

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
No. 2010-CA-01597**

REBUILD AMERICA, INC.

APPELLANT

v.

**COUNTRYWIDE HOME LOANS, INC. and
THE BANK OF NEW YORK**

APPELLEES

**BRIEF OF APPELLEES, COUNTRYWIDE HOME LOANS, INC.
AND THE BANK OF NEW YORK**

**ON APPEAL FROM THE CHANCERY COURT OF
HANCOCK COUNTY, MISSISSIPPI**

ORAL ARGUMENT NOT REQUESTED

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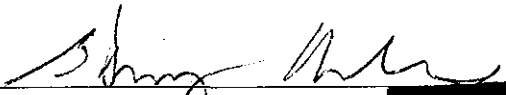
CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeal may evaluate possible disqualification or recusal.

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THIS, the 11th day of July, 2011.

Respectfully submitted,



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STATEMENT OF ISSUES

- I. THE LOWER COURT WAS CORRECT IN GRANTING THE MOTION FOR SUMMARY JUDGMENT OF COUNTYWIDE AND THE BANK OF NEW YORK AS THERE ARE NO GENUINE ISSUES OF MATERIAL FACT CONCERNING THE VALIDITY OF THE TAX SALES AT ISSUE.**
- II. COUNTRYWIDE AND THE BANK OF NEW YORK HAVE STANDING TO CONTEST THE TAX SALES.**
- III. MISSISSIPPI STATUTES REGARDING THE PROCEDURE FOR TAX SALES MUST BE STRICTLY CONSTRUED AND REQUIRE THE CHANCERY CLERK TO EXECUTE TWO AFFIDAVITS DOCUMENTING EFFORTS WHEN PROPERTY OWNERS CAN NOT BE LOCATED.**
- IV. REQUEST FOR REFUND OF AMOUNTS PAID BY REBUILD AMERICA'S PREDECESSOR IN TITLE WAS NOT ADDRESSED BY THE LOWER COURT PRIOR TO THE APPEAL.**

STATEMENT OF THE CASE

This case arises from the sale of certain real property located at 123 Harrison Court, Bay Saint Louis, Mississippi 39520 (the “Subject Property”) for delinquent Hancock County real estate taxes for years 2003 and 2004. The purchaser of the Subject Property at the tax sale for the delinquent 2003 taxes, Wolf Run, LLC, did not attempt to confirm its tax title as provided by Mississippi law. The assignee of the Property from the purchaser of the 2004 delinquent taxes and the Appellant herein, Rebuild America, Inc. (“Rebuild America”) sought, through the instant action, to confirm its tax title to the Property. To that end, Rebuild America filed its Motion for Summary Judgment seeking judgment as a matter of law regarding its claims to the Property, which was denied by the Court below. Thereafter, the Appellees herein, Countrywide (“Countrywide”) and The Bank of New York (“Bank of New York”), filed a Counterclaim seeking to have the Court to void the tax sales of the Property and to confirm title in Countrywide. The Court below granted Countrywide and the Bank of New York’s Motion for Summary Judgment, voided the tax sales and subsequent conveyance to Rebuild America and confirmed title in Countrywide. Rebuild America has filed the instant Appeal seeking reversal of the grant of Summary Judgment by the Court below.

I. Course of Proceedings from the Court Below.

On April 17, 2008, Rebuild America filed its Complaint to Quiet and Confirm Tax Title seeking to confirm its title to one of two parcels that form the Subject Property, specifically, Parcel 114M-0-19-195.00 according to the Hancock County tax map (the “Subject Parcel”). (R. 1-23). [The other tax parcel consists only of a driveway and is not at issue in this case.] On June 20, 2008, two lien holders to the Subject Parcel, Countrywide and the Bank of New York, filed their combined Answer denying the allegations of Rebuild America and seeking dismissal of the

Complaint. (R. 24-27). On June 27, 2008, Cindy S. Favre and Scott M. Favre also filed their Answer denying the allegations of Rebuild America's Complaint and affirmatively pleading that the notice and affidavit in conjunction with the tax sale were insufficient and further pleading that the prior tax sales were void and should be set aside. (R. 28-32).

On August 29, 2008, Rebuild America filed its Motion for Summary Judgment and Memorandum Brief arguing that Countrywide and the Bank of New York had no standing to challenge the tax sale from which Rebuild America obtained title to the Subject Parcel because their interest was lost in the prior year's tax sale. (R. 107-233). Countrywide and the Bank of New York responded on September 11, 2008 arguing their interest in the Subject Parcel and pointing to the deficiencies in the subject tax sales. (R. 236-332). After conducting a hearing on January 22, 2009, the Chancery Court of Hancock County, Chancellor Carter O. Bise, denied Rebuild America's Motion and entered his Order on February 19, 2009 finding several questions of material facts regarding the validity of the tax sales. (R. 337-340).

On October 12, 2009, Counsel for Scott M. Favre and Cindy S. Favre filed their Motion for Leave to Withdraw stating that they "have assigned their rights in and to the redemption from the tax claims at issue to Defendant, Countrywide Home Loans, Inc." (R. 342). Additionally, on March 22, 2010, Countrywide and the Bank of New York filed a Motion to Dismiss Certain Defendants seeking dismissal of Scott M. Favre and Cindy S. Favre. (R. 346-349). On March 31, 2010, the court entered its Agreed Order of Dismissal holding that "Scott M. Favre and Cindy S. Favre, have executed a Quitclaim Deed to Countrywide Home Loans, Inc., conveying all of their title and interest in the above described property to Countrywide and therefore, have no interest in continuing with this litigation." (R. 376-378, 377).

On March 29, 2010, Countrywide and the Bank of New York filed a Motion for Leave to File Amended Answer, Counterclaim and Cross-Claims seeking leave to supplement the Answer

with affirmative defenses and to assert a counterclaim to set aside Rebuild America's tax title. (R. 350-375). On June 18, 2010, the court entered its Agreed Order granting Countrywide and the Bank of New York permission to file their Amended Answer, Counter-Claim and Cross-Claims. (R. 379-381). Thereafter, the pleading was filed on June 24, 2010. (R. 382-473).

