

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

2020 AUG 11 PM 2:16

KANAWHA COUNTY CIRCUIT COURT

NR DEED, LLC,

Plaintiff,

v.

CIVIL ACTION NO. 19-C-1086  
(Honorable Carrie L. Webster)

ROBERT E. SIMMONS,

Defendant/Counterclaim-Plaintiff,

v.

NR DEED, LLC,

Counterclaim Defendant.

**ORDER DENYING PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM**

Pending before the Court is Plaintiff's Motion to Dismiss Counterclaim. Plaintiff/Counterclaim Defendant, NR Deed, LLC ("NR Deed") filed its Motion to Dismiss Counterclaim, arguing that Defendant/Counterclaim-Plaintiff Robert E. Simmons's equitable claims asserted in this action are barred by the doctrine *res judicata* and it is entitled to an order granting possession of Mr. Simmons's home. Mr. Simmons argues his claims in this case were never adjudicated by the circuit court in the previously dismissed action and therefore cannot be barred in this case. (*See NR Deed, LLC v. Robert E. Simmons*, No. 18-C-0788, slip op. at 1 (Kan. Cty. Cir. Ct., W. Va. May 16, 2019).) Mr. Simmons asserts he has a right to assert his equitable defenses – having asserted them for the first time here – to NR Deed's Complaint prior to losing his home. Consistent with the Findings of Fact and Conclusions of Law set forth below, the Court **DENIES** Plaintiff's Motion to Dismiss Counterclaim.

**FINDINGS OF FACT**

1. Counterclaim Plaintiff Robert E. Simmons is a natural citizen living at 1029 Midway Drive, Dunbar, Kanawha County, West Virginia. At all relevant times prior to April 2018, Mr. Simmons was the

titled, record owner of certain real estate located at 1029 Midway Drive, Dunbar, Kanawha County, West Virginia, more specifically described as:

LT A ANDERSON EST AARONS FK LESS 1/6 MIN INT (Tax account No.: 06364819; Tax District: 26 – Dunbar Map 15, Parcel 0005)

(Countercl. ¶ 2.)

2. Counterclaim Defendant, NR Deed is an Indiana limited liability company that has reported to the West Virginia Secretary of State that its principal place of business is located at 4355 Cobb Parkway, Suite J505, Atlanta, Georgia, 30339. (Countercl. ¶ 2(a).)

3. Mr. Simmons alleges that on more than 80 occasions in the past three years, NR Deed has taken title to tax Deeds issued pursuant to a tax sale in Kanawha County, West Virginia. At least 45 of these conveyances were from a related entity named GSRAN-Z. (Countercl. ¶ 3(b).) GSRAN-Z is a Delaware limited liability company with a principal place of business located at 2020 Howell Mill Road N.W., Suite C-513, Atlanta, Georgia, 30318. GSRAN-Z is not licensed with the West Virginia Secretary of State to do business in West Virginia. (Countercl. ¶ (c).) At certain times relevant to this action, GSRAN-Z was identified in notices, correspondences, affidavits, and Deeds as GRAN-Z (no ‘S’). GRAN-Z is a non-entity, neither a person, corporation, partnership or LLC. It apparently is an alias through which the principals of Counterclaim Defendant attempt to flip properties. In approximately 17 tax Deeds issued by the Clerk of the Kanawha County Commission in April 2018, including in the tax Deed issued regarding Counterclaim-Plaintiff’s property, Counterclaim-Defendant is listed as GRAN-Z. (Countercl. ¶ 3(d).)

4. Mr. Simmons alleges that the Counterclaim-Defendant NR Deed and GSRAN-Z are related entities set up by two lawyers from Georgia: John “Buddy” Ramsey and Robert “Bob” Proctor. Ramsey and Proctor operate a property flipping firm, sometimes known as Penia Holdings (penia is Latin for poverty) or Vesta Holdings, which has purchased and sold tax liens or Deeds for decades in Georgia. (Countercl. ¶ 4.) Ramsey and Proctor have purchased more than \$275,000,000.00 delinquent property taxes from metro Atlanta counties since 1998. Ramsey and Proctor have expanded their property flipping

business to West Virginia, Connecticut, Missouri, Kentucky, and Massachusetts. Ramsey and Proctor have been alleged to engage in aggressive investment in tax liens and deceptive tactics. (Countercl. ¶ 5.)

