Whitlock, previous owner of the property at issue herein, also conveyed his remaining title, ownership and interest in said property, if any, by Quitclaim Deed to Rebuild America, dated October 20, 2006 and filed in the aforesaid office on October 31, 2006, bearing Instrument No. 20608032.

### **SUMMARY OF THE ARGUMENT**

First Union National Association, predecessor in interest to Appellant(s) herein and lienholder of record at the time of the 2003 tax sale through the date of conveyance by Tax Deed of the property the subject of this action, unequivocally received Notice of Forfeiture to Lienor via certified mail, return receipt requested, within the time fixed by law. Though information set forth within said Notice of Forfeiture was sufficient to reasonably apprise First Union as to its interest in the property and impending expiration of the redemption period, First Union took no action whatsoever to protect its interest. Such negligence should not be rewarded given the substantial compliance of the Chancery Clerk's Notice with § 27-43-5, Miss. Code Ann.

Relying upon the failure of the Chancery Clerk to include the date, book and page of the security instrument comprising the lien of First Union within the Notice of Forfeiture, Appellants ask this Court to reverse the lower court and hold the tax title void in its entirety. Such relief is contrary to Mississippi statute and precedent. Thus, should this Court deem the Notice of Forfeiture provided to First Union insufficient to satisfy § 27-43-5, Miss. Code Ann., the tax title of Rebuild America shall be void only as to First Union. If such is the decision of this Court, this matter must be remanded to the lower court so as to afford Rebuild America the opportunity to elect its remedy and, if so chosen, obtain reimbursement of all taxes paid since the year ending 2002 through to the present date, in addition to statutory interest and penalty thereon.

## ARGUMENT

### Standard of Review.

The standard utilized by the Mississippi Court of Appeals for review of a Chancellor's decision is abuse of discretion. *Stokes v. Campbell*, 794 So. 2d 1045, 1048 (Miss. Ct. App. 2001)(citing *McNeil v. Hester*, 753 So. 2d 1057 (Miss. 2000)). The standard of review for questions of law is *de novo*. *Gillespie v. Kelly*, 809 So. 2d 702, 705 (Miss. Ct. App. 2001)(citing *Consolidated Pipe & Supply Co. v. Colter*, 735 So. 2d 958, 961 (Miss. 1999)).

I. The Lower Court Neither Abused Its Discretion Nor Committed Manifest Error in Finding Proper Notice Afforded To First Union National Association in Compliance With § 27-43-5, Miss. Code Ann.

The lower court neither committed manifest error nor erroneously interpreted the relevant Mississippi Statute(s) in rendering its Final Order Overruling the Motion for a New Trial/ To Amend Findings of Fact and Conclusions of Law and/or To Alter or Amend a Judgment of Wachovia Bank and Mid-State Trust VII.

The Chancery Clerk, previous to expiration of the statutory redemption period following the 2003 tax sale, executed and caused to be served upon First Union National Bank<sup>2</sup> its *Notice of Forfeiture to Lienor* by certified mail, return receipt requested, as required by the relevant Mississippi Statute. Section 27-43-5, Miss. Code Ann., which sets forth the requirements of the Chancery Clerk in providing notice to lienholders of record prior to expiration of the applicable redemption period states, in pertinent part that, the clerk "shall send by certified mail with return receipt requested" notice of sale to all lienors

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<sup>2</sup> First Union National Bank was the lienholder on said property at the time of the subject sale by virtue of Deed of Trust, dated May 12, 1998, executed by Derrick Whitlock and Sonja Whitlock, in favor of Jim Walter Homes, Inc., as beneficiary, recorded in the land records of the office of the Chancery Clerk of Jones County in Book 1165 at Page 569, securing an original principal indebtedness of \$180,936.00.

within the time period fixed by law for notifying landowners, which is at least forty-five (45) days prior to the expiration of the redemption period.

There is no dispute that the Chancery Clerk for Jones County mailed the requisite notice to the lienholder of record, First Union National Bank (hereinafter "First Union"), within the statutorily required time period; however, said Notice of Forfeiture to Lienor did fail to identify the security instrument which created its lien by Book, Page and date. Regardless of this omission, Rebuild America maintains that the Chancery Clerk of Jones County satisfied the requirements of Mississippi statute such that the notice provided to First Union, prior to expiration of the redemption period on August 15, 2005, was sufficient to identify the property upon which it held a lien, apprise First Union of the expiration of the respective redemption period and was within the time period fixed by law. Thus, this Court must affirm the Judgment of the lower court.

