

THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WACHOVIA BANK, N.A. SUCCESSOR
IN INTEREST TO FIRST UNION
NATIONAL BANK, AS INDENTURE TRUSTEE,
AND MID-STATE TRUST VII

APPELLANTS

VS.

CASE # 2009-CA-01703


REBUILD AMERICA, INC.

APPELLEE

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 this court may evaluate possible disqualification or recusal.

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4. **Honorable Frank C. McKenzie**, Chancellor
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STATEMENT OF THE ISSUES

1. Whether the sale for 2002 Jones County ad valorem taxes was void as to the lien holder, First Union National Bank, for lack of proper notice of maturation provided by the Chancery Clerk of the Second Judicial District of Jones County, Mississippi, pursuant to the provisions of Section 27-43-5 of the Mississippi Code Annotated of 1972, as amended effective January 2, 1995, and/or Rule 6 of the Mississippi Rules of Civil Procedure.
2. Whether the Chancellor committed manifest error in finding that substantial compliance with the notice requirements of Section 27-43-5 of the Mississippi Code Annotated of 1972, as amended, is sufficient to render the sale of 2002 Jones County ad valorem taxes valid as to the lien holder, First Union National Bank.

STATEMENT OF THE CASE

Disposition in the Lower Court and Procedural History

On October 30, 2006, Florence Easterling and Wachovia Bank, N.A., (“Wachovia”) successor in interest to First Union National Bank, as Indenture Trustee, filed their original Complaint to Set Aside Tax Sale, Tax and Subsequent Deeds in the Chancery Court of the Second Judicial District of Jones County, Mississippi.

On March 9, 2007, Rebuild America, Appellee herein, filed its Motion to Dismiss, Answer with Affirmative Defenses to Plaintiff’s Complaint and Counterclaim.

On April 3, 2007, Florence Easterling filed her Motion to Respond to Counterclaim, and on May 3, 2007, Florence Easterling filed her Answer to Counterclaim.

On July 6, 2007, Wachovia and Mid-State Trust VII (“Mid-State”) filed their Motion to Amend Complaint Adding as Party-Plaintiff, Mid-State Trust VII and Dismissing Florence Easterling as Party-Plaintiff.

On October 15, 2007, the Chancery Court of the Second Judicial District of Jones County, Mississippi, entered its Order Granting Plaintiff Leave to file Amended Complaint, and on October 19, 2007, Wachovia and Mid-State filed their Amended Complaint to Set Aside Tax Sale, Tax and Subsequent Deeds.

On November 9, 2007, Rebuild America filed its Motion to Dismiss and Answer with Affirmative Defenses to Plaintiff’s Amended Complaint.

On January 14, 2009, the Chancery Court of the Second Judicial District of Jones County, Mississippi, entered its Decree Confirming Tax Sale.

On January 23, 2009, Wachovia and Mid-State filed their Motion for a New Trial/To Amend Findings of Fact and Conclusions of Law and/or to Alter or Amend a Judgment.

On February 23, 2009, Rebuild America filed its Response in Opposition to Motion for a New Trial/To Amend Findings of Fact and Conclusions of Law and/or to Alter or Amend a Judgment.

On September 21, 2009, the Chancery Court of the Second Judicial District of Jones County, Mississippi, 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.

From the preceding Decree and Order, Wachovia and Mid-State timely filed their Notice of Appeal on October 16, 2009.

ARGUMENT

Standard of Review

Absent an abuse of discretion, a reviewing court will uphold the decision of the Chancellor. *Hollon v. Hollon*, 784 So.2d 943, 946 (Miss. 2001). The Supreme Court should not disturb the findings of the Chancellor unless the Chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. *Henderson v. Henderson*, 757 So.2d 285, 289 (Miss. 2000).

Additionally, in matters that are questions of law, this Court employs a *de novo* standard of review and will only reverse for an erroneous interpretation or application of law. *Rebuild America, Inc. v. Milner*, 7 So.3d 972 (Miss. Ct. App. 2009)(citing *Morgan v. West*, 812 So.2d 987, 990 (Miss. 2002)).

Issue 1

Whether the sale for 2002 Jones County ad valorem taxes was void as to the lien holder, First Union National Bank, for lack of proper notice of maturation provided by the Chancery Clerk of the Second Judicial District of Jones County, Mississippi, pursuant to the provisions of Section 27-43-5 of the Mississippi Code Annotated of 1972, as amended effective January 2, 1995, and/or Rule 6 of the Mississippi Rules of Civil Procedure.

The Decree Confirming Tax Sale at issue in the case *sub judice*, filed January 14, 2009, places exclusive emphasis on the length of time between the date the Notice of Forfeiture to Lienor (Wachovia's predecessor in interest, First Union National Bank, hereinafter "First Union"), was issued, June 24, 2005, and the date of maturation, August 25, 2005, and wholly failed to mention what is submitted to be clear error by the Clerk in the form of the Notice provided First Union National Bank as stipulated into evidence in the lower court by the parties. (R. 35). It is only in 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 that the lower court addresses the notice requirements of Mississippi Code Annotated 1972 ("M.C.A.") Section 27-43-5. (R. 42).