5. Mr. Simmons alleges that in Kanawha County, West Virginia, two of Vesta Holdings's many spin-off entities, GSRAN-Z and NR Deed, have started an aggressive tax lien investment scheme. The scheme involves complicated corporate transactions, either intentionally deceptive or carelessly drafted notices, Deeds, and other tax lien related documents, and the purchase of liens and sale of real property in West Virginia despite having not registered with the West Virginia Secretary of State. (Countercl. ¶ 6.) From April 2017 to June 2018, GSRAN-Z was issued as many as 28 tax Deeds from the Clerk of the County Commission of Kanawha County. The tax liens were purchased, and the tax Deeds were issued in the name of "Christian Trust as Custodian for GSRAN-Z, LLC." These 28 tax Deeds issued by the Clerk of the County Commission of Kanawha County were subsequently conveyed to NR Deed. Despite the active engagement in the business of the purchase and sale of tax liens and real property in West Virginia, GSRAN-Z is not registered as a foreign LLC to do business in West Virginia. (Countercl. ¶ 7.)

6. Mr. Simmons alleges that on April 11, 2018, as many as 17 tax Deeds, including a tax Deed concerning the Counterclaim-Plaintiff Robert Simmons's property, were conveyed to an entity named "Christiana Trust as custodian for GRAN-Z, LLC." All 17 of these Deeds were conveyed subsequently to NR Deed. On information and belief there is no entity named GRAN-Z and no such entity is registered to do business with the West Virginia Secretary of State. Nevertheless, these 17 tax liens were purchased in the name of GRAN-Z and the tax Deeds issued by the Clerk of the County Commission for Kanawha County identify GRAN-Z as the grantee. (Countercl. ¶ 8.)

7. Mr. Simmons alleges there is an agreement, of which the Counterclaim-Defendant is a party thereto, called "Custodian and Collateral Agent Under Tax Lien and Loan Administration Agreement." Pursuant to this agreement that the tax lien and tax Deeds, including the tax Deed of Counterclaim-Plaintiff Robert Simmons, were conveyed to Counterclaim-Defendant. (Countercl. ¶ 9.)

8. Mr. Simmons alleges that on January 26, 2015, Mr. Simmons purchased his current home located at 1029 Midway Drive, Dunbar, Kanawha County, West Virginia from a couple named Kent and

Michelle Thomas. Mr. Simmons paid cash for the home from the proceeds of a medical malpractice settlement. (Countercl. ¶ 10.) Because the tax ticket remained in the name of Kent and Michelle Thomas and Mr. Simmons believed the taxes has been paid at closing, Mr. Simmons failed to pay the \$1,562.35 due for the 2015 taxes. (Countercl. ¶ 11.)

9. The Court **FINDS** and **CONCLUDES** the tax lien for Mr. Simmons's 2015 property taxes was sold on or around November 16, 2016. Mr. Simmons alleges he did not receive notice of the delinquent taxes prior to their sale. The Court **FINDS** and **CONCLUDES** the tax lien was sold in the name of the prior owners. (Countercl. ¶ 12.)

10. The Court **FINDS** and **CONCLUDES** the tax lien was purchased by GSRAN-Z for \$4,800.00, which identified itself to the Sheriff of Kanawha County as "Christiana Trust as Custodian for GRAN-Z LLC." (Countercl. ¶ 13.) The Court **FINDS** and **CONCLUDES** in or around mid to late January 2018, Defendant GSRAN-Z caused to be mailed a Notice to Redeem to among others, Mr. Simmons. The Court **FINDS** and **CONCLUDES** the Notice to Redeem provided that \$2,816.34 was required by March 31, 2018 to redeem the taxes and again identified the purchaser as "Christiana Trust as Custodian for GRAN-Z LLC."

11. The Court **FINDS** and **CONCLUDES** that on or around April 2, 2018, GSRAN, using the name "Christiana Trust as Custodian for GRAN-Z LLC," applied for a tax Deed. (Countercl. ¶ 17.) On April 11, 2018, the Clerk for the County Commission for Kanawha County issued a tax Deed to "Christiana Trust as Custodian for GRAN-Z." (Countercl. ¶ 18.)

