

FILE COPY

DO NOT REMOVE
FROM FILE

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

NO. 20-0705

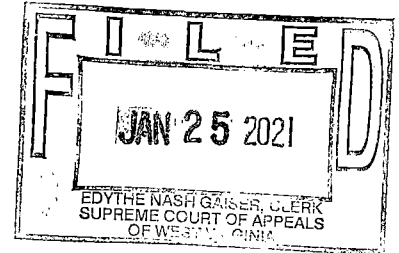
NR DEED, LLC,

Plaintiff Below, Appellant,

v.

ROBERT E. SIMMONS,

Defendant Below, Appellee.



Appeal from the Circuit Court of Kanawha County, West Virginia

APPELLEE'S BRIEF

Bren J. Pomponio (W.Va. I.D. No. 7774)

MOUNTAIN STATE JUSTICE

1217 Quarrier Street

Charleston, West Virginia 25301

(304) 344-3144

bren@msjlaw.org

Lonnie C. Simmons (W.Va. I.D. No. 3406)

DIPIERO SIMMONS MCGINLEY & BASTRESS, PLLC

P.O. Box 1631

Charleston, West Virginia 25326

(304) 342-0133

lonnie.simmons@dbdlawfirm.com

Counsel for Appellee Robert E. Simmons

TABLE OF CONTENTS

I.	Introduction	1
II.	Assignment of error	
	Whether the trial court was correct in holding that the equitable defenses asserted by Mr. Simmons in this second action had not been adjudicated in the first action, and, therefore, the doctrine of res judicata does not bar Mr. Simmons from going forward with these equitable defenses in the present action?	4
III.	Statement of the case	4
IV.	Summary of argument	5
V.	Statement regarding oral argument and decision	6
VI.	Argument	6
VII.	Conclusion	10

TABLE OF AUTHORITIES

West Virginia cases:

<i>Bailey v. Savage</i> , 160 W. Va. 523, 236 S.E.2d 203 (1977)	
<i>Blake v. Charleston Area Medical Center, Inc.</i> , 201 W. Va. 469, 498 S.E. 2d 41 (1997)	7
<i>Christian v. Sizemore</i> , 185 W.Va. 409, 407 S.E. 2d 715 (1991)	7
<i>Conley v. Spillers</i> , 171 W.Va. 584, 301 S.E. 2d 216 (1983)	7
<i>Hannah v. Beasley</i> , 132 W.Va. 814, 53 S.E.2d 729 (1949)	8
<i>Kuhn v. Shreeve</i> , 141 W.Va. 170, 89 S.E.2d 685 (1955)	8
<i>Porter v. McPherson</i> , 198 W.Va. 158, 479 S.E.2d 668 (1996)	8
<i>State ex rel. Southland Properties, LLC v. Janes</i> , 240 W.Va. 323, 811 S.E.2d 273 (2018)	9

Other jurisdiction cases:

<i>Read v. Dingess</i> , 60 F. 21 (4th Cir. 1894)	8
--	---

Miscellaneous:

7A Michie's Jurisprudence, Equity § 16	10
Rule 54(b), West Virginia Rules of Civil Procedure	4
W.Va.Code §11A-3-1	9

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

NO. 20-0705

NR DEED, LLC,

Plaintiff Below, Appellant,

v.

ROBERT E. SIMMONS,

Defendant Below, Appellee.

Appeal from the Circuit Court of Kanawha County, West Virginia

APPELLEE'S BRIEF

I. Introduction

To The Honorable Justices of the

West Virginia Supreme Court:

Appellant NR Deed, LLC, is an aggressive property flipping company from Atlanta that seeks to make substantial profits by purchasing houses cheaply at tax sales and then reselling these houses. Appellee Robert E. Simmons is a single father who lives with his two sons in a home **HE PAID FOR IN FULL** with proceeds from a medical malpractice suit. Mr. Simmons did not receive notice of the tax delinquency or any notice of the tax lien sale, and was provided only two months' notice of his right to redeem, which by statute was intended to provide property owners eighteen months to redeem their taxes. Mr. Simmons owned his property free and clear at the time he lost it to Appellant at the tax sale. Quite simply, Mr. Simmons is fighting to save his home.

Just a little over three months after receiving notice of his right to redeem, Mr. Simmons offered to tender Appellant the amount it paid for the Deed—\$4,800—plus all the out-of-pocket expenses Appellant incurred in purchasing the tax lien, with interest at the statutory rate. Appellant takes the position that Mr. Simmons must pay \$50,000 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. This demand by Appellant is consistent with the its practice of attempting to gain a windfall from the resale of residential real property at the expense of homeowners, who may have fallen upon hard economic times.

