Dismissed in Part, Writ Denied, and Opinion filed May 20, 2021.

In The

Fourteenth Court of Appeals

NO. 14-19-00571-CV

DEK-M-NATIONWIDE, LTD., AND KENNETH D. EICHNER, P.C., Relators

ORIGINAL PROCEEDING
WRIT OF MANDAMUS
2nd 25th District Court
Colorado County, Texas
Trial Court Cause No. 4362

O P I N I O N

In this proceeding, cast alternatively as an appeal or a petition for writ of mandamus, DEK-M Nationwide, Ltd. (DEK-M), and Kenneth D. Eichner, P.C. (KDEPC), challenge two orders granting summary judgments in post-judgment proceedings in a delinquent-tax suit. After this delinquent-tax suit was filed, KDEPC became a judgment debtor of the original tax debtor and later obtained a security interest in certain of the debtor's property. KDEPC allegedly foreclosed on its lien and sold the properties to DEK-M, but in accordance with the final judgment in this

case, Colorado County Central Appraisal District (CCCAD) foreclosed the tax lien on the same properties, which were sold to David Moseley, Cassie Moseley, and David Hill, individually and d/b/a DOH Oil Company (collectively, the Buyers). We determine this proceeding is properly considered a petition for writ of mandamus; however, we dismiss KDEPC from this proceeding for lack of standing. We further conclude that the trial court did not abuse its discretion in granting CCCAD's and the Buyers' summary-judgment motions, and we deny DEK-M's petition for writ of mandamus.

I. BACKGROUND

Walter Willis, individually and d/b/a Eagle Lake Energy Service, owned non-producing royalty interests in several tracts of land. His taxes on these interests became delinquent, and in March 2010, CCCAD, on behalf of several taxing districts, sued Willis and those of Willis's creditors who had recorded liens. We refer to this action as "the Tax Suit." The trial court rendered final judgment in the Tax Suit on December 13, 2010, for delinquent taxes, penalties, and interest in the amount of $90,169.98 and ordered Willis's royalty interests sold to satisfy this amount, plus the costs of suit, sale, and other expenses incurred in the Tax Suit.

While the Tax Suit was pending, KDEPC obtained a money judgment against Willis and had the abstract of judgment recorded. Shortly after final judgment was rendered in the Tax Suit, KDEPC reduced the interest on Willis's debt in exchange for security interests in the same royalty interests that were the subject of the final judgment in CCCAD's favor.

A. Sales of the Royalty Interests

On January 29, 2013, an order of sale was issued effectuating the final judgment in the Tax Suit. Meanwhile, Willis had failed to pay KDEPC as agreed,

and a few days after the order of sale was issued in the Tax Suit, KDEPC's trustee conducted a non-judicial foreclosure sale of Willis's royalty interests. DEK-M Nationwide, Ltd., an entity related to KDEPC, bought the property and had the deed recorded.

Pursuant to the Tax Suit's judgment and order of sale, Willis's royalty interests in three tracts of land were sold on March 5, 2013. David and Cassie Moseley jointly bought the interests in two tracts, and David Hill, individually and d/b/a DOH Oil Company, bought the interest in a third tract; we refer collectively to the interests that were sold as "the Properties."[1] The sheriff's deeds to the Buyers were recorded on April 19, 2013, specifying that the Buyers acquired all of the interests in the Properties that Willis and the other defendants in the Tax Suit had on the date the Tax Suit was filed—that is, before KDEPC became a judgment creditor or acquired a secured interest in the Properties, and before DEK-M allegedly purchased the Properties. The excess proceeds of the tax sales were paid into the court's registry, and KDEPC successfully petitioned the trial court in the Tax Suit to receive from the excess funds the amount of Willis's judgment debt to KDEPC, together with interest, attorney's fees, and costs. The order awarding KDEPC these funds was not appealed.

