NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 1129

JOLIE MAISON DEVELOPMENT COMPANY, L.L.C.

VERSUS

JULIE DRAKE, WIFE OF AND SEAN PAUL JEANFREAU AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

Judgment Rendered: February 12, 2010

Appealed from the
Twenty-second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Docket Number 2008-12031

Honorable August J. Hand, Judge Presiding

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BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

WHIPPLE, J.

In this appeal, a mortgage holder appeals a judgment rendered against it, confirming a preliminary default and cancelling and erasing a mortgage it held on immovable property sold to plaintiff at tax sale. The mortgage holder also seeks to collaterally challenge, on the basis of absolute nullity, a previous judgment by default confirming and quieting the tax title acquired by plaintiff. For the following reasons, we affirm the default judgment at issue on appeal, which cancelled and erased the mortgage, and decline to declare, on the record before us, the absolute nullity of the previous judgment by default confirming and quieting tax title. We also deny the exception of no cause of action filed in this court.

FACTS AND PROCEDURAL HISTORY

On April 14, 2008, plaintiff, Jolie Maison Development Company, LLC ("Jolie Maison"), instituted this "Action to Confirm and Quiet Title to Real Estate and for Cancellation of Mortgage," seeking to confirm its title to immovable property in St. Tammany Parish acquired by tax sale for unpaid 2003 ad valorem taxes and to have a mortgage recorded against the property cancelled and erased. Named as defendants were Julie Drake, wife of and Sean Paul Jeanfrau, the record owners at the time of the tax delinquency and tax sale, and Mortgage Electronic Registration Systems, Inc. ("MERS"), the mortgage holder. No responsive pleadings were filed by the defendants.

On December 10, 2008, after the passage of more than six months, Jolie Maison obtained a preliminary judgment by default against Drake and

Jeanfrau based on their failure to file responsive pleadings.[1] Following a hearing to confirm the preliminary default, the trial court rendered judgment, dated December 16, 2008, confirming and quieting Jolie Maison's tax title and recognizing Jolie Maison as the sole owner. This judgment was not appealed.

Two days later, on December 18, 2008, Jolie Maison filed a motion for preliminary default against MERS, contending that, despite personal service, MERS also had not filed any responsive pleadings. A preliminary default against MERS was entered on December 19, 2008. Following a confirmation hearing, the trial court, by judgment dated January 5, 2009, rendered judgment against MERS, confirming the preliminary default and cancelling and erasing the mortgage inscription of the original mortgage holder and the inscription of assignment of the mortgage to MERS affecting the property at issue.

On March 6, 2009, MERS filed a motion for devolutive appeal of the January 5, 2009 judgment cancelling the mortgage inscriptions. On appeal, MERS contends that the trial court erred both in confirming the tax title (the December 16, 2008 judgment that was not appealed) and in cancelling the mortgage of the property at issue (the January 5, 2009 judgment on appeal), where the record is devoid of any evidence to prove that the statutorily

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[1]Pursuant to LSA-R.S. 47:2228, now repealed, after the lapse of three years from the date of recording a tax deed in the conveyance records in the parish where the property is situated, a tax purchaser may file a petition against the former proprietors of the property to quiet tax title. The former proprietor then has six months from the date of service of the petition and citation to institute a proceeding to annul the tax title. After the lapse of six months, if no proceeding to annul has been instituted, judgment may be rendered quieting and confirming the tax title. LSA-R.S. 47:2228.

Pursuant to Acts 2008, No. 819, § 1, effective January 1, 2009, the statutory scheme governing tax sales, procedures to quiet tax title, and actions to annul was replaced with Chapter 5 of Subtitle III of Title 47. Pursuant to § 2 of Acts 2008, No. 819, the prior statutory scheme, including LSA-R.S. 47:2171 through 2194, LSA-R.S. 47:2221 through 2230, and LSA-R.S. 47:2251 through 2262, was repealed. However, because the prior statutory scheme was in effect at the time of the tax sale proceedings herein, throughout our opinion, we will refer to the statutes in effect at that time.

required notice was provided to the owner and mortgagee of the property. MERS also filed in this court an exception of no cause of action, contending that Jolie Maison failed to state a cause of action in its "Action to Confirm and Quiet Title to Real Estate and for Cancellation of Mortgage," given that it failed to allege therein that the statutorily required notice of tax delinquency and intent to sell had been given.

