

Mississippi Judicial College Chancery Clerks Statewide Seminar

Case Law Update

Recent Decisions of the Mississippi
Supreme Court and Court of Appeals

By John Brunini

Tax Confirmation Suits

Notice of Expiration of Redemption Period and Tax Sale

Miss. Code Ann. § 27-43-3

- I. Issue Notice to Sheriff for Personal Service
- II. Mail Notice to Usual Street Address
- III. Publish Notice

I. Notice to be Served by Sheriff

A. Serve as Summons from Court

B. File Return with Chancery Clerk

I. Notice to be Served by Sheriff

A. Personal Service to be Served in Accordance with Rule 4

What Does Rule 4 Require?

I. Notice to be Served by Sheriff

- Without getting into too much detail, Rule 4 of the Mississippi Rules of Civil Procedure essentially requires PERSONAL service.
- Posting notice on the door of defendant's home is NOT sufficient.
- Viking Investments v. Addison Body Shop, Inc. – 2006 Miss. Court of Appeals Case

I. Notice to be Served by Sheriff

Viking Investments v. Addison Body Shop, Inc. – 2006 Miss. Court of Appeals Case

- **Court recognized that the Chancery Clerk met two of three requirements for notice – notice by certified mail and notice by publication.**
- **Court ruled that Sheriff's posting of notice at defendant's property was insufficient and, therefore, the tax sale was VOID.**

I. Notice to be Served by Sheriff

- Court's ruling in Viking Investments sounds nitpicky...
- IT IS nitpicky

BUT,

Mississippi courts have repeatedly held that “Statutes dealing with land forfeitures for delinquent taxes should be strictly construed in favor of the landowners.” Viking Investments v. Addison Body Shop, Inc., 931 So.2d 679 (Miss. App. Ct. 2006).

Any deviation from the statutorily mandated procedure renders the sale **void**.

I. Notice to be Served by Sheriff

B. Sheriff Should File Return of Service with Chancery Clerk; Clerk should keep record of this along with proof of publication, proof of notice by mail, etc.

II. Mail Notice to Usual Street Address

Notice should be sent by registered or certified mail.

This may seem simple, but what if mail is returned as undeliverable?

Stay tuned...

III. Publish of Notice

- Publish notice in newspaper of the county or, if no such newspaper, a newspaper having general circulation within the county.
- Publication should contain name, address, legal description of property to be sold.
- Publication must occur at least 45 days prior to expiration of redemption period.

Problems with Notice?

- What if mailed notice comes back as undeliverable?
- What if Sheriff's return of service states that defendant could not be found?

Problems with Notice?

- The applicable statute is not entirely clear, but case law has filled in the blanks.
- Document, document, document...
or in this case,

Make further search and inquiry (a checklist would help) and file two affidavits.

Problems with Notice?

- Miss. Code Ann. § 27-43-3 states that if notice by mail is returned undelivered and service by sheriff is returned as “not found”, then
- Chancery Clerk is required to make “further search and inquiry to ascertain the reputed owner’s street and post office address...”
- Huh?

Problems with Notice?

- Further search and inquiry...
- In O.C. Rush v. Wallace Rentals, LLC, 837 So. 2d 191 (Miss. 2003), the Mississippi Supreme Court explained what should be considered “further search and inquiry”
- Chancery Clerk had a form affidavit reciting the nature of the further search and inquiry performed.

Problems with Notice?

- Further search and inquiry...
- One item on list was search of telephone directories. Although search of telephone directories was not performed, search of a number of other resources was performed.
- If telephone directories had been searched, deputies would have discovered a current address.

Problems with Notice?

- The Rush court ruled that strict adherence to the checklist was not required, so long as efforts reflected a diligent search and inquiry.
- Based on what court determined was diligent search and inquiry by the Chancery Clerk, the tax sale was confirmed.
- The Mississippi Supreme Court did make a suggestion to Chancery Clerks...

Problems with Notice?

- “As a matter of suggestion, the chancery clerks could perhaps consider a ‘check list’ form affidavit containing a general list of the description of actions normally taken in a search and inquiry, and then merely ‘check off’ on the list the action actually taken in any particular search and inquiry.” Rush, 837 So.2d at 200.

Problems with Notice?

- What should be on this check list?
 - Telephone directories
 - Tax collector records (car tags)
 - Tax assessor records (homestead exemptions)
 - Voter registration info on file with Circuit Clerk
 - Deed which requires address for Grantee and Grantor

Problems with Notice?

- We are currently involved in case being appealed to Supreme Court right now in which a prior Chancery Clerk's failure to make diligent search and inquiry – specifically, the failure to check the deed for the grantee's current address – will most likely invalidate the tax sale.

Problems with Notice?

- What is all this talk about affidavits?
- And why two?

Problems with Notice?

- After the “further search and inquiry” we just described, Miss. Code Ann. § 27-43-3 requires the Chancery Clerk to prepare an affidavit that sets forth the actions taken to locate a current address for the property owner.



Problems with Notice?

- If, after further search and inquiry, the Chancery Clerk finds another address for the property owner, the Clerk must:
 - Issue notice to the Sheriff for Service
 - Send notice by registered and certified mail

Problems with Notice?

- If after further search and inquiry, no current address can be found for property owner, then Chancery 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.
- Retain this affidavit as a permanent record in the Chancery Clerk’s office.

Problems with Notice?