On July 6, 2010, Countrywide and the Bank of New York filed a Motion for Summary Judgment based upon the Counterclaim against Rebuild America (R. 490-959) along with a Memorandum Brief in Support (R. 475-488) seeking to void the prior tax sales of the Subject Parcel and further seeking to confirm title in Countrywide. On July 28, 2010, Rebuild America filed its Response in Opposition to Summary Judgment and Supporting Memorandum. (R. 963-986). On August 26, 2010, the Chancellor granted Summary Judgment in favor of Countrywide and the Bank of New York. (R. 1004-1010). The lower Court held that "[a]t no time did Scott and [Cindy] Favre receive actual notice of their right of redemption for either tax sale" and "[n]either tax sale conformed to Miss. Code Ann. 27-43-3." (R. 1008-1009). Thereafter, on September 13, 2010, Countrywide and the Bank of New York filed their Motion for Entry of Final Judgment Confirming Title and Dismissing Case. (R. 1014-1021). The court, however, did not have an opportunity to rule on the Motion due to the fact that Rebuild America filed its Notice of Appeal of the court's Summary Judgment on September 27, 2010. (R. 1022-1023).

II. Statement of Facts

On July 6, 2001, Scott M. Favre purchased the Subject Property from Michael A. Haman as evidenced by the Warranty Deed filed of record in the office of the Hancock County Chancery Clerk in Book BB230, Page 730. (R. 500-501). On February 27, 2002, Scott M. Favre transferred the Subject Property to his wife Cindy S. Favre by Warranty Deed which is filed of record in the office of the Hancock County Chancery Clerk on March 5, 2002 at Book BB241, Pages 114-115. (R. 502-503). On April 18, 2003, Cindy S. Favre, a married woman, and Scott

M. Favre executed a deed of trust on the Subject Property in favor of Countrywide Home Loans, Inc. securing a mortgage loan in the amount of \$380,000.00, filed of record in the office of the Chancery Clerk for Hancock County, Mississippi, on April 29, 2003 at Book 756, Pages 668-679. (R. 504-515). On July 23, 2003, Countrywide Home Loans, Inc. assigned its April 18, 2003 Deed of Trust to the Bank of New York and filed a Corporate Assignment of Deed of Trust in the office of the Chancery Clerk for Hancock County, Mississippi, on August 26, 2004 at Book 852, Page 626. (R. 516-517). On September 23, 2003, Cindy S. Favre and Scott M. Favre executed another deed of trust on the Subject Property in favor of Countrywide Home Loans, Inc. securing a home equity loan in the amount of \$128,500.00, filed of record in the office of the Chancery Clerk for Hancock County, Mississippi, on October 1, 2003 at Book 793, Page 039. (R. 518-523).

The 2003 Hancock County taxes were not paid on a portion of the Property (tax parcel no. 144M-0-19-195 – again, the “Subject Parcel”) and on August 30, 2004, the Hancock County Tax Assessor/Collector sold the Subject Parcel for the delinquent taxes in the amount of \$3,471.94 to Wolf Run, LLC. (R. 690). Subsequently, the 2004 Hancock County taxes were not paid on the Subject Parcel and on October 31, 2005, the Subject Parcel was again sold at a tax sale to Wachovia Bank, N.A., as Custodian for Sass Muni V, LLC, (“Sass Muni”) in order to satisfy the delinquent 2004 ad valorem taxes in the sum of \$3,471.94. (R. 555 and 760). The tax sale for the 2004 ad valorem taxes was scheduled to occur on August 29, 2005. (R. 544). Due to the landfall of Hurricane Katrina on that date, the tax sale was rescheduled until October 31, 2007. (R. 544). The house located on the Subject Parcel was heavily damaged by Hurricane Katrina and has remained uninhabited since the storm. (R. 829-834) (R.841-842).

On August 30, 2006, the statutory period of redemption ended for the tax sale associated with the 2003 delinquent taxes on the Subject Parcel. As verified by the Hancock County

Chancery Clerk, the period ended without adequate notice being given to Cindy Favre, the property owner. (R. 595-596). The Clerk's tax sale file for this parcel for the delinquent 2003 taxes does not contain any reference to personal service upon Cindy S. Favre of the notice of the expiration of the redemption period. (R. 687-704). Thereafter, on April 30, 2007, Timothy A. Kellar, Hancock County Chancery Clerk conveyed the Subject Parcel to Wolf Run, LLC, purchaser of delinquent 2003 taxes assessed on the Subject Parcel, by Chancery Clerk's Conveyance, filed of record in the office of the Chancery Clerk for Hancock County, Mississippi, on May 1, 2007 at Book 2007, Page 9252. (R. 705).

On October 31, 2007, the statutory redemption period ended for the tax sale conducted regarding the 2004 delinquent taxes. Again, the Clerk's tax sale file indicates that no adequate notice of the statutory right to redeem the Subject Parcel was given to Cindy Favre. (R. 595-596). The Chancery Clerk, Mr. Kellar, testified that he knew Scott Favre and testified that Scott Favre had performed services for Hancock County prior to Hurricane Katrina. (R. 532-535). Despite having access to the County voter rolls and the County car tag information for residents of Hancock County, Mississippi, the Chancery Clerk did not use said resources in attempting to locate Mr. and Mrs. Favre for the purposes of giving them notice of their rights of redemption for these two tax sales. (R. 571-573 and 595-597). Cindy Favre's name was contained in the local Hancock County phonebook at least as early as November of 2006, but was misspelled as "Farve" as opposed to "Favre" which Mr. Kellar testified was a common misspelling of this name. (R. 532-533, 564 and 661-666). The listing for Cindy appears on the same page of the phonebook as other individuals with the spelling of "Favre" in Hancock County. (R. 564 and 595-596). Cindy Favre was never personally served with notice of the expiration of her right of redemption for either of the 2003 or the 2004 taxes. (R. 595-596). Even though his name was no longer on the title to the Subject Property, Scott M. Favre's name is mentioned in at least one

of the tax sale files maintained by the Chancery Clerk. (R. 580). The vesting deed to Cindy Favre also mentioned the name of an attorney that prepared the deed to Mrs. Favre which was recorded in the land records of Hancock County, Mississippi. (R. 502-503). The Chancery Clerk's office did not contact the attorney that prepared the instrument to Cindy Favre in order to attempt to locate Mrs. Favre for notice purposes in these two sales. (R. 567-68).