B. KDEPC's and DEK-M's Challenges to the Tax-Foreclosure Sales

On March 3, 2014, KDEPC and DEK-M filed in the Tax Suit a post-judgment "Motion to Set Aside Order of Sale and Vacate and Void Tax Sale." Immediately after filing the motion, DEK-M alone filed a separate lawsuit against CCCAD and the Buyers. To differentiate it from the Tax Suit, we refer to the separate lawsuit as

[1] The Tax Suit's final judgment authorized the foreclosure of Willis's royalty interests in four tracts of land, and all four royalty interests were offered for sale at the same tax sale; however, the royalty interest in the fourth tract was not sold at that time, and we do not include it in the "Properties" discussed herein.

"the Title Suit," but in both proceedings, DEK-M asked the trial court to hold that (1) the tax sales were invalid, (2) DEK-M is the rightful owner of the Properties, and (3) DEK-M is entitled to receive the royalty payments as the Properties' owner.

A year later, KDEPC and DEK-M amended their motion in the Tax Suit to invalidate the tax sale; we refer to this motion as the "First Amended Motion." KDEPC and DEK-M represent that the trial court held a hearing on the First Amended Motion on May 4, 2015; however, the record contains no notice of a hearing on the motion; there is no reporter's record of such a hearing; and the trial court issued no written orders that mention the motion.[2]

In the Title Suit, however, CCCAD and the Buyers successfully moved for summary judgment. This Court affirmed on the ground, among others, that under the theory of res judicata, the final judgment in the Tax Suit barred DEK-M's claims. *See DEK-M Nationwide, LTD v. Hill*, No. 14-15-01030-CV, 2017 WL 1450016, at *2, *4 (Tex. App.—Houston [14th Dist.] April 18, 2017, pet. denied) (sub. mem. op. on denial of reh'g), *cert. denied*, 138 S. Ct. 1999 (May 14, 2018). Both the Supreme Court of Texas and the Supreme Court of the United States denied DEK-M's petitions for further review.

More than seven months after the Supreme Court of the United States denied certiorari in the Title Suit, KDEPC and DEK-M filed in the Tax Suit a document styled as "Bill of Review – KDEPC & DEK-M's Motion in Support of the Uncompleted May 4, 2015, Hearing 'First Amended Motion to Set Aside Order of Sale and Vacate and Void Tax Sale'" ("Bill of Review"). CCCAD responded with a combined motion for summary judgment, motion to dismiss, and response to the Bill

[2] In response to our inquiry, the official court reporter at the time of the hearing wrote that she had "notated on the docket that the motion was withdrawn and no hearing was had on the motion."

of Review, in which CCCAD asked the trial court to deny all of KDEPC's and DEK-M's claims for relief. Among other things, CCCAD argued that (a) KDEPC lacked standing because it had no interest in the Properties, (b) KDEPC's and DEK-M's claims were barred by res judicata, and (c) the Bill of Review was barred by limitations and was required to be filed as a separate action. The Buyers adopted CCCAD's hybrid motion and added a few more grounds. The trial court granted both summary-judgment motions.

In this proceeding, KDEPC and DEK-M present eighteen issues in their brief, which they have titled, "First Amended Mandamus Brief of Kenneth D. Eichner, P.C. and DEK-M Nationwide, Ltd., Mandamus Appellants." They have asked that this proceeding be treated alternatively as an appeal or an original proceeding.

We accordingly begin our analysis by identifying the nature of this proceeding. Next, we will address CCCAD's and the Buyers' arguments that KDEPC lacks standing, for if KDEPC lacks standing, then we have no jurisdiction to consider the merits of its claims for relief. *See Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 150 (Tex. 2012) (because standing is "a constitutional prerequisite to suit," a court has no jurisdiction over, and must dismiss, a claim by a party without standing to assert it). Only after resolving these threshold matters will we address the merits of those issues necessary to dispose of the proceeding.

II. TYPE OF PROCEEDING

We begin by determining whether this is an appeal or a petition for writ of mandamus.

Appeals are generally available only from final judgments and from orders for which an interlocutory appeal is authorized by statute. *CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011). But in arguing whether this proceeding should be

treated as an appeal, KDEPC and DEK-M have made inconsistent representations, arguing that (a) no final judgment was ever rendered in this case, (b) final judgment was rendered against them, and (c) mandamus is appropriate because it seeks review of the trial court's post-judgment order. To ascertain the extent to which any of these representations is correct, we begin with the nature of the proceedings below.

