IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2009-CP-01312

PERRY OSBORNE **APPELLANT**

VS.

G. RIVES NEBLETT **APPELLEES**

GLENN H. WILLIAMS, ATTORNEY AND TRUSTEE FOR G. RIVES NEBLETT

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellees certifies that the following listed persons have an interest in the outcome of this case. These representation 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. The Honorable William G. Willard, Jr., Chancery Court Judge, District Seven, Trial Judge;

2. Perry Osborne, Appellant;

3. David E. Flautt, former Attorney for Appellant in lower court;

4. Glenn H. Williams, Attorney for Appellee;

5. G. Rives Neblett, Appellee.

CERTIFIED this 30th day of August, 2010.

Glenn H. Williams, MS Bar #[redacted]
Attorney and Trustee for G. Rives Neblett

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ORAL ARGUMENT IS NOT REQUESTED

The instant appeal is resolved by clearly established law. Oral argument is not requested.

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BRIEF OF APPELLEES

I. Statement of the Issues

The Appellant in his brief itemizes seven issues to be considered by the Court on his appeal. In doing so, he attempts to encompass in this appeal every complaint, grievance and exception which he wishes to assert with regard to the proceedings in the Trial Court. However, the Appellant (hereafter "Osborne") chose not to appeal the Judgment of the Chancery Court within the time frame provided by the rules, and instead chose to file a Motion for Reconsideration, For Stay of Order and Other Relief pursuant to *MRCP 62(b)* (hereafter "the Motion For Reconsideration"). Therefore, this Court is limited to a review of the Chancellor's Order denying the Motion For Reconsideration, and the sole issues for consideration by this Court with regard to the Order are set forth as follows:

1. **Whether Osborne has failed to provide an adequate record to consider his issues on Appeal;**
2. **Whether Osborne has waived all claims based on any alleged defect in the foreclosure process; and**
3. **Whether the Chancery Court abused its discretion in denying Osborne's Motion For Reconsideration, for Stay of Order and Further Relief, pursuant to *M.R.C.P. 62(b)*, filed in the Chancery Court of Bolivar County, Mississippi, Second Judicial District on March 16, 2009.**

I. Statement of the Case

A. Course of Proceedings and Disposition in Lower Court

The action in the Trial Court was initiated by Osborne's filing of a pro se Complaint For Injunctive Relief in the Chancery Court of Bolivar County, Second Judicial District on December 4, 2008. The filing of the Complaint for Injunctive Relief was precipitated by the commencement of a foreclosure on a Deed of Trust held by Neblett on certain real property owned by Osborne near Alligator, Mississippi. The Notice of Sale set forth December 4, 2008 as the day of the Trustee's Sale, and Osborne's Complaint for Injunctive Relief was filed on this same day. Osborne never attempted to obtain a temporary restraining order or preliminary injunction, either prior to or on the day of Trustee's Sale, and the Trustee's Sale was conducted on the date and time as set forth by the Notice of Sale.

On December 23, 2008, Neblett filed an Answer and Counter-Claim, praying that Osborne's Complaint for Injunctive Relief be dismissed and that Judgment be entered in favor of Neblett on his counter-claim, directing Osborne to vacate the subject property and awarding exclusive possession of the property to Neblett.

The record does not reflect any activity in the case from December 23 through January 13, and Osborne made no attempt to bring the matter to a conclusion by obtaining a setting on his Complaint for Injunctive Relief. The undersigned Counsel for Neblett then obtained a trial date, and duly filed a Notice of Hearing with Certificate of Service to

Osborne. From January 13, 2009 to the date of the Hearing on February 5, 2009, Osborne neither filed a Motion for Continuance nor notified opposing Counsel or the Court, by telephone or otherwise, that he had any objection to the date on which the hearing was noticed. Although Osborne made no objection to the date on which the hearing was set, February 5, he did file a set Discovery on February 3, 2009.