After two separate attempts to mail notice to Cindy S. Favre at a pre-Hurricane Katrina address, only one affidavit regarding the Chancery Clerk's diligent search inquiry was executed in connection with each tax sale for 2003 and 2004 taxes owed by Mr. and Mrs. Favre. (R. 600, 687-704, 758-769. Affidavits - 691 and 761). It is important to note that Cindy Favre was an adult resident citizen of Hancock County, Mississippi, during the summer of 2006, when the Chancery Clerk was charged with giving Mrs. Favre notice of her right to redeem the property from the 2003 tax sale, but the Hancock County Chancery Clerk testified that that there was no personal service on Cindy Favre. (R. 595-596). During discovery, Countrywide and the Bank of New York obtained copies of both tax sale files from the Chancery Clerk of Hancock County, Mississippi, for the Subject Parcel and there is no notice to Cindy Favre contained in either file. (R. 687-704 and 758-769).

On January 24, 2008, Timothy A. Kellar, Hancock County Chancery Clerk conveyed the Subject Parcel to Sass Muni, purchaser of delinquent 2004 taxes assessed on the Subject Parcel, by Chancery Clerk's Conveyance filed of record in the office of the Chancery Clerk for Hancock County, Mississippi, on January 24, 2008 at Book 2008, Page 2451. (R. 656). The total amount paid for the Subject Parcel was \$3,471.94 plus \$147.01 in recording fees. (R. 555 and 656). On February 1, 2008, Sass Muni conveyed the Subject Parcel to Rebuild America, Inc. by Quitclaim Deed and Assignment, filed of record in the office of the Chancery Clerk for Hancock County, Mississippi, on February 6, 2008 at Book 2008, Page 3480. (R. 771-773).

On April 17, 2008, Rebuild America, Inc., the Plaintiff herein, filed the instant action to confirm its tax title to the Subject Parcel. (R. 1-23). On June 27, 2008, Cindy S. Favre and Scott M. Favre filed their Answer denying the allegations of Rebuild America's Complaint and affirmatively pleading that the notice and affidavit in conjunction with the tax sale were insufficient and the tax sale is void and should be set aside. (R. 28-32). On July 15, 2008, Scott M. Favre and Cindy S. Favre filed suit against Countrywide regarding this Subject Property and regarding many of the same facts in the United States District Court for the Southern District of Mississippi, Civil Action No. 1:08-cv-00304-RHW. Depositions of the Favres were taken in said action. (R. 706-757 [Cindy Favre] and R. 777-959 [Scott Favre and exhibits for both depositions]). The federal court action has been dismissed upon the settlement between the Favres and Countrywide.

On May 29, 2009, Scott M. Favre and Cindy S. Favre conveyed the Property to Countrywide Home Loans, Inc. by Quitclaim Deed which is filed of record in the office of the Chancery Clerk for Hancock County, Mississippi, on June 4, 2009, at Book 2009, Page 6900. (R. 774-776). On March 31, 2010, the Favres were dismissed from this case when the court entered its Agreed Order of Dismissal holding that "Scott M. Favre and Cindy S. Favre, have executed a Quitclaim Deed to Countrywide Home Loans, Inc., conveying all of their title and interest in the above described property to Countrywide and therefore, have no interest in continuing with this litigation." (R. 376-378, 377).

On June 18, 2010, the court entered its Agreed Order granting Countrywide and Bank of New York's motion for leave to file their Amended Answer and Affirmative Defenses and Counterclaim and Cross-claims to Remove Clouds and Confirm Title. (R. 379-381). Countrywide and Bank of New York filed their Amended Answer, Counterclaim and Cross-claims on June 24, 2010. (R. 382-473). Finally, Countrywide and the Bank of New York filed

the Motion for Summary Judgment and the Memorandum in Support on their Counter-Claim against Rebuild America on July 6, 2010 (R. 475-488 and 490-959). Summary Judgment was granted by the lower court on August 26, 2010. (R. 1004-1010). The Chancery Court determined the following:

...

19. The clerk sent two certified mail notices to Cindy Favre; one at a post office address and one to the 123 Harrison Court address. Both were returned undeliverable as addressed and unable to forward.

...

22. There is only one affidavit from the Chancery Clerk regarding his efforts to provide notice to Cindy Favre for the 2004 tax sale and her right of redemption.

23. There is no dispute that there is no return of any personal service on Cindy Favre for either the 2003 delinquency sale or the 2004 delinquency sale.

...

31. At no time did Scott and [Cindy] Favre receive actual notice of their right of redemption for either tax sale.

...

39. The Clerk failed to file the necessary second affidavit in both tax sales.

40. The language of the statute is mandatory, and therefore, the tax sales are void. Countrywide and Bank of New York have standing to raise this issue.

(R. 1007-1009).

SUMMARY OF ARGUMENT

In seeking reversal of the lower court, Rebuild America argues that the owner of the Subject Parcel, Cindy Favre, abandoned the property prior to the filing of this litigation. The pages of the Record cited in Rebuild America's brief do not support this contention. The record indicates that Cindy Favre no longer sought to keep the property on April 10, 2009, the date of her deposition. Her pleadings in this case assert her intent prior to that time was to retain the property. Rebuild America further argues that its inability to depose the former property owners justifies reversal of the case. This suit was filed by Rebuild America on April 17, 2008 and Cindy Favre was named a defendant. No deposition was ever noticed by Rebuild America of Cindy Favre. Cindy Favre was dismissed from this case by an Agreed Order dated March 29, 2010. No request was made by Rebuild America to depose Cindy Favre after the filing of the Motion for Summary Judgment on July 6, 2010. Rebuild America had ample opportunity to depose the property owners over at least a two year period.