12. Mr. Simmons alleges that by letter dated May 8, 2018, Mr. Simmons, through counsel, offered to repay Counterclaim Defendant GSRAN-Z for the amount it had actually paid for the property, with interest at the statutory rate, if GSRAN-Z would agree to quit claim the property back to Mr. Simmons. Just a little over 3 months after receiving notice of his right to redeem, Mr. Simmons offered to tender Plaintiff/Counterclaim Defendant the amount it paid for the Deed -- \$4800 -- plus all the out of pocket expenses they incurred in purchasing the tax lien, with interest at the statutory rate. (Countercl. ¶ 19.)

13. Mr. Simmons alleges that Plaintiff/Counterclaim-Defendant is an aggressive property flipping company from Atlanta, who refused Mr. Simmons's offer and instead filed an action to eject Mr. Simmons from his property. Mr. Simmons alleges NR Deed takes the position that Mr. Simmons must pay \$50,000.00 plus its attorney's fees incurred in the filing of this action for him to keep his home, which he previously owned free and clear. Mr. Simmons alleges this is consistent with the Plaintiff's practice in attempting to gain a windfall from the resale of residential real property at the expense of homeowners. (Countercl. ¶ 20.)

14. The Court **FINDS** and **CONCLUDES** that on or around May 14, 2018 GSRAN-Z conveyed the Deed to Mr. Simmons's property to NR Deed. (Countercl. ¶ 21.)

15. The Court **FINDS** and **CONCLUDES** that on or around June 18, 2018, NR Deed filed an action in the Circuit Court of Kanawha County, West Virginia seeking possession of Mr. Simmons's property. That action was ultimately dismissed by the The Honorable Louis H. "Duke" Bloom because NR Deed failed to present any evidence in support of its claims. (*NR Deed, LLC v. Robert E. Simmons*, No. 18-C-0788, slip op. at 1 (Kan. Cty. Cir. Ct., W. Va. May 16, 2019).)

16. Mr. Simmons alleges while the previous action was pending, NR Deed failed to pay the property taxes due on the property. Rather, Mr. Simmons paid the 2017 property taxes prior to them becoming delinquent and forcing another tax lien sale. (Countercl. ¶ 23.)

#### CONCLUSIONS OF LAW

17. Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure* allows dismissal of a claim for "failure to state a claim upon which relief can be granted." W. Va. R. Civ. P. 12(b)(6). Such a motion "is viewed with disfavor." *Fass v. Nowasco Well Serv., Ltd.*, 177 W. Va. 50, 51, 350 S.E.2d 562, 563 (1986). In considering such a motion, the Court should view the facts alleged in the Counterclaim in the light most favorable to Mr. Simmons. *See State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995). As the West Virginia Supreme Court of Appeals has explained:

The purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the complaint. The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint 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. Dismissal for failure to state a claim is proper where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.

*Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, 52, 717 S.E.2d 235, 239 (2011) (internal quotation marks and citations omitted).

18. NR Deed seeks to bar Mr. Simmons from asserting his equitable claims to NR Deed's quiet title action. Mr. Simmons argues because Judge Bloom did not adjudicate these equitable claims in the previous action, they are not barred by the doctrine of *res judicata*.

19. NR Deed must establish three elements to preclude Mr. Simmons from raising his equitable claims:

First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

Syl. Pt. 4, *Blake v. Charleston Area Medical Center, Inc.*, 201 W. Va. 469, 498 S.E. 2d 41 (1997). The Court **FINDS** and **CONCLUDES** because the prior litigation did not adjudicate the merits of Mr. Simmons's equitable claims raised for the first time here, Mr. Simmons's purely equitable claims are not barred by the doctrine of *res judicata*.

20. The Supreme Court of Appeals of West Virginia has identified the central inquiry on an assertion of the application of *res judicata* as "whether the cause of action in the second suit is the same as in the first suit." *Conley v. Spillers*, 171 W. Va. 584, 588, 301 S.E. 2d 216, 200 (1983). This is because the purpose of the doctrine of *res judicata* is to "preclude relitigation of the same cause of action." *Christian v. Sizemore*, 185 W. Va. 409, 412, 407 S.E. 2d 715, 718 (1991); see also *Porter v. McPherson*, 198 W. Va. 158, 166, 479 S.E. 2d 668, 676 (1996) ("[A] judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action.") (citation omitted); *Hannah v. Beasley*, 132 W. Va. 814, 821-22, 53 S.E. 2d 729, 733 (1949) ("A cause of action between persons who were parties to a former adjudication, set up in a subsequent action between them, is not *res judicata* by the

former decision, unless it is identical with the one actually or constructively heard and determined in the former suit.”) (citation omitted).