- On January 29, 2008, the Mississippi Court of Appeals rendered its decision in Moore v. Marathon Asset Mgmt., LLC.
- This opinion has not been officially released for publication and is subject to change.

Problems with Notice?

- In Moore, the court overruled a Chancery Court Judge and declared a tax sale void because, at least in part, the Chancery Clerk did not file affidavits required by Miss. Code. Ann. § 27-43-3.
- Court stated “the clerk was required to conduct additional search and inquiry and file two affidavits detailing her efforts to locate the owner.” Moore, 2008 WL 223286, p. 3.

Problems with Notice?

- The statute is not entirely clear about requiring **two** affidavits...
- However, it is abundantly clear that at least one affidavit is required in this situation.
- In any event, if the Court of Appeals says that two affidavits are required, then by all means, file two affidavits.
- The statute is less than clear about when these affidavits must be prepared and filed...

Problems with Notice?

- The Moore case also created law on the issue of who has standing to contest validity of a tax sale.
- Moore, the named party in the case, was not the owner of record at the time notices were given...

Problems with Notice?

- Moore acquired the property after notices were made. It was undisputed that, even if notices had been made properly to the reputed owner and chancery clerk had properly documented the file, Moore would not have received this notice.
- The court ruled that Moore had a colorable interest in the outcome of the litigation and could be adversely impacted by it. Thus, Moore satisfied the state's standing requirements.

Problems with Notice?

Because Moore had standing to bring the suit and because the Chancery Clerk had not strictly adhered to the requirements of Miss. Code Ann. § 27-43-3, the Court of Appeals invalidated the tax sale.

Can he sue me?

Can he sue me?

- The answer to this question is almost always YES, but...it is probably the wrong question.
- The better question is “Can he sue me AND win?”

Can he sue me?

- There are a few recently reported decisions in which plaintiffs have filed suit against the Chancery Clerk.

Can he sue me?

- In *Alexander v. Taylor*, purchasers at tax sale sued the Chancery Clerk individually and in his official capacity for refusal to issue tax deeds.
- Chancery Clerk refused to issue tax deeds on the grounds that the properties were subsequently redeemed.

Can he sue me?

- Plaintiffs in the Alexander case brought a number of claims against the Clerk, including federal claims involving denial of civil rights, equal protection, and due process.
- Plaintiffs claimed entitlement to a litany of damages, including punitive damages.

Can he sue me?

- After over ten years of threats, claims, and litigation in a number of courts, the Mississippi Court of Appeals in 2006 ruled that all of plaintiffs' claims were barred by applicable statutes of limitations.
- Court never actually addressed substantive issues raised, but did shed some light on potential liability of Chancery Clerks.

Can he sue me?

- Chancery Clerks are officials of political subdivisions of the State and, when acting within the course and scope of their employment, are entitled to the protections of the Miss. Tort Claims Act (limited sovereign immunity).

Can he sue me?

- A failure to make required payments or similar failures to comply with statutory duties constitute “misfeasance in office” and give rise to claims against the Clerk on his official bond.
- The remedy of mandamus is the proper remedy when a Clerk improperly withholds a tax deed.

Can he sue me?

- In *Young v. Benson*, a 2002 Court of Appeals case, plaintiff sued the Chancery Clerk for failing to issue a check for \$415 as had allegedly been ordered by the court.
- Alleging that the Clerk gained the benefit (interest) of the \$415 for approximately 6 months and that by the time the check was received it was no longer valid, the plaintiff sought to recover \$600,000 in damages from the Clerk and company issuing his bond.

Can he sue me?

- Here again, the Court ruled that the statute of limitations barred the plaintiff's claim.
- In deciding this matter, the Court of Appeals considered whether plaintiff's claims were frivolous.
- The court ruled that plaintiff's claims were, in fact, frivolous because a reasonable person in this circumstance would have understood that she had no hope for success.

Can he sue me?

- Because the court deemed the plaintiff's claims frivolous, it imposed sanctions on plaintiff of double costs of the appeal.

Can he sue me?

- In one final example, the Court of Appeals heard a case involving a Chancery Clerk's refusal to allow removal of records of chancery court actions under appeal.
- The court ruled that plaintiffs failed to state a claim upon which relief could be granted and dismissed their case.

Can he sue me?

- In affirming the dismissal, the Court of Appeals ruled that “Court clerks are immune from liability when performing official acts.”
- The court also determined that the Chancery Clerk’s decision to restrict plaintiffs’ review of the record was a decision made in the Chancery Clerk’s official capacity and was not merely a ministerial function. Accordingly, mandamus was the appropriate remedy.

Can he sue me?

- Ministerial acts not protected; quasi judicial acts are protected.
- Clerk acting in quasi judicial function is immune.
- A quasi judicial act is the determination of the fact as to whether, for instance, the claim is a proper item.
- In short, if a Clerk has a reasonable basis for refusing to take some action or otherwise acting impermissibly, its actions will be protected from personal lawsuits.

Can he sue me?

- In their zeal to argue their case, plaintiffs threatened the lower court Judge with bar complaints and litigation directed at him if he failed to reconsider his opinion.
- This action led the court to determine that plaintiffs had abused the judicial process.
- Court ruled “One acting *pro se* has no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets.”

Can he sue me?

- One way courts have dealt with “recreational litigants” is to limit their access to courts.
- Plaintiffs argued that because they could pay filing fees, they were entitled to unlimited access to the court system.
- Court of Appeals affirmed lower court’s decision to obtain leave of court before filing additional lawsuits.

THE END

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