After being unable to resolve this matter, on or about June 18, 2018, Appellant filed a complaint in the Circuit Court of Kanawha County to eject Mr. Simmons and his family from his property. This first case was assigned to the Honorable Judge Louis “Duke” Bloom. In his **ANSWER AND COUNTERCLAIM**, Mr. Simmons asserted three theories against Appellant and GSRAN-Z, LLC a/k/a GRAN-Z premised on the fact that GSRAN-Z, which was associated with Appellant in purchasing properties at tax sales, was not registered to do business in this State. Based upon this deficiency, Mr. Simmons sought in a purported class action to have all of the tax sale purchases made by GSRAN-Z and Appellant declared null and void.

In rejecting this illegality theory, Judge Bloom held that the purchase of tax liens “falls squarely within the statutory exceptions provided by West Virginia Code § 31B-10-1003(7) and (8).” (JA at 1043).¹ When the parties appeared for the trial, where Mr. Simmons planned to assert his

¹Citations will be made to the Joint Appendix (JA) filed by Appellant and to the Supplemental Appendix (SA) filed by Mr. Simmons with a motion for leave to file two additional documents that Mr. Simmons respectfully submits are needed for the Court to have a complete understanding of the procedural history in this case.

remaining equitable defenses, Appellant failed to present any witnesses and Judge Bloom dismissed the case in an order concluding, “The Court **FINDS** that the material facts underlying this action are in dispute and require witness testimony for Plaintiff to carry its burden in this action.” (SA at 15).

Subsequently, on or about October 30, 2019, Appellant filed a second action against Mr. Simmons to eject him from his property (the present action which underlies this appeal). The action was assigned to the Honorable Judge Carrie L. Webster. In his **ANSWER AND COUNTERCLAIM** filed only against Appellant in response to this second complaint, Mr. Simmons no longer asserted a purported class action, but did allege one counterclaim seeking to clear the title to his home based upon equitable theories that had not been resolved in the first action. The sole counterclaim seeks to assert purely equitable defenses to the complaint and seeks no monetary damages. The counterclaim could have been characterized equally as an affirmative defense.

Appellant filed a motion to dismiss Mr. Simmons’s counterclaim arguing that Judge Bloom’s dismissal of the illegality counterclaim in the first case somehow precludes Mr. Simmons from pursuing these defenses in the present action under the doctrine of res judicata. Judge Webster denied the motion based upon the following analysis, “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. ...The Court **FINDS** and **CONCLUDES** there was no adjudication of these claims, and accordingly, Mr. Simmons’ equitable claims are not barred.” (JA 1202). Judge Webster included the appropriate language in her final order making this res

judicata ruling appealable.² Appellant seeks to reverse the denial of its motion to dismiss Mr. Simmons's counterclaim based upon this res judicata theory.

II. Assignment of error

Whether the trial court was correct in holding that the equitable defenses asserted by Mr. Simmons in this second action had not been adjudicated in the first action, and, therefore, the doctrine of res judicata does not bar Mr. Simmons from going forward with these equitable defenses in the present action?³

III. Statement of the case

Although Appellant is appealing the August 11, 2020 **ORDER DENYING PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM**, Appellant does not cite any specific language from this order. Mr. Simmons respectfully submits certain fact findings made by Judge Webster are pertinent and undisputed for purposes of this appeal.

Judge Webster found that Mr. Simmons paid cash for his home from the proceeds of a medical malpractice settlement. Because the tax ticket remained in the name of the former owners and Mr. Simmons believed the taxes had been paid at the closing, Mr. Simmons failed to pay the

²Pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, Judge Webster concluded "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.**" (Emphasis added). (JA at 1203).

³In its brief, Appellant raises two issues relating to its res judicata arguments. These res judicata arguments are appealable at this time based upon the Rule 54(b) language included in the order denying Appellant's motion to dismiss. However, the third assignment of error raised by Appellant asks the Court to address the merits of Mr. Simmons's equitable defenses. Mr. Simmons respectfully submits this argument seeks to address an issue where the facts have not been developed, the trial court never ruled on the merits, and which goes beyond the trial court's final order making only the res judicata ruling appealable. Therefore, Mr. Simmons asks the Court to reject this premature invitation by Appellant to address the substance of his equitable defenses where this issue simply is not properly before the Court.

