

**IN THE SUPREME COURT OF MISSISSIPPI**

**CASE NO. 2010-CA-01597**

**REBUILD AMERICA, INC.**

**APPELLANT**

**v.**

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

**APPELLEES**

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***APPELLANT'S BRIEF***

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

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***ORAL ARGUMENT REQUESTED***

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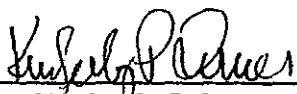

**CERTIFICATE OF INTERESTED PERSONS**

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

1. Rebuild America, Inc., Appellant;
2. Countrywide Home Loans, Inc., Appellee;
3. The Bank of New York, Appellee;
4. Kimberly P. Turner, PLLC, inclusive of attorney Kimberly P. Turner, Attorney of Record for Appellant, Rebuild America, Inc.; and
5. McGlinchey Stafford, inclusive of attorney G. Dewey Hembree, III, Attorney of Record for Appellees, Countrywide Home Loans, Inc. and The Bank of New York.

Respectfully submitted,  
REBUILD AMERICA, INC.

By and Through Counsel:  
KIMBERLY P. TURNER, PLLC

By:   
Kimberly P. Turner (MBN )

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### **STATEMENT OF ISSUES**

- I. GENUINE ISSUES OF MATERIAL FACT PRECLUDED THE LOWER COURT'S GRANTING OF SUMMARY JUDGMENT IN FAVOR OF COUNTRYWIDE AND THE BANK OF NEW YORK.**
- II. NEITHER COUNTRYWIDE NOR THE BANK OF NEW YORK ARE ENTITLED TO RAISE AND MAINTAIN THE ARGUMENTS RIGHTFULLY HELD BY CINDY S. FAVRE.**
- III. THE ABSENCE OF A SECOND AFFIDAVIT WAS NOT DISPOSITIVE OF THE ACTION.**
- IV. REBUILD AMERICA IS ENTITLED TO A DETERMINATION OF A REDEMPTION AMOUNT, COMPRISED OF ALL OUTSTANDING TAXES PAID BY REBUILD AMERICA, IN ADDITION TO STATUTORY PENALTY AND INTEREST THEREON.**

### **STATEMENT OF THE CASE**

This Appeal is taken from Summary Judgment entered by the Chancery Court of Hancock County, Mississippi on August 26, 2010, pursuant to which the Honorable Carter Bise voided, set aside and held for naught Chancery Clerk's Conveyance to Wolf Run, LLC, dated April 30, 2007; Chancery Clerk's Conveyance to Wachovia N.A., as custodian for Sass Muni V, LLC, dated January 24, 2008; and Quitclaim Deed and Assignment from Wachovia N.A., as custodian for Sass Muni V, LLC (hereinafter "Sass Muni V") to Appellant herein, Rebuild America, Inc., dated February 1, 2008. (R Vol. 8 at 01010).

On April 17, 2008, Rebuild America filed a Complaint to Quiet and Confirm Tax Title, pursuant to which Rebuild America sought confirmation of its title acquired by Quitclaim Deed and Assignment from Sass Muni V, in and to that real property described as "part of Lot 41, 1<sup>st</sup> Ward" situated in Hancock County, Mississippi, bearing parcel no. 144M-0-19-195.000 (hereinafter "the Property"). (R. Vol. 1 at 00001 -00023).

Defendants Countrywide Home Loans, Inc. and The Bank of New York filed an

Answer on June 20, 2008 (R. Vol. 1 at 00024 - 00027); while Defendants Cindy S. Favre and Scott M. Favre filed their Answer on June 27, 2008. (R. Vol. 1 00028 -00032). Such that none of the remaining named defendants filed an answer or responsive pleading to the Complaint to Quiet and Confirm Tax Title, Rebuild America filed its Motion for Default Judgment<sup>1</sup>, with supporting exhibits attached thereto, on July 2, 2008. (R. Vol. 1 at 00033 - 00093), with Judgment by Default entered by the Court on November 12, 2008 as against Wolf Run, LLC, Capital One Bank, f/k/a Hibernia National Bank, Lyndon Property Insurance Company, CTC Real Estate Services and the Unknown Heirs of Mrs. O. D. Knox. (R. Vol 3 at 00335 -00336).

On August 29, 2008, Rebuild America filed its Motion for Summary Judgment, with supporting memorandum and documentation attached as exhibits thereto. (R. Vol. 1 at 00107 - 00150, Vol. 2 at 00151 - 00233), to which Defendants, Countrywide Home Loans, Inc. and The Bank of New York filed a Response, likewise with supporting memorandum and documentation attached as exhibits thereto. (R. Vol. 2 at 00236 - 00300, Vol. 3 at 00301 - 00332). Subsequent to a hearing held upon the Motion for Summary Judgment of Rebuild America on January 22, 2009, the Court denied the same by Order entered February 19, 2009. (R. Vol. 3 at 00337 - 00340).