A. Final Judgment Was Rendered in 2010, But Not Against KDEPC or DEK-M.

This case is a delinquent-tax suit in which CCCAD sought to foreclose its tax lien. A tax lien attaches to taxable property on January 1st of each year and takes priority over other liens on the property and over the claims of the property owner's creditors. TEX. TAX CODE ANN. §§ 32.01, 32.05. A taxing unit may sue to foreclose the lien securing payment of the tax, and if the judgment is for foreclosure, the trial court must order the property sold to satisfy the judgment. *Id*. §§ 33.41, 33.53.

Here, the tax lien attached to Willis's interests in minerals in place. Such interests are real property, but once produced, the minerals are personalty. *See id.* § 1.04(2), (4). CCCAD sued Willis, as the Properties' owner, and Willis's creditors who had recorded liens.[3] The trial court rendered judgment against Willis and authorized CCCAD to foreclose the tax liens against any defendant or any person claiming under a defendant. Finally, the trial court ordered the Properties sold, with any excess funds to be paid to, and held by, the clerk of the court.

KDEPC and DEK-M argue that the judgment is not final due to the inclusion in the judgment of this paragraph:

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[3] These creditors were Wells Fargo, N.A.; Mahendra Patel d/b/a Eagle Lake Farm & Home Supply; the Attorney General of the State of Texas; Egypt Service Company, L.L.C.; the Internal Revenue Service; Viper Well Services, LLC; Viper Vacuum Services; Viper SWD, Inc.; Viper Packing Services; and Key Energy Services. KDEPC and DEK-M were not among the defendants because they were not judgment creditors and had no recorded interest in the Properties when the delinquent-tax suit was filed.

> IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all parties heretofore named in any pleadings filed by any party and not included in this judgment, and any property set out in previous pleadings but not included in this judgment, are hereby dismissed without prejudice to the right to refile their claims, or to have the claims against them refiled, and any relief previously requested and not herein granted is expressly denied.

KDEPC and DEK-M assert that "all parties heretofore named in any pleading" refers to KDEPC because KDEPC was a plaintiff in a separate lawsuit against Willis. But, it would be absurd to construe this phrase to include every person or entity ever previously named as a party in any pleading in any lawsuit in any court. The judgment plainly is referring only to parties previously named in a pleading in this lawsuit, for those were the only parties capable of being "dismissed" from this suit. Neither KDEPC nor DEK-M were among the "parties heretofore named" in a pleading in this case, so the language they cite cannot refer to them.

Although the December 2010 judgment was not rendered against KDEPC and DEK-M, it was a final judgment because it disposed of all parties and claims that were before the trial court. *See Lehmann v. Har-Con Corp*., 39 S.W.3d 191, 200 (Tex. 2001); *see also Mount Vernon United Methodist Church v. Harris Cnty*., No. 01-18-01114-CV, 2019 WL 6869333, at *2 (Tex. App.—Houston [1st Dist.] Dec. 17, 2019, pet. denied) (mem. op.) (in a suit for delinquent property taxes, the judgment in the taxing units' favor for the unpaid taxes is the final judgment (citing *Royal Indep. Sch. Dist. v. Ragsdale*, 273 S.W.3d 759, 763–64 (Tex. App.—Houston [14th Dist.] 2014, no pet.))).

B. Relief Regarding the Challenged Post-Judgment Orders Is Available, If at All, Only by Mandamus.

Given the ambiguity of KDEPC's and DEK-M's arguments, the only orders of the trial court challenged in this proceeding that we have been able to identify are

the orders granting CCCAD's and the Buyers' motions for summary judgment on claims asserted by KDEPC and DEK-M years after final judgment was rendered in this case. We must decide whether those orders are appealable.

"[W]hen a final judgment exists, a subsequent order that has no effect except to enforce provisions of the judgment does not qualify as another final judgment subject to appeal." *McFadin v. Broadway Coffeehouse, LLC*, 539 S.W.3d 278, 284 (Tex. 2018) (citing *Wagner v. Warnasch*, 156 Tex. 334, 295 S.W.2d 890, 893 (1956)); *see also In re Fluid Power Equip., Inc*., 612 S.W.3d 130, 134 (Tex. App.—Houston [14th Dist.] 2020, orig. proceeding) ("[P]ost-judgment orders made for the purpose of enforcing or carrying into effect a prior judgment are not subject to appeal because they are not final judgments.").

