

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00958 COA

ALFORD-TUPELO, L.P.

APPELLANT

v.

BOARD OF SUPERVISORS OF LEE COUNTY, MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. THOMAS J. GARDNER III

COURT FROM WHICH APPEALED: CIRCUIT COURT OF LEE COUNTY

ATTORNEY FOR APPELLANT:

DAVID R. SPARKS

ATTORNEY FOR APPELLEE:

WILLIAM M. BEASLEY

NATURE OF THE CASE: CIVIL-APPEAL FROM BOARD OF SUPERVISORS DECISION

TRIAL COURT DISPOSITION: DISMISSAL

MANDATE ISSUED: 6/10/97

BEFORE BRIDGES, C.J., HERRING, AND PAYNE, JJ.

HERRING, J., FOR THE COURT:

This action came before the Court on appeal from a ruling by the trial court granting the motion of the Appellee, the Board of Supervisors of Lee County, Mississippi (the County), to dismiss with prejudice the petition for appeal and change of assessment filed with the trial court by the Appellant,

Alford-Tupelo, L.P. (Alford), a foreign corporation owning certain real property in Lee County, Mississippi. The motion to dismiss the petition was filed by the County pursuant to Mississippi Rule of Civil Procedure 12 (b)(6) because of Alford's alleged failure to state a claim upon which relief can be granted.

After careful consideration of the issues raised on appeal, we affirm the ruling of the trial court.

## FACTS

Alford filed an application with the County on August 30, 1993, after the county assessment roll had already been approved, seeking a reduction in the 1992 taxes assessed by the County against real property owned in the county by Alford. This application was filed pursuant to Sections 27-35-143 as amended and 27-35-145 of the Mississippi Code of 1972. The County ultimately heard and denied Alford's request for an assessment change on February 7, 1994. Thereafter, on February 17, 1994, Alford filed a new petition for appeal and change of assessment in the Circuit Court of Lee County, Mississippi, pursuant to Section 11-51-77 of the Mississippi Code of 1972.

On April 6, 1994, Lee County filed its motion to dismiss Alford's petition pursuant to Mississippi Rule of Civil Procedure 12(b)(6). In its motion, the County alleged, *inter alia*, that Alford's original application to change the assessment, which was filed with the Lee County Board of Supervisors, was not timely filed and failed to comply with the provisions of the Section 27-35-143 as amended. Section 27-35-143 gives the board of supervisors the power, upon application of the interested party, to change or decrease an assessment under certain circumstances, "at any time after the assessment roll containing such assessment has been finally approved by the State Tax Commission, and prior to the last Monday in August next, . . . ." The county assessment roll was approved on November 2, 1992.

The County contends that since the application of Alford was not even filed with the Lee County Board of Supervisors until Monday, August 30, 1993, after the Lee County assessment roll had been finally approved by the State Tax Commission, then Alford failed to comply with the

provisions of Section 27-35-143, and is therefore barred from seeking any relief by virtue of the statute. The County's position is that any assessment change must be *completed* prior to the last Monday in August. On the other hand, Alford contends that Section 27-35-143 was amended, effective July 1, 1993, and that prior to the amendment, the same statute provided that a change in assessment had to take place prior to September 30 following the approval of the assessment role. Thus, in this case, Alford claims that he had until September 30, 1993, to file an application to change the 1992 assessment of his property.

As shown by the record, both parties filed legal memoranda concerning the questions of whether the application of Alford to change the assessment was timely filed. Without comment or reason, the trial court granted the County's motion to dismiss Alford's appeal to the circuit court. Alford now appeals to this Court for relief.

## DISCUSSION

## I. STANDARD OF REVIEW.

A motion for dismissal pursuant to Mississippi Rule of Civil Procedure 12(b)(6) raises an issue of law upon which the court will conduct a de novo review. *Tucker v. Hinds County*, 558 So. 2d 869, 872 (Miss. 1990); *Bilbo v. Thigpen*, 647 So. 2d 678, 687 (Miss. 1994); see also 5 Wright & Miller, *Federal Practice and Procedure* 1357, at 598 (1969). As stated in *Tucker*:

A motion to dismiss made under rule 12(b)(6) is not favored, and should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. (citations omitted). When considering a 12(b)(6) motion, the Court's inquiry essentially is limited to the content of the complaint. (citations omitted). The court must assume the factual allegations in the complaint are true, construe them in a manner most favorable to the non-movant, and decide if the facts alleged could give use to an actionable claim. (citations omitted). The court does not have to accept legal conclusions or allegations as to the legal effect of events which may be included in a

complaint. . . .