EXCEPTION OF NO CAUSE OF ACTION

The objection of no cause of action is properly raised by the peremptory exception and questions whether the law extends a remedy to anyone under the factual allegations of the petition. The purpose of the exception of no cause of action is to determine the sufficiency in law of the petition. Richardson v. Home Depot USA, 2000-0393 (La. App. 1st Cir. 3/28/01), 808 So. 2d 544, 546. A peremptory exception may be filed for the first time in the appellate court. LSA-C.C.P. art. 2163; Snearl v. Mercer, 99-2738, 99-1739 (La. App. 1st Cir. 2/16/01), 780 So. 2d 563, 572, writs denied, 2001-1319, 2001-1320 (La. 6/22/01), 794 So. 2d 800, 801.

Generally, the exception of no cause of action is triable solely on the face of the petition and any annexed documents. Woodland Ridge Association v. Cangelosi, 94-2604 (La. App. 1st Cir. 10/6/95), 671 So. 2d 508, 510. For purposes of determining the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. The court must determine if the law affords plaintiff a remedy under those facts. While evidence generally may not be introduced to support or controvert the exception, a jurisprudentially recognized exception to this rule allows the court to consider evidence that is admitted without objection to enlarge the pleadings. Stroscher v. Stroscher, 2001-2769 (La. App. 1st Cir. 2/14/03), 845 So. 2d 518, 523.

Any doubts are resolved in favor of sufficiency of the petition. The question, therefore, is whether, in the light most favorable to the plaintiff, and with every doubt resolved in its behalf, the petition states any valid cause of action for relief. If two or more causes of action are based upon separate and distinct operative facts, partial grants of the exception of no cause of action may be rendered, while preserving other causes of action. Stroscher, 845 So. 2d at 523.

Pursuant to article VII, section 25 of the Louisiana Constitution of 1974, a tax-sale purchaser may quiet his title as "provided by law." Cressionnie v. Intrepid, Inc., 2003-1714 (La. App. 1st Cir. 5/14/04), 879 So. 2d 736, 739. Moreover, as stated in footnote one above, LSA-R.S. 47:2228 provided the method and procedure for quieting a tax title. Specifically, after the lapse of three years from the date of recording a tax deed in the conveyance records in the parish where the property is situated, a tax purchaser was authorized to file a petition against the former proprietors of the property to quiet tax title. LSA-R.S. 47:2228; Cressionnie, 879 So. 2d at 739.

Louisiana Revised Statute 47:2228 further provided that the tax purchaser in its petition to quiet tax title must set forth the following: "a description of the property, mention of the time and place of the sale and name of officer who made same, reference to page of record book and date of recording tax deed, notice that petitioner is owner of the said property by virtue of tax sale, and notice that the title will be confirmed unless a proceeding to annul is instituted within six months from date of service of the petition and citation." The petition of Jolie Maison alleges all of the required elements listed above and sets forth the required notices as listed in LSA-R.S. 47:2228. Jolie Maison was not required to additionally allege that

the former proprietor and the mortgagee had been provided with notice of the tax delinquency and impending tax sale in order to state a cause of action pursuant to LSA-R.S. 47:2228. Moreover, we agree with Jolie Maison that MERS, through its exception of no cause of action, is improperly attempting to assert the defense of lack of notice in the guise of an exception of no cause of action. Accordingly, we conclude that Jolie Maison stated a cause of action to quiet its tax title and to cancel the mortgage encumbering the property. The exception of no cause of action filed by MERS in this court is therefore denied.