Rebuild America argues that Countrywide and the Bank of New York do not have standing to contest the two tax sales. Both entities were named defendants by Rebuild America in its suit and both had an interest in the Subject Parcel as lien holders. After the litigation began, Countrywide became a successor owner of the property by virtue of a deed from Cindy Favre. Once Countywide obtained title to the property, it properly filed a counter-claim and motion for summary judgment to clear title to its property.

There is ample legal authority in Mississippi to illustrate that both prior tax sales involved in this case are void due to the actions or inactions of the Hancock County Chancery Clerk. The law requires strict construction of the statutes governing the tax sale process and the clerk failed to follow the procedures necessary to divest the property owner of title.

Rebuild America seeks a remand of the case in order to calculate the amount it contends that it is due as tax purchaser. This request is not a proper subject of this appeal. A motion was pending to conclude the matter in the proceedings below and the lower Court did not review this issue.

ARGUMENT

I. THE LOWER COURT WAS CORRECT IN GRANTING THE MOTION FOR SUMMARY JUDGMENT OF COUNTYWIDE AND THE BANK OF NEW YORK AS THERE ARE NO GENUINE ISSUES OF MATERIAL FACT CONCERNING THE VALIDITY OF THE TAX SALES AT ISSUE.

A. Standard of Review.

In the summary judgment context, the Court “examines all the evidentiary matters before it - admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If, in this view, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his or her favor.” *Lawrence v. Lawrence*, 956 So. 2d 251, 255-56 (¶11) (Miss. Ct. App. 2006) (citing *McMillan v. Rodriguez*, 823 So. 2d 1173, 1176-77 (¶ 9) (Miss. 2002)).

In reviewing the facts determined by the lower court in appeals concerning tax sales, the Mississippi Court of Appeals stated:

This Court maintains a limited review of a chancellor’s findings of fact. We will not reverse the factual findings of the chancellor when supported by substantial evidence unless the Court can say that the findings are manifestly wrong, clearly erroneous, or amount to an abuse of discretion. 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 the law.

Rebuild America, Inc. v. Milner, 7 So. 3d 972, 974 (¶ 6)(Miss. Ct. App. 2009) (citing *Morgan v. West*, 812 So. 2d 987, 990 (¶ 7) (Miss. 2002)).

The Mississippi Supreme Court and the Court of Appeals have both held that the statutory requirements of section 27-43-3 must be strictly construed in favor of landowners. *See Moore v. Marathon Asset Management, LLC*, 973 So. 2d 1017, 1020-21 (Miss. Ct. App. 2008) (citing *Brown v. Riley*, 580 So. 2d 1234, 1237 (Miss. 1991); *Norwood v. Moore*, 932 So. 2d 63, 66 (Miss. Ct. App. 2006); *Lawrence v. Rankin*, 870 So. 2d 673, 676 (Miss. Ct. App. 2004); and

Roach v. Goebel, 856 So. 2d 711, 716 (Miss. Ct. App. 2003). “Any deviation from the statutorily mandated procedure renders the sale void.” *Moore*, 973 So. 2d at 1021 (quoting *Roach*, 856 So. 2d at 716 (citing *Hart v. Cartoe*, 390 So. 2d 1001, 1003 (Miss. 1980))).

B. The Genuine Issues of Material Fact argued by Rebuild America in Seeking Reversal of the Case do not Relate to the Facts Relied Upon by the Lower Court in Declaring the Tax Sales Void.

Rebuild America argues that Cindy S. Favre “only answered” the Complaint and never sought to set aside the tax sale by counter-claim or join in Countrywide and Bank of New York’s summary judgment arguments. Appellant’s Brief at p. 13. This argument is puzzling. Mississippi case law states “An owner of land sold for taxes, which sale is void, may, if he so desires, redeem it from the sale, bring an action to cancel the sale, or await action by the purchaser at the sale or his vendees and then invoke the invalidity of the sale in bar of any title there-from.” *Lee v. Smith* 189 Miss. 636, 198 So. 296, 298 (Miss. 1940). The Record reveals that the Favres contested the allegations of Rebuild until they reached a settlement and were dismissed from the case. Prior to the suit, Scott Favre made repairs to the house after Hurricane Katrina (R. 735). Ms. Favre testified that she did not know about the tax sale issues until she was served with Rebuild America’s lawsuit. (R. 736). The record reflects that Scott and Cindy Favre timely filed their Answer and Affirmative Defenses on June 27, 2008, denying the allegations of Rebuild America’s Complaint and affirmatively pleading that the notice and affidavits were insufficient and the tax sales and subsequent deeds were void and should be set aside and requesting that title should be restored to Cindy S. Favre. (R. 28-32).

It is un-contested that the Favres last payment was made on August 15, 2005, but it is also uncontested that Hurricane Katrina destroyed the property on August 29, 2005. The record does not reflect that the Favres abandoned the property during the redemption periods for the two tax sales. As with many properties on the Gulf Coast during this time period, the Subject

Property was not habitable. Many people moved inland during this time and this relocation by the Favres does not prove abandonment. The Favres participated via counsel in the proceedings before the lower Court. One of their attorneys, Michael Moore, appeared at the hearing on Rebuild America's Motion for Summary Judgment. (*See* R. Volume 8 at p. 17). On July 6, 2010, when Countrywide and the Bank of New York filed the Motion for Summary Judgment (R. 490-499) and supporting Memorandum (R. 475-488), Scott and Cindy Favre were no longer defendants in the case by virtue of the transfer of their interest in the Subject Property on May 29, 2009, by Quitclaim Deed to Countrywide (R. 774-776). The Agreed Order of Dismissal of Mr. and Mrs. Favre (executed by Rebuild America) was entered on March 31, 2010. (R. 376-378).