\$1,562.35 due for the 2015 taxes. (JA at 1199). This property was sold at a tax sale on or about November 16, 2016. Mr. Simmons did not receive any notice of this tax sale and Judge Webster found the tax lien was sold in the name of the prior owners. (*Id.*).

This property was purchased by GSRAN-Z for \$4,800. In late January, 2018, a notice to redeem was sent to several people, including Mr. Simmons. In this notice, \$2,816.34 was required to be paid by March 31, 2018, to redeem the taxes. (*Id.*).

On May 8, 2018, Mr. Simmons, through his counsel, offered to repay GSRAN-Z the amount of money it actually paid, with interest at the statutory rate, in return for a quitclaim deed back to Mr. Simmons. This offer was made within three months after Mr. Simmons received the notice to redeem. (*Id.*). This offer was rejected because Appellant sought \$50,000 plus the payment of attorneys' fees incurred. On or about May 14, 2018, GSRAN-Z conveyed the deed to Mr. Simmons' property to Appellant. (JA at 1200). Finally, while the first action was pending, Appellant failed to pay the property taxes due on this property. In an effort to avoid a second tax sale, Mr. Simmons paid the 2017 property taxes. (*Id.*).

IV. Summary of argument

An action to quiet title is based in equity and is subject to equitable defenses. Mr. Simmons's equitable defenses contained in his counterclaim were never adjudicated in the first action. Indeed, Mr. Simmons never presented evidence to support his equitable defenses because Judge Bloom dismissed Appellant's case, without prejudice. Accordingly, there clearly was no adjudication of Mr. Simmons's equitable defenses in the prior action, and Judge Webster's ruling that *res judicata* did not bar these equitable defenses was correct.

V. Statement regarding oral argument and decision

The record is clear that the dismissal order entered by Judge Bloom did not in any way address the merits of the equitable claims asserted by Mr. Simmons. Consequently, unless the Court has some specific questions that are not clear in the record, Mr. Simmons respectfully submits oral argument is not required and the affirmance of the trial court's final ruling relating to Appellant's res judicata argument should be affirmed in a memorandum decision.

VI. Argument

In its brief, Appellant concedes that "Judge Louis Bloom in his final order in the 2018 case correctly (**albeit implicitly**) ruled that the affirmative defenses sought to be relied upon by Appellant Simmons were not pertinent to the cause of action." (Emphasis added). (Appellant's Brief at 12). Thus, Appellant freely admits Judge Bloom's dismissal order did not directly and finally adjudicate the equitable defenses asserted by Mr. Simmons in the second action. Nevertheless, Appellant continues to seek to bar Mr. Simmons's equitable defenses, which he has never been able to raise before now.

Despite Appellant's arguments to the contrary, Judge Bloom did not adjudicate the equitable defenses Mr. Simmons asserts in this action, and therefore they are not barred by res judicata. In the final order, Judge Webster concluded, "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." (JA 1202).

An Action to Quiet Title is an equitable claim, to which Mr. Simmons is entitled to assert equitable defenses. Based on a consideration of the totality of the circumstances, Mr. Simmons argues for the first time in this case that Appellant should not be entitled to the equitable remedy of

quieting title. Rather, the equitable result would be to award Appellant its out-of-pocket expenses incurred in obtaining the tax Deed, with interest and Mr. Simmons should be permitted to retain title to his home. Mr. Simmons is prepared to present evidence that Appellant failed to ensure Mr. Simmons received proper notice; that Appellant failed to meet the statutory prerequisites required by the applicable statutes; and that Appellant depriving Mr. Simmons of title to his home does not serve the purposes of the statute where Appellant may be made whole without forfeiture of Mr. Simmons's home.

For Appellant to prevail in this appeal, it would have to establish the following three elements to preclude Mr. Simmons from raising his equitable claims in the present case explained by this Court in Syllabus Point 4 of *Blake v. Charleston Area Medical Center, Inc.*, 201 W. Va. 469, 498 S.E. 2d 41 (1997):

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.

Because the prior litigation did not adjudicate the merits of Mr. Simmons's equitable defenses raised for the first time here, Mr. Simmons's purely equitable defenses are not barred by the doctrine of res judicata.

This Court 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, 219 (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).

Judge Bloom issued a final adjudication on the merits only of Mr. Simmons’s claims arising out of his claim of illegality. 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 defenses raised by Mr. Simmons here, res judicata does not operate to bar Mr. Simmons’s equitable defenses in defense to Appellant’s action to quiet title.

To begin, Appellant’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).