By virtue of the settlement of a simultaneous proceeding pending before the United

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<sup>1</sup> On August 21, 2008, the State of Mississippi and Cono Caranna, as District Attorney, filed their Answer to the Complaint, asserting no claim nor interest in and to the Property, and providing consent to a hearing upon Plaintiff's prayer for relief at any time, without further notice to said defendants. (R. Vol. 1 at 00105 - 00106).

Though filing no Answer or responsive pleading to the Complaint, Hancock County entered into an Agreed Order with Plaintiff, Rebuild America, in which Hancock County asserted no interest or claim in the Property and consented to a hearing upon the requested relief, at any time, without further notice to said defendant, as entered by the Court on November 6, 2008. (R. Vol. 3 at 00333 - 00334).

States District Court for the Southern District of Mississippi, initiated by Scott Favre and Cindy Favre against Countrywide Home Loans, Inc., Scott M. Favre and Cindy S. Favre conveyed all of their title and interest in the Property to Countrywide Home Loans, Inc. by Quitclaim Deed, filed in the land records of the Hancock County Chancery Clerk on Jun 4, 2009 in Deed Book 2009 at Page 6900. (R. Vol. 3 at 000347). Thus, by Motion to Dismiss Certain Defendants and Agreed Order of Dismissal, Scott M. Favre and Cindy S. Favre were dismissed from the lower court action. (R. Vol. 3 at 00346 - 00349, 00376 - 00378).

Countrywide Home Loans, Inc. and The Bank of New York filed an Amended Answer with Affirmative Defenses, Counterclaim and Cross-Claim to Remove Clouds and Confirm Title<sup>2</sup>, with permission as granted by Agreed Order. (R. Vol. 3 at 00379 - 00450, Vol. 4 at 00451 - 00474). On July 6, 2010, Countrywide Home Loans, Inc. and The Bank of New York filed their Motion for Summary Judgment, with supporting memorandum and documentation attached as exhibits thereto (R. Vol. 4 at 00475 - 00600, Vol. 5 at 00601 - 00750, Vol. 6 at 00751 - 00900, Vol. 7 at 00901 - 00959), to which Rebuild America filed its Response in Opposition to said Motion, with supporting memorandum and documentation attached as exhibits thereto. (R. Vol. 7 at 00963 - 00987). Subsequent to a hearing held

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<sup>2</sup> The State of Mississippi and Cono Caranna as District Attorney filed their Answer to the Counterclaim and Cross-Claims of Countrywide Home Loans, Inc. and The Bank of New York on July 21, 2010, against asserting no interest or claim in the Property and consenting to a hearing upon the relief requested at any time, without further notice to said counter defendants (R. Vol. 7 at 00960 - 00961).

Though filing no Answer or other responsive pleading to the Counterclaim and Cross-Claims of Countrywide Home Loans, Inc. and The Bank of New York, Hancock County entered into an Agreed Order with said Counter Plaintiffs, asserting no interest or claim in the Property and consenting to a hearing upon the relief requested at any time, without further notice to said counter defendant, entered by the Court on September 8, 2010. (R. Vol. 7 at 01011 - 01012).



upon the Motion for Summary Judgment of Rebuild America on July 29, 2010<sup>3</sup>, the Court granted the relief requested by Countrywide Home Loans, Inc. and The Bank of New York by entry of Summary Judgment on August 26, 2010. (R. Vol. 7 at 01006 - 01010).

Rebuild America timely filed its Notice of Appeal from that Summary Judgment on September 23, 2010 (R. Vol. 7 at 01022 - 01023).

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<sup>3</sup> At the time of filing the Motion for Summary Judgment and hearing held thereon, the trial of this case was scheduled to begin on August 20, 2010 (R. Vol. 8 at p. 33).

### **STATEMENT OF FACTS**

This case arose from two (2) consecutive sales of real property located at 123 Harrison Court in Bay St. Louis, Mississippi for delinquent Hancock County ad valorem taxes for the years 2003 and 2004, each resulting in a conveyance by the Chancery Clerk subsequent to expiration of the applicable redemption periods.

During the years 2003 and 2004, the Property was owned by Cindy S. Favre by virtue of Warranty Deed from her husband, Scott M. Favre, dated February 27, 2002 and filed in the land records of the Chancery Clerk of Hancock County, Mississippi in Book BB241 at Page 114. (R. Vol. 4 at 00502 - 00503). The Property was also subject to two (2) liens of record, specifically that Deed of Trust executed by Cindy S. Favre in favor of Countrywide Home Loans, Inc. (hereinafter "Countrywide"), dated April 18, 2003 and filed in the land records of the aforesaid office in Book 756 at Page 668, as assigned to Bank of New York by Corporation Assignment of Deed of Trust dated July 23, 2003 and filed in the land records of the aforesaid office in Book 852 at Page 626; and that second Deed of Trust executed by Cindy S. Favre in favor of Countrywide, dated September 23, 2003 and filed in the land records of the aforesaid office in Book 793 at Page 39. (R. Vol. 4 at 00504 - 00523).

