

NEWSLETTER OF THE REAL PROPERTY SECTION OF THE MISSISSIPPI BAR

DECEMBER 2016

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CHAIR'S COLUMN

I would like to take the opportunity to wish you a happy ending to 2016 and a very prosperous upcoming 2017.

The title/closing industry has experienced a lot of changes over the last 24 months. All of which have been taxing to say the least. Hopefully, with the new administration we can get some of the remaining issues resolved in order to facilitate a better closing process. Please talk with your Congressmen, Senators and the title underwriters to let them know of your concerns so that they may help provide the needed solutions.

New construction costs are increasing statewide but builders in the northern part of the State are finding that psf price per the appraisal is not keeping track. With that dilemma new construction in Northern Mississippi may well slow down until that can be rectified. It appears other areas in the State have not had the lingering effects of the mortgage meltdown affect the new construction sales prices so severely. This is something I believe the Mississippi Appraisal leaders need to address quickly. Please let your state legislator, your local appraisal company and the local mortgage lender know that this is an issue that needs immediate attention. Without help that part of our industry will not continue to thrive.

This newsletter contains an article concerning the proposed legislation for the "Marketable Record Title Act". Please discuss any issues directly with your legislator so this legislation can proceed. All of the title insurers are actively involved and may be able to provide more direct information for you.

Again have a prosperous 2017.

Eric Sappenfield

LEGISLATION

A Look into the (Possible) Future: The Mississippi Marketable Record Title Act

Kenneth Farmer

Mississippi does not currently have a Marketable Record Title Act and there is no statute regarding the minimum search period. Instead, the standard for conducting title searches in Mississippi has evolved over time by custom. For residential transactions, title searches generally cover a minimum search period of 32 years. This 32-year search period is derived from 21 years of minority, the ten-year statute of adverse possession, and a possible gestation period. *See* Miss. Code Ann. § 1-3-27; Miss. Code Ann. § 15-1-13. For commercial transactions, title searches generally cover a minimum search period of 50 years. Finally, for searches involving mineral interests, a search all the way back to the original federal land patent is required.

Notwithstanding these customs, practitioners face a number of problems when examining title that could be resolved by marketable record title legislation. To that end, the Mississippi Marketable Record Title Act (“Act”) will be introduced in the upcoming 2017 session by Representative Brad Touchstone. The Act is based in large part of the Uniform Marketable Record Title Act promulgated by the Uniform Law Commissioners in 1990, which is itself derived from the Uniform Simplification of Land Transactions Act. To date, nearly half of the states have adopted their own version of the Act.

The Act would create a new statutory concept of title: marketable record title. Matters arising prior to the “root of title” could be ignored because their effect on title would be eliminated by the Act. Essentially, the Act would work as a statute of limitations for certain title claims by eliminating old defects and stale claims to real property. The Act would limit the labor involved in traditional title examinations.

Under the Act, a recorded chain of title which is more than thirty-two years old would be deemed “marketable record title,” and all interests – with certain exceptions – which are older than the root of title would be nullified. The exceptions include, but are not limited to, interests in oil, gas and other minerals, interests of a political subdivision, or interests of those with title derived from a recorded chain of title in excess of thirty-two years who file a notice of intent to preserve their interest (*e.g.*, think restrictive covenants for HOA).

If the Act is adopted, abstractors would search the records for the following: (1) interests of the U.S. Government, (2) interests of the State of Mississippi, (3) easements (in use pre-root and post-root type), (4) mineral rights (both reserved and granted), and (5) post-root matters (including re-imposed and noticed pre-root matters). When conducting the search, an abstractor would first locate a root of title transaction. Next, the abstractor would divide the title information to a pre-root part and a post-root part. In the pre-root part, abstractors would search for

conveyances from the United States or State of Mississippi, easements, and, if applicable, any mineral rights. In the post-root part, abstractors would look for specific references to pre-root documents (e.g., by book and page), and for statutory notices that may preserve certain pre-root rights. Then the abstractor would locate the document specifically referred to in any post-root instruments or notices, and consider its effect on title. This approach would allow title examiners to discover all matters that currently affect the title being examined and omit matters barred by the Act.