On February 5, 2009, at 8:30 a.m., Osborne appeared at the hearing scheduled before the Chancery Court of Bolivar County, Second Judicial District. Osborne was dressed in a suit and appeared in all respects prepared and ready for trial. In addition, he was accompanied by a female companion, who assisted him and at times seemed to act in some form of representative capacity. However, when the Chancellor advised the parties that he was ready to proceed with the hearing, Osborne requested a continuance, based on his alleged dental problems. After some verbal exchanges with Osborne, the Court evaluated Osborne and determined that he was able to communicate and proceed pro se, as he had obviously chosen to do by his initial filing of the pro se Complaint. The Chancellor thereupon conducted the hearing, and his findings and rulings are set forth in the Order of the Court entered on February 12, 2009.

From February 12, 2009 through March 16, 2009, there is no activity in the record, until the filing of the Motion for Reconsideration by Osborne's newly retained Counsel, David E. Flautt. A Notice of Motion was filed, setting hearing on the Motion for Reconsideration for May 29, 2009. On this date, the parties appeared at the hearing, each represented by their respective Counsel of Record. Despite Osborne's protestations about the manner in which the hearing was held, the Court conducted the hearing in normal

fashion, first consulting briefly with the attorneys and then conducting the hearing with both of the parties and their respective attorneys present. Both attorneys presented legal arguments to the Court, and each party was given the opportunity to make such statements and present such testimony as he wished. No witnesses were called beyond Osborne to substantiate any facts supporting his Motion For Reconsideration, and Osborne made no request for a stenographic record of the hearing.

B. Standard of Review

This Court reviews orders denying motions pursuant to *M.R.C.P. 60(b)* under an abuse of discretion standard. R.K.V.J.K., 946 So.2d 764,776 (Miss.2007).

III. Statement of the Facts

The essential facts as set forth by the Judgment of the Chancery Court dated February 12, 2009 are set forth as follows:

On June 30, 2000, Perry Osborne executed and delivered a Promissory Note and Deed of Trust to G. Rives Neblett in the original principal sum of $18,000,00. The Deed of Trust was duly filed of record in the office of the Chancery Clerk of Bolivar County, at Cleveland, Mississippi on August 22, 2000, and said Deed of Trust matured according to its terms on or about August 1, 2003.[1]

Upon maturity of the Deed of Trust in August, 2003, a balloon payment became due in the sum of $11,566.22, and Osborne presented no evidence at the hearing to indicate that he had made any payments against the balance due under the Promissary Note since the

[1] Any question regarding the statute of limitation to foreclosure this deed of trust has been clearly resolved by this court. Jordan v. Bancorp South, 964 So 2d 1205 (Miss. App.2007) clarifies that a six year statue of limitation applies.

date of its maturity in August 2003, beyond payments reflected on the amortization schedule generated by Neblett (*Appellee's Tr. Ex.31*).[2] Although Osborne disputed the amount of the balance existing under the Promissory Note, he admitted that there was a substantial balance which remained due and owing, and the Court additionally found that real property taxes on the subject property had not been paid for two (2) to three (3) years. Therefore, there was no question that default existed under the Promissory Note and Deed of Trust prior to August 2008.

On July 31, 2008, Neblett undertook such actions as necessary to foreclose the Deed of Trust, including posting a notice at the Bolivar County Courthouse and delivering a Notice of Trustee's Sale to the Bolivar Commercial for publication. However, upon being advised by the Osborne that he did not receive sufficient notice of the sale and that he wished to have an additional opportunity to determine the existing balance of principal and interest under the subject Promissory Note, counsel for Neblett agreed to stop the foreclosure, prior to actually conducting the Trustee's Sale of the property. Neblett thereafter communicated with the Osborne in an attempt to provide the him with all justly due credits, and an amortization schedule reflecting all credits was generated by Neblett, which indicated a balance of principal and interest as of August 31, 2008, in the sum of $17,140.93. This statement was provided to the Osborne, but he never issued any payment in partial or complete satisfaction of this balance.