On August 30, 2004, the Property was sold to Wolf Run, LLC, a Mississippi limited liability company, for outstanding and delinquent taxes owed for the year 2003. (R. Vol. 7 at 00933). Prior to expiration of the applicable redemption period, Lienor's Notice of Forfeiture was issued by the Chancery Clerk, mailed to Countrywide via certified mail, and received on April 10, 2006 as evidenced by return receipt. (R. Vol. 7 at 00937, 00942). Similarly, Lienor's Notice of Forfeiture was issued by the Chancery Clerk, mailed to The Bank of New York via certified mail, and received on April 10, 2006 as evidenced by return

receipt. (R. Vol. 7 at 00936, 00940).

On March 15, 2006, Owner's Notice of Forfeiture was issued by the Chancery Clerk and mailed, via certified mail, return receipt requested, to Cindy S. Favre at Post Office Box 3720, Bay St. Louis, Mississippi 39520, said address identified as both Grantor's Address and Grantee's Address on the Warranty Deed by which title was conveyed from Scott M. Favre to Cindy S. Favre. (R. Vol. 4 at 00502 - 00503, Vol. 7 at 00932, 00944 - 00945). By return of this Notice to the Chancery Clerk as "undeliverable as addressed", diligent search and inquiry ensued to locate an alternate post office and/or street address for Cindy S. Favre, resulting in a second Notice of Forfeiture mailed, via certified mail, return receipt requested to 419 Main Street, Bay St. Louis, Mississippi 39520. (R. Vol. 7 at 00946). This second attempt was likewise returned to the Chancery Clerk, marked as "NMR". Unable to ascertain an alternate post office or street address for Cindy S. Favre, Deputy Chancery Clerk Gloria Jordan executed her Affidavit attesting to her diligent efforts made to locate Ms. Favre, through consultation of phone directories, land records, tax rolls and other means<sup>4</sup>. (R. Vol. 7 at 00934). With no redemption made of the Property, Chancery Clerk's

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<sup>4</sup> As the Rule 30(b)(6) designee of Defendant Hancock County, Mississippi Chancery Clerk Timothy A. Kellar testified, with regard to the degree of diligence exercised in seeking alternate post office and street addresses for property owners, that

we actually will go well beyond what the law requires us to do. If we send the certified mail to the property owner and it comes back undelivered, our next step is to go to the - we'll go to the phone books, we'll go to Google search, we'll go to those means to try to find the latest, greatest address on these folks. If we can find anything that matches that person, whether it's the middle initial with that name, whatever it may be, we'll send a certified mailing to them. A lot of times it comes back not the right person, but we've tried that. We actually will then go to the former owners of the property, whoever sold it to them, making them aware because so many times there's some kind of owner finance that's out there that may not be recorded with us. So we'll go to former owners in these cases notifying them that the property is getting ready to be lost for taxes. We go to the mortgage companies. So we go as far as we can go with it before we finally give up. So we're at least three or four steps into certified mailing

Conveyance was delivered to Wolf Run, LLC on April 30, 2007, and filed in the land records of the aforesaid office on May 1, 2007 in Book 2007 at Page 9252. (R. Vol. 7 at 00933).

On October 31, 2005, the Property was sold to Wachovia as custodian for Sass Muni V, for outstanding and delinquent taxes owed for the year 2004. (R. Vol. 7 at 00950). Prior to expiration of the applicable redemption period, Owner's Notice of Forfeiture was mailed, via certified mail, return receipt requested, to Wolf Run, LLC, the previous owner of record of the Property by virtue of the previous year's Chancery Clerk's Conveyance, at Post Office Box 166, Pass Christian, Mississippi. (R. Vol. 7 at 00957). By return of this Notice to the Chancery Clerk as "unclaimed", diligent search and inquiry was undertaken to locate an alternate post office and/or street address for Wolf Run, LLC, which resulted in a second Notice of Forfeiture being mailed, via certified mail, and received on July 28, 2007 as evidenced by return receipt. (R. Vol. 7 at 00953, 00957). Wolf Run, LLC was personally served with Notice of Forfeiture by Hancock County Deputy Sheriff on September 26, 2007. (R. Vol. 4 at 00543, Vol. 5 at 00644).