*Tucker*, 558 So. 2d at 872 (citations omitted in original).

In granting the motion to dismiss, the trial court made no specific findings of fact and gave no reasons for its decision to grant the motion. In such a case, the Mississippi Supreme Court has stated that the appellate court is required by "prior decisions and by sound institutional considerations" to assume that the trial court resolved all issues in favor of the appellee. *Walters v. Patterson*, 531 So. 2d 581, 583-84 (Miss. 1988).

## II. DID THE TRIAL COURT ERR IN DISMISSING THE APPEAL OF ALFORD?

Mississippi statutes dealing with the assessment of ad valorem taxes provide a variety of methods whereby a taxpayer can challenge the assessment of taxes on his real property. See generally *State Tax Comm'n v. Fondren*, 387 So. 2d 712, 715 (Miss. 1980). According to the statutory scheme, it is the duty of the county tax assessor to assess all of the lands in his county and file his assessment rolls with the clerk of the board of supervisors on or before the first Monday in July of each year. Miss. Code Ann. 27-35-49 (Supp. 1980) and 27-35-81 (1972). The board of supervisors is thereafter required to equalize the assessment rolls at least ten days prior to its August meeting and notify the public that the rolls are ready for inspection. Miss. Code Ann. 27-35-83 (1972). The general public is then given an opportunity to object to any assessment of ad valorem taxes at a public meeting held by the board of supervisors on the first Monday of August. At this meeting, a taxpayer is given the opportunity to state the reasons for his objection, and the board supervisors is required to consider the objections and rule thereon. Miss. Code Ann. 27-35-89 (Supp. 1989). A person who is dissatisfied with the assessment is required to present his objections in writing and file such objections with the clerk of the board. Otherwise, except for minors and persons non compos mentis, the objecting party is precluded from questioning the validity of the assessment after its final approval by the board of supervisors or its final approval by operation of law. Miss. Code Ann. 27-35-93 (1972).

A taxpayer whose objection has been denied at the August public hearing has the right to appeal from

the decision of the board of supervisors to the circuit court within ten days after the adjournment of the meeting of the board of supervisors at which the approval of the assessment roll is entered. Miss. Code Ann. 27-35-119 and 27-35-121 (1972); *see also* Miss. Code Ann. 11-51-77 (1972) for the procedure through which to perfect such an appeal. It should be noted that there is nothing in the record to indicate that Alford took advantage of any of the statutory procedures mentioned above through which a taxpayer may challenge or object to the assessment of ad valorem taxes imposed upon his real property. No objections were made, and no appeal was taken from the final assessments.

In this action the taxpayer relies, instead, on Section 27-35-143 and appeals from an order of the Lee County Board of Supervisors denying a change in an assessment that had already become final. Section 27-35-143 as amended, provides that notwithstanding the taxpayer's failure to object to an assessment in accordance with the statutory procedures mentioned above, a county board of supervisors may nevertheless still change and decrease an assessment under certain circumstances pursuant to provisions of the statute. *Knights & Daughters of Tabor v. City of Mound Bayou*, 404 So.2d 548, 549 (Miss. 1981). The present statute was amended and became effective from and after July 1, 1993. In pertinent part, the statute reads as follows:

The board of supervisors of each county shall have power, upon application of the party interested, or by the assessor on behalf of such party, or otherwise as prescribed in Sections 27-35-145 through 27-35-149, to change cancel or decrease an assessment in the manner herein provided at any time after the assessment roll containing such assessment has been finally approved by the State Tax Commission, *and prior to the last Monday in August next, under the following circumstances. . . .*

Miss. Code Ann. 27-35-143 (Supp. 1993) (emphasis added). The prior version of Section 27-35-

143 permitted the board of supervisors until the day "prior to September 30, next" to change such an assessment. In the case *sub judice*, the application to change the assessment was *filed* on August 30, 1993, the last Monday in August of that year.

Alford claims that the amended version of Section 27-35-143 does not apply to the present case since this action was a cause of action already in existence at the time the amended statute became effective on July 1, 1993. He further contends that even if the amended version of Section 27-35-143 is applicable in the present case, then the application to change the assessment was nevertheless timely filed, since the last day for filing the application fell on a Sunday, and the application was filed on the following day, August 30, 1993.