21. The Court **FINDS** and **CONCLUDES** Judge Bloom issued a final adjudication on the merits *only* of Mr. Simmons’s claims arising out of his claim of illegality. (*See NR Deed, LLC v. Robert E. Simmons*, No. 18-C-0788, slip op. at 4-5 (Cir. Ct. Kan. Cty. April 29, 2019).) Mr. Simmons argued that because GSRAN-Z was not licensed to do business in West Virginia, the purchase and sale of Mr. Simmons’s tax lien was illegal. Because the final adjudication on the merits relates strictly to Mr. Simmons’s claim of illegality, and does not address the equitable claims raised by Mr. Simmons here, the Court **FINDS** and **CONCLUDES** *res judicata* does not operate to bar Mr. Simmons’s equitable claims in defense to NR Deed’s action to quiet title.

22. The Court **FINDS** and **CONCLUDES** NR Deed’s action to quiet title is based in equity, *Kuhn v. Shreeve*, 141 W. Va. 170, 174, 89 S.E.2d 685, 689 (1955) (“Equity has jurisdiction of the enforcement of liens . . .”), and “[e]quity abhors a forfeiture.” *Bailey v. Savage*, 160 W. Va. 523, 528, 236 S.E.2d 203, 206 (1977).

No man ought to lose his estate because of failure to meet his engagements or perform his duties by some exact day which has been prescribed by statute; and to that extent the law favors provisions for redemptions from forfeitures of mortgages or from judicial sales, and this principle applies to laws providing for redemption from tax sales.

*Read v. Dingess*, 60 F. 21, 30 (4th Cir. 1894).

23. The Court **FINDS** and **CONCLUDES** Mr. Simmons was prepared to raise his equitable claims in the previous action; however, NR Deed was unprepared for trial and its case was dismissed. (*See NR Deed, LLC v. Robert E. Simmons*, slip op. at 1 (Kan. Cty. Cir. Ct., W. Va. May 16, 2019).) The Court **FINDS** and **CONCLUDES** there was no adjudication of these claims, and accordingly, Mr. Simmons’s equitable claims are not barred.

The Court **FINDS** and **CONCLUDES** Judge Bloom never adjudicated Mr. Simmons’s equitable claims he seeks to assert for the first time in this action. Accordingly, NR Deed’s Motion to Dismiss is hereby **DENIED**.

The Court further **FINDS**, pursuant to West Virginia Rules of Civil Procedure Rule 54(b), that this judgment is intended to be a final judgment with respect to the issues of the application of res judicata as to the previous litigation between the parties and the validity of the relevant sheriff sale; that there is no reason for delay in entering a final judgment on this particular claim in the case; and that the Court expressly directs the entry of judgment on this particular aspect of the case to allow for an immediate appeal of the Court's ruling on the claim.

The Court preserves the objections of the parties to adverse rulings contained herein.

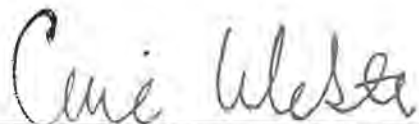
The Clerk is directed to transmit copies of this order, duly certified, to the following:

David R. Karr, Jr.  
PO Box 1283  
Charleston, WV 25325  
*Counsel for NR Deed, LLC*

Bren J. Pomponio (WVSB #7774)  
MOUNTAIN STATE JUSTICE, INC.  
1217 Quarrier Street  
Charleston, WV 25301  
(304) 304-344-3144  
(304) 344-3145 (fax)

Lonnie C. Simmons (State Bar ID No. 3406)  
Robert M. Bastress, III (State Bar I.D. No. 9616)  
DIPERO SIMMONS MCGINLEY & BASTRESS, PLLC  
P.O. Box 1631  
Charleston, WV 25326  
Telephone: (304) 342-0133  
Facsimile: (304) 342-4605  
*Counsel for Defendant/Counterclaim Plaintiff*

ENTERED August 11, 2020



Honorable Carrie L. Webster  
CIRCUIT JUDGE

STATE OF WEST VIRGINIA  
COUNTY OF MANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY OF THE RECORDS OF SAID COURT AND THE FOREGOING  
GIVEN UNDER MY HAND AND SEAL OF OFFICE ON THIS  
DAY OF \_\_\_\_\_ 2020  
  
CIRCUIT COURT OF MANAWHA COUNTY, WEST VIRGINIA