

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES M. JOHNSON

APPELLANT

V.

CASE NO. 2010-CP-01356 **E**

E. H. ANDERSON AND RUBY T. ANDERSON

APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

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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.

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## **STATEMENT OF THE ISSUE**

- A. Whether the trial Court abused its discretion in refusing to set aside its Judgment of January 5, 2010.

## STATEMENT OF THE CASE

James Johnson has not paid real property taxes assessed on the subject property for the year 2005 to present. The description of the property follows:

Lots 20, 21, 22, 23, and 24, in Block One (1) of Biloxi Forrest Park Subdivision in the City of Biloxi, Second Judicial District, Harrison County, Mississippi, as per map or plat thereof recorded in Copy Book 4, Page 23 of the Records of Plats on file in the Office of the Chancery Clerk, Harrison County, Second Judicial District, Mississippi.

### LESS AND EXCEPT:

A parcel of land situated in the Southwest 1/4 of the Southwest 1/4 of Section 25, Township 7 South, Range 10 West, Harrison County, City of Biloxi, Mississippi, being more particularly described as follows:

Beginning at the northwest corner of Lot 24, Biloxi Forest Park Subdivision, a subdivision as per the official map or plat thereof on file and of record in the Office of the Chancery Clerk of the Second Judicial District of Harrison County, Mississippi, in Plat Book 19, Page 35; thence S00 Degree 01'30"W 110.00 feet to an iron rod set; thence S83 Degrees 11'13"E 100.00 feet to an iron rod set; thence S00 Degree 01'30"W 50.00 feet to an iron rod set; thence N83 Degrees 11'13"W 100.00 feet to an iron set; thence N00 Degree 01'30"E 50.00 feet to the point of beginning, containing 5,000.00 square feet.

The subject property was sold to appellants on August 28, 2006. On October 8, 2008, John McAdams, Chancery Clerk of Harrison County, conveyed the property to the Andersons. On August 26, 2009, the Andersons filed a Complaint to Confirm and Quiet Title.<sup>1</sup> The Andersons attempted personal service on Johnson, but they were unable to locate the appellant. Counsel performed a diligent search and inquiry but could not locate Johnson. Thereafter, summons by publication was issued on October 2, 2009, and said summons was published in the Sun Herald, a paper of general circulation in Harrison County, Mississippi, on October 9, 2009, October 16, 2009, and October 23,

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<sup>1</sup> Trial court record at Page 1; Appellee's Record Excerpt #1

2009. Proof of Publication was filed with the Chancery Court on November 2, 2010.<sup>2</sup> All remaining Defendants answered the Complaint by claiming no interest in the property.

Having received no response from Johnson, the Andersons filed an Application to the Clerk for Entry of Default and Supporting Affidavit on January 4, 2010.<sup>3</sup> The Clerk executed and filed an Entry of Default against Johnson as well as Defendant, Regions Bank.<sup>4</sup> On January 5, 2010, the Chancery Court of Harrison County, Mississippi, First Judicial District, entered a judgment by default confirming and quieting title to E. H. Anderson and Ruby T. Anderson in the subject property.<sup>5</sup> Rather than take appeal from that judgment, on February 1, 2010, Johnson filed a Motion to Set Aside Default Judgment.<sup>6</sup> On July 7, 2010, the Chancery Court entered its Judgment refusing to set aside the Judgment entered on January 5, 2010.<sup>7</sup>

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<sup>2</sup>Trial court record at Page 31; Appellee's Record Excerpt #2