Rebuild America also takes issue with the use of the depositions of Scott and Cindy Favre taken in the collateral federal court action because Rebuild America was unable to participate in those depositions. Appellant's Brief at p. 18. Rebuild America does not argue any procedural defect regarding the use of the depositions. Rather, it argues that it could have conducted its own examination of Scott and Cindy Favre and material facts could have arisen which should have precluded summary judgment. *Id.* It restates the arguments above that Cindy Favre may have abandoned the Subject Property and that she may have had actual knowledge of the first Chancery Clerk's Conveyance of the Subject Parcel. *Id.* Again, the Record does not support these assertions.

This suit was filed by Rebuild America on April 17, 2008 and Cindy Favre and her husband were named as defendants. No depositions were ever noticed by Rebuild America of Mr. and Mrs. Favre. The Favres were dismissed from this case by an Agreed Order on March 29, 2010. No request was made by Rebuild America to depose Mr. or Mrs. Favre after

Countrywide et al filed the Motion for Summary Judgment on July 6, 2010. Rebuild America had ample opportunity to depose the property owners over at least a two year period.

The basis of the Chancellor's ruling below centered upon the procedural deficiencies associated with the conduct of the Hancock County Chancery Clerk in connection with the two tax sales. The "material facts" that Rebuild America wishes to explore on remand will have no effect on the facts determined by the Chancellor below. Specifically, the Court determined that "As for the 2003 sale, there is one affidavit of the clerk concluding that the notice of the right of redemption was undeliverable. There is no second affidavit of a second search as required. The same is true for the 2004 sale." (R. 1009). The Court further found that "[t]here is no dispute that there is no return of any personal service on Cindy Favre for either the 2003 delinquency sale or the 2004 delinquency sale." (R. 1007-1009). The Summary Judgment cited the evidence that the Favres were residents of Hancock County, during the statutory redemption periods for both of the tax sales. (R. 1006-1008). These facts are undisputed and support the Court's decision to declare the two tax sales void.

II. COUNTRYWIDE AND THE BANK OF NEW YORK HAVE STANDING TO CONTEST THE TAX SALES.

Rebuild America notes that there is a distinction between the tax sale redemption notices provided to property owners under Mississippi Code Sections 27-43-1 and 27-43-3 and the tax sale redemption notices provided to lien holders under Mississippi Code Section 27-43-5. *See* Appellant's Brief at pp. 18-20. Specifically, Rebuild America argues that "an owner who was not provided the requisite notice may successfully set aside a Chancery Clerk's Conveyance, and be restored title and ownership of a property, a lienor who was not provided the requisite notice, retains only its lien upon the property." Appellant's Brief at p. 19 (citing MISS. CODE ANN. §27-43-11 and *SKL Investments, Inc. v. American General Finance, Inc.* 22 So. 3d 1247, 1250-51

(¶11) (Miss. Ct. App. 2009). Rebuild America contends that “it was error on the part of the lower court to grant Countrywide and The Bank of New York ‘standing’ to assert those arguments held by Cindy S. Favre, regarding an alleged lack of notice provided to her by the Chancery Clerk.” Appellant’s Brief at p. 20.

First and foremost, as stated by the Chancellor in his Summary Judgment, “[t]here is no dispute that there is no return of any personal service on Cindy Favre for either the 2003 delinquency sale or the 2004 delinquency sale.” (R. 1008). There is no issue of fact Cindy Favre was not personally served with notice of either of the subject tax sales. Secondly, the Chancellor held in his Summary Judgment that the standing issue raised by Rebuild America is addressed by *Milner* and *Moore*. (R. 1009).

In *Milner*, Rebuild America obtained a quitclaim deed from the property owners for their interest in the property at issue one day after the complaint was filed and argued that “it is necessary, in order to have standing to sue to remove a tax deed as a cloud on title, that the plaintiff prove title in himself, or such interest as will warrant the action.” 7 So. 3d 972, 975 (¶11) (citing *Osborn v. Harrison*, 447 So. 2d 122, 123 (Miss. 1984)). This Court stated that “the issue of standing is determined at the commencement of the lawsuit.” *Id.* at (¶12) (quoting *Delta Health Group, Inc. v. Estate of Pope*, 995 So. 2d 123, 126(¶13) (Miss. 2008)). With that proposition, this Court held

Even if, as Rebuild America argues, the quitclaim deed relinquished the Milners’ interest in the property, the deed was not signed by the Milners until after the filing of the complaint. The lawsuit had already been commenced; therefore, we need not address the effect, if any, that the quitclaim deed had on the Milners’ standing in this matter. Accordingly, this issue has no merit.

Id. at (¶12).

Rebuild America named both Countrywide and Bank of New York as defendants in this case. Both entities held an interest in the subject property. Still, the instant matter is factually similar

to *Milner* because Cindy Favre, as the owner of the Subject Property, had a right to contest the tax sale on the basis that she did not receive notice of the expiration of the redemption period. When Rebuild America filed its Complaint on April 17, 2008, Cindy Favre exercised her right to contest the sales in her Answer. (R. 28-32). Thereafter, Cindy Favre quitclaimed her interest and rights in the Subject Property to Countrywide on May 29, 2009. (R. 774-776). Countrywide took that interest in the Subject Property and sought to amend its Answer to add affirmative defenses (as an owner) regarding the improprieties in the tax sales and to add a counter-claim to set aside the sales and quiet title in itself. (R. 350-375). Rebuild America agreed with the requested relief and on June 18, 2010, the Chancellor entered the Agreed Order granting Countrywide and Bank of New York's motion for leave to file their Amended Answer and Affirmative Defenses and Counterclaim and Cross-claims to Remove Clouds and Confirm Title. (R. 379-381). Countrywide and Bank of New York filed their Amended Answer, Counterclaim and Cross-claims on June 24, 2010. (R. 382-473). Finally, Countrywide and the Bank of New York filed their Motion for Summary Judgment which was granted by the Chancellor and spurred the instant appeal.