In the lower court proceedings the parties agreed to a Stipulation of the Notice sent to First Union pursuant to 27-43-5 of M.C.A., as amended effective July 1, 1995. (R. 30). The statute requires that the Clerk of the Chancery Court examine the record of deeds, mortgages and deeds of trust in his office to ascertain the names and address of all mortgagees, beneficiaries and holders of vendor's liens of all land sold for taxes and within one hundred eighty (180) days and not less than sixty (60) days prior to the expiration of the time of redemption with respect to land sold, send by certified mail with return receipt requested to all such lienors so shown of record the following notice, to-wit:

"You will take notice that _____ (here describe lands) assessed to, or supposed to be owned by _____ was on the ____ day of _____, 20____, 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 _____ of 20____.

This ____ day of _____, 20____.

" _____ "

M.C.A. Section 27-43-5.

It is submitted that the notice forwarded to First Union by the Clerk of the Chancery Court in the case at bar is fatally defective in that such notice fails to disclose a book number, page number,

or the date of the lien held by First Union, all of which are material information concerning the lien held by First Union. Longstanding law of this State provides that **any deviation** from the statutory mandated procedure renders the tax sale void. (Emphasis added). See *Roach v. Goebel*, 856 So.2d 711, 716 (Miss. Ct. App. 2003)(citing *Hart v. Catoe*, 390 So.2d 1001, 1003 (Miss. 1980)).

The Mississippi Court of Appeals set out the United States Supreme Court's position on tax sale notification as follows:

Notice and the opportunity to be heard are bedrock principles of our law. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). "The fundamental requisite of due process of law is the opportunity to be heard." *Id.* At 314 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). The United States Supreme Court said that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id.* In a tax sale context, the United States Supreme Court reiterated that notice of a tax sale to a mortgagee is an elementary and fundamental requirement of due process. *Mennonite Bd. Of Missions v. Adams*, 462 U.S. 791, 798 (1983). ***Since a mortgagee possesses a substantial property interest that is significantly affected by a tax sale, the mortgagee is entitled to notice that is "reasonably calculated to apprise him of a pending tax sale."*** *Id.* Even before these United States Supreme Court decisions, our supreme court held a tax sale void where the lienor of the property sold for taxes received no notice. *Everett v. Williamson*, 163 Miss. 848, 143 So. 690 (1932). "[A] failure to give the required notice to lienors renders a tax sale void as to such lienors[.]" *Id.* At 854, 692.

Gober v. Chase Manhattan Bank, 918 So.2d 840, 845 (Miss. Ct. App. 2005)(Emphasis added). The Mississippi legislature required that notice be provided identifying the name of the lienholder, its interest, book and page number where the lien is recorded, and the date on which such lien was recorded. That the Chancery Clerk for the Second Judicial District of Jones County, Mississippi, failed to include the preceding relevant and required information in the prescribed notice is not disputed.

Most recently in *Green Tree Servicing, LLC v. Linda Kay Dukes*, 2009-CA-00422-COA, 2009 WL 4596160, the Court analyzed a situation similar to the case at bar. In *Green Tree* the Clerk sent a notice, which was returned as undeliverable, to the owner of tract being sold for delinquent

taxes. The Clerk sent a copy of the owner's notice to Conseco Finance, predecessor in interest to Green Tree Servicing, LLC ("Green Tree"), and lienor of the property at issue in the case. No response was received from either the owner or the lienholder, and subsequently, a tax deed was issued by the clerk conveying the property. Green Tree filed a complaint to set aside and void the tax sale. The Chancellor entered judgment against Green Tree dismissing the complaint. Green Tree timely appealed.

The Court in *Green Tree* found that there was clear deviation from the statutorily mandated notice in that the clerk merely sent a duplicate of the owner's notice to the lienholder. The Court goes on to say:

The 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. The notice did not state the date of any document creating an interest in the lienholder, nor did it state the book and page number where any document was recorded.

Green Tree Servicing, LLC v. Linda Kay Dukes, 2009-CA-00422-COA, 2009 WL 4596160 at ¶ 13. The Court stated, "The statutorily-mandated notice is intended to without equivocation advise a party that he has a specific interest which requires his attention. The attempted notice in this case did not meet that test and is, therefore, invalid." *Green Tree* at ¶ 14.

The Court in *Green Tree* reversed the Chancellor's judgment and set aside the tax sale as it pertains to any interest in the subject property held by Green Tree. The same reasoning and result is required in the case at bar.

The procedures governing notice for tax sales and maturation of those sales is derived solely from the statutes of this State, rather than common law. As such, the Courts have, with virtual unanimity, construed those statutes with great deference to the rights of both land owners and

lienholders, providing strict standards in order for maturity of a tax sale to be declared valid, if challenged.