On November 13, 2008, the Neblett commenced a second foreclosure proceeding

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[2] The amortization schedule does reflect a payment after August 03, 2003, but no evidence of any additional payment was presented by Osborne.

with regard to the subject property, by posting a Notice of Trustee's Sale at the Bolivar County Courthouse and publishing notice in the Bolivar Commercial. The Notice of Trustee's Sale set December 4, 2008 at 1:00 p.m. as the date and time of the sale, and the Appellant admitted at the hearing that he received a copy of the notice prior to the date of sale. However, the Plaintiff made no attempt to issue any payment in complete or partial satisfaction of the indebtedness existing under the subject Promissory Note and Deed of Trust, and instituted no legal action to enjoin the Trustee's sale prior to the date as set forth in the notice. The Trustee's Sale proceeded as scheduled, and the property was struck off and sold at the Trustee's Sale to Neblett, he being the highest and best bidder, for the sum of $17,548.30.

On the date of the Trustee's Sale but after the completion of the sale at 1:00 p.m. on December 4, 2008, Osborne filed his Complaint for Injunctive Relief in the Chancery Court of Bolivar County, Second Judicial District. Because the Complaint for Injunctive Relief was served on Neblett after the completion of the sale and because the Osborne did not attempt to obtain a Temporary Restraining Order or set a hearing prior to the date and time of the Trustee's Sale, the filing of the Complaint had no effect on the validity of the Trustee's Sale or the Trustee's Deed, executed and filed following the sale.

IV. Summary of the Argument

While Osborne sets forth numerous complaints, accusations and claims of bias in support of his appeal from the Chancellor's Order denying his Motion For Reconsideration, there is scant if any factual record to support his claims of error. Osborne

waived all claims regarding any alleged defect in the foreclosure proceedings by his failure to raise any such issue in his Complaint and/or failing to bring any such issue to the attention of the Trial Court at trial or any time before entry of the original Order on February 12, 2009. This Order confirmed title to subject property in Neblett, and the Trial Court properly found that Osborne had waived all claims with regard to any defect in the foreclosure proceedings. There is nothing in the record to support that the Chancellor abused his discretion, and this Court should affirm the Chancellor's Order denying the Motion For Reconsideration entered on July 9, 2009.

V. Argument

PROPOSITION 1: OSBORNE HAS FAILED TO PROVIDE AN ADEQUATE RECORD TO CONSIDER HIS ISSUES ON APPEAL.

It is unnecessary, if not impossible, for Neblett to respond to each of Osborne's rambling and scatter-shot allegations, complaints and accusations as set forth in his brief, and Neblett should not be required to respond to such factual assertions, which are not supported by the record. "It is the Appellant's duty to supply a reviewing court with an adequate record for the issues under consideration. Oakwood Homes Corp. v. Randall, 824 So. 2d 1292, 1293 (Miss. 2002). Facts asserted to exist must and ought to be definitely proved and placed before us by a record, certified by law; otherwise we cannot know them. *Id. at 124.*" Thompson v. Department of Human Services, 850 So. 2d 739,741 (Miss. 2003). There is no evidence in the record, or even suggestion by Osborne in his brief, that he or his attorney requested a stenographic record of either the original hearing held on February 5, 2009 or the hearing on the Motion For Reconsideration held on May 29, 2009.

Without addressing each and every factual allegation, complaint and accusation set forth by Osborne in his brief, Neblett would show that there is no evidence in the record to support the vast majority of the factual allegations and complaints which Osborne asserts as the basis for his appeal; especially with regard to the manner in which the hearings were conducted. All such allegations, which are not supported by the record, are disputed by Neblett.