RECENT CASES

Ad Valorem Taxes Have Priority Over Perfected Lien in Mobile Home

In re Riley, 550 B.R. 728 (Bankr. N.D. Miss. 2016). Riley owned a mobile home in Panola County. Ditech had a perfected security interest in the mobile home. Riley filed Chapter 13 bankruptcy. Panola County filed proofs of claim for ad valorem taxes due, and asserted that its claim for taxes had priority over Ditech's perfected security interest under Section 27-35-1 of the Mississippi Code. Section 27-35-1 provides in relevant part that ad valorem taxes are assessed against all real and personal property "excepting motor vehicles subject to the Motor Vehicle Ad Valorem Tax Law of 1958, Sections 27-51-1 through 27-51-49," that the taxes are a lien on the property, and that this lien has priority over all other liens, including Ditech's security interest. Ditech argued that Riley's unit was a "motor vehicle" as that term is used in Section 27-35-1, and fell within the exception to Section 27-35-1, and therefore its security interest had priority over the county's claim for taxes. Judge Jason D. Woodward, United States Bankruptcy Court Judge for the Northern District of Mississippi, held that the county's lien for taxes had priority over Ditech's security interest. The Motor Vehicle Ad Valorem Tax Law distinguishes between a "mobile home", which is detached from a self-propelled vehicle and parked on real estate, *see* Section 27-53-1(b), from a "motor vehicle," as that term is used in Section 27-35-1. Riley's unit was not attached to a motor vehicle and therefore was a "mobile home" that was subject to the lien for taxes imposed under Section 27-35-1. Ditech also argued that Panola County had not perfected its lien for taxes under Section 27-41-101. Section 27-41-101 provides in relevant part that when ad valorem taxes on personal property become delinquent, the tax collector can give notice to the taxpayer, and file a notice of tax lien as a judgment with the circuit clerk. Section 27-41-101, wrote the court, is only a "permissive collection method" for a county to use, and compliance with Section 27-41-101 is not necessary in order for the lien for ad valorem taxes imposed by Section 27-35-1 to have priority over other liens.

Note 1: One reason that this case is noteworthy is that it clarifies the distinction between "motor vehicles" and "mobile homes" for ad valorem tax purposes. But from the editor's standpoint, the case is more noteworthy because it clarifies the difference between the lien assessed against real and personal property under the general assessment statute, Section 27-35-1, and the notice of lien that the tax collector can file under Section 27-41-101. While the lien for ad valorem taxes attaches to real and personal property under Section 27-35-1, and this lien has priority over all other interests, personal property is not automatically sold during the last week in August like real property. The tax collector has to take affirmative action to sell personal property, and Section 27-41-101 *et seq.* provides a non-judicial means for the tax collector to proceed against the personal

property. But the lien for taxes imposed under Section 27-35-1 against personal property exists and has priority over all other interests regardless of whether the tax collector takes any action, and that the notice of lien that the tax collector can file under Section 27-41-101 is only one method of enforcing the lien, and does not create the lien. This is the first case that the editor is aware of interpreting Section 27-41-101 to clarify this point.

Note 2: This case is only about personal property taxes on mobile homes, and does not address the separate questions of when a mobile home has become part of the real estate for ad valorem tax purposes, and how to create and perfect a security interest in mobile homes. Anyone who has looked at these issues knows that the Mississippi law on these points is a morass of contradictions. A statute, SB 2345, was introduced in the 2016 legislative session to try to resolve some of these contradictions and bring some clarity to this area, but it died. Hopefully it will be re-introduced or a similar bill will be introduced in the 2017 legislative session.

Municipality Did Not Have Authority to Impose Deadlines for Construction

Gaffney v. City of Richland, 202 So. 3d 238 (Miss. Ct. App. 2016). In 2002 the City of Richland issued a permit to Gaffney to build a house. The permit expired by its terms after six months. In 2007, the city notified Gaffney that his permit was void because of the lack of construction on the house. Gaffney applied for and obtained a second permit. In 2012, the city again notified Gaffney that his permit was void because construction had not been completed. The city filed a complaint in the Chancery Court of Rankin County asking the Chancery Court to declare that the house was a nuisance under Section 21-19-11 of the Mississippi Code. The city also asked the court to find that the city had the authority to set deadlines for completing construction of a dwelling, and authority to demolish the uncompleted house if Gaffney did not complete construction by the deadline. The Chancery Court issued an order requiring Gaffney to finish the house by a certain date. When Gaffney did not finish the house by that date, the Chancery Court found Gaffney in contempt and authorized the city to demolish the house. On appeal by Gaffney, the Court of Appeals, in an opinion by Justice Lee, reversed and remanded the case to the Chancery Court for dismissal. Section 21-19-11 requires a hearing before the Board of Aldermen and then an appeal to circuit court, which was not done. While a chancery court has authority to give injunctive relief, an injunction is only proper when no adequate remedy at law exists. In this case, the statutory scheme in Section 21-19-11 provides an adequate remedy at law. The Court of Appeals also found that no authority existed for the city to set deadlines for construction and then demolish the improvements if not completed by the deadline. The Court of Appeals reversed the chancellor's judgment and remanded the case to the Chancery Court for entry of an order dismissing for lack of subject-matter jurisdiction and failure to state a claim upon which relief could be granted.