<sup>3</sup>Trial court record at Page 36; Appellee's Record Excerpt #3

<sup>4</sup>Trial court record at Page 33; Appellee's Record Excerpt #4

<sup>5</sup>Trial court record at Page 38; Appellee's Record Excerpt #5

<sup>6</sup>Trial court record at Page 41; Appellee's Record Excerpt #6

<sup>7</sup>Trial court record at Page 113; Appellee's Record Excerpt #7

## SUMMARY OF THE ARGUMENT

This case presents an appeal of the ruling of the Chancery Court of Harrison County, Mississippi, First Judicial District to not set aside a Judgment entered on January 5, 2010.<sup>8</sup> The brief of the intervenor provides a detailed procedural which is not repeated here, but it is included by reference. Though not well pleaded by the *pro se* appellant, on February 1, 2010, appellant filed a motion which, on its face, seeks relief pursuant to M.R.C.P. 60.<sup>9</sup> After conducting hearings and taking evidence from the parties, the trial court determined the Rule 60 Motion was not well taken, and the court denied the relief sought by appellant. Because the decision to grant relief under Rule 60 is a matter left to the sound discretion of the trial court, this appeal calls upon this Court to determine if the trial court abused its discretion. *Richardson vs. Derouen*, 920 So.2d 1044, 1050 (Miss. App. 2006). The trial court correctly found that the plaintiffs attempted personal service on the defendant, but were unable to do so despite a diligent search and inquiry.<sup>10</sup> The trial court went on to find that service of process was effected by publication. Additionally, the trial court correctly found that Johnson did not exercise the equitable right of redemption. *Id* Therefore, Johnson has no colorable defense to the claims of the plaintiffs.

This case arises from a tax sale which took place on August 28, 2006, for 2005 real property taxes. The Harrison County Tax Collector sold the subject property at issue herein to E.H. Anderson and Ruby Anderson (hereinafter "the Andersons") after Appellant, James M. Johnson, failed to pay the taxes assessed thereon. Johnson never made an offer of tender to redeem the property, and to

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<sup>8</sup>Trial court record at Page 113; Appellee's Record Excerpt #7

<sup>9</sup> Trial court record at Page 41; Appellee's Record Excerpt #6

<sup>10</sup>Trial court record at Page 113; Appellee's Record Excerpt #7

date, has not made an offer of tender to redeem the property for taxes paid by the Andersons. In short, Johnson alleged that the Plaintiffs failed to properly serve him with process. The court correctly found that Johnson's motion was futile, and denied the relief sought.

The Chancery Court of Harrison County, First Judicial District, correctly found that Plaintiffs attempted to serve the Defendant by personal service at his last known address, 954-1/2 Howard Avenue, Biloxi, Mississippi.<sup>11</sup> Said address was listed on the tax assessor's tax roll as the last known address of Johnson.<sup>12</sup> This address was also listed as Johnson's address on his bankruptcy filings as late as June of 2008.<sup>13</sup> The process server returned the summons and stated that he was unable to locate Johnson at the Howard Avenue address or elsewhere. Counsel for the Andersons stated by sworn affidavit that he had not been able to ascertain the location of Johnson, after diligent search and inquiry nor could counsel for the Andersons locate a post office address or street address of Johnson. Thereafter, the Plaintiffs had issued a Summons by Publication on October 2, 2009, and said publication was published in *The Sun Herald*, a local newspaper on October 9, 16, and 23<sup>rd</sup>, 2009. Proof of publication was filed with the Court on November 2, 2009. Thereafter, on January 5, 2010, the Court entered a Judgment confirming and quieting the Andersons' title to the property.

During hearings held by the Court, Johnson represented to the Court that he had a forwarding address of 230-C Baker Street.<sup>14</sup> However, upon questioning, he stated that there was no water or electricity at that address and that he did not reside there.<sup>15</sup> The Court found that Johnson had kept

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<sup>11</sup>Trial court record at page 57-59; Appellee's Record Excerpt #8

<sup>12</sup>Trial court record at page 30; Appellee's Record Excerpt #9

<sup>13</sup>Hearing on Motion to Set Aside at pages 26-28; Appellee's Record Excerpt #10

<sup>14</sup>Hearing on Motion to Set aside, page 7; Appellee's Record Excerpt #11

<sup>15</sup>Hearing on Motion to Set aside, pages 22-24; Appellee's Record Excerpt #12



multiple addresses over the last few years and that the Andersons had conducted a diligent search and had attempted to locate Johnson and used his last known address of record.