Because neither Osborne nor his counsel requested a stenographic record of either the initial hearing on February 5, 2009 or the hearing on the Motion for Reconsideration on May 29, 2009, Osborne does not assert any error in this regard. However, even in the absence of a stenographic record, there was a means to correct any deficiency in the record:

> If no stenographic report of the evidence or proceedings is available, the Appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection. The statement should convey a fair, accurate and complete account of what transpired with respect to those issues that are the basis of the appeal..... *M.R.A.P.10(c)*

"The summary is to be filed with the Court Clerk, and the opposing party then has an opportunity to file timely objections. We must have some statement which would serve a as a basis for an appellant's claims. Absent a record basis to determine otherwise, we presume the Chancellor's Order is based on adequate evidence." *Thompson at 741.* In the absence of evidence in the record to support Osborne's complaints of irregularities and error on the part of the Trial Judge, all such claims fail as a matter of law. Osborne could have taken advantage of the procedures provided by *M.R.A.P. 10(c),* but he failed to do so.

The fact that Osborne is preceding pro se does not relieve him of his duty to provide

the court with an adequate record on which to consider his appeal. "This court has held that pro se parties are held to the same rules of procedure as represented parties. Dethlefs v. Beau Maison Dev. Corp., 511 So. 2d 112, 118 (Miss. 1987). "While we acknowledge on the one hand that a pro se litigant should be afforded some latitude, on the other hand, we have consistently held that pro se parties are held to the same rules of procedure as represented parties." Black v. City of Tupelo, 853 So. 2d 1221, 1226 (Miss.1987). "Pro se litigants are not entitled to a general dispensation from the rules of procedure." Perry v. Andy, et al, 858 So. 2d 143,149 (Miss.2003). It was Osborne's duty to provide this Court with an adequate record setting forth facts to support his rambling assertions in support his claimed errors on the part of the Chancellor. In the absence of a record of the facts to support his claims, there is no basis to find error.

PROPOSITION TWO: OSBORNE HAS WAIVED ALL CLAIMS BASED ON ANY ALLEGED DEFECT IN THE FORECLOSURE.

Osborne raised in his Motion to Reconsider (then represented by Counsel) an alleged defect in the foreclosure with regard to the publication of notice. However, no such defect was alleged or even remotely suggested in his Complaint filed in the Chancery Court on December 4, 2008, and Osborne has never suggested that he in any way raised the issue at the hearing before the Trial Court on February 5, 2009. In the Order following that hearing, the Chancellor expressly found that "the Plaintiff has presented no facts or legal argument which would in any way support setting aside the Trustee's Sale or Trustee's Deed executed and filed following the sale, and the Trustee's Sale should be and is hereby confirmed and ratified in all respects." *(Appellee's Tr. Ex. 14)*. The Chancery Court further found in its

Order that title to the subject property "is now vested in the Defendant/Counter-Claimant, G. Rives Neblett".

The issue was raised for the first time in Osborne's Motion for Reconsideration, and the Court ruled in its Order denying Osborne's Motion for Reconsideration that "while the Plaintiff suggests that there was a defect in the foreclosure proceedings with regard to the manner of publication, no such defect in the foreclosure proceedings was alleged in the Complaint, and this issue was not raised at the hearing on Plaintiff's Complaint held on February 5, 2009. Therefore, said issue is not properly before the Court and/or all claims in this regard have been waived by the Plaintiff."

The Chancellor's ruling was correct because "the lower Court is limited to those issues raised in the pleadings and to the proof in the record." Setser v. Piazza, 644 So 2d 1211, 1217 (Miss. 1994). Although not raised in the pleadings issues may (only) be tried by implied consent pursuant to *M.R.C.P. 15(b)*". Id. Because the issue was not alleged in the Complaint and not raised or even suggested by Osborne at the hearing on February 5, the Chancellor correctly found that the issue had been waived, and the Order of the Court acted as a confirmation of title in Neblett.