The tax sale statutes are strictly construed in favor of those seeking redemption. A failure to strictly adhere to tax sale statutes renders the tax sale void. *See Norwood v. Moore*, 932 So.2d 63 (Miss. 2006); *Viking Investments v. Addison*, 931 So.2d 679 (Miss. 2006); *Lawrence v. Rankin*, 870 So.2d 673 (Miss. 2004); *Roach v. Goebel*, 856 So.2d 711 (Miss. Ct. App. 2003); *Rebuild America v. Milner*, 7 So.3d 972 (Miss. Ct. App. 2009); *SKL Investments, Inc. v. American General Finance, Inc.*, 22 So.3d 1247 (Miss. Ct. App. 2009) and *Hart v. Catoe*, 360 So.2d 1001 (Miss. 1980). The prescribed notification was not provided to the lienholder in the present case; therefore, the tax sale should be set aside and held void.

Issue 2

Whether the Chancellor committed manifest error in finding that substantial compliance with the notice requirements of Section 27-43-5 of the Mississippi Code Annotated of 1972, as amended, is sufficient to render the sale of 2002 Jones County ad valorem taxes valid as to the lien holder, First Union National Bank.

From the language of the lower court's Decree Confirming Tax Sale and Order Overruling Motion for a New Trial/To Amend Findings of Fact and Conclusions of Law and/or to Alter or Amend a Judgment, it does not appear that the clerk's failure to strictly comply with the notice requirements of the code provision aforesaid was considered by the lower court. (R.35, 42). It is submitted that doing so would have led the Chancellor to the conclusion that the clerk failed to strictly comply with the mandates of M.C.A. Section 27-43-5, which the Court has held is required, thus rendering the tax sale and subsequent maturation void.

It is submitted that the Chancery Court for the Second Judicial District of Jones County,

Mississippi, committed manifest error in finding that **substantial** compliance with the notice requirements of M.C.A. Section 27-43-5 would render the subject tax sale valid as to the lienholder, First Union. (Emphasis added). If one follows the trial court's reasoning, there was no need for the legislature to prescribe a different notice requirement to a lienholder. The trial court reasons that the notice need only contain the name of the borrower, the legal description of the property, and the deadline to redeem, and need not contain important information such as the book and page number where the lien is recorded and the date on which such lien was recorded. Obviously, this is not the case. The legislature expressly provided for a different, detailed form of notification to the lienholder. The notice provided First Union did not contain the prescribed information necessary for First Union to be apprised of its interest in the subject property sold for Jones County ad valorem taxes. The lower court clearly erred in finding that the notice provided by the clerk in the present case was sufficient to satisfy the requirements of M.C.A. Section 27-43-5 and notify First Union of its interest in the subject property. Again, the Appellants submit to the Court the following cases that support the proposition that strict compliance with tax sale statutes is required and failure to strictly comply with those statutes renders a tax sale void: *Norwood v. Moore*, 932 So.2d 63 (Miss. 2006); *Viking Investments v. Addison*, 931 So.2d 679 (Miss. 2006); *Lawrence v. Rankin*, 870 So.2d 673 (Miss. 2004); *Roach v. Goebel*, 856 So.2d 711 (Miss. Ct. App. 2003); *Rebuild America v. Milner*, 7 So.3d 972 (Miss. Ct. App. 2009); *SKL Investments, Inc. v. American General Finance, Inc.*, 22 So.3d 1247 (Miss. Ct. App. 2009) and *Hart v. Catoe*, 360 So.2d 1001 (Miss. 1980).

CONCLUSION

While it is true that owners of property are provided more protection by the law with regard to the number and type of notices required by statute, the statute for notice to lienholders requires no less diligence by the clerk in performance of his or her duties with regard to the form of notice

required by statute. The Appellants' contention is that the notice mailed by the Clerk to the lienholder of record does not comply with the provisions of M.C.A. Section 27-43-5 which sets forth **in specific detail** the notice required to a lienholder of record. (Emphasis added.)

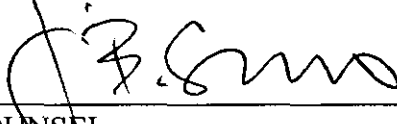
Moreover, the lower court clearly erred in finding that substantial, rather than strict compliance with the notice requirements of M.C.A. Section 27-43-5 is sufficient to render the subject tax sale valid as to the lienholder, First Union National Bank.

For the reasons set forth, Wachovia and Mid-State respectfully request that this Court reverse and render the Decree and Order of the lower court, finding that the tax sale and subsequent maturation to Rebuild America should be set aside and declared void.

Respectfully submitted,

WACHOVIA BANK, N.A. SUCCESSOR
IN INTEREST TO FIRST UNION
NATIONAL BANK, AS INDENTURE TRUSTEE,
AND MID-STATE TRUST VII

BY: ROBISON & HOLMES, PLLC



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CERTIFICATE OF SERVICE

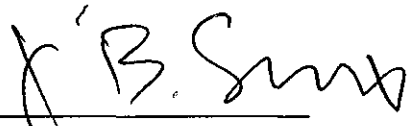
I, JOSE' B. SIMO, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the foregoing Brief of Appellant to the following:

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This the 19th day of Feb., 2010.



JOSE' B. SIMO