## ARGUMENT

### **a) Service of Process – The Nature of Johnson's reasons for his default**

The Plaintiffs first attempted to serve Johnson at his address listed with the tax assessors's office of 9541/2 Baker Street, Biloxi, MS pursuant to M.R.C.P. 4(c)(1). The process server was unable to locate the defendant at that address, or elsewhere. Thereafter, counsel for the plaintiffs performed a diligent search and inquiry for Johnson, and was unable to locate him.<sup>16</sup> Counsel for plaintiffs then arranged for service pursuant to M.R.C.P. (c)(4)(A) by preparing and having the clerk issue a summons for publication and having said Summons published for three successive weeks in the public newspaper for Harrison County, Mississippi. Proof of publication was then filed with the clerk as required by M.R.C.P. 4(c)(4)(B).<sup>17</sup>

Johnson's sole argument that counsel for the plaintiffs did not perform a diligent search and inquiry must fail. The trial court asked Mr. Johnson first on March 15, 2010, "Mr. Johnson, what is your address?"<sup>18</sup> Johnson stated he lived at 230C, Baker Street, Biloxi, MS. Again at the hearing on April 15, 2010, the court asked, "What is your current address, sir?"<sup>19</sup> Johnson again provided the 230C Baker Street address. Johnson told the court that summons by publication was improper because he could have been found. *Id.* However, after counsel for the plaintiffs pointed out to the trial court that there was no water or power at the 230C address, the court further interrogated

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<sup>16</sup>Trial court record at page 36; Appellee's Record Excerpt #3

<sup>17</sup>Trial court record at page 31; Appellee's Record Excerpt #2

<sup>18</sup> Hearing on Preliminary Injunction at page 8; Appellee's Record Excerpt #13

<sup>19</sup> Hearing on Motion to Set Aside at page 7; Appellee's Record Excerpt #11

Johnson about his address. Johnson went on to tell the court that he had lost the 230C Baker Street address in a bankruptcy proceeding, and that his actual address was 222C Baker Street.<sup>20</sup>

The Court properly found that counsel for the plaintiffs had conducted a diligent search and inquiry for Johnson, and the summons by publication was proper. In so holding, the trial court implicitly found that Johnson had failed to provide the court with a legitimate argument against the default taken.

**b) Failure to Redeem – Johnson has no colorable defense to the claims of Plaintiffs**

Johnson has not tendered or offered to tender the funds to redeem the property sold for taxes to date. Johnson argued to the trial court that the judgment should be set aside because Johnson's rights in the subject property were somehow protected by his multiple bankruptcy proceedings. Though not well stated, this claim is the sole defense that Johnson attempted to allege as a defense to the Complaint to Quiet and Confirm Title. Johnson argued that, "The other basis is that upon January the 5<sup>th</sup>, 2010, that the – I was still under the jurisdiction of the bankruptcy court."<sup>21</sup> There is no dispute that both Johnson and the Bankruptcy Court had actual knowledge of the taxes owed from 2005 forward, and there is no dispute that neither Johnson nor the trustee took any steps to redeem the subject property during the pendency of any of Johnson's bankruptcy proceedings.<sup>22</sup>

Testimony was taken from Johnson, and the trial court considered excerpts of the record from Johnson's various bankruptcy proceedings and determined that Johnson had not stated a viable defense to the suit to Quiet and Confirm Title. Johnson's first bankruptcy petition was filed on April

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<sup>20</sup> Hearing on Motion to Set Aside at pages 22-24; Appellee's Record Excerpt #12

<sup>21</sup> Hearing on Motion to Set Aside at page 8; Appellee's Record Excerpt #13

<sup>22</sup> Hearing on Motion to Set Aside at pages 14 and 18; Appellee's Record Excerpt #14

28, 2008. *Id* at page 8. However, this bankruptcy proceeding was dismissed on September 10, 2008. The trial court correctly analyzed 11 U.S.C. § 108(b), and held that "a debtor is only guaranteed a minimum of 60 days to redeem under the Bankruptcy Code, and that the automatic stay does not toll the running of the redemption period."<sup>23</sup> Because neither Johnson nor the trustee redeemed the property during the redemption period, and that period has expired, the trial court properly found that Johnson's sole "colorable defense" argued to the court was untenable, and thus the court correctly denied Johnson's motion to set aside.