The West Virginia Legislature has included the following two purposes in enacting the tax lien sale statute:

(1) To provide for the speedy and expeditious enforcement of the tax claims of the state and its subdivisions; **(2) to provide for the transfer of delinquent and nonentered lands to those more responsible to, or better able to bear, the duties of citizenship than were the former owners; (3) to secure adequate notice to owners of delinquent and nonentered property of the pending issuance of a tax Deed.**

W.Va.Code §11A-3-1 (emphasis added). Here, two of the three stated intentions of the Legislature are not served by awarding a Deed to Appellant because (1) Mr. Simmons did not receive adequate notice and the time to redeem was unfairly truncated; and (2) Appellant has failed to demonstrate that it is more responsible or better able to bear the payment of the property taxes.

Mr. Simmons did not receive notice of the tax delinquency, no notice of the tax lien sale, and was provided only 2 months' notice of his right to redeem, which was intended to provide property owners eighteen months to redeem their taxes. He owned the property free and clear at the time of the tax sale. Appellant's refusal to accept the tender by Mr. Simmons is in violation of the purpose and intention of the legislature in adopting the statutory procedure for the sale of tax liens:

The Legislature's statutory scheme, without doubt, is aimed at protecting the due process rights of a delinquent land owner by requiring notice, ample redemption periods, and delineating express causes of action in the event the Deed was improperly obtained or the sale improperly conducted.

The Legislature's enumerated purpose for the remedies of redemption and corresponding rights and avenues to challenge the sale of tax-delinquent property is to "provide reasonable opportunities for delinquent taxpayers to protect their interests in their lands and to provide reasonable remedies in certain circumstances for persons with interests in delinquent and escheated lands.

State ex rel. Southland Properties, LLC v. Janes, 240 W.Va. 323, 332, 811 S.E.2d 273, 282 (2018).

Mr. Simmons' offer to tender the amount set forth by the legislature is certainly a reasonable remedy that forwards the protection of his interest in his home place.


"A plaintiff in equity has no standing in equity if his conduct with reference to the matter in controversy has been inequitable, unfair, unjust, or marked by bad faith or unconscientious dealing." 7A Michie's Jurisprudence, Equity § 16. Appellant has refused reasonable efforts by Mr. Simmons to make it whole, opting instead to pursue a windfall that would result from the forfeiture of Mr. Simmons's title to his home.

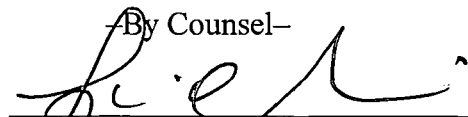
Mr. Simmons was prepared to raise these equitable defenses in the previous action; however, Appellant was unprepared for trial and its case was dismissed, without prejudice. Appellant seeks to deprive Mr. Simmons from ever raising his equitable defenses based on the theory that res judicata, which translates to "a thing adjudged." However, the things (Mr. Simmons's equitable defenses) were never adjudicated. Consequently, Mr. Simmons respectfully submits Appellant's appeal should be denied, the trial court's final ruling should be upheld, and this case should be remanded to permit Mr. Simmons to present his equitable defenses to Appellant's complaint.

VII. Conclusion

For the foregoing reasons, Appellee Robert E. Simmons respectfully moves the Court to deny Appellant's appeal, to affirm the trial court's ruling, and to remand this case for further proceedings.

ROBERT E. SIMMONS, Appellee


Bren J. Pomponio (W.Va. I.D. No. 7774)
MOUNTAIN STATE JUSTICE
1217 Quarrier Street
Charleston, West Virginia 25301
(304) 344-3144
bren@msjlaw.org

By Counsel-

Lonnie C. Simmons (W.Va. I.D. No. 3406)
**DIPIERO SIMMONS MCGINLEY &
BASTRESS, PLLC**
P.O. Box 1631
Charleston, West Virginia 25326
(304) 342-0133
lonnie.simmons@dbdlawfirm.com

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

NO. 20-0705

NR DEED, LLC,

Plaintiff Below, Petitioner,

v.

ROBERT E. SIMMONS,

Defendant Below, Respondent.


Appeal from the Circuit Court of Kanawha County, West Virginia

CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing **APPELLEE'S BRIEF**

Counsel of record by email and mail on January 25, 2021, to the following:

David R. Karr, Jr.
Post Office Box 1283
Charleston, West Virginia 25325-1283
(304) 345-3203
dkarr@karrlaw.net



Lonnie C. Simmons (W.Va. I.D. No. 3406)