PROPRIETY OF CHALLENGE TO DECEMBER 16, 2008 JUDGMENT CONFIRMING TAX TITLE

As set forth above, in its sole assignment of error, MERS challenges both the December 16, 2008 judgment against Drake and Jeanfreau, confirming the tax title, and the January 5, 2009 judgment against MERS, cancelling the mortgage inscriptions. However, MERS timely appealed only the January 5, 2009 judgment cancelling the mortgage inscriptions.[2]

Nonetheless, MERS contends that it may properly challenge, or collaterally attack, in this appeal the earlier December 16, 2008 judgment, which was rendered in these same proceedings and confirmed the tax title, because that judgment was an absolute nullity due to **lack of proof** that the statutorily required notice of tax delinquency and intention to sell the property was provided to the record owners and mortgagee.

A "collateral attack" on a judgment is an attempt to impeach the decree from one proceeding in another proceeding not instituted for the express purpose of annulling such decree. Smith v. LeBlanc, 2006-0041

[2]Clearly, MERS attempts to collaterally attack the prior, unappealed December 16, 2008 judgment quieting tax title in this appeal as a means of preventing the automatic cancellation of its mortgage pursuant to LSA-R.S. 47:2183(B), as more fully discussed in the following section of this opinion.

(La. App. 1st Cir. 8/15/07), 966 So. 2d 66, 71 n.2. A person with interest may show the absolute nullity of a judgment in collateral proceedings at any time and before any court, as absolutely null judgments are not subject to the venue and delay requirements of the action of nullity. Smith, 966 So. 2d at 71.

The sale of property for nonpayment of taxes is an action that affects a property right protected by the Due Process Clause of the Fourteenth Amendment. Lewis v. Succession of Johnson, 2005-1192 (La. 4/4/06), 925 So. 2d 1172, 1176. Thus, the property owner must be provided with notice reasonably calculated to apprise him of a pending tax sale. LSA-Const. art. VII, § 25(A); LSA-R.S. 47:2180(A); Lewis, 925 So. 2d at 1176-1177. Additionally, a mortgagee possesses a substantial property interest that is significantly affected by a tax sale. Thus, a mortgagee is also entitled to notice reasonably calculated to apprise it of the pending tax sale. Mennonite Board of Missions v. Adams, 462 U.S. 791, 798, 103 S. Ct. 2706, 2711, 77 L. Ed. 2d 180 (1983). Failure to provide the required notice renders a tax sale of the property an absolute nullity. Jamie Land Company, Inc. v. Jones, 2005-1471 (La. App. 1st Cir. 6/9/06), 938 So. 2d 738, 739, writ denied, 2006-1735 (La. 10/6/06), 938 So. 2d 86.

On the other hand, tax sales are presumed valid, and LSA-Const. art. VII, § 25(A)(1) provides that the "tax deed by a tax collector shall be prima facie evidence that a valid sale was made." LSA-Const. art. VII, § 25(A)(1); Lewis, 925 So. 2d at 1177. Thus, in a suit to quiet tax title, the tax deed of the sheriff constitutes prima facie proof of the regularity of the tax adjudication proceedings. Cressionnie, 879 So. 2d 736, 739. The defendant must then offer evidence sufficient to rebut the presumption of regularity. Only if the presumption is sufficiently rebutted does it become the burden of

the tax purchaser to go forward and prove that all requisites for a valid tax sale were complied with. Cressionnie, 879 So. 2d at 739.