Though unnecessary by virtue of the previous year's Chancery Clerk's Conveyance to Wolf Run, LLC, a Lienor's Notice of Forfeiture was once again issued by the Chancery Clerk, mailed to Countrywide via certified mail, and received on June 4, 2007 as evidenced by return receipt. (R. Vol. 5 at 00647, Vol. 7 at 00954). Similarly, Lienor's Notice of Forfeiture was issued by the Chancery Clerk, mailed to The Bank of New York via certified mail, and received on June 4, 2007 as evidenced by return receipt. (R. Vol. 5 at 00646, Vol. 7 at 00953).

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before we actually give up that they're not going to redeem it or we don't have any other source to go after to get the certified mailing to them.  
(R. Vol. 4 at 00541).

On April 16, 2007, a second Owner's Notice of Forfeiture was issued by the Chancery Clerk and mailed, via certified mail, return receipt requested, to Cindy S. Favre at Post Office Box 3720, Bay St. Louis, Mississippi 39520. (R. Vol. 7 at 00952, 00959). By return of this Notice to the Chancery Clerk as "not undeliverable as addressed", diligent search and inquiry ensued to locate an alternate post office and/or street address for Cindy S. Favre, resulting in a second Notice of Forfeiture mailed, via certified mail, return receipt requested to 123 Harrison Court, Bay St. Louis, Mississippi 39520. (R. Vol. 7 at 00958). This second attempt also was returned to the Chancery Clerk as "not deliverable as addressed". (R. Vol. 7 at 00958). Unable to ascertain an alternate post office or street address for Cindy S. Favre, Deputy Chancery Clerk Gloria Jordan executed her Affidavit attesting to her diligent efforts made to locate Ms. Favre, through consultation of phone directories, land records, tax rolls and other means<sup>5</sup>. (R. Vol. 7 at 00951).

With no redemption made of the Property, Chancery Clerk's Conveyance was

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<sup>5</sup> As the Rule 30(b)(6) designee of Defendant Hancock County, Mississippi Chancery Clerk Timothy A. Kellar testified, with regard to the degree of diligence exercised in seeking alternate post office and street addresses for property owners, that

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(R. Vol. 4 at 00541).

delivered to Wachovia, as Custodian for Sass Muni V, on January 24, 2008, and filed in the land records of the aforesaid office in Book 2008 at Page 2451. (R. Vol. 7 at 00950).

Rebuild America acquired title to the Property from Wachovia, as Custodian for Sass Muni V, by virtue of Quitclaim Deed and Assignment dated February 1, 2008 and filed in the land records of the Chancery Clerk of Hancock County on February 6, 2008 in Book 2008 at Page 3480. (R. Vol. 1 at 00010).

Subsequent to the filing of the lower court action to quiet and confirm tax title by Rebuild America, Scott Favre and Cindy Favre filed their Complaint against Countrywide in the United States District Court for the Southern District of Mississippi, Southern Division (hereinafter "the Federal Action"). (R. Vol. 4 at 00477, Vol. 7 at 01008). Rebuild America was neither a party to this federal action nor privy to the pleadings filed therein, discovery conducted between the parties and settlement attained, pursuant to which Scott Favre and Cindy Favre conveyed their title and interest unto Countrywide by Quitclaim Deed dated May 29, 2009, and filed in the land records of the Chancery Clerk of Hancock County in Book 2009 at Page 6900. (R. Vol. 3 at 00347, Vol. 7 at 01008).

Though Rebuild America was not afforded the opportunity to be present and conduct cross-examination either of Scott Favre or Cindy Favre, the deposition testimony of each witness was proffered as evidence by Countrywide and The Bank of New York in the lower court case. Specifically, Countrywide and The Bank of New York relied upon the testimony of Cindy Favre to establish her residency within Hancock County, Mississippi and her alleged failure to receive written Notice of Forfeiture prior to expiration of the redemption period preceding the Chancery Clerk's Conveyance to Wolf Run, LLC. (R. Vol. 4 at 00478). Of additional importance, however, was the testimony of Cindy Favre indicating

an abandonment of the Property as early as August 15, 2005, and actual knowledge of the 2003 tax sale and resulting Chancery Clerk's Conveyance to Wolf Run, LLC in December, 2006, prior to expiration of the redemption period preceding the Chancery Clerk's Conveyance to Wachovia, as Custodian for Sass Muni V. (R. Vol. 5 at 00718, 00735 - 00736, 00743).

### **SUMMARY OF ARGUMENT**

By virtue of deposition testimony relied upon, in part, by Countrywide and The Bank of New York, genuine issues of material fact were present in the lower court action, which should have precluded summary judgment. Based upon this testimony, it appears that Cindy S. Favre abandoned the Property, intentionally seeking not to regain title, ownership or possession of the same. Based upon this testimony, it also appears that Cindy S. Favre may have had actual notice of the first Chancery Clerk's Conveyance, yet did nothing. These issues were relevant, and Rebuild America should have been given the opportunity to conduct its examination of Cindy S. Favre at a trial upon the merits.