In *Moore*, the Court of Appeals stated that "Mississippi has very liberal standing requirements." *Moore*, 973 So. 2d 1017, 1021 (¶ 17) (Miss. Ct. App. 2008) (citing *Dunn v. Miss. State Dep't of Health*, 708 So. 2d 67, 70 (¶ 9) (Miss. 1998)). "In Mississippi, parties have standing to sue 'when they assert a colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the defendant, or as otherwise provided by law.'" *Id.* (quoting *State v. Quitman County*, 807 So. 2d 401, 405 (¶ 11) (Miss. 2001)). There, *Moore* was not the property owner entitled to notice of the redemption period, but rather purchased the property at foreclosure prior to the expiration of the redemption period. *Id.* at (¶ 21). "As a purchaser at a foreclosure sale, *Moore* stepped into the shoes of the mortgagee . . .

[t]his gave Moore an interest in the property because, upon purchasing it at foreclosure, he took title to the property. *Id.* at (¶ 19). Moore (1) had a colorable interest in the property and (2) was adversely affected by the tax purchaser's claim to the property, which gave him standing to assert a claim. *Id.* at (¶ 20).

As stated above, *Moore* directly applies to the instant appeal by virtue of Cindy Favre's quitclaim deed to Countrywide. Additionally, Countrywide and the Bank of New York have standing on their own to contest the tax sales because as mortgagees: (1) they have a colorable interest in the Subject Property and (2) they experienced an adverse effect in that their mortgage loans to Cindy Favre were purportedly wiped out by the tax sales.

III. MISSISSIPPI STATUTES REGARDING THE PROCEDURE FOR TAX SALES MUST BE STRICTLY CONSTRUED AND REQUIRE THE CHANCERY CLERK TO EXECUTE TWO AFFIDAVITS DOCUMENTING EFFORTS WHEN PROPERTY OWNERS CAN NOT BE LOCATED.

A. Two Affidavits are Required.

Rebuild America argues that in the cases of *Lawrence*, 870 So. 2d 673, 676 (¶ 13), *Moore*, 973 So. 2d at 1021 (¶ 15), and *Norwood v. Moore*, 932 So. 2d 63, 66 (¶ 7) (Miss. Ct. App. 2006) the Court of Appeals' interpretation of the relevant statute is erroneous. Appellant's Brief at p. 22. Rebuild America contends that two (2) affidavits are not required by the Chancery Clerk to satisfy the statutory procedures of Section 27-43-3, thus the single affidavit provided by the Chancery Clerk in each of the tax sales was sufficient. *Id.* at p. 23. Rebuild America also contends that the interpretation of two (2) affidavits conflicts with this Court's opinions in *Hart v. Catoe*, 390 So. 2d 1001 (Miss. 1980), *Reed v. Florimonte*, 987 So. 2d 967 (Miss. 2008) and *Rush v. Wallace Rentals, LLC*, 837 So. 2d 191 (Miss. 2003) and the Court of Appeals decision in *Alexander v. Gross*, 996 So. 2d 822 (Miss. Ct. App. 2008) as those cases make no mention of a second affidavit.

The four cases cited by Rebuild America do not address the need for two affidavits. In *Hart v. Catoe*, the Supreme Court examined Section 27-43-3 and held that “it is undisputed that the chancery clerk failed to file the supporting affidavits required by the statute.” 390 So. 2d at 1002. Rebuild America’s cite to this case points to an *American Jurisprudence* quote used within the case itself. See Appellant’s Brief at pp. 22-23.

In *Reed v. Florimonte*, the issue examined by the Supreme Court was the incomplete affidavit of the deputy clerk outlining her attempts to locate the property owner. In holding that the Forrest County Chancery Clerk’s office did not comply with the statute’s notice requirements the Court stated the “affidavit had blanks to check indicating a search had occurred in the ‘Phone Directory,’ with the ‘City Tax Collector,’ and in the ‘City Tax Directory.’ Also, there was a blank to list ‘Other’ sources used. On the face of the affidavit, Styron did not check any blanks and did not note any sources of her search.” 987 So. 2d at 974 (¶ 21). The Court focused its inquiry on the fact that nothing was done by the deputy clerk to find the property owner. *Id.* at (¶ 20). In this case, there is some evidence regarding efforts which were made to locate Cindy Favre, but those efforts were not sufficient. The clerk did not comply with the statutory procedure and conduct sufficient inquiry which should have been evidenced by the completion of two separate affidavits.

In *Rush v. Wallace Rentals*, the Court focused on the “egregiousness” of the owner’s actions. 837 So. 2d at 199 (¶ 24). There, the listed property owner was not the property owner, but instead allowed her first cousin to purchase the property in her name and intentionally placed her daughter’s address on the deed as her correct mailing address. *Id.* The Court specifically noted their opinion was “fact-driven” and “based on the facts and circumstances peculiar to this particular case” *Id.* at (¶¶ 25-26). As such, the *Rush* opinion is inapplicable regarding the issue of the statute requiring two (2) clerk’s affidavits.

Finally, in *Alexander v. Gross*, the Court of Appeals focused on the fact that the Madison County Chancery Clerk did not conduct a diligent search as required by statute because they did not send notice to the owner's post office box listed on tax receipts and deeds filed of record. 996 So. 2d at 824-25(¶¶ 9-11). This case is also inapplicable to the two (2) affidavit issue at hand.

In this case, neither sale for the delinquent ad valorem taxes complied with Miss. Code Ann. § 27-43-3, which states:

The clerk shall issue the notice to the sheriff of the county of the reputed owner's residence, if he be a resident of the State of Mississippi, and the sheriff shall be required to serve personal notice as summons issued from the courts are served, and make his return to the chancery clerk issuing same. The clerk shall also mail a copy of same to the reputed owner at his usual street address, if same can be ascertained after diligent search and inquiry, or to his post office address if only that can be ascertained, and he shall note such action on the tax sales record. The clerk shall also be required to publish the name and address of the reputed owner of the property and the legal description of such property in a public newspaper of the county in which the land is located, or if no newspaper is published as such, then in a newspaper having a general circulation in such county. Such publication shall be made at least forty-five (45) days prior to the expiration of the redemption period.

