NEWSLETTER OF THE REAL PROPERTY SECTION OF THE MISSISSIPPI BAR

MARCH 2019

2018-2019 REAL PROPERTY SECTION OFFICERS

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LEGISLATION

The following bills affecting real property are still alive in the Mississippi legislature following the March 5 deadline for committees to report general bills originating in the other house:

HB 777-Creates the Revised Mississippi Law on Notarial Acts, which would replace most of Mississippi's antiquated laws governing notaries. This bill was the result of a study group organized by the Secretary of State's office and is based on a uniform law drafted by the Uniform Laws Commission. Among other things, it authorizes the Secretary of State to promulgate rules regarding notarial acts with respect to electronic records. This bill keeps the amount of the notary's bond at $5,000.

HB 807-Extends to 2022 the automatic repealer in Miss. Code Ann. 29-1-75, which prohibits corporations and nonresident aliens from becoming the owner of public lands.

HB 962-Amends Miss. Code Ann. § 89-1-69, which prohibits transfer fees in subdivision covenants, to limit the exceptions to application of the statute.

HB 1307-Amends Miss. Code Ann. § 27-43-3, which currently provides that a tax sale is void if the chancery clerk fails to send the proper notices, to provide that the sale is voidable upon suit by the record owner or his heirs, successors and assigns. It also allows the tax assessor to apply to reduce a property's assessment after a casualty even if the owner does not make an application.

HB 1375-Makes changes to a number of statutes in Chapter 91 of the Mississippi Code dealing with administration of wills. This bill was the result of a study group organized by the Secretary of State's office.

HB 1429-Makes a number of changes in statutes addressing tax exemptions to reduce the requirements for exemptions for data centers. For example, the minimum capital investment is reduced from $50 million to $20 million, and the number of full-time jobs required to be created is reduced from 50 to 12.

HB 1584-Amends Miss. Code Ann. § 27-7-22.31, which addresses historic tax credits, to increase the amount of credits that can be awarded from $120 million to $180 million in any one year, and extends the term of the program from 2016 to July 1, 2019.

HB 1612 – Authorizes municipalities to create special local improvement assessment districts. Taxpayers within the district can vote to impose an assessment to pay for public improvements within the district.

SB 2716-Makes landlord-friendly changes to the tenant eviction process.

SB 2901-Creates the Landowners Protection Act, which would limit premises liability claims. It also amends Miss. Code Ann. § 85-5-7, which addresses the liability of joint tort-feasors, so that this statute applies to torts committed with a specific wrongful intent.

Changes to Bills of Exception Statute

The 2018 Legislature revised the statute that describes the bill of exceptions that must be filed in order for one to appeal from a decision of a municipality or county, Miss. Code Ann. Section 11-51-75. This statute is crucial for one appealing from an adverse zoning or other decision by a municipality or board of supervisors. Prior to the 2018 amendment, Section 11-51-75 required an appellant to file a bill of exceptions within ten days from the date of adjournment of the "session" of the board of supervisors or municipal authorities at which the adverse decision was rendered. The bill of exceptions had to have the record of the hearing attached. The bill of exceptions also had to be signed by the "person acting as president of the board of supervisors or of the municipal authorities." Some of the issues with the statute were determining when the ten-day period began, what had to be attached to bill of exceptions in terms of the record, what happened if the city did not cooperate in providing the documents needed to complete the record within the ten-day period, and what happened if the president of the board of supervisors or the municipal body refused to sign the bill of exceptions. The Mississippi Supreme Court and Court of Appeals have addressed these issues in various cases, but the cases arguably are not consistent, especially on the point of when the ten-day period begins. The changes to Section 11-51-75 address these issues. The amendments require that the appellant file a notice of appeal with the circuit clerk within ten days after the session of the meeting at which the board of supervisors or governing authorities of the municipality rendered the decision being appealed. The notice of appeal must describe the matters that the appellant desires to be made part of the record. The clerk of the board of supervisors or the municipality has thirty days to assemble the record. The circuit court then hears the case on the record. In other words, the amendment shifts the burden for assembling the record from the appellant to the clerk of the board of

supervisors or the municipality that rendered the decision being appealed. This statute became effective on July 1, 2018.

