

7/1/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01167 COA

*TOWER LOAN OF MISSISSIPPI, INC. D/B/A*

*TOWER LOAN OF PORT GIBSON AND*

*JACK R. LEE, AS TRUSTEE APPELLANTS*

v.

*ARCHIE LACY, AS EXECUTOR OF THE*

*ESTATE OF PEARLIE MAE BAILEY,*

*DECEASED APPELLEE*

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. HYDE RUST JENKINS II

COURT FROM WHICH APPEALED: JEFFERSON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANTS: MICHAEL T. PARKER

JENNIFER P. BURKES

ATTORNEY FOR APPELLEES: JOSEPH B. MOFFETT

NATURE OF THE CASE: CIVIL - CIVIL PROCEDURE

TRIAL COURT DISPOSITION: TOWER LOAN ESTOPPED FROM FORECLOSING ON  
PROPERTY

MANDATE ISSUED: 7/22/97

BEFORE McMILLIN, P.J., HERRING, HINKEBEIN, AND KING, JJ.

HINKEBEIN, J., FOR THE COURT:

Tower Loan of Mississippi, Inc. [hereinafter Tower] appeals from the Jefferson County Chancery Court's finding that a deed of trust granted in favor of Tower was void, estopping Tower from foreclosing on the subject property. Tower argues that the chancery court erred in its ruling because the action brought by the plaintiff, Archie Lacy [hereinafter Lacy], was barred by laches. Tower frames its assignment of error as follows:

I. WHETHER THE APPELLEE'S FIFTEEN YEAR DELAY IN ASSERTING HIS INTEREST IN PROPERTY PURSUANT TO A WILL, THE EXISTENCE OF WHICH HE HAD ACTUAL AND/OR CONSTRUCTIVE NOTICE, CONSTITUTES LACHES AND WHETHER TOWER CAN THEREFORE PROCEED WITH FORECLOSURE ON THE PROPERTY PURSUANT TO ITS DEED OF TRUST.

Holding Tower to have waived the defense of laches by failing to affirmatively plead it before the chancery court, this assignment of error is procedurally barred from this Court's review.

### FACTS

In 1965, Pearlie Mae Bailey [hereinafter Mrs. Bailey] acquired certain real property located in Jefferson County. In her will, Mrs. Bailey devised a non-mortgagable life estate in the property to her husband, Samuel Bailey [hereinafter Mr. Bailey], with the remainder interest to her nephew, Lacy. Mrs. Bailey died in 1979. The will, however, was not probated until fifteen years later, in September of 1994. The delay in probating the will was apparently due to Mr. Bailey's intentional concealment of the document from Lacy, who had inquired about it soon after the death of Mrs. Bailey in 1979. Lacy testified that prior to Mrs. Bailey's death she informed him that she had a will, and that it devised all of her real and personal property to him. Although Lacy knew that Mrs. Bailey had a will, based on the representations she made to him, he never actually saw the will until Mr. Bailey finally produced the document in June of 1994.

The deed of trust at issue in this case was granted by Mr. Bailey to Tower in January of 1993. In order to receive a loan using Mrs. Bailey's property as collateral, Mr. Bailey represented to Tower that he was the sole heir of Mrs. Bailey. To substantiate his claim of having inherited Mrs. Bailey's real property, Mr. Bailey provided Tower with two affidavits of heirship stating that he was her only heir at law. Tower also conducted a title search of Mrs. Bailey's property, which revealed that it was (as of January 1993) held solely in her name. The title search indicated no evidence of a will or probate of record. Based on this information, Tower loaned Mr. Bailey approximately \$20,000, taking a deed of trust on Mrs. Bailey's property as collateral for the loan to Mr. Bailey. There is no dispute that Tower in good faith believed that Mr. Bailey had inherited the property of his wife, via intestate succession. It is clear, however, that Mr. Bailey withheld from Tower the fact that he possessed Mrs. Bailey's unprobated will and that under its provisions he would receive only a non-mortgagable life estate, with the remainder interest belonging to Lacy.

Lacy took possession of Mrs. Bailey's will in June of 1994, when Mr. Bailey passed it to him under a veil of secrecy, instructing Lacy not to show it to anyone. Mr. Bailey died in August of 1994. It was not until September of 1994 that Lacy attempted to probate the will, after a friend informed him of the trustee's foreclosure notice then being published in the local paper. The ruling at issue in this case

was made after a hearing on the matter wherein the chancellor entered a final order declaring the deed of trust invalid, estopping Tower from foreclosing on the property.

## ANALYSIS

### I. WHETHER THE APPELLEE'S FIFTEEN-YEAR DELAY IN ASSERTING HIS INTEREST IN PROPERTY PURSUANT TO A WILL, THE EXISTENCE OF WHICH HE HAD ACTUAL AND/OR CONSTRUCTIVE NOTICE, CONSTITUTES LACHES AND WHETHER TOWER CAN THEREFORE PROCEED WITH FORECLOSURE ON THE PROPERTY PURSUANT TO ITS DEED OF TRUST.

Tower appeals the chancery court's ruling solely on the issue of Lacy's delay in probating the will of Mrs. Bailey. Tower asserts, for the first time on appeal, that the doctrine of laches barred Lacy from defending against the foreclosure by asserting his rights under Mrs. Bailey's will, which he waited fifteen years after her death to probate. According to Tower, because of Lacy's failure to probate the will in a timely fashion, he can not use the disposition of her property as contained in the will to defeat the deed of trust granted by Mr. Bailey. Lacy responds by arguing that because Tower failed to affirmatively plead the defense of laches before the chancery court it is procedurally barred from being raised on appeal. We agree with Lacy.

Procedurally, the issue of laches was a defense to Lacy's action that should have been asserted by Tower in its responsive pleading. Rule 8(c) of the Mississippi Rules of Civil Procedure requires that the defense of laches be affirmatively plead, or be raised at trial and tried with the consent of all parties. *See* Miss. R. Civ. Pro. 8(c) (requiring that "a party shall set forth affirmatively . . . laches . . . and any other matter constituting an avoidance or affirmative defense"); *see also Wholey v. Cal-Maine Foods, Inc.*, 530 So. 2d 136, 138 (Miss. 1988) (holding that if party intends to rely on defense enumerated in Rule 8(c) he must affirmatively plead that defense, and that affirmative defenses neither plead nor tried by consent are deemed waived). This Court has closely scrutinized Tower's brief submitted to the chancery court and notes that it never once mentions the doctrine of laches, much less does it affirmatively plead laches as a defense. Additionally, the trial transcript reveals that Tower never raised laches as a defense at trial, so there is no issue as to whether it was tried by consent. Because of Tower's failure to affirmatively plead the defense of laches, or have it tried by consent, this issue is procedurally barred from review by this Court. *See Goode v. Village of Woodgreen Homeowners Ass'n*, 662 So. 2d 1064, 1076 (Miss. 1995) (holding that appellant's failure to affirmatively plead defense of laches acted as procedural bar to raising it for first time on appeal). Accordingly, this assignment of error must be rejected.

**THE JUDGMENT OF THE JEFFERSON COUNTY CHANCERY COURT DECLARING THE DEED OF TRUST GRANTED BY SAMUEL BAILEY TO BE VOID IS AFFIRMED. COSTS ARE ASSESSED AGAINST APPELLANTS.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**