Osborne could have filed a Notice of Appeal to this Court from the Judgment entered on February 12, 2009, and he obviously has the capability to do so. If he had done so, however, there would be no basis for this Court to consider this issue on appeal. "As this Court has stated, time and time again, an issue not raised before the lower Court is deemed waived and is procedurally barred." Gail v. Thomas, et al, 759 So 2d 1150, 1159 (Miss. 1999). The Chancellor found, just as this Court would have found if Osborne had taken

appeal to this Court from the Trial Court's Order of February 12, 2009, that this issue has been waived.

PROPOSITION THREE: THE CHANCERY COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE PLAINTIFF'S MOTION FOR RECONSIDERATION, FOR STAY OF ORDER AND FURTHER RELIEF.

Although the original hearing before the Chancery Court was held on February 5, 2009, the Order on this hearing was not entered until February 12, and Osborne had 30 days from this date or approximately 37 days from the day of the original hearing to file a Notice of Appeal; in which case, he could have sought review of all issues joined in the Complaint and supported by record. However, Osborne elected to file a motion pursuant to *M.R.C.P. 62(b)* and requested the following relief:

> (1) To reconsider its February 12, 2009 Order for the reasons stated above, to set said Order aside and allow Plaintiff to proceed on the merits of his complaint and such others amended and additional pleadings as are necessary to be filed;
>
> (2) To stay execution in the said Order under *M.R.C.P. 62(b)* until final consideration of this motion;
>
> (3) Upon granting Plaintiff's Motion For Reconsideration, to allow Counsel for Plaintiff to amend Plaintiff's Complaint to more clearly and artfully present the Plaintiff's claims herein, and to promptly reply to the Defendant's counterclaim. *(Appellee's Tr. Ex. 14).*

By filing a Motion for Reconsideration pursuant to *M.R.C.P. 62(b)*, Osborne is

limited to a review of the Chancellor's decision and Order under an abuse of discretion standard. Porter v. Porter, 23 So 3d 438, 450 (Miss. 2009). *M.R.C.P. 60(b)* provides that a party may seek relief from a Judgment for the following reasons;" 1) Fraud, misrepresentation....; 2) Accidents or mistakes; 3) Newly discovered evidence....; 4) The judgment is void; 5) The judgment has been satisfied...; and 6) Any other reason justifying relief from the judgment." Since 60(b) (1) (2)(3)(4) and (5) clearly have no application to Osborne's alleged grounds to seek relief from the judgment as set forth in his Motion For Reconsideration, he is obviously seeking relief under rule 60(b)(6), and "relief under 60(b)(6) is reserved for extraordinary and compelling circumstances, such as fraud upon the Court." Trim v. Trim, 33 So. 3d 471, 75 (Miss. 2010). Furthermore, "Rule 60(b) should not be used by litigants as an escape hatch in cases where the movant has had procedural opportunities afforded under other rules yet has failed to pursue said procedural remedies." Welch v. Bank One, 6 So.3d 435, 438 (Miss.2009) citing City of Jackson v. Jackson Oakes L.T.D. Partnership, 792 So. 2d 983, 986 (Miss.2001).

In the case at bar, Osborne has failed to present any "extraordinary and compelling circumstances" which would support his claim that the Chancellor abused his discretion in failing to grant the Motion for Reconsideration. There is no basis in the record for this Court to find that the Chancellor did not fairly consider Osborne's Motion for Continuance and his ability to proceed, especially considering that Osborne's Motion for Continuance was made on the day of the hearing, without any advance notice to the Court or opposing Counsel. Osborne was also technically in default for having not responded to Neblett's counter-claim within 30 days. *M.R.C.P.* 12(a). Nevertheless, Neblett did not move

for an entry of default, and there is nothing in the record to suggest that the Court did not carefully consider all arguments, testimony and evidence submitted by Osborne at the hearing. "It is the Appellant's duty to supply a reviewing Court an adequate record for the issues under consideration." Oakwood Homes Corporation v. Randall, 824 So.2d 1292, 1293 Miss (2002). Facts asserted to exist must and ought to be definitely proved and placed before us by a record, certified by law; otherwise, we cannot know them. Thompson v. Miss Dept of Human Services, 856 So.2d 739, 741 (Miss.2003). "Absent a record basis to determine otherwise, we presume the Chancellor's Order.... was based on adequate evidence." *Id* Accordingly, Osborne's rambling allegations, accusations and suggestions of bias and fault on the part of the Trial Court, which are without any factual support in the record, provide this Court with no basis whatsoever to find that the Chancellor has abused his discretion in denying Osborne's Motion for Reconsideration.