CASES

Tenant Who Gave Notice To Exercise Option to Purchase Was Not Holdover Tenant

Ing v. Adams, 248 So. 3d 881 (Miss. Ct. App. 2018). Adams, as landlord, and Ing, as tenant, entered into a lease of a basement of a building in Holly Springs. The building consisted of the basement, which was operated as a pizza restaurant; the first floor, which the landlord operated as a liquor store; and an upstairs apartment. The lease provided in relevant part that at the end of the term the tenant had the option to extend the lease for an additional five years or to purchase the building at its then appraised value. Before the end of the lease, the tenant gave the landlord a written notice of his intent to exercise the option to purchase the entire building, and that the purchase price would "be at appraised value as agreed." Four days later, on the date that the lease expired, the landlord's attorney sent a letter to the tenant stating that the landlord did not wish to sell the building to the tenant, that the landlord was willing to continue to lease the basement to the tenant on a month-to-month basis, and that the tenant had committed unspecified breaches of the lease. The tenant stopped paying rent but continued to operate the restaurant. The landlord brought an action in the Circuit Court of Marshall County alleging that the tenant had breached the lease by not paying its share of taxes and insurance, residing in the premises and other breaches. The landlord acknowledged that the tenant had given notice of exercise of the option to purchase, but alleged that the tenant had not tendered any money or taken any other acts toward purchasing the property, and therefore had not properly exercised his option before it expired. The landlord asked for a declaration that the lease had terminated, that the option to purchase had expired, and to evict the tenant. The tenant filed a counterclaim denying that he had breached the lease, and asserting that the landlord had breached the lease by refusing to sell the building. The Circuit Court held that the tenant had the right to exercise the option, but that the tenant had not adequately exercised the option because he did not tender the purchase price or obtain an appraisal. The Circuit Court ruled that the tenant owed the landlord rent of $2500 for each month that the tenant had stayed in possession after the lease expired. The Circuit Court also ordered the tenant to vacate the premises. On appeal, the Mississippi Court of Appeals, in a decision by Justice Wilson, reversed. The landlord argued that option was unenforceable because it failed to specify a sales price. The Court of Appeals wrote that it was not necessary to state a sales price as long as there was clear method of determining one. The lease provided that the option price would be the building's "then appraised value," which was sufficiently clear for the option to be valid. In regard to the landlord's argument that the tenant had not sufficiently exercised the option because the tenant had not tendered the purchase price, the Court of Appeals wrote that written notice of intent to exercise the option was all that the tenant needed to do for a valid exercise of the option. The option holder was not required to tender the purchase price or show an ability to tender the purchase price. The tenant also was not required to obtain an appraisal once the landlord had refused to honor the option. Finally, the Court of Appeals wrote that once the tenant exercised the option to purchase and the landlord refused to honor the option, the tenant became the equitable owner of the building, and therefore did not owe any holdover rent.

Note 1: Justice Carlson filed a separate opinion concurring part and dissenting in part. She concurred in the majority's holding that a valid option existed, and that the tenant was entitled to specific performance. She disagreed with the majority's holding that the circuit court erred in finding that the tenant did not owe rent

for the period after the lease expired. She reasoned that once the lease expired, a month-to-month lease was implied. Justice Carlson noted that the tenant had continued to operate its business on the property for sixteen months after the lease expired without paying any rent. The majority opinion acknowledged Justice Carlson's point, but also noted that if the landlord had honored its obligation to sell the building, the tenant would have been entitled to the rents from the ground floor and the second floor of the building.

Note 2: While the lease was only for the basement of the building, the option was to purchase the entire building, not just the leased premises. This does not seem to have made any difference in the legal analysis.

Note 3: Finding that stating that the option price would be the building's "then appraised value" seems like a pretty low bar for determining that the option agreement stated the purchase price. Where do the parties stand if they each get an appraisal and the appraised values are different?