In urging this Court to reverse the decision of the lower court and set aside the 2002 tax sale and subsequent conveyances, Appellants contend that the Chancery Clerk's failure to set forth the date, book and page number of the lien within that notice provided to First Union renders the tax sale void and rely upon Mississippi case law in which strict compliance is the holding and opinion of the reviewing court(s), such as in *Roebuck v. Bailey*, 166 So. 358 (Miss. 1936). In *Roebuck* however, the Chancery Clerk of Newton County, Mississippi provided no notice whatsoever to the lienholder of record by reason of a defective acknowledgment. In reversing the lower court's holding, the Supreme Court explained that

[t]he clerk was under a duty to examine the records of his office to see if there had been any liens or sale, and to give notice thereof to all lienors, but he is not to pass his judgment upon the validity of such liens, if any. . . . Had the clerk failed to

record the instrument when presented to him because of the defective acknowledgment, that might have protected him, but having recorded the instrument, and, presumably, done everything proper in the way of indexing, etc., he must be held to have known of liens existing, and in the absence of any such showing, to have made a notation that he had examined the records and did not find such liens.

Thus, in stating that the statute requiring lienors to be given notice of any tax sale should be liberally and not narrowly construed, the *Roebuck* Court was advising against the clerk's determination as to the validity of an instrument creating a lien and reiterating the clerk's obligation to provide notice to all lienors who possessed liens of record, valid or not. The *Roebuck* decision did not contemplate the form of the notice provided to a lienor, but only considered whether a lienor was entitled to notice under the statute by reason of a recorded yet perhaps invalid lien by virtue of defective acknowledgment. This is not the issue before this Court.

Interpreting § 27-43-5, Miss. Code Ann., substance should prevail over form; thus, the pivotal inquiry of this Court must be whether the Notice of Forfeiture provided to First Union was sufficient to identify the property the subject of the tax sale and ultimately apprise the lienholder of the date on which the redemption period would expire. *See Green Tree Servicing, LLC v. Linda Kay Dukes*, – So. 3d –, 2009 WL 4596160 (¶ 14) (Miss. Ct. App. 2009)([t]he statutorily-mandated notice is intended to without equivocation advise a party that he has a specific interest which requires his attention); *Gober v. Chase Manhattan Bank*, 918 So. 2d 840, 845 (Miss. Ct. App. 2005)(citing, and quoting, in part, *Mennonite Bd. of Missions v. Adams*, 462 U. S. 791, 198 (1983)(. . . the mortgagee is entitled to notice that is 'reasonably calculated to apprise him of a pending sale.'). Despite the absence of the Book, Page and date of the Deed of Trust, the Notice of Forfeiture herein

was in the proper form, as prescribed by § 27-43-5, Miss. Code Ann., clearly indicating on the face thereof that the same was intended for the lienholder of record, namely First Union. *cf. Green Tree Servicing, LLC*, 2009 WL 4596160 (¶ 13)([t]he notice sent to the lienholder was merely a duplicate of that notice sent to the property owner. The notice . . . did not state it was in fact intended for the lienholder, as opposed to having been sent in error).

The Notice of Forfeiture further described the property by brief legal description, tax parcel number and name of the mortgagor, Derrick M. Whitlock. By providing notice to First Union in the proper form as prescribed by statute, First Union was clearly apprised that it held a lien by virtue of an instrument of file and of record in the office of the Chancery Clerk of Jones County. *cf. Green Tree Servicing, LLC*, 2009 WL 4596160 (¶ 13)([t]he notice did not identify any interest purportedly held by the lienholder in the property that was the subject of the notice. The notice did not indicate that Green Tree, or any other entity might hold or be the beneficiary of a deed of trust on the subject property. Nor did the notice identify the source of any interest purportedly held by the lienholder in the subject property). Lastly, and most importantly, the Notice of Forfeiture specifically stated "that the title to said land will become absolute in said purchaser unless redemption from said sale be made on or before August 25, 2005".

A layman of average intelligence and business prudence, armed with the knowledge imparted by the Notice of Forfeiture to Lienor should have taken those steps necessary to protect its interests as described within said notice. Sufficient information, such as the mortgagor's name and brief legal description of the property, was contained within the Notice so as to reasonably apprise First Union, and/or its successors and assigns such as

Appellants herein, of the importance of taking action prior to the expiration of the stated redemption period. The Notice was therefore adequate to reasonably apprise First Union as to the expiration of the redemption period and as to the importance of taking whatever action was necessary to protect its interest in the property. Its failure to do so is not reason sufficient to grant the relief sought by Appellants, which was caused by First Union's own negligence. *See Rush v. Wallace Rentals, LLC*, 837 So. 2d 191, 200 (Miss. 2003)([i]t is incumbent upon the landowner to be knowledgeable about the assessment on his property and to be diligent to make sure that his taxes are paid).