On the other hand, a post-judgment order that acts as a mandatory injunction is considered final and appealable. *See Alexander Dubose Jefferson & Townsend LLP v. Chevron Phillips Chem. Co.*, 540 S.W.3d 577, 586–87 (Tex. 2018) (per curiam). A post-judgment order has this effect "when it resolves property rights and imposes obligations on the judgment creditor or interested third parties." *Jack M. Sanders Family Ltd. P'ship v. Roger T. Fridholm Revocable, Living Tr.*, 434 S.W.3d 236, 242 (Tex. App.—Houston [1st Dist.] 2014, no pet.). A post-judgment order also passes this test if it "imposes obligations in addition to or in excess of those in the judgment, . . . provided the order disposes of all pending issues and parties." *McFadin*, 539 S.W.3d at 284. A non-final order that does not pass this test may be challengeable by mandamus. *See id.*

The challenged orders do not order relief that differs from or exceeds that afforded by the final judgment; indeed, the orders award no relief at all. The orders also do not dispose of all of the property rights asserted post-judgment by all parties, for the Buyers asserted property rights of their own. They responded to KDEPC and

DEK-M's First Amended Motion by asking the trial court to enter an order "validating and confirming" the tax sale at which the Buyers purchased the Properties. There is no order adjudicating the Buyers' claims.

We accordingly conclude that the summary-judgment orders are not appealable, and relief is available, if at all, only through a writ of mandamus.

Mandamus is granted only when the relator shows that the trial court abused its discretion and that no adequate appellate remedy exists. *In re Turner*, 591 S.W.3d 121, 124 (Tex. 2019) (orig. proceeding). A trial court abuses its discretion when it acts without reference to guiding rules or principles or in an arbitrary or unreasonable manner. *In re Garza*, 544 S.W.3d 836, 840 (Tex. 2018) (orig. proceeding) (per curiam). A trial court has no discretion in determining what the law is or in applying the law to the facts. *In re Fox River Real Estate Holdings, Inc.*, 596 S.W.3d 759, 763 (Tex. 2020) (orig. proceeding).

This standard can be readily applied to the review of the challenged summary-judgment order because a movant for traditional summary-judgment can prevail only by establishing that there is no genuine issue of material fact and that it is entitled to prevail as a matter of law. *See* TEX. R. CIV. P. 166a(c); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215–16 (Tex. 2003). If CCCAD failed to carry this burden, then the trial court abused its discretion in granting the motion.

To determine whether a movant established its right to summary judgment as a matter of law, we construe the evidence in the light most favorable to the non-movant, crediting evidence favorable to the nonmovant if a reasonable factfinder could and disregarding contrary evidence unless a reasonable factfinder could not. *See Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009).

But before we consider the merits of the challenges to the summary-judgment orders, we must determine who has standing to challenge them.

III. KDEPC'S STANDING

A plaintiff has standing when it is personally aggrieved. *Data Foundry, Inc. v. City of Austin*, No. 19-0475, __S.W.3d__, 2021 WL 1323405, at *3 (Tex. Apr. 9, 2021). To maintain standing, a party must show that (1) the party has actually sustained an injury in fact that is both concrete and particularized, or that the infliction of such an injury is "imminent, not conjectural or hypothetical"; (2) the injury is fairly traceable to the opposing party's challenged action; and (3) "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at *4.

As CCCAD and the Buyers pointed out in their summary-judgment motions, KDEPC lacks standing to challenge the validity of the tax sale or the Buyers' ownership of the Properties because KDEPC does not claim to have any interest in the Properties. KDEPC did not become a judgment creditor until after the Tax Suit was filed, and KDEPC acquired a specific security interest in the Properties only after the trial court rendered final judgment. In the interval between the rendition of final judgment and the tax sale, KDEPC purportedly conducted a non-judicial foreclosure of its lien, and KDEPC and DEK-M have argued that DEK-M purchased the Properties at that foreclosure sale and is the rightful owner. Thus, KDEPC's interests—first as one of Willis's general judgment creditors and later as the holder of a secured interest in the Properties—had come and gone in the interval between the filing of the Tax Suit and the tax sale.