**A. DOES THE AMENDED VERSION OF SECTION 27-35-143 APPLY, THEREBY REQUIRING THAT ANY CHANGE OF ASSESSMENT UNDER THE STATUTE TAKE PLACE "PRIOR TO THE LAST MONDAY OF AUGUST NEXT?"**

We hold that it does. In *Stone v. McKay Plumbing Co.*, 200 Miss. 792, 811, 26 So. 2d 349, 350-351 (1946), Judge Griffith stated:

After the legislature enacts a statute giving the consent of the state to the bringing of suits against it,

it may at any time it thinks proper withdraw that consent and thus deny the right of a suitor to maintain an action against the state, *or it may change the condition under which it will permit the state to be sued*. It may withdraw the consent or change the conditions and requirements after a claim against the state arises, and make it effective as to that claim, and even after suit is instituted on a claim the state may withdraw its consent or impose different conditions, thus causing the abatement of the pending suit.

(quoting 49 Am. Jur. *States, Etc.* 99) (emphasis added). On rehearing, the Mississippi Supreme Court held that such a change could not affect a suit that had already reached judgment, but otherwise, its opinion did not change. *Stone v. McKay Plumbing Co.*, 200 Miss. 813, 30 So. 2d 91, 94 (1947). *See also* 72 Am. Jur. 2d *States, Etc.* 125 (1974); 81A C.J.S. *States* 300 (1977). Here,

the State on July 1, 1993, changed "the condition under which it will permit" a claim to be brought against a subdivision of the state. There is no impropriety in making such a change effective, as in this case, against a claim that had not yet been brought.

It has consistently been the rule in Mississippi that once the statute has been changed, as in this case, its application is prospective in nature unless the statute clearly requires retroactivity. *State ex rel. Moore v. Molpus*, 578 So. 2d 624, 643 (Miss. 1991). Section 27-35-143 was amended, effective July 1, 1993, and required that any change of assessment had to take place prior to August 30, 1993. The application filed by the taxpayer on August 30, 1993, to change an assessment came too late, and the Board of Supervisors necessarily had no jurisdiction to make any change in the assessment after August 29, 1993.

It is noteworthy that the *Stone* case also states (without regard to whether the sovereign is being sued):

[I]t is further settled in our jurisprudence that when a right of action or remedy is created solely by statute and does not exist at common law, the repeal of the statute has the same effect as had the statute never existed; or, if the statute is modified or amended the effect is the same as had the statute previously existed all the while in the same language as the amending act, unless there is a saving[s] clause . . . .

*Stone*, 26 So. 2d at 350 (citing *Deposit Guar. Bank & Trust v. Williams*, 193 Miss. 432, 9 So. 2d 638 (1942)). This ruling is consistent with settled law in Mississippi in cases where proceedings are already in progress when a statutory change occurs. For example, in *Oliphant v. Carthage Bank*, 224 Miss. 386, 410, 80 So. 2d 63, 72 (Miss. 1955), the Mississippi Supreme Court held:

It is well-settled by the decisions of our Court, and in most every other jurisdiction, that when proceedings are in process under a statute and have not been completed, and have not reached the stage of final judgment, and a new act is passed, modifying the statute under which the proceedings were begun, the new statute becomes integrated into and a part of the old statute as fully as if written therein from the very time the old statute was enacted . . . .

In *City of Clarksdale v. Mississippi Power & Light Co.*, 556 So. 2d 1056, 1057 (Miss. 1990), an eminent domain case, the Mississippi Supreme Court further stated that "[i]t is also the general rule

that where a statute affects only the mode of procedure, and not the substantive rights of [the] parties, it applies to pending actions." In *Clarksdale*, the court held that an amendment to the statute requiring a city to cancel a utility company's certificate of public convenience and necessity prior to bringing eminent domain proceedings to condemn the certificate or exclusive service area of the utility company did not affect the substantive rights of the city but only dealt with the mode of procedure in bringing eminent domain proceedings. *Clarksdale*, 556 So. 2d at 1057. *See also* *Deposit Guar. Bank & Trust Co. v. Williams*, 193 Miss 432, 437-38, 9 So. 2d 638, 639 (1942) (an amendment to a usury statute); *Bell v. Mitchell*, 592 So. 2d 528, 532-33 (Miss. 1991) (amendment to probate laws which issued similar rulings). In the case *sub judice*, the substantive rights of Alford were not affected by the amendment to Section 27-35-143. Only the procedural rights of Alford involving when to file its request for an assessment change were modified.