Summary Judgment was granted by the lower court based upon alleged insufficiencies in that notice provided to Cindy S. Favre; however, this argument was not advanced by Ms. Favre, but by Countrywide and The Bank of New York. Neither Countrywide nor The Bank of New York were "owners" of the Property as defined by statute, yet each was permitted to maintain an argument rightfully held by Ms. Favre. Given that both Countrywide and The Bank of New York received notice of forfeiture as required by and in compliance with Mississippi statute, Rebuild America contends that these entities should not have been able to successfully argue an alleged absence of notice provided to Cindy S. Favre.

Despite certain cases to the contrary, Rebuild America submits that § 27-43-3, Miss. Code Ann., does not require that two (2) affidavits be filed, as a matter of course, by the Chancery Clerk.



Alternatively, remand of this case is necessary so that the lower court may determine the appropriate redemption amount owed to Rebuild America, to which it is entitled pursuant to §§ 27-45-3 and 27-45-27, Miss. Code Ann.

## **ARGUMENT**

### A. Standard of Review.

The granting of a motion for summary judgment is a matter of law; therefore, an appellate court employs a de novo standard of review. *Mantachie Natural Gas Dist. v. Miss. Valley Gas Co.*, 594 So. 2d 1170, 1172 (Miss. 1992); *Price v. Purdue Pharma Co.*, 920 So. 2d 479, 483 (Miss. 2006)(citations omitted).

### B. Genuine Issues of Material Fact Precluded the Lower Court's Granting of Summary Judgment in Favor of Countrywide and The Bank of New York.

Though represented by counsel, Cindy S. Favre only answered the Complaint, never seeking to set aside the Chancery Clerk's Conveyance(s) by counterclaim and never responding in opposition to or in joinder of either Motion for Summary Judgment filed by Rebuild America and Countrywide/ The Bank of New York, respectively. Though Cindy Favre never offered testimony in this case, testimony elicited by Countrywide during a deposition taken in the Federal Action was proffered by Countrywide and The Bank of New York in this action.

During this deposition, Cindy Favre stipulated that the last payments made to Countrywide and The Bank of New York, in payment of the indebtedness owed by Ms. Favre to each lender, was August 15, 2005. (R. Vol. 5 at 00718). Given the damage sustained to the residence as a result of Hurricane Katrina and the intentional cessation of payments to each lender in August of 2005, the argument could certainly be made that Ms. Favre abandoned the Property. Additional merit is found for this argument in Ms. Favre's answer to the question "[w]ould you be interested in getting the property back?" (R. Vol. 5 at 00743). She responded, "No". (R. Vol. 5 at 00743). Rebuild America should have been

given the opportunity to further explore a basis for and merit in such an argument based upon the previous record owner's abandonment of the Property.

Likewise, Countrywide asserts within its Motion for Summary Judgment that Cindy Favre received no notice whatsoever of either forfeiture of the Property by reason of unpaid taxes. However, Ms. Favre admits to knowledge of unpaid taxes resulting in the first Chancery Clerk's Conveyance as early as December, 2006. Likewise, Rebuild America should have been given the opportunity to further question Ms. Favre, such that "our laws do not permit landowners to ignore their responsibilities to be diligent." If she did indeed have actual knowledge of the first tax sale and resulting Chancery Clerk's Conveyance, then it was incumbent upon Ms. Favre to take whatever action was necessary to regain title, ownership and possession of the Property at that time. It is by reason of the use of the deposition transcripts from the Federal Action within this action, absent the participation of Rebuild America therein, and the inability of Rebuild America to conduct its own examination of these witnesses, that material facts arose, which should have precluded summary judgment as a matter of law. Rebuild America therefore requests summary judgment be set aside, and remand to the lower court for a trial upon the merits.

C. Neither Countrywide nor The Bank of New York are Entitled to Raise and Maintain the Arguments Rightfully Held by Cindy S. Favre.

This case involved a wholly disinterested (previous), record title owner, namely Cindy S. Favre, in whom title and ownership was not restored by virtue of the lower court's granting of Summary Judgment, and two (2) lienors of record, each of which received the statutorily required Notice of Forfeiture prior to expiration of the redemption period preceding the Chancery Clerk's Conveyance to Wolf Run, LLC and prior to expiration of the

redemption period preceding the Chancery Clerk's Conveyance to Wachovia, as Custodian for Sass Muni V. The notice required to be provided to the reputed owner is set forth within §§ 27-43-1 and 27-43-3, Miss. Code Ann., while the notice required to be provided lienors of record is set forth within § 27-43-5, Miss. Code Ann. The statutory requirements are therefore different between reputed owners and lienors of record.