Consistent with its lack of interest in the Properties, KDEPC has alleged no facts that would constitute an actual injury in fact traceable to CCCAD's or the Buyers' actions. No property was taken from KDEPC, who instead voluntarily

foreclosed upon its inferior lien. KDEPC suffered no "concrete and particularized injury," and having divested itself of any interest in the Properties (and thus, any interest in the royalties payable in connection with the Properties), no such injury can be imminent.

We accordingly dismiss KDEPC from this proceeding for lack of standing. We also dismiss the petition for writ of mandamus as it applies to issues that are specific to KDEPC,[4] and we hereafter address KDEPC and DEK-M's arguments as though they were advanced by DEK-M alone.

IV. THE SUMMARY-JUDGMENT ORDERS

Both CCCAD and the Buyers sought summary judgment on the ground, among others, of res judicata. Res judicata, or claim preclusion, bars relitigation of claims or causes of action that have been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit. *Barr v. Resolution Tr. Corp. ex rel. Sunbelt Fed. Sav*., 837 S.W.2d 627, 628 (Tex. 1992). Thus, res judicata prevents a plaintiff from "splitting" his cause of action into separate cases. *See Jeanes v. Henderson*, 688 S.W.2d 100, 103 (Tex. 1985).

To prevail on the affirmative defense of res judicata, the party asserting it must prove (a) the existence of a prior final judgment on the merits by a court of competent jurisdiction; (b) identity of the parties or those in privity with them; and (c) the current action is based on the same claims that were raised, or that could have been raised, in the first action. *Philips v. McNease*, 467 S.W.3d 688, 697 (Tex.

[4] These are Issues 7 and 17, which are stated as follows:

> Issue No. 7: Did the trial court err or abuse its discretion by not ruling KDEPC complied with *Texas Tax Code* 34.08 provisions?
> Issue No. 17: Did the trial court err or abuse its discretion by not rendering a decision on May 4, 2015, hearing, effectively, denying KDEPC of a defense.

App.—Houston [14th Dist.] 2015, no pet.) (citing *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 449 (Tex. 2007)).

CCCAD and the Buyers asserted in their summary-judgment motions that the final judgment in Title Suit bars DEK-M's claims in the Tax Suit. They attached a certified copy of the Title Suit's December 3, 2015, final judgment against DEK-M and in favor of CCCAD and the Buyers, and their summary-judgment motions included citations to (a) this Court's judgment affirming the judgment in the Title Suit, (b) the Supreme Court of Texas's orders denying DEK-M's petition for review and its motion for rehearing, and (c) the Supreme Court of the United States' denial of certiorari. This evidence established that the Title Suit's judgment on the merits is final, and a comparison of DEK-M's Bill of Review with the Title Suit's final judgment or with this Court's opinion in DEK-M's appeal of that case established that all of the parties in the Title Suit were parties to DEK-M's Bill of Review in the Tax Suit.

Finally, DEK-M admitted in its Bill of Review that "[b]oth cases include identical facts" and that, with one exception (discussed in the paragraph below), all of the claims asserted in the Tax Suit were also asserted in the Title Suit. DEK-M is a limited partnership, and Kenneth Eichner, the president of DEK-M's general partner, signed a declaration stating under penalty of perjury that this representation was within his personal knowledge and was true and correct. CCCAD and the Buyers were entitled to rely on this judicial admission. *See* TEX. R. CIV. P. 166a(c); *Philips*, 467 S.W.3d at 697.

The only claim raised in the Tax Suit that was not raised in the Title Suit was DEK-M's claim for "estoppel by deed," which was added in the Bill of Review itself. CCCAD and the Buyers responded to the Bill of Review by moving for summary judgment on the ground, among others, that the final judgment in the Title Suit

foreclosed all of DEK-M's claims. Given the identity of parties and DEK-M's admission that the claims were based on "identical facts," all of its claims were, or could have been, litigated in the now-final Title Suit—including its claim for estoppel by deed.