Note 4: An interesting comparison to the *Ing* case is *Fairchild v. Bilbo*, 166 So. 3d 601 (Miss. Ct. App. 2015). In the *Fairchild* case, the property was a house, and the tenant had a lease with an option to purchase. After the house was damaged by a tornado, the tenant gave notice to the landlord that it intended to exercise its option. There were two property insurance policies on the property, one from Alfa acquired by the landlord in connection with a mortgage loan on the house, but with the premiums paid by the tenant pursuant to the lease. The tenant was not named as an insured on that policy. The tenant acquired a second policy from State Farm in its own name. The landlord refused to sell the property. The tenant then stopped paying rent. In an action by the tenant for specific performance of the option, the Chancery Court of Forrest County held that the tenant acted reasonably in stopping paying rent because the landlord had refused to sell the property after the tenant exercised the option. Since the landlord breached the lease by refusing to sell the property pursuant to the option to purchase, the tenant was not in default for failing to pay the rent. The Chancery Court also held that the tenant was entitled to use the proceeds of the landlord's Alfa policy to rebuild the house, in part because the tenant had paid the premiums on that policy. The Mississippi Court of Appeals affirmed.

Note 5: The Court of Appeals in *Ing* relied on two federal district courts from other states for the proposition that the tenant becomes the "equitable owner" of the property once the tenant exercises an option to purchase. The *Fairchild* case, discussed in the preceding note also found that the tenant did not owe rent after the landlord refused to honor the option, but did not rely on an "equitable owner" theory. The editor is unsure of what it means to be an "equitable owner," is concerned that mischief (*e.g.*, premises liability) could be made of the tenant being deemed to be an "owner," and wishes that the Court of Appeals had simply followed *Fairchild* on this point rather than adopting the reasoning of federal district courts in other states, and not taken the extra and arguably unnecessary step of declaring that the tenant becomes an equitable owner of the property once it exercises an option to purchase the property. Hopefully future courts will construe the tenant to be an equitable owner of the property only as to the question of whether the tenant has to pay rent after the landlord refuses to exercise an option to purchase.

<u>Appraiser's Testimony Excluded When DOR Regs Required Different Method of Valuation</u>

NRG Wholesale Generation LP v. Kerr, 258 So. 3d 278 (Miss. 2018). NRG owns a power plant in Choctaw County, Mississippi. The property was assessed as industrial personal property. The Tax Assessor of

Choctaw County determined that the true value of the power plant was approximately $467 million. NRG appealed the Tax Assessor's assessment of its property. NRG appeared before the Choctaw County Board of Supervisors to protest the tax assessor's valuation. The supervisors declined to reduce the assessment. On appeal to the Circuit Court of Choctaw County, NRG's appraiser calculated the value of the plant by the customary sales-comparison, income, and cost of replacement approaches, and then reached a reconciled value of $180 million. At the close of discovery, the County moved to exclude NRG's appraiser's testimony because it did not comply with the method of valuation required by the Mississippi Department of Revenue's regulations. The Department of Revenue's regulations require that industrial personal property be valued as a trended historical cost-less-depreciation approach, which is basically replacement cost less depreciation. Since NRG's appraiser did not use this method of valuation, the county argued, the appraiser's testimony should be excluded. The circuit court granted the county's motion. On appeal, the Mississippi Supreme Court, in an opinion by Justice Ishee, affirmed. Section 27-35-50 provides that the Department of Revenue can determine the method for valuing different types of personal property. Section 27-35-50 also provides that the tax assessor can use only the method prescribed by the Department of Revenue. Since NRG's appraiser did not use the approach mandated by the Department of Revenue, the circuit court was correct in excluding the appraiser's testimony.

Note 1: NRG's appraiser did what appears to be a customary test for income-producing real property, which means calculating the value under the comparable sales, income and cost approaches, and then determining which of these three values makes the most sense for this particular property. According to footnote 1 of the opinion, "Value under the cost approach is determined by calculating the 'amount currently required to erect or construct a new plant of equal utility,' less physical deterioration, functional obsolescence, and economic obsolescence; …" The trended historical cost-less-depreciation approach mandated by the Department of Revenue for industrial personal property is "Original acquisition cost new, including all cost associated with installing the equipment in place for production, will be the base for all industrial property…The base cost will be multiplied by the appropriate inflation factor furnished by the [DOR] …based on the age of the item. This calculation will be multiplied by the appropriate depreciation factor (again based on age) that is provided internally by the DOR." In other words, it appears to the editor, NRG provided a customary appraisal for income-producing real property, while the Department of Revenue's regulations required a method appropriate for equipment.

Note 2: There is probably a sound answer to this question that makes sense to tax experts, but how does a power plant get classified as personal property?

Note 3: One take-away from this case is that regulations issued by the Department of Revenue provide specialized methods of valuation for particular kinds of property, and that if one is going to appeal a tax assessment and provide an appraisal, he or she needs to consult these regulations to see what valuation method the Department of Revenue requires.