Furthermore, the remedy afforded a reputed owner who was not provided the statutorily required notice of forfeiture is different from the remedy afforded a lienor of record who was not provided its statutorily required notice of forfeiture. While 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. *See* Section 27-43-11, Miss. Code Ann.; *SKL Investments, Inc. v. American General Finance, Inc.*, 22 So. 3d 1247, 1250 - 1251 (¶ 11) (Miss. Ct. App. 2009). Thus, tax title may be held valid, and confirmed as to all other interest parties, to the exclusion of a lienor which did not receive its notice of forfeiture.

Here, neither Countrywide nor The Bank of New York can complain of an alleged insufficiency of notice, in that it is undisputed that each received actual written notice of forfeiture via certified mail, prior to the expiration of the redemption period preceding each Chancery Clerk's Conveyance, in strict compliance with § 27-43-5, Miss. Code Ann. Neither lienor redeemed the Property, though arguably required to do so as alleged by Scott and Cindy Favre within the Federal Action. However, Countrywide sought to remedy its own negligence, for which it was called to answer in the Federal Action, through its assertion of those arguments held specifically by the reputed owner, namely Cindy S. Favre.

As of the date of each tax sale, Cindy S. Favre was the reputed owner. During each two (2) year redemption period, Cindy S. Favre was the reputed owner. As of the date of expiration of the applicable redemption period preceding the Chancery Clerk's Conveyance to Wolf Run, LLC, Cindy S. Favre was the reputed owner. Conversely, neither Countrywide nor The Bank of New York were the owner(s) of the Property the subject of this action as of the date of the expiration of either redemption period, nor at the commencement of this action. Given the disinterest of the reputed owner and lack of participation of Cindy S. Favre within the lower court action, the separate statutory schemes afforded lienors and owners, as well as the differing remedies afforded lienors and owners, Rebuild America contends 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.

D. The Absence of a Second Affidavit Was Not Dispositive of the Lower Court Action.

Unable to ascertain a valid post office or street address for Cindy S. Favre following diligent search and inquiry therefor, the Chancery Clerk executed her Affidavit attesting thereto, in the proper form, and maintained within the permanent records of the office. Based upon *Moore v. Marathon Asset Management, LLC*, 973 So. 2d 1017 (Miss. Ct. App. 2008), the lower court found a failure on the part of the Chancery Clerk to fully comply with § 27-43-3, Miss. Code Ann., by reason of the Clerk's failure to file "the necessary second affidavit in both tax sales"<sup>6</sup>. (R. Vol. 7 at 01009).

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<sup>6</sup> In addition to the discussion set forth herein, this holding by the lower court is also erroneous in that, if two (2) affidavits were executed by the Chancery Clerk in connection with the first tax sale, prior to the Chancery Clerk's Conveyance to Wolf Run, LLC, then this noticing would have been sufficient to fully comply with the requirements of § 27-43-3, Miss. Code Ann., as interpreted by the lower court, and therefore, Cindy S. Favre would have forfeited all right, title and

Whereas the language of the statute is mandatory, the filing of two (2) affidavits is not required by the statute. This two affidavit requirement is, in fact, in conflict with § 27-43-3, Miss. Code Ann., prior published decisions of the Court of Appeals and prior published decisions of the Mississippi Supreme Court. Though § 27-43-3, Miss. Code Ann., provides for two (2) possible scenarios, it requires only one affidavit be executed and filed by the Chancery Clerk. In the event Notice of Forfeiture by mail is returned as undelivered and the personal notice required to be served by the sheriff is returned as not found, the clerk is required to make further search and inquiry to ascertain an alternate street and/or post office address for the reputed landowner. Following this second search and inquiry, the clerk may either (1) ascertain an alternative street and/or post office address for the reputed landowner or (2) fail to ascertain an alternative street and/or post office address for the reputed landowner.

In the first scenario, the Chancery Clerk is thereafter required to again issue notice of forfeiture. If the same is returned as not found, and if notice by mail is returned as undelivered, then the clerk must file an Affidavit to that effect, specifying therein the acts of search and inquiry made by him to ascertain the reputed owner's street and/or post office address. In the second scenario, it is unnecessary for the Chancery Clerk to issue any additional notice, but must file an Affidavit specifying therein the acts of search and inquiry made by him to ascertain the reputed owner's street and/or post office address.

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interest in and to the Property, the same being extinguished by the Chancery Clerk's Conveyance to Wolf Run, LLC.

In the case of *Alexander v. Gross*, 996 So. 2d 822 (Miss. Ct. App. 2008), this Court appears to concur with the statutory interpretations set forth herein. In consideration of the first scenario, the Court opined that

Section 27-43-3 is clear that if notice by mail and personal service by the sheriff are unsuccessful, the chancery clerk must make further inquiry to determine the owner's street and post office address. Only after further investigation and an effort to send notice to the post office address may the chancery clerk file **an** affidavit relieving his office of any further duties regarding notice.