The record before us establishes that in support of its claim to quiet its tax title, Jolie Maison filed into evidence at the earlier December 16, 2008 default confirmation hearing a certified copy of the tax deed, as prima facie evidence of the validity of the tax sale. However, MERS argues that the tax deed offered therein could not have been sufficient for Jolie Maison to carry its burden of proving a valid tax sale because the tax deed itself provides that notice was given to Velvet Pines Developers, LLC, whom MERS contends was a prior owner of the property, but not the record owner of the property at the time of the delinquency notice and subsequent tax sale.[3] MERS further argues that the tax deed does not recite that MERS, the holder of the mortgage at the time of the tax sale, received the statutorily required notice. Thus, MERS contends, because Jolie Maison failed to prove that the statutorily required notice was provided to the record owners and the mortgagee, the December 16, 2008 judgment quieting the tax deed is an absolute nullity and, thus, subject to collateral attack herein.

While the tax deed shall ordinarily be deemed prima facie evidence that a valid sale was made, the Louisiana Supreme Court has held that a statement in a tax deed declaring that notice was duly served on "the delinquent taxpayer," but thereafter naming someone other than the owner at the time of the tax sale proceedings, "cannot be in any manner construed as showing that the notice was served on the actual owner." In re Lafferranderie, 114 La. 6, 11, 37 So. 990, 991-992 (1904); also see generally West v. Negrotto, 52 La. Ann. 381, 27 So. 75 (1899) (The sale of property

[3]As correctly noted by MERS on appeal, Jolie Maison set forth in its petition herein that Drake and Jeanfreau acquired the property by act of donation on January 1, 2004.

by the state for the payment of taxes vests in the purchaser a title legal on the face of the papers, unless it thereon appears otherwise).

Nonetheless, even if we were to accept MERS's argument that the trial court should not have accepted the tax deed as prima facie evidence of the regularity of the tax sale proceedings, given the statement therein that notice was provided to one other than the record owner or mortgage holder, we find that MERS is arguing that the purported **insufficient evidence of notice** is equal to **proof of lack of notice**. The record before us simply does not contain proof that notice was not given to the appropriate parties. While the declaration in the tax deed regarding notice may potentially raise some questions as to the notice given, the tax deed alone does not support a conclusion that the appropriate notice was not given and, accordingly, does not support a declaration herein of the absolute nullity of the tax sale.

Judgments rendered contrary to law (such as when rendered in favor of a plaintiff who allegedly did not carry its burden of proof) are subject to reversal on appeal, but an allegation of insufficiency of the evidence to establish a claim cannot form the basis of a claim for nullity. See generally Levy v. Stelly, 254 So. 2d 665, 667 (La. App. 4th Cir. 1971), writ denied, 260 La. 403, 256 So. 2d 289 (1972).

Thus, on the basis of the record before us, we decline to consider in this appeal the issue of the absolute nullity of the prior judgment quieting tax title. This attack on the judgment quieting title due to lack of notice is inappropriate on appeal herein and is more properly addressed in a nullity

action.[4] See generally National Loan Investors v. Cooper, 99-145 (La. App. 3rd Cir. 6/2/99), 741 So. 2d 777, 779, writ denied, 99-1880 (La. 10/8/99), 751 So. 2d 221.

CHALLENGE TO JANUARY 5, 2009 JUDGMENT CANCELLING MORTGAGE INSCRIPTIONS

In its appeal of the January 5, 2009 judgment cancelling the mortgage inscriptions that encumbered the property at issue, MERS contends that the trial court erred in confirming the default judgment in favor of Jolie Maison and against MERS where Jolie Maison failed to prove that Drake and Jeanfreau, the record owners of the property, and MERS, the mortgage holder, had received the statutorily required notice of tax delinquency and intention to sell the property.

In order for a plaintiff to obtain a default judgment, he must establish the elements of a prima facie case with competent evidence, as fully as though each of the allegations in the petition were denied by the defendant. LSA-C.C.P. art. 1702(A); Sessions & Fishman v. Liquid Air Corp., 616 So. 2d 1254, 1258 (La. 1993). The elements of a prima facie case are established with competent evidence that convinces the court that it is probable that the plaintiff would prevail at trial on the merits. Arias v. Stolthaven New Orleans, L.L.C., 2008-1111 (La. 5/5/09), 9 So. 3d 815, 820.