Note 1: Section 21-19-11 is the statute that allows a municipality to tear down abandoned homes. If a property is a "menace to the public health, safety and welfare of the community", the governing body of a municipality may vote to remove abandoned or dilapidated buildings after giving notice by mail to the owner and a hearing. The municipality can treat the cost of removing the abandoned or dilapidated buildings as a lien against the property. The tax collector of the municipality can

sell the property to satisfy the lien in the same manner as the sale of lands for municipal taxes. The editor's reading of this statute is that it was intended to make it easier for municipalities to deal with blight caused by abandoned homes that had been sold for taxes.

Note 2: One can understand the city's frustration with Gaffney. Twelve years after first applying for a permit, Gaffney had not completed the house. The case recites that the city and the Chancery Court gave him multiple opportunities to complete the improvements. Moreover, the facts suggest that Gaffney may have been occupying the house before it was complete. Gaffney had run electric and water lines from his neighbor's house, clothes were stored in one of the closets, and there was a cot in the house. But if the city only denies a permit for him to complete the house, the city probably gets stuck with an abandoned, partially completed house.

Note 3: The Court of Appeals' decision notes that there was no state law or local ordinance that authorized the city to abandon. So can Richland simply pass an ordinance that allows it to demolish homes that are not completed by a deadline set by the city?

Lender Can Waive Costs in Reinstatement of Installment Loan

Hobson v. Chase Home Finance, LLC, 179 So. 3d 1026 (Miss. 2015)(*en banc*). Quimby had a loan with Chase secured by a deed of trust on real property in Warren County. When Quimby failed to make installment payments on the loan, Chase initiated a non-judicial foreclosure proceeding. The foreclosure sale was scheduled for March 20, 2008. On the day before the sale, Quimby attempted to reinstate the loan by paying the past due installments under Mississippi Code Ann. § 89-1-59. The deed of trust provided in relevant part that "Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this paragraph...including but not limited to reasonable attorneys fees and costs of title evidence." (Emphasis added). Chase's reinstatement quote included \$912.76 in attorneys fees and other costs to the date of reinstatement. Quimby's check was for an amount that included all of the past due installments, but not the \$912.76 in costs. The trustee in the deed of trust, who apparently was not aware of the reinstatement, conducted the sale as scheduled. Hobson appeared at the sale and made the high bid of \$60,948.82. Hobson delivered to the trustee a cashier's check in the amount of his bid. The trustee gave Hobson a receipt that stated, among other things, that "The sale will not be considered final until all requirements have been met and may be withdrawn based on a timely reinstatement..." Chase subsequently returned to Hobson his check, and told Hobson that the sale had been cancelled because of Quimby's reinstatement. Hobson brought an action against Chase in the County Court of Warren County asserting that by accepting his check, Chase had made a contract to sell the property to him. He asked the court to order Chase to issue the deed, or in the alternative to pay damages equal to the difference between the amount that he bid at the foreclosure sale and the fair market value of the property. The County Court granted Hobson's motion for summary judgment that a contract existed and ordered a hearing on the amount of damages. The Circuit Court affirmed. On interlocutory appeal by Chase, the Mississippi Supreme Court reversed the judgments of the County Court and the Circuit Court and remanded the case to determine if Quimby had made an effective reinstatement. 81 So. 3d 1097 (Miss. 2012). On remand, the County Court found that the reinstatement was valid and the foreclosure sale therefore was a "nullity," and

granted Chase's motion for summary judgment. The Circuit Court affirmed. The Mississippi Supreme Court, in a unanimous *en banc* decision by Justice Kitchens, affirmed. Hobson argued that the reinstatement by Quimby was not effective because Quimby did not pay the \$912.76 in costs shown on the reinstatement quote. Chase asserted that it had "reversed" the costs and did not charge Quimby for them. Section 89-1-59 provides that in an installment loan secured by a deed of trust, a borrower may reinstate by paying past due installments and costs "actually past due by the terms of such instrument or lien." The Supreme Court wrote that under the wording of the deed of trust, Chase was entitled to but did not have to charge and collect the foreclosure costs. The reinstatement therefore was proper. Section 89-1-59 does not provide a purchaser at a foreclosure sale with a remedy if the sale is invalidated by a reinstatement. The receipt that the trustee gave Hobson at the time that Hobson delivered his check to the trustee gave Hobson notice that the sale could be set aside if Quimby had reinstated the loan. The principle of *caveat emptor* is applied with great strictness at foreclosure sales, according to the court.