*Id.* at ¶ 10 (emphasis added).

However, in the cases of *Lawrence v. Rankin*, 870 So. 2d 673, 676 (¶ 13) (Miss. Ct. App. 2004), *Moore v. Marathon Asset Management, LLC*, 973 So. 2d at 1021 (¶ 15), *Norwood v. Moore*, 932 So. 2d 63, 66 (¶ 7) (Miss. Ct. App. 2006), the Court of Appeals, by reference to the statute and without analysis, concludes that "the clerk was required to conduct additional search and inquiry and file two affidavits detailing her efforts to locate the owner." *Moore*, 932 So. 2d at 66 (¶ 7). Such an interpretation of the statute is erroneous.

Furthermore, such an interpretation conflicts with prior published decisions of the Mississippi Supreme Court, such as *Hart v. Catoe*, 390 So. 2d 1001 (Miss. 1980), in which 72 Am.Jur.2d *State and Local Taxation* § 1019 at 293 (1974) was cited and quoted as follows:

The requirements of the statute as to the service and proof of service of the notice required to terminate an owner's right to redeem from a tax sale are usually considered to be mandatory and required to be strictly followed. It has been held that no presumption that the requirements of such a statute have been complied with may be indulged. There must be strict compliance with the requirement of the filing of an affidavit showing the making, manner and place of service, or, in the case of inability to serve the notice a strict compliance with the provisions regarding the proof to be filed showing the excuse for not serving the notice.

The Mississippi Supreme Court likewise made no mention of the absence of a second affidavit, and did not base its decision, in any part, upon the absence of a second affidavit in the cases of *Reed v. Florimonte*, 987 So. 2d 967 (Miss. 2008), a case which wholly turned upon “the affidavit” and which was rendered after *Moore v. Marathon Asset Management*, and *Rush v. Wallace Rentals, LLC*, 837 So. 2d 191 (Miss. 2003), in which the Court specifically stated that “[t]he statute requires, inter alia, the filing of ‘an affidavit specifying therein the acts of search and inquiry’ regarding efforts to ascertain the landowner’s street address and post office address.” *Rush*, 837 So. 2d at 199 (¶ 20)(emphasis added).

Rebuild America respectfully submits that two (2) affidavits of the Chancery Clerk are not required so as to fully satisfy the statutory prerequisites of § 27-43-3, Miss. Code Ann. Thus, the notice provided by the Chancery Clerk previous to its Conveyance to Wolf Run, LLC, and previous to its Conveyance to Wachovia, as Custodian for Sass Muni V, were sufficient to extinguish all right, title and interest of the previous record title owner, Cindy S. Favre, and of the previous lienors of record, Countrywide and The Bank of New York. Accordingly, Rebuild America asks the Court to reverse the judgment of the lower court and render judgment in favor of Rebuild America.

E. Rebuild America is Entitled to a Determination of a Redemption Amount, Comprised of All Outstanding Taxes Paid by Rebuild America, In Addition to Statutory Penalty and Interest Thereon.

Remand is necessary so that the chancery court may determine the appropriate statutory redemption amount owed to Rebuild America in accordance with § 27-45-3, Miss. Code Ann., § 27-45-27, Miss. Code Ann., *Lawrence v. Rankin*, and *Rebuild America, Inc. v. McGee*, 49 So. 3d 156 (Miss. Ct. App. 2010). Rebuild America requested, within its



Complaint to Quiet and Confirm Tax Title, reimbursement of all taxes paid by, and on behalf of, Rebuild America, with interest thereon. (R. Vol. 1 at 00008 - 00009).

Section 27-45-3, Miss. Code Ann., states, in pertinent part, as follows:

The owner, or any persons for him with his consent, or any person interested in the land sold for taxes, may redeem the same, or any part of it . . . by paying to the chancery clerk, regardless of the amount of the purchaser's bid at the tax sale, the amount of all taxes for which the land was sold, with all costs incident to the sale, and five percent (5.0% damages on the amount of taxes for which the land was sold, and interest on all such taxes and costs at the rate of one and one-half percent (1-1/2%) per month, or any fractional part thereof, from the date of such sale, and all costs that have accrued on the land since the sale, with interest thereon from the date such costs shall have accrued, at the rate of one and one-half percent (1-1/2%) per month, or any fractional part thereof.