When reviewing a default judgment, the court of appeal is restricted to determining whether the record contains sufficient evidence to prove a prima facie case. LSA-C.C.P. art. 1702. To obtain reversal of a confirmation of

[4]Through a direct action challenging the judgment quieting tax title as an absolute nullity, evidence such as the proces verbal, any return receipts related to the notice given, and testimony of the parties involved could be offered to resolve the issue of whether proper notice was given. See LSA-C.C.P. art. 2005 (A judgment may be annulled after the delays for appealing have elapsed. Moreover, a judgment affirmed on appeal may nonetheless be annulled when the ground for nullity did not appear in the record of appeal or was not considered by the appellate court). Indeed, in its brief in this matter, MERS states that an action in nullity has been commenced.

default judgment, the defendant must overcome the presumption that the judgment was rendered upon sufficient evidence and that it is legally correct. However, this presumption does not apply where the record contains a note of evidence introduced or a transcript of the proceedings in the trial court. Assamad v. Percy Square and Diamond Foods, L.L.C., 2007-1229 (La. App. 1st Cir. 7/29/08), 993 So. 2d 644, 646-647, writ denied, 2008-2138 (La. 11/10/08). 996 So. 2d 1077. In the instant case, the record before us contains a transcript of the January 5, 2009 hearing to confirm the preliminary default, which lists the evidence introduced.[5]

At the hearing to confirm the preliminary default, Jolie Maison presented the testimony of James Lindsey, a representative of Jolie Maison, who testified that Jolie Maison had previously confirmed and quieted the tax title against Drake and Jeanfreau by judgment dated December 16, 2008, in this suit and record, and that the property obtained by tax title was encumbered by a mortgage that had been assigned to MERS. Jolie Maison then introduced into evidence: (1) the mortgage in question, recorded on January 9, 2004; (2) the subsequent assignment to MERS, recorded on January 29, 2004; (3) the return of the long arm service affidavit on MERS, on June 16, 2008; and (4) the entry of preliminary default on December 19, 2008.

Based on the testimony and evidence presented, and given its previously rendered judgment quieting the tax title, the trial court confirmed the default judgment in favor of Jolie Maison and against MERS, cancelling the mortgage inscriptions encumbering the property obtained by Jolie Maison by tax title, which title, as stated above, had already been judicially

[5]We note that while the transcript of the hearing lists the evidence introduced at the hearing, the file-stamped copies of the evidence introduced at the January 5, 2009 hearing are not contained in the record before us.

quieted. Thus, on appeal, we must determine whether Jolie Maison established a prima facie case of its entitlement to cancellation of the mortgage encumbering the property it obtained by tax title where it established that the mortgagee had notice of the action to quiet the tax title and cancel the mortgage and that the tax title had already been quieted in this proceeding.

Pursuant to LSA-R.S. 47:2180(A)(1)(a) and (B), on the second day after the deadline for payment of taxes each year, the tax collector shall send notice by certified mail, return receipt requested, to each taxpayer who has not paid all the taxes which have been assessed to him on immovable property that his taxes must be paid within twenty days after the service or mailing of the notice or that the property will be sold according to law. At the expiration of twenty days' notice, the tax collector shall proceed to advertise the property for sale. LSA-R.S. 47:2181. The tax collector shall then sell the property upon which delinquent taxes are due. LSA-R.S. 47:2182. When property is purchased at tax sale, the tax collector shall further execute and sign a deed of sale to the tax-sale purchaser, in which the tax collector shall relate in substance a brief history of the proceedings had, shall describe the property, state the amount of the taxes, interest, and costs and the bid made for the property, and the payment made to him. The tax deed shall additionally provide that the property shall be redeemable at any time within three years of the filing of the deed in the conveyance office in the parish in which the property is situated. LSA-R.S. 47:2183(A).