Note 1: The court's holding that Hobson did not have a cause of action for damages is not surprising. One of the things that the editor found interesting about this case was that Chase's position was saved by the particular language in its deed of trust, that the lender "shall be entitled" to collect its costs as a condition of reinstatement. If the deed of trust provided that the borrower was required to pay the costs as a condition of the deed of trust, then, under the logic of the opinion, the reinstatement would not have been effective, and the sale would be valid. Is there any potential downside to lender in a deed of trust reserving the right to collect attorneys fees and costs as a condition of reinstatement rather than making the accrual of attorneys fees automatic?

Note 2: Another thing that the editor found interesting about this case was the receipt that the trustee gave Hobson that stated that the sale may be withdrawn based on a timely reinstatement. The editor has never heard of such a receipt given when the property is sold to a third party, but in this case it certainly helped Chase's position.

Note 3: This case is unusual because the foreclosing lender was arguing that its own foreclosure sale was invalid because of what appears to be an internal communications error. That fact that the lender accepted the payment for the reinstatement for less than the amount of its quote put it in a tough position. If the court held that the sale was valid, the bank probably would have faced a lender liability action by Quimby.

Contractor's Duty to Warn About Soils Survives "As-Is" Clause in Sales Contract

Stribling Investments, LLC v. Mike Rozier Construction Co., 189 So. 3d 1216 (Miss. 2016)(*en banc*). DG Gluckstadt, LLC owned land in Gluckstadt. It agreed with Dollar General to build a Dollar General store on the land and lease the land and completed store to Dollar General. DG Gluckstadt hired Mike Rozier Construction Company, Inc. ("Rozier Construction") to build the store. Mike Rozier was the principal of both DG Gluckstadt and Rozier Construction. No written construction contract was entered into between DG Gluckstadt and Rozier Construction. A soils-testing group was retained to test the soil and recommend the best way to build the parking

lot that was part of the store property. This testing was done and the soils-testing group issued a report with recommendations for construction of the parking lot. Rozier Construction did not follow the recommendations of the soils-testing group and built a less-expensive parking lot than the soils-testing group recommended. According to Rozier, Rozier Construction informed the owner, DG Gluckstadt (also Rozier), about the work to be done on the parking lot, and DG Gluckstadt (still Rozier) agreed to the less-expensive construction of the parking lot. After the store was completed and the lease with Dollar General commenced, DG Gluckstadt sold the land and improvements to Stribling. The sales contract between DG Gluckstadt, as seller, and Stribling, as purchaser, provided that the property was being sold “as is.” After the parking lot began showing signs of deterioration and deficiencies, Stribling brought an action in Madison County Circuit Court against Rozier Construction alleging negligent design and construction of the parking lot. The Circuit Court of Madison County held that Rozier Construction did not owe a duty to Stribling and granted Rozier Construction’s motion for summary judgment. Stribling appealed. The Mississippi Supreme Court, in an *en banc* decision by Justice Coleman, reversed and remanded. A contractor traditionally has had a duty to disclose defects in fills and subsoils to the owner. In recent years courts have expanded this duty so that when the contractor and the owner are related—in other words, a “builder-vendor” relationship exists between the contractor and the first owner—the builder-vendor has the duty to disclose defects in the soil to the first purchaser. The Court found that the question of whether a builder-vendor relationship existed between Rozier Construction and DG Gluckstadt was a question of material fact, and remanded the case to the Madison County Circuit Court for this determination. If the builder-vendor relationship exists, then the “as-is” clause in the sale contract does not overcome the builder-vendor’s affirmative duty to disclose defects within the subsoil to a purchaser.

Note 1: To clarify, neither the tenant of the property, Dollar General, nor the first owner of the land, DG Gluckstadt, with whom Rozier Construction had a verbal construction contract, are parties to this lawsuit. DG Gluckstadt’s vendee, Stribling, is the plaintiff and DG Gluckstadt’s contractor, Rozier Construction, is the defendant. No contract existed between Stribling and Rozier Construction.

Note 2: To understand why Rozier Construction is making a waiver argument, one needs to know about *Pike v. Howell Building Supply, Inc.*, 748 So. 2d 710 (Miss. 1999). In *Pike*, the subcontractor who was pouring the cement for a new gas station told the owner that the dirt around the gasoline tanks had not been sufficiently compacted to provide support for the concrete to be poured on top of the tanks. The owner told the subcontractor to proceed with pouring the concrete anyway, which the subcontractor did. The concrete over the tanks later collapsed and ruptured the tanks. The Mississippi Supreme Court in that case held that the contractor (via the subcontractor) had fulfilled its obligation to warn the owner about the soil issues, and the action of the owner in instructing the subcontractor to pour the concrete anyway constituted a waiver by the owner. In the *Stribling* case, Rozier Construction, is asserting that it is in the same position as the contractor in the *Pike* case because the owner, DG Gluckstadt, chose to proceed with the less-expensive parking lot construction. The twist in this case is that the contractor and the owner have the same principals.