**c) The Andersons and intervenor stand to suffer actual and severe prejudice.**

There is no dispute that the Andersons purchased the subject property in 2006 for 2005 taxes. The clerk conveyed the subject property to the Anderson by tax deed in October of 2008. Judgment Confirming and Quieting title in the Andersons was not entered until January of 2010, five years after the subject assessment. As record title holders with a Judgment confirming title in hand, the Andersons sold the property to the intervenor, Thomas Kohler. During redemption period, Johnson had actual knowledge of the tax obligation, the tax sale, the clerk's conveyance, and the fact that the Andersons had listed the property with a realtor. At no point did Johnson take any step to exercise the equitable right of redemption or challenge the claim of title asserted by the Andersons.

If the trial court would have set aside the Judgment, then the third-party purchaser for value, the intervenor, would be deprived of ownership and possession of the subject property.<sup>24</sup> Additionally, the Andersons would face direct liability as a result of such a deprivation. Finally, if the judgment were set aside, then Johnson's dilatory and evasive conduct would not only be

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<sup>23</sup> Trial court record at page 113; Appellee's Record Excerpt #7

<sup>24</sup> Hearing on Motion to Set Aside at page 58; Appellee's Record Excerpt #15

sanctioned, but encouraged by the court. Damages would cascade down upon plaintiffs and intervenor, while Johnson would profit from his failure to fulfill a simple duty under the law: pay the property taxes assessed by the taxing authority. This case clearly presents a scenario where Johnson had actual knowledge of the taxes assessed. Rather than pay the taxes owed on the property, Johnson engaged in a pattern of conduct attempting to avoid his obligations through multiple bankruptcy filings and late motion practice. At no time has Johnson offered tender of payment, and the Andersons and intervenor should not now be punished at the hand of his dilatory and evasive conduct.

#### **d) Conclusion**

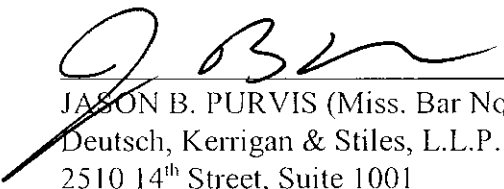
Though not well pleaded by Johnson, his motion practice invokes the holdings of *Flagstar Bank, FSB vs. Danos*, 46 So. 3d 298 (Miss. 2010). At the hearing before the trial court, evidence was presented as to the three prongs of the test laid out in *American States Ins. Co. vs. Rogillio*, 10 So. 3d 463, 467 (Miss. 2009). The Court considered Johnson's arguments regarding the reasons for his default as well the sole defense he would raise if the judgment were set aside. Additionally, the court considered argument regarding the actual prejudice which would be suffered by the plaintiffs and intervenor.

The most important prong, whether or not the defendant has a meritorious defense, was also analyzed by the trial court. Johnson argued that his period of redemption had not expired due to his various bankruptcy filings. The court considered Johnson's arguments, and found that neither Johnson, nor the bankruptcy trustee, elected to redeem the property during the additional 60 days which may have been available secondary to the bankruptcy proceedings. Thus, Johnson had no colorable defense to the Complaint filed by the Andersons. After analyzing the factual and procedural posture of the case, the court also considered Johnson's explanation for his default, and

found that he had failed to state good cause for his default. Lastly, the trial court had before it the possible prejudice to the plaintiff and intervenor as evidenced by the recitation of facts and the statement of the case in the Judgment which acknowledges the ownership interest of the third party purchaser.

For all of the foregoing, the Appellees respectfully request the Court deny the relief sought by appellant and affirm the Judgment of the Chancery Court of Harrison County, First Judicial District.

**Respectfully submitted**, this the 2<sup>nd</sup> day of March, 2011.



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**CERTIFICATE OF SERVICE**

I, Jason B. Purvis, hereby certify that a copy of the above and foregoing pleading has been served upon the following via United States Mail, First Class, postage prepaid:

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Hon. Margaret Alfonso  
PO Box 7017  
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*Trial court judge*

This the 2<sup>nd</sup> day of March, 2011.

  
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