If said reputed owner is a nonresident of the State of Mississippi, then the clerk shall mail a copy of said notice thereto in the same manner as hereinabove set out for notice to a resident of the State of Mississippi, except that personal notice served by the sheriff shall not be required.

Notice by mail shall be by registered or certified mail. In the event the notice by mail is returned undelivered and the personal notice as hereinabove required to be served by the sheriff is returned not found, then the clerk shall make further search and inquiry to ascertain the reputed owner's street and post office address. If the reputed owner's street or post office address is ascertained after the additional search and inquiry, the clerk shall again issue notice as hereinabove set out. If personal notice is again issued and it is again returned not found and if notice by mail is again returned undelivered, then the clerk shall file an affidavit to that effect and shall specify therein the acts of search and inquiry made by him in an effort to ascertain the reputed owner's street and post office address and said affidavit shall be retained as a permanent record in the office of the clerk and such action shall be noted on the tax sales record. If the clerk is still unable to ascertain the reputed owner's street or post office address after making search and inquiry for the second time, then it shall not be necessary to issue any additional notice

but the clerk shall file an affidavit specifying therein the acts of search and inquiry made by him in an effort to ascertain the reputed owner's street and post office address and said affidavit shall be retained as a permanent record in the office of the clerk and such action shall be noted on the tax sale record.

Should the clerk inadvertently fail to send notice as prescribed in this section, then such sale shall be void and the clerk shall not be liable to the purchaser or owner upon refund of all purchase money paid.

MISS. CODE ANN. § 27-43-3 (2007)(emphasis added).

B. The 2003 Sale is Void.

The sale of the 2003 taxes for the Subject Parcel is void due to insufficient notice of the expiration of redemption period given by the Hancock County Chancery Clerk. The copy of the tax sale file obtained from the Hancock County Chancery Clerk of the sale of the delinquent 2003 real estate taxes depicts deviations from the statutorily mandated procedure. The copy of this file contains only one (1) affidavit of the Chancery Clerk regarding the attempts to deliver the notice of the expiration of the right of redemption to Cindy S. Favre. (R. 687-704). The file illustrates the acts of search and inquiry made by the Clerk to ascertain Cindy S. Favre's address and concludes by stating that the notice was undeliverable. According to Miss. Code Ann. § 27-43-3, the file should contain two (2) affidavits outlining the due diligence of the clerk. Once the mail is returned undeliverable, the clerks duties do not end. *See Lawrence*, 870 So. 2d at 676 (¶ 13), *Moore*, 973 So. 2d at 1021 (¶ 15), *Norwood*, 932 So. at 66 (¶ 7) and *Milner*, 7 So. 3d at 1205 (¶ 10) ("not one, but two affidavits, documenting the two distinct searches and inquiries that are required by the statute, are required where the required service has failed."). The Hancock County Chancery Clerk testified that there is only one such affidavit for the 2003 tax sale in this matter. (R. 600).

In addition to the affidavit issue, the copy of the tax sale file for the delinquent 2003 taxes does not contain any reference to personal service upon Cindy S. Favre of the notice of the expiration of the redemption period. (R. 687-704). Mr. Kellar testified that Cindy Favre was not served personally for either tax sale involved in this case. (R. 595-596) As an adult resident citizen of Mississippi, Cindy S. Favre, was required to be served with personal service. The Mississippi Supreme Court has held that a Mississippi resident must be served by all three methods of service in that “[s]ection 27-42-3 requires redemption notice be given by personal service, by mail, and by publication in an appropriate newspaper.” *Viking Investments, LLC v. Addison Body Shop, Inc.*, 931 So. 2d 679, 681 (¶¶ 5-6) (Miss. Ct. App. 2006) (quoting *DeWeese Nelson Realty, Inc. v. Equity Services Co.*, 502 So. 2d 310, 312 (Miss. 1986)). *See also, Milner*, 7 So. 3d at 1204 (¶ 6) (“in order for a redemption notice to be complete and in accordance with statute, all three requirements must be met.”). The failure to personally serve Cindy Favre pursuant to Miss. Code Ann. § 27-43-3 alone is enough to void the tax sale. *See Milner*, 7 So. 3d at 975-77 (¶¶ 13-19). Rebuild America’s Complaint alleges that Cindy S. Favre is believed to be an adult resident citizen of Hancock County, Mississippi and depicts the address at Nicola Road in Hancock County. This residence allegation is admitted in Cindy S. Favre’s Answer filed with the Court on June 27, 2008. By virtue of the failure of the Chancery Clerk’s office to comply with the Mississippi statutes related to the property owner’s right of redemption, the tax sale for the 2003 ad valorem taxes for the subject Property is void.

C. The 2004 Sale is Void.

The copy of the tax sale file obtained from the Hancock County Chancery Clerk for the delinquent 2004 real estate taxes depicts deviations from the statutorily mandated procedure. (R. 758-69) As discussed above, Cindy S. Favre was an adult resident citizen of Mississippi at the time the notice of the right of redemption was issued, and she was required to be served by

publication, certified mail **and** personal service regarding the expiration of the redemption period. *See Viking Investments, LLC*, 931 So. 2d at 681 (§§ 5-6). *See also, Milner*, 7 So. 3d at 1204 (§ 6) (“in order for a redemption notice to be complete and in accordance with statute, all three requirements must be met.”). The Hancock County Chancery Clerk testified that that there was no personal service on Cindy Favre. (R. 595-596).