Note 3: One reason that the editor thinks that this case is important is that it expands the contractor's duty to warn the owner about soil defects. To review the basics about the contractor's duty to the owner: A "contractor who knows, or should know of a defect in a particular subsoil does not perform his contractual obligations in a workmanlike manner if he fails to notify the owner of the existence of the condition." *Pike v. Howell*, 748 So. 2d 710, 712 (Miss. 1999). This duty of a contractor to the owner is separate and distinct from the implied warranty made by a contractor that a residence is built in a workmanlike manner and is suitable for habitation. The contractor's duty to disclose defects in the subsoil only applies to the first purchaser, while the implied warranty of habitability of a residence can be enforced by subsequent owners. *See Keyes v. Guy Bailey Homes, Inc.* 439 So. 2d 670, 673 (removing requirement of privity in action for breach of implied warranty in construction of home.)

Note 4: In this case the Mississippi Supreme Court expands the traditional rule that a contractor must warn the owner of soil problems so that when the contractor and the owner are related entities, or a single "builder/vendor," the builder/vendor has an obligation to disclose problems with the soil to the first purchaser from the builder/vendor. The Mississippi Supreme Court wrote in this case that it "has continued to hear cases in which a party has been accepted as a builder-vendor entity, but as of yet has not established a framework for determining what, exactly, constitutes a builder-vendor." The court then quotes from an Arizona case that the definition of the party that has this duty has changed "from the traditional builder-vendor model to arrangements under which a construction entity builds the homes and a sales entity markets them to the public. In some cases, the builder may be related to the vendor; in some cases, the builder and the vendor may be unrelated." Then the court writes, "Mississippi's overarching policy is to vitiate sham transactions that would deny relief to the innocent purchaser of new construction. The builder-vendor transactions may take the form of hollow sales of completed projects to strawmen, and then to the first true purchaser. They also may take the form of sister companies-one entity who owns the land, the other who improves the land-that work together to effectuate sham waivers of notices or implied warranties." In this case, the Circuit Court of Madison County must determine whether DG Gluckstadt and Rozier Construction are so closely related that they should be considered a single builder/vendor that had a duty to warn Stribling Investments of defects in the soil under the Dollar General parking lot.

Note 5: A single entity can be both the owner and contractor, at least in the context of contractors' liens. In *Associated Dealers Supply v. Mississippi Roofing Supply*, 589 So. 2d 1245 (Miss. 1991), the court found that Intervest was both an owner and general contractor, and that suppliers of labor and materials were subcontractors and therefore had no liens against the property.

Note 6: Another reason that this case is important is that this case establishes for the first time that an "as-is" clause in a sales contract does not eliminate the obligation of the contractor to warn about soil problems.

Note 7: The editor does not see a compelling case for carving an exception to the "as is" clause in a sales contract for commercial property, especially for this type of property. The editor does not know anything about the parties to this case or this property other than what's in the published opinion, but in his experience most Dollar General stores, like most drugstores, tractor supply

stores, and stand-alone restaurants, have triple-net leases to creditworthy national tenants, with the fee owner of the dirt having few if any responsibilities or risks. Given the dismal returns of other investments, the stream of rents to the landlord on these triple-net lease properties are considered by many investors to be safe and attractive investments relative to other available investments. These interests also may provide an easy place for a seller of property to re-invest net sales proceeds in a Section 1031 exchange. The fee interests are bought and sold regularly by sophisticated investors who can afford attorneys and consultants. There are several websites that list these types of properties, such as www.loopnet.com and www.1031exchangeadvisors.com. An instructive comparison to the *Stribling* case is *Stonecipher v. Kornhaus*, 623 So. 2d 955 (Miss. 1993). In what may be the worst possible circumstances, shortly after the Stoneciphers purchased a new home in Pass Christian, a tree limb fell on Mrs. Stonecipher and caused horrible injuries to her and her unborn child. When the Stoneciphers brought an action for negligent misrepresentation against the sellers regarding the condition of the tree, the Mississippi Supreme Court relied in part on the as-is clause in the sales contract to affirm a grant of summary judgment for the sellers. Why should the law give more protection to *Stribling* Investments than to Mrs. Stonecipher and her child?

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