In summary, we hold that any change in the assessment had to take place prior to the last Monday in August next 1993. It should be noted, in any event, that the Lee County Board of Supervisors did not take action on the application of the Appellant until February 7, 1994, well after August 1993, and there was no allegation of misconduct or bad faith on the part of the board of supervisors in waiting more than five months to deny Alford's application.

#### B. WAS THE APPLICATION FOR THE ASSESSMENT CHANGE NEVERTHELESS TIMELY FILED, ASSUMING THAT THE AMENDED VERSION OF SECTION 27-35-143 OF THE MISSISSIPPI CODE OF 1972 APPLIES?

In support of this contention, Alford cites Mississippi Rule of Civil Procedure 6(a) and a number of authorities which hold generally that if a statute of limitations time period expires on a

Sunday, complaints filed on the following Monday are timely filed. *Nelson v. James*, 435 So. 2d 1189, 1191 (Miss. 1983). We hold that the due dates mentioned in both the original and amended version of Section 27-35-143 do not set a time limit in which to *file* an application to change an assessment. Rather, the statutes set a time limit in which an assessment can be changed. In other words, a *condition precedent* to any change of assessment pursuant to Section 27-35-143 is that it must take place prior to the deadline as shown in the statute. Any action by the board of supervisors taken to change the assessment after that date would be void, since the board would have no jurisdiction to act after the due date. *See Kellum v. Johnson*, 237 Miss. 580, 115 So. 2d 147, 150-51 (Miss. 1959). The court stated:

[A] statute of limitations is differentiated from conditions which are annexed to a right of action created by statute . . . 'A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right . . . .'

*Id.* at 150-51. (citation omitted). *See also* 54 C.J.S. *Limitations of Actions* 4 (1954) which states:

A distinction exists between statutes of limitation and special statutory limitations qualifying a given right in which time is made an essence of the right created and the limitation is an inherent part of the

statute out of which the right in question arises, so that there is no right of action whatever independent of the limitation; a lapse of the statutory period operates, therefore, to extinguish the right altogether. For example, those statutes which create substantive rights unknown to common law and in which time is made an inherent element of the right so created, are not 'statutes of limitation' in the sense of merely suspending the remedy and not the right of action.

In the case *sub judice*, Section 27-35-143 gives the taxpayer a right unknown at common law, namely, the right to seek relief from an undue burden of taxation. Thus, it is a statute of creation and the right of the board of supervisors to change an assessment pursuant to Section 27-35-143, absent

fraud, bad faith, or other special circumstances, does not exist subsequent to the date specified in the statute. *See Danis v. Middlesex County Bd. of Taxation*, 113 N.J. Super. 6, 9, 272 A.2d 542, 544 (N.J. Super.A.D., 1971) for an example of how this problem was handled in another jurisdiction. Moreover, the Lee County Board of Supervisors did not act on the application to change assessment filed by Alford until February 7, 1994, months after the statutory deadlines imposed by the original and amended versions of Section 27-35-143. Thus, the circuit court correctly ruled that the Alford's appeal should be dismissed.

#### CONCLUSION

We acknowledge that our ruling today may create questions regarding the appropriate time for *filing* an application for change in assessment pursuant to Sections 27-35-143 as amended and 27-35-145 of the Mississippi Code of 1972. The legislature has chosen not to impose such a deadline, and it not our obligation nor our position to create such a deadline. Logically, an interested party must file a written application for change in an assessment within sufficient time to allow the board of supervisors to consider the matter prior to the last Monday, next, in August following the year the assessment was made and approved. According to the statutory scheme, a taxpayer desiring to have an assessment changed has approximately one year in which to attempt to challenge, through a variety of methods, his assessment before the board of supervisors. Should a taxpayer feel that a board of supervisors, for good or bad reasons, is delaying action upon an application for a change in assessment, he should take appropriate legal action to compel the board to discharge its statutory duties.

In the case *sub judice*, we hold that Alford failed to file his application to change assessment until after the County's authority to change the assessment had expired. We further hold that the Lee County Board of Supervisors had no authority to consider Alford's application, one way or the other, on February 7, 1994. We therefore hold that the trial court was correct in dismissing Alford's appeal and, accordingly, we affirm.

**THE JUDGMENT OF THE CIRCUIT COURT OF LEE COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.J.J., COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. HINKEBEIN, J., NOT PARTICIPATING.**