Note 4: This case is another example of the general principle that the deck is stacked against landowners in Mississippi who want to challenge their tax assessments. For one thing, a taxpayer does not get any actual notice that the board of supervisors is going to increase his assessment. If the taxpayer does appear before the board at the meeting at which tax assessments are considered, his opportunity to appeal an increase in assessment is pretty much gone. *See* Miss. Code Ann. § 27-35-93; *but see* Miss. Code Ann. § 27-35-143

(circumstances in which board of supervisors can change assessments at any time). Another example is the rule that a taxpayer who appeals an increased assessment must not only pay the increased taxes during the appeal, but must post a bond in double the amount in dispute. *See* Miss. Code Ann. § 11-51-77; *Board of Supervisors of Clarke County v. BTH Quitman Hickory, LLC*, 255 So. 3d 1261 (Miss. 2018); *Natchez Hospital Company, LLC v. Adams County Board of Supervisors*, 238 So. 3d 1162 (Miss. 2018).

Tenant's Waiver of Implied Warranty of Habitability and Landlord's Duty to Repair Enforceable

Lee v. Keller Williams Realty, 247 So. 3d 293 (Miss. Ct. App. 2017). Keller Williams, as landlord, and Lee, as tenant, entered into a lease of a house in Horn Lake. The lease provided that the tenant waived any warranty about the condition of the premises and any obligation of the landlord to perform repairs. After Lee moved into the house, a portion of the house flooded after rain. Mold resulted from the flooding. Lee brought an action against Keller Williams in the Circuit Court of DeSoto County alleging negligence and breach of contract for failure to repair the property. The Circuit Court granted Keller Williams' motion for summary judgment on the basis that Lee failed to prove a breach of the lease. On appeal by Lee, the Mississippi Court of Appeals, in a decision by Justice Greenlee, affirmed. Mississippi has an implied warranty of habitability for residential properties, but this duty can be waived by the tenant. The Mississippi Residential Landlord and Tenant Act provides that the landlord will make repairs to the leased premises, but also provides that the tenant may agree in writing to perform some or all of the landlord's duties if the transaction is entered into in good faith. Lee asserted in her complaint that she did not knowingly waive any rights. The Court of Appeals found that in reviewing the record, "it is clear that Lee understood the agreement's provisions and that she voluntarily entered into the agreement with such provisions, constituting a waiver. In her deposition, Lee admitted that she understood the agreement and its contents. The waivers in the lease of the landlord's duty to repair therefore were enforceable.

Note 1: This is the first reported case that the editor has found in which a court has held that the tenant made a valid waiver of Mississippi's implied warranty of habitability, or the landlord's obligation to repair under the Residential Landlord and Tenant Act.

Note 2: Unfortunately, the case is a vague about wording of the lease provisions at issue. It does not give the language of the waivers. The court wrote that the lease "contained a "condition of the premises" clause and an "indemnity" clause, which relieved Keller Williams of its duty to make repairs to the property after the inception of the lease." An agreement to indemnify, of course, is not the same thing as a waiver, and it is not clear how an agreement to indemnify by itself would serve to waive the implied warranty of habitability or the duty to repair. A "condition of the premises" clause could be one that provides that the tenant accepts the condition of the premises as is, and waives any obligation of the landlord to repair. But one can't tell from reading the case what magic language the court found sufficient to constitute a waiver.

Note 3: In determining that the tenant made a knowing and voluntary waiver in the lease, the Court of Appeals was impressed with a legend at the top of the first page of the lease that read that "[t]his is a legally binding document. If any party to this lease does not fully understand it, or has any question, the party should seek advice from competent legal professional before signing."

Note 4: The tenant also argued that the landlord undertook the obligation to repair because when the tenant called the landlord's agent about the flooding, the landlord's agent told the tenant that she would what could be done. The Court of Appeals wrote that a duty can be assumed in two ways, by contract or by detrimental reliance on a gratuitous promise. In this case there was no contract in which the landlord assumed the obligation to repair, and the agent's statement that she would see what could be done did not constitute a promise upon which the tenant could rely.

Note 5: The editor's understanding is that the wisdom on the street is that a residential tenant is in a better legal position if he or she does not read the lease. Does this case suggest that street wisdom is correct on this point?