Because CCCAD and the Buyers met their initial burden to establish their right to summary judgment on the ground of res judicata, the burden shifted to DEK-M to raise a genuine issue of material fact.

A. CCCAD and the Buyers Did Not Waive Their Res Judicata Defense.

DEK-M's primary counter-argument is that CCCAD and the Buyers waived the affirmative defense of res judicata by failing to object to "claim-splitting." Under the single-action rule, a plaintiff has "one indivisible cause of action for all damages arising from a defendant's single breach of a legal duty." *Pustejovsky v. Rapid-Am. Corp*., 35 S.W.3d 643, 646–47 (Tex. 2000). Res judicata normally prevents "claim-splitting" in violation of the single-action rule, but the Restatement (Second) of Judgments provides an exception when "[t]he parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein." RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(a) (1982). In particular, DEK-M relies upon a comment to this provision:

> Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one of the actions does not preclude the plaintiff from proceeding and obtaining judgment in the other action.

Id. cmt a. As an example, the Restatement states that when a plaintiff sues a defendant asserting claims arising from a collision and prosecutes a suit for personal injuries to judgment while the plaintiff's separate suit for property damage is pending, the defendant cannot obtain dismissal of the property-damage suit if the

defendant, by failing to object in either suit, apparently acquiesced in the splitting of the plaintiff's claim. *See id.*

But, DEK-M failed to show that it split its claims. As CCCAD and the Buyers pointed out in their summary-judgment motions, DEK-M admitted in its Bill of Review that the same claims it asserted in the Tax Suit were also litigated in the Title Suit. Those claims were not "split"; they were identical.

The sole exception was DEK-M's claim for "estoppel by deed," but that claim was added in its Bill of Review in the Tax Suit on December 31, 2018—long after final judgment was rendered in the Title Suit. Consequently, there was never a time when that cause of action was, or could have been, "split" between two simultaneously pending suits.

B. No Genuine Issue of Material Fact Precluded Summary Judgment.

DEK-M also argues that it raised genuine issues of material fact about whether (1) KDEPC and DEK-M were "in privity with [Willis], and [sic] or themselves"; (2) an irregular sheriff's sale occurred; or (3) CCCAD "committed fraud to void the Foreclosure Events against one or both of [KDEPC and DEK-M]." But, none of these issues preclude CCCAD and the Buyers from prevailing on their affirmative defense of res judicata. For example, CCCAD and the Buyers successfully argued in the Title Suit that DEK-M was in privity with Willis, and that the final judgment in the Tax Suit barred DEK-M's claims in the Title Suit. The judgment in the Title Suit now prevents DEK-M from litigating that same privity argument—again—in the Tax Suit. The same is true of DEK-M's attempts to invalidate the tax sales. DEK-M unsuccessfully litigated the same issue against the same defendants in the Title Suit, and res judicata bars DEK-M from doing so again. In sum, none of DEK-M's arguments raise a genuine issue of material fact regarding any element of res

judicata, nor has DEK-M presented evidence as to every element of a counter-affirmative defense.

Because CCCAD and the Buyers established their entitlement to summary judgment as a matter of law, the trial court did not abuse its discretion in granting their motions. We accordingly overrule DEK-M's first, second, fourth, ninth, tenth, and eighteenth issues,[5] and the portion of its thirteenth issue that concerns title to the Properties.[6] In light of our disposition of these issues, it is unnecessary to address DEK-M's fifth and sixth issues, which address other grounds on which CCCAD and the Buyers sought summary judgment.[7] We also do not reach DEK-M's fourteenth issue concerning the merits of DEK-M's claim to invalidate the tax sale to the

[5] These issues are as follows:

> Issue No. 1: Did the trial court err or abuse its discretion in granting Appellee CCCAD's Motion for Summar Judgment?r
> Issue No. 2: Did the trial court err or abuse its discretion in granting the [Buyers'] Motion for Summary Judgment?
> Issue No. 4: Did the trial court err or abuse its discretion by not ruling against Appellee's res judicata arguments?
> Issue No. 9: Did the trial court err or abuse its discretion by not ruling Appellees' argument of standing, waiver, and other defenses, including payment fail?
> Issue No. 10: Did the trial court err or abuse its discretion by not ruling that Appellees' argument failed because they did not challenge the Appellants' defense?
> Issue No. 18: Pervasive genuine issues of material fact existed: Appellants were not in privity with tax debtor, and or themselves; whether an irregular sheriff's sale occurred; or, if CCCAD committed fraud to void the Foreclosure Events against one or both Appellants.