In *Lawrence v. Rankin*, 870 So. 2d at 677 (¶¶ 19-22), the Court found error on the part of the lower court in failing to require the property owner to pay unto the tax sale purchaser, whose tax deed had been previously set aside by the lower court, the taxes paid, in addition to the penalty and interest due to him as provided by Mississippi statute. Likewise, in *Rebuild America v. McGee*, 49 So. 3d at 160 (¶¶ 10-13), the Court, following a Motion for Rehearing, remanded the issue of damages for calculation by the lower court “[b]ecause the relief requested by Rebuild America [was] consistent with section 27-43-3 and our holding in *Lawrence*.”

Should Summary Judgment be affirmed by the Court, Rebuild America respectfully requests remand, with instruction to calculate all amounts owed to Rebuild America, inclusive of statutory penalty and interest at the rate of one and one-half percent (1-1/2%) per month, and designation of a date certain by which such amount is to be paid to Rebuild America. Further, Rebuild America requests that, should Countrywide and/or The Bank of New York fail or refuse to pay unto Rebuild America that amount to which it is owed on or

before the date designated by the lower court, the subject property shall forfeit to Rebuild America.

In cases such as *Lawrence v. Rankin*, *Rebuild America v. McGee*, and *Hammett v. Johnson*, 624 So. 2d 58 (Miss. 1993), in which each tax deed was set aside by reason of insufficient notice, the parties were restored to their previous, respective positions of property owner and tax sale purchaser. The property owner is afforded the opportunity to redeem the property in accordance with § 27-45-3, Miss. Code Ann., and the tax sale purchaser holds title, subject to divestiture upon the property owner's redemption.

Whereas the lower court's denial of confirmation was affirmed in *Hammett v. Johnson*, 624 So. 2d at 60, the Mississippi Supreme Court required remand, in part, stating, in response to the chancellor's declaration that the tax sale purchaser had no interest, whatsoever, in the property the subject of the action that,

Hammett bought the .086 acre parcel for taxes in 1985. No redemption has been made. Upon proper notice he [Hammett] is entitled to a tax deed for this parcel should Johnson fail to pay the 1984 taxes, plus penalty and interest as prescribed by statute.

It is suggested that Hammett failed to pray for this relief. While that is true, as we read the decree of the chancery court, no fault is found with the manner in which Hammett acquired the tax title. Miss.Code Ann. § 27-41-79 (1972). The question is whether that title became absolute. We hold that it did not for failure of proper notice. As a result, the parties are left where they were. The property has not been redeemed. Johnson has now received actual notice of that fact. We remand to the chancery court for entry of a decree giving Johnson a time certain in which to redeem the .086 acre tract, not to exceed 60 days from the issuance of the mandate from this Court.

By the August 26, 2010 Summary Judgment, Countrywide was restored to the position of record owner of the Property, by virtue of the Quitclaim Deed from Scott Favre and Cindy Favre, while Rebuild America was restored to the position of tax sale purchaser

of the Property. By the August 26, 2010 Summary Judgment, the lower court reinstated Countrywide's statutory right to redeem the Property. The litigation and this appeal comprise actual notice to Countrywide of its statutory right, and obligation to redeem the property within that certain time as may be designated by the lower court. In reliance upon *Hammett v. Johnson*, should Countrywide and/or refuse to "redeem" its property by making payment to Rebuild America in reimbursement of all taxes paid, with statutory penalty and interest thereon, then Rebuild America is entitled to a second Chancery Clerk's Conveyance, this time vesting perfect and absolute title in Rebuild America, as against Countrywide.

Should the Court affirm Summary Judgment, Rebuild America respectfully requests remand to the chancery court with instructions consistent with § 27-45-3, Miss. Code Ann., § 27-45-27, Miss. Code Ann., *Lawrence v. Rankin*, *Rebuild America, Inc. v. McGee* and *Hammett v. Johnson*.


**CONCLUSION**

For the above and foregoing reasons, Appellant, Rebuild America, Inc., respectfully requests that the judgment of the lower court be reverse, and Judgment be rendered in favor of Rebuild America, Inc. In the alternative, should Summary Judgment be affirmed, Rebuild America requests remand to the lower court, with instruction for the calculation of the redemption amount owed to Rebuild America, inclusive of statutory penalty and interest thereon, and designation of a date certain by which such redemption amount must be paid.

Appellant prays for such further relief as may be proper in the circumstances.

Respectfully submitted, this the 6<sup>th</sup> day of June, 2011.

REBUILD AMERICA, INC.

By: 

KIMBERLY P. TURNER (MB )

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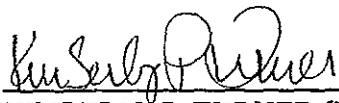
**CERTIFICATE OF SERVICE**

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

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Hon. Carter Bise  
Hancock County Chancery Judge  
152 Main Street, Suite B  
Bay St. Louis, Mississippi 39500

DATED, this the 6<sup>th</sup> day of June, 2011.

  
KIMBERLY P. TURNER (M [REDACTED])