In fact, the BellSouth *Real Yellow Pages* for the Mississippi Gulf Coast for November 2006-07 listed “Farve - Cindy 5161 Nicola Road, Kiln 39556 467-7256.” (R. 661-666). Mr. Kellar, acknowledged that the name “Favre” is commonly spelled both ways. (R. 532-533 and 564). The right of redemption period expired for the delinquent 2004 ad valorem taxes in the months preceding October 31, 2007. From a review of the second tax sale file, it appears that the Deputy Clerk again failed to conduct a diligent search as required by Miss. Code Ann. § 27-43-3. Cindy Favre’s address and telephone number were readily available in the local telephone directory, but the Chancery Clerk never sent notice to Cindy Favre’s address and never contacted her by telephone. This lack of search and notice, again, renders this tax sale void. *See Alexander*, 996 So. 2d at 824-25 (§§ 9-11).

The copy of the 2004 tax sale file contains only one (1) affidavit of the Chancery Clerk stating that the notice of right of redemption sent to Cindy S. Favre was returned undeliverable and specifying the acts of search and inquiry which were made to ascertain the Cindy S. Favre’s address. (R. 758-69, 556-559 and 600). According to Miss. Code Ann. § 27-43-3, the file should contain two (2) affidavits of the clerk. *See Lawrence*, 870 So. 2d at 676 (§ 13), *Moore*, 973 So. 2d at 1021 (§ 15), *Norwood*, 932 So. at 66 (§ 7) and *Milner*, 7 So. 3d at 1205 (§ 10).

This particular affidavit is of particular importance because it states that “I certify that I have made a diligent effort to locate this above name person...in the following manner **Phone**

Directories.” (R. 761). This singular affidavit can not be considered a diligent search by the Deputy Clerks. *See, generally, Reed v. Florimonte*, 987 So. 2d 967 (Miss. 2008).

The Chancery Clerk had other resources available to him which may have been of use in contacting Mr. and Mrs. Favre regarding their rights to redeem the property. However, he testified that he did not consider using the voting rolls of Hancock County nor did he use the car tag records available to Hancock County, Mississippi. (R. 572 and 597). He also did not review or contact the individuals referenced on the vesting deed to Cindy Favre, who may have had knowledge of her whereabouts. (R. 566-570). Mississippi law places a burden on local chancery clerks to be diligent in their search to notify residents of their rights to redeem property from tax sales. In this case, the Clerk's office did not use the means at its disposal to locate Mr. and Mrs. Favre in order to provide them with adequate notice of this important statutory right.

D. The Affidavits are Defective.

The affidavits contained in both the 2003 and 2004 tax sales files are defective on their faces. Only one affidavit regarding the Chancery Clerk's diligent search inquiry was executed in connection with each tax sale for 2003 and 2004 taxes owed by Mrs. Favre. (R. 600, 687-704, and 758-769. Affidavits - 691 and 761). Neither of the documents are affidavits at all, but simply documents entitled "Affidavit" signed by deputy clerks for Hancock County Chancery Clerk, Timothy Keller. (R. 691 and 761). The Mississippi Court of Appeals recently addressed this issue in *Johnson v. Ferguson*, 58 So. 3d 711 (Miss. Ct. App. 2011). There, the Court of Appeals examined an affidavit by a DeSoto County deputy clerk which stated

Affidavit

In accordance with Section 27-43-3 of the Mississippi Code of 1972, I have issued and attempted to serve the notice required upon the above named reputed owner in the above described manner in an effort to ascertain the reputed owner's street and post office address, and after diligent search and inquiry, I have tried to locate the person named above, This the _____ day of _____, 20 ____.

Id. at (¶ 3).

This affidavit was signed by the deputy clerk in the space allotted, but the form was neither dated nor notarized. *Id.* The Court of Appeals held that the document purporting to be an “affidavit” was merely a piece of paper with the word “affidavit” as its title and thus insufficient to meet the statutory requirements of section 27-43-3. *Id.* at (¶ 9) (citing *Thomas v. Greenwood Leflore Hospital*, 970 So. 2d 273, 277 (¶ 19) (Miss. Ct. App. 2007) and *Rebuild America, Inc. v. McGee*, 49 So. 3d 156, 159 (¶¶ 7-8) (Miss. Ct. App. 2010)).

Following the holding in *Johnson*, the affidavits in the 2003 and 2004 tax sales are insufficient to meet the statutory requirements of Section 27-43-3. Neither of the Affidavits are sworn, nor, for that matter, contain any type of acknowledgement at all. Per the decision in *Johnson*, the subject tax sales are void.

IV. REQUEST FOR REFUND OF AMOUNTS PAID BY REBUILD AMERICA'S PREDECESSOR IN TITLE WAS NOT ADDRESSED BY THE LOWER COURT PRIOR TO THE APPEAL.

Finally, Rebuild America requests remand “so that the chancery court may determine the appropriate statutory redemption amount owed to Rebuild America in accordance with § 27-45-3, § 27-45-27, *Lawrence v. Rankin* and *Rebuild America, Inc. v. McGee*.” Appellant’s Brief at p. 23. Rebuild America requests remand to calculate all amounts owed to Rebuild America, “inclusive of statutory penalty and interest at the rate of one and on-half percent (1-1/2%) per month, and a designation of a date certain by which such amount is to be paid to Rebuild

America” or the “subject property shall forfeit to Rebuild America.” Appellant’s Brief at pp. 24-25.

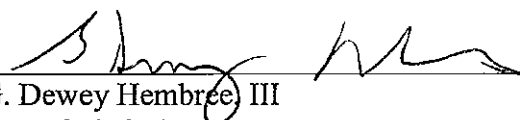
Since the matter was not presented, the lower Court did not address the issue prior to the appeal and there are no facts or argument or even a decision to review regarding any refund due to or from any of the parties to the litigation.

CONCLUSION

The Summary Judgment granted to Countrywide Home Loans, Inc. and The Bank of New York voiding the two tax sales involved in this case should be affirmed by this Court. The Chancery Clerk failed to give proper notice of the right to redeem the Subject Parcel from the prior tax sales to the property owner as required by law. This Court has held that the statutes governing this process should be strictly construed. The tax sales in question were properly determined to be void.

Respectfully submitted,

**COUNTRYWIDE HOME LOANS, INC. and
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