Rebuild America maintains that the Chancery Clerk of Jones County, Mississippi satisfied the requirements of § 27-43-5, Miss. Code Ann., such that the notice provided to First Union, prior to expiration of the redemption period, was sufficient to identify the property upon which it held a lien, apprise First Union of the respective redemption period and was within the time period fixed by law. Thus, this Court must affirm the Judgment of the lower court.

II. If Notice is Found Deficient, Tax Title is Void Only As To The First Union Only.

Should this Court find the Notice of Forfeiture provided to First Union failed to comply with § 27-43-5, Miss. Code Ann., the relief requested by Appellants is without precedent. Pursuant to § 27-43-11, Miss. Code Ann., a failure to provide the required notice to a lienholder of record renders "the tax title void *as to such lienor, 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." *See Green Tree Servicing, LLC*, 2009 WL 4596160 at ¶ 15; *SKL Investments, Inc. v. American General Finance, Inc.*, 22 So. 3d 1247, 1250 (¶ 10)(Miss. Ct. App. 2009) *Gober*, 918 So. 2d at 854



(quoting *Everett v. Williamson*, 143 So. 690, 692 (Miss. 1932)). Thus, the tax title may be held valid and confirmed as to all other interested parties, to the exclusion of First Union and/or its successors and assigns be reason of its failure to receive the statutorily required notice (should this Court so determine).

In addition, should this Court find the Notice of Forfeiture provided to First Union failed to comply with § 27-43-5, Miss. Code Ann., this case must be remanded to the lower court so as to afford Rebuild America the opportunity to make its election of remedies. *See SKL Investments, Inc.*, 22 So. 3d at 1250- 1251 (¶ 11). If Rebuild America should choose to file its claim for redemption pursuant to § 27-43-11, Miss. Code Ann., as opposed to retaining the property subject to the lien of First Union, Rebuild America is entitled to reimbursement of all taxes paid since 2002 and continuing through the date hereof, in addition to statutory interest of one and one-half percent per month and penalty in accordance with § 27-45-27, Miss. Code Ann., within thirty (30) days from the date of the lower court's Order subsequent to remand and/or Rebuild America's election of remedy. *See also Equity Services Co. v. Hamilton*, 257 So. 2d 201 (Miss. 1972)([r]edeeming landowner must pay not only taxes for which land was sold but also taxes due after sale); *Lawrence v. Rankin*, 870 So. 2d 673, 677 (Miss. Ct. App. 2004).

Though Rebuild America respectfully requests this Court affirm the Final Order of the lower court, finding the Notice of Forfeiture provided by the Chancery Clerk to First Union compliant with § 27-43-5, Miss. Code Ann., a finding herein to the contrary must result in remand to the lower court for a determination of remedy and damages consistent with §§ 27-43-11, 27-45-27 and controlling Mississippi case law.

CONCLUSION

For the above and foregoing reasons, Appellee, Rebuild America, Inc., respectfully requests that this Court affirm the findings and conclusions of the lower court, specifically its denial of the Motion for a New Trial/ To Amend Findings of Fact and Conclusions of Law and/or To Alter or Amend a Judgment of Appellants. Alternatively, Rebuild America respectfully requests this case be remanded to the lower court for a determination of remedy and damages consistent with §§ 27-43-11, 27-45-27 and controlling Mississippi case law.

Respectfully submitted, this the 7<sup>th</sup> day of May, 2010.

REBUILD AMERICA, INC.  
By and Through Counsel:

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**CERTIFICATE OF SERVICE**

I, Kimberly P. Turner, do hereby certify that I have this date served by First Class United States mail, postage prepaid thereon, a true and correct copy of the above and foregoing Brief of Appellee to the following:

W. Stewart Robison, Esq.  
Jose' B. Simo, Esq.  
Robison & Holmes, PLLC  
Attorney for Appellants  
Post Office Drawer 1128  
McComb, Mississippi 39649-1128, and

Honorable Franklin C. McKenzie, Jr.  
Chancellor, 19<sup>th</sup> Chancery District (Jones County)  
Post Office Box 1961  
Laurel, Mississippi 39441.

DATED, this the 7<sup>th</sup> day of May, 2010.

  
\_\_\_\_\_  
KIMBERLY P. TURNER (MBN [REDACTED])