Likewise there is no basis for this court to find any error in the Chancellor's denial of Osborne's ore tenus motion for continuance, and Osborne has failed to suggest what additional evidence he would have presented if a continuance had been granted. He showed no intention to hire an attorney prior to the hearing, and he failed to retain an attorney until more than thirty days after the entry of the Order on February 12, 2009. There is nothing in the record to suggest that the Chancellor did not fairly consider Osborne's Motion For Continuance and his ability to proceed. Furthermore, "the grant or denial of a continuance rests within the sound discretion of the trial court, and appellate court will not reverse unless convinced the trial court abused its discretion and unless it is satisfied that injustice has resulted therefrom. Bay Springs Forest Products, Inc. V. Wade, et al, 435 So.2d 690,692

(Miss.1983).

Osborne's claim that he was not allowed to approve the Order pursuant to Uniform Chancery Rule 5.04, which requires the attorney drawing the order to submit the same to "opposing counsel for criticism as to form only" is no basis for error. Osborne's stated objections to the order, such as they are, are clearly to the "substance" not the "form" of the order, and he has not stated exactly why he objects to the "form" of the judgment. Furthermore, his attorney raised this issue in Osborne's Motion for Reconsideration, and the Chancery Court clearly found no merit with any claim for relief in this regard.

Osborne's statement in his Motion to Reconsider that "this Court is required to liberally construe *M.R.C.P. 60(b)* in deciding whether to grant" his Motion for Reconsideration is completely contrary to the law. "Motions for relief under Rule 60(b) are generally addressed to the sound discretion of the Trial Court, and review is limited to whether that discretion has been abused". Porter v. Porter at 451. Osborne makes this statement, in both his motion and his brief, without citing any supporting legal authority, and "the failure to sight authority in support of an issue precludes this Court from considering the issue on appeal". Kirkley v. Forrest County Gen. Hosp., 991 So.2d 652, 662(Miss.Ct. App. 2008). Without no legal authority cited to support the vast majority of Osborne's issues on appeal, there is no legal basis for this Court to find that the Chancellor committed any error or abused his discretion in denying Osborne's Motion For Reconsideration.

VI. Conclusion

In the absence of any factual record or legal authority cited by Osborne, there is no basis for this Court to find that the Chancellor committed any error in finding that Osborne

presented no legal or factual basis for the Chancery Court to reconsider its Order entered on February 12, 2009. The Chancery Court was also correct in finding that any defect in the foreclosure process had been waived by Osborne's failure to raise such issue in the pleadings and/or bring the issue it to the attention of the Court at the hearing on February 5, 2009, and the Chancellor properly entered the Order which confirmed title in Neblett. There is no legal or factual basis to find the Chancellor abused his discretion denying the Motion for Reconsideration, and this Court should affirm the Order denying the Motion for Reconsideration entered on July 09, 2009.

RESPECTFULLY SUBMITTED this, 30th day of August, 2010.

GLENN H. WILLIAMS
Attorney and Trustee for the Appellee,
G. Rives Neblett

CERTIFICATE OF SERVICE

I, Glen Williams, attorney of record for Appellee, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **Brief of Appellees to:**

Honorable William G. Willard, Jr.
Bolivar County Chancery Court
P.O. Box 22
Clarksdale, MS 38614

Perry Osborne
P.O. Box 211
Merigold, MS 38759

SO CERTIFIED this 31st day of August, 2010.

Glenn H. Williams