[6] In this portion of its thirteenth issue, DEK-M asserts that the trial court erred or abused its discretion "by not ruling when and whether title to the real . . . property mineral rights transferred to whom and when."

[7] DEK-M phrases these issues as follows:

> Issue No. 5: Did the trial court err or abuse its discretion by not ruling Appellants did not file a Bill of Review or were not subject to the Statute of Limitations?
> Issue No. 6: Did the trial court err or abuse its discretion by not ruling Appellants were not subject to laches?

Buyers,[8] because that claim was effectively defeated by summary judgment on CCCAD's and the Buyers' affirmative defenses. Finally, we do not reach the remainder of DEK-M's thirteenth issue, in which DEK-M complains that the trial court did not issue a ruling specifying "when and whether title to the . . . personal property mineral rights transferred to whom and when." That issue concerns the royalties to be paid to the owners of the Properties, but because the summary-judgment orders disposed of DEK-M's claim that it owns the Properties, we do not reach issues concerning the proceeds of the Properties.

V. DEK-M'S REMAINING ISSUES

DEK-M's remaining issues are premised on the existence of facts that are not supported by the record.

A. There Is No Adverse Final Judgment.

DEK-M asks in its third issue, "Did the trial court err or abuse its discretion in granting final judgment effective against either Appellant?" We overrule this issue, because as previously discussed, the post-judgment orders granting CCCAD's and the Buyers' summary-judgment motions do not constitute a final judgment.

B. There Are No Orders Concerning Royalties.

DEK-M raises several issues purporting to challenge orders declaring ownership of, or disbursing from the registry of the court, the proceeds of the Properties—that is, the royalties payable to the Properties' owner. But in this delinquent-tax suit, the tax lien attached to an interest in minerals in place, and such

[8] In Issue 14, DEK-M asks, "Did the trial court abuse its discretion by not ruling in Appellants' favor that any or more than one of the Cumulative Error Doctrine or the Significant Errors voided the Foreclosure Events or [the Buyers'] deeds?"

interests are real property. *See* TEX. TAX CODE ANN. § 1.04(2). Minerals do not become personalty until they have been removed from the land. *See id*. § 1.04(4).

The tax lien foreclosed upon was a lien on real property, not a lien on personal property such as minerals removed from the land or the proceeds from the removed minerals. *See CKD Homes Direct, Ltd. v. Hegar*, No. 03-19-00776-CV, 2020 WL 3479257, at *5 (Tex. App.—Austin June 26, 2020, no pet.) (mem. op.). CCCAD did not assert a lien against the Properties' proceeds, and the record of this case contains no ruling foreclosing a lien on royalties or specifying the person or entity to whom such proceeds must be paid. There also are no orders in this case requiring royalty payments to be paid into or out of the court's registry.

We overrule Issues 8 and 15, which purport to challenge the trial court's orders concerning royalty payments; DEK-M has not shown that any such orders were issued in this case.[9] We also overrule the portion of Issue 12 in which DEK-M erroneously assumes that CCCAD asserted a tax lien against the Properties' royalty payments.[10]

C. The Trial Court Did Not Fail to Rule on the First Amended Motion.

In its sixteenth issue, DEK-M asks, "Did the trial court err or abuse its discretion by not rendering a decision in the May 4, 2015, hearing on the *First Amended Motion to Set Aside Order of Sale and Vacate and Void Tax Sale*?" DEK-M seems at times to argue that the trial court was required to rule on the motion when it was heard. There is no record of a hearing, but even if a hearing was held, DEK-M

[9] Issue 8 is, "Without knowing the rightful owner of the [Properties] or its proceeds, did the trial court abuse its discretion paying any funds out of the registry of the court?" Issue 15 is, "Did the court abuse its discretion by not requiring DEK-M's deed be set aside before Appellees could obtain any proceeds?"