If, however, the property is not redeemed, the tax purchaser, after the lapse of three years from the date of recording a tax deed, may file a petition against the former proprietors of the property to quiet tax title, as was instituted by Jolie Maison herein. LSA-R.S. 47:2228; Cressionnie, 879 So.

2d at 739. Moreover, if not redeemed, "such record[, i.e., the tax deed,] in the conveyance or mortgage office **shall operate as a cancellation of all conventional** and judicial **mortgages.**" LSA-R.S. 47:2183(B) (emphasis added); Northeast Realty, L.L.C. v. Misty Bayou, L.L.C., 41,873 (La. App. 2nd Cir. 2/28/07), 953 So. 2d 936, 942, writ denied, 2007-0657 (La. 5/11/07), 955 So. 2d 1283.

The three-year period for the automatic cancellation of conventional and judicial mortgages provided for in LSA-R.S. 47:2183(B) corresponds to the three-year redemptive period provided for in LSA-Const. art. VII, § 25(B) (1974). See Grieshaber v. Cannon, 346 So. 2d 166, 168 (La. 1977) (interpreting the similar provision in LSA-Const. art. X, § 11 (1921)). The statute has the obvious purpose of cancellation of conventional and judicial mortgages as a convenient means to clear title to property sold for taxes and relieve a tax purchaser of such burdens. However, the strict wording of LSA-R.S. 47:2183(B) providing for the cancellation of conventional and judicial mortgages after the lapse of three years from the date of recordation of the tax deed must, of necessity, mean after the recordation of a **valid and effective tax deed**. Grieshaber, 346 So. 2d at 168.

Nonetheless, while MERS contends on appeal that the automatic cancellation of the mortgage it held on the property could not have occurred because the tax deed was not valid (based on its allegation of lack of **proof** of notice of the tax delinquency and impending tax sale), we note that the efficacy of the tax deed had already been heard and decided by the trial court with its earlier rendition of the judgment dated December 16, 2008, quieting the tax title. Thus, the issue of the validity and effectiveness of the tax deed was no longer an issue before the court at the subsequent January 6, 2009

hearing to confirm the default against MERS and to have the automatic cancellation of the mortgage at issue judicially recognized.

Moreover, while MERS claims that the earlier December 16, 2008 judgment quieting tax title is an absolute nullity and, thus, can be collaterally attacked herein on appeal, for the reasons set forth above, we conclude that the alleged absolute nullity of the December 6, 2008 judgment quieting tax title is not apparent on the face of the record before us and, thus, is pretermitted and will not be decreed by this court.

Had MERS timely filed any pleadings in these proceedings within the six-month period provided by LSA-R.S. 47:2228, MERS could have raised, and presented evidence to establish, the affirmative defense of lack of notice as to Jolie Maison's claims both to quiet its tax title and for judicial cancellation of the mortgage held by MERS. However, MERS did not do so. Thus, MERS, as the defendant against whom a default judgment was confirmed, may not assert an affirmative defense on appeal, Arias, 9 So. 3d at 820, especially in a situation such as this, where the record does not sufficiently support its assertion on appeal of the affirmative defense of the absolute nullity of an underlying tax title and judgment quieting tax title. Accordingly, the January 5, 2009 judgment on appeal, cancelling the mortgage inscriptions encumbering the property at issue, is affirmed.[6]

CONCLUSION

For the above and foregoing reasons, the January 5, 2009 judgment on appeal is affirmed. The exception of no cause of action filed by MERS in

[6]However, we again note that, pursuant to LSA-C.C.P. art. 2005, a judgment affirmed on appeal may nonetheless be annulled when the ground for nullity did not appear in the record of appeal or was not considered by the appellate court. Thus, our action today of affirming the appealed-from judgment cancelling the mortgage inscriptions encumbering the property at issue does not prevent MERS from attempting to establish the absolute nullity in a direct action of nullity.

this court is denied. Costs of this appeal and the exception are assessed against MERS.

AFFIRMED; EXCEPTION OF NO CAUSE OF ACTION DENIED.