[10] DEK-M's twelfth issue is, "Did the court abuse its discretion by not ruling CCCAD's lien terminated against [the Properties] *and its related proceeds*?" (emphasis added).

cites no authority that a trial court is required to rule on a motion before a hearing on a motion concludes.

If it instead is DEK-M's position that the trial court never ruled on the motion, then DEK-M is mistaken. DEK-M's Bill of Review was actually titled, "Bill of Review – KDEPC & DEK-M's Motion in Support of [t]he Uncompleted May 4, 2015, [H]earing 'First Amended Motion to Set Aside Order of Sale and Vacate and Void Tax Sale.'" In other words, the Bill of Review was presented not only as a bill of review[11] but also as a supplement to the First Amended Motion. We conclude that the trial court did rule on the motion inasmuch as CCCAD and the Buyers asked in their summary-judgment motions that the trial court deny all relief sought by DEK-M, and the trial court granted the motions. We accordingly overrule DEK-M's sixteenth issue.

D. The Trial Court Did Not Abuse Its Discretion in Failing to Grant Unrequested Relief.

In those issues, and parts of issues, that remain, DEK-M asks whether the trial court erred or abused its discretion in failing to issue rulings that, so far as we can tell, DEK-M did not request. *See Walker v. Packer*, 827 S.W.2d 833, 837 (Tex. 1992) (orig. proceeding) (relator has burden to provide court with record sufficient to establish right to mandamus relief).

[11] CCCAD and the Buyers correctly pointed out in their summary-judgment motions that a bill of review must be brought as a separate action and must be filed within four years of the judgment. *See Caldwell v. Barnes*, 975 S.W.2d 535, 537 (Tex. 1998) (bill of review is an independent proceeding to set aside a judgment that is no longer subject to appeal or to a motion for new trial); TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (residual limitations period is four years). DEK-M filed its Bill of Review as a post-judgment motion in the Tax Suit more than eight years after the final judgment in that case. Thus, to the extent that the Bill of Review was intended as exactly that—a bill of review—CCCAD and the Buyers established both that the bill of review was filed in the wrong action and that it was time-barred. We affirm summary judgment on this basis as well.

In Issue No. 11, DEK-M asks, "Did the court abuse its discretion by not ruling that any Government division violated a U.S. Constitutional Amendment or an Article of the Texas Constitution against either or both appellants?" Although DEK-M has argued that various actions by CCCAD violated the state or federal constitution, it did so in support of its request for a declaration that the tax sale did not transfer title and that DEK-M is the rightful owner of the Properties;[12] it did not plead for an independent declaration that a particular "Government division" violated DEK-M's rights under a particular constitutional provision.

The same is true of the remaining portion of Issue 12 in which DEK-M contends the trial court erred or abused its discretion "by not ruling CCCAD's lien terminated against [the Properties]." No such relief was requested; moreover, no one actually contends that CCCAD continued to have a lien on the Properties even after the tax sale. *See* TEX. TAX CODE ANN. § 34.01(q) (tax sale of property to purchaser other than a taxing unit extinguishes the lien against that property for the delinquent taxes, penalties, and interest included in the judgment).

Because the trial court did not abuse its discretion in failing to make these unrequested rulings, we overrule these issues.

VI. CONCLUSION

We dismiss KDEPC from this proceeding for lack of standing, and we dismiss the issues specific to KDEPC for want of jurisdiction.

As for DEK-M, we conclude that CCCAD and the Buyers established their entitlement to summary judgment as a matter of law, and thus, the trial court did not

[12] In granting summary judgment denying DEK-M all relief, the trial court denied DEK-M's request for declarations invalidating the tax sale and holding DEK-M to be the Properties' rightful owner.

abuse its discretion in granting their motions. We accordingly deny DEK-M's petition for writ of mandamus.

/s/ Tracy Christopher
Chief Justice

Panel consists of Chief Justice Christopher and Justices Wise and Hassan.