STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Ray M. Tatterson and Carol L. Tatterson,
Plaintiffs Below, Petitioners

vs.) No. 11-1015 (Marion County 10-C-427)

Columba Nwoko, Marilyn Price,
Joseph Carpenter, and Junior Slaughter,
Defendants Below, Respondents

FILED
September 4, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioners Ray M. Tatterson and Carol L. Tatterson, pro se, appeal the February 22, 2011 order of the Circuit Court of Marion County dismissing their civil action as to all Defendants based upon the doctrine of res judicata and the court's separate order of March 29, 2011, granting summary judgment on Respondent Columba Nwoko's counterclaim. Mr. Nwoko, by David A. Glance, his attorney, filed a summary response.[1] Respondents Marilyn Price, Joseph Carpenter, and Junior Slaughter, by Charles A. Shields, their attorney, also filed a summary response. Petitioners filed a reply.

The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds that a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Mr. Nwoko bought real estate at Lot 21A, Fourth Street, Fairmont, West Virginia, at a tax sale. Subsequently, on July 7, 2008, in Civil Action No. 08-P-73, Petitioner Ray M. Tatterson filed a petition to have Mr. Nwoko's deed set aside pursuant to West Virginia Code § 11A-4-2, claiming that "he paid the real estate taxes owed for the year 2005 on property located at Lot 21A Fourth Street in Fairmont, West Virginia on October 27, 2006." Mr. Tatterson asserted that "[former Sheriff] Slaughter, or his office, applied his payment to another parcel of land[, in which he allegedly had an interest]."

However, the circuit court credited the testimony of Ms. Price, the Sheriff's Chief Tax Deputy, in concluding that "[Mr. Tatterson] failed to pay his 2005 property taxes on the property

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[1] Mr. Glance is an additional defendant in the case and was also dismissed by the circuit court in its February 22, 2011 order.

located at Lot 21A Fourth Street." The court's finding that Mr. Tatterson did not pay his 2005 property taxes precluded him from obtaining relief under West Virginia Code § 11A-4-2, entitled "Right to set aside sale or deed when all taxes paid before sale." Relief was still available to Mr. Tatterson under West Virginia Code § 11A-4-4, entitled "Right to set aside deed when one entitled to notice not notified," because of the circuit court's other finding that "[Mr. Tatterson] did not receive notice of his right to redeem [Lot 21A, Fourth Street]."

In order to have Mr. Nwoko's tax deed set aside under West Virginia Code § 11A-4-4, Mr. Tatterson had to pay to Mr. Nwoko "the amount which would have been required for redemption, together with any taxes which have been paid on the property since delivery of the deed, with interest at the rate of twelve percent per annum." W.Va. Code § 11A-4-4(a). Mr. Tatterson failed to make the payments required by § 11A-4-4 even when the circuit court gave him a second chance to do so in a July 7, 2009 order denying a motion to dismissed filed by Mr. Nwoko. The circuit court gave Mr. Tatterson a month from its July 7, 2009 order to make the required payments. He failed, once again, to pay. Mr. Nwoko consequently renewed his motion to dismiss, which the circuit court instructed him to do if Mr. Tatterson did not make the payments. The circuit court granted Mr. Nwoko's renewed motion to dismiss, finding that "[Mr. Tatterson] failed to act on his statutory rights and the matter must now be dismissed, with prejudice." *See* W.Va. Code § 11A-4-4(c).

Mr. Tatterson appealed the circuit court's order granting Mr. Nwoko's renewed motion to dismiss. By an order entered on June 22, 2010, this Court refused Mr. Tatterson's appeal. Mr. Tatterson sought reconsideration; however, he was informed that the Court was of the opinion that its June 22, 2010 order was final and no further filings would be considered. Mr. Tatterson also filed a second action, Civil Action No. 09-P-68, naming the new Sheriff, Mr. Carpenter, as a defendant and omitting the former Sheriff, Mr. Slaughter, and Mr. Nwoko as defendants. That civil action, however, contained the same allegations as Mr. Tatterson's first action, No. 08-P-73, and was dismissed based upon the doctrine of res judicata by an order of the circuit court entered on July 7, 2009. Mr. Tatterson did not appeal the dismissal of his second action in No. 09-P-68.

On December 6, 2010, Mr. Tatterson, along with Mrs. Tatterson (collectively "petitioners"), filed a third action, Civil Action No. 10-C-427, naming Mr. Nwoko and his attorney Mr. Glance along with Mr. Carpenter, Mr. Slaughter, and Ms. Price as defendants and seeking monetary damages for the loss of Lot 21A, Fourth Street, and for associated losses.[2] Petitioners alleged that they had been the victims of a "tyranical [sic] conspiracy" as a result of "the combined actions of the Defendants."[3] According to petitioners, they also filed in No. 10-C-427 a motion to have the circuit

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[2] Mrs. Tatterson's claims were for loss of consortium, alleging that Mr. Tatterson's health has suffered as a result of this dispute, and for loss of her dower interest in Lot 21A, Fourth Street. Petitioners acknowledged that dower has been abolished in West Virginia but argued that its abolition had violated the United States and West Virginia Constitutions.

[3] Specifically, petitioners alleged, *inter alia*, that several of the other Defendants either knew or had reason to know of "the falsity of this testimony of Defendant Marilyn Price," that Ms. . . .

court's dismissal of No. 08-P-73 declared void. The defendants moved to dismiss. Mr. Nwoko also filed a counterclaim that he owned Lot 21A, Fourth Street, in fee simple absolute and was entitled to immediate possession of the property.

In a February 22, 2011 order, the circuit court dismissed with prejudice petitioners' action in No. 10-C-427, as to all Defendants, based upon the doctrine of res judicata:

> While [petitioners] do not set forth any facts in support of their allegation of a "tyrannical conspiracy," it is clear that if such a conspiracy existed it arose out of the 2006 Sheriff's tax sale that was the basis of cases 08-P-73 and 09-P-68 before this Circuit. Such a claim could have been litigated on the merits in the prior cases before this Circuit, and are [sic] now barred by res judicata.

The circuit court ordered that No. 10-C-427 was to remain on its active docket so that it could adjudicate Mr. Nwoko's counterclaim. In a March 29, 2011 order, the circuit court found that there was "no genuine issue as to any material fact" and granted Mr. Nwoko summary judgment.[4] The circuit court granted Mr. Nwoko immediate possession of Lot 21A, Fourth Street. The circuit court stayed its order during the pendency of any appeal and required petitioners to post a $5,000 appeal bond.

On appeal, petitioners argue that the circuit court's judgment in Mr. Nwoko's favor in No. 08-P-73 was void because of fraud and that fraud constitutes an exception to the application of res judicata. Petitioners also argue that the circuit court erred in No 08-P-73 by basing its decision upon West Virginia Code § 11A-4-4. All Respondents argue that the circuit court properly dismissed No. 10-C-427 based upon the doctrine of res judicata.[5] Mr. Nwoko further argues that the circuit court properly granted him summary judgment on his counterclaim that he was entitled to immediate possession of Lot 21A, Fourth Street, and that all other issues raised by petitioners had previously been adjudicated in No. 08-P-73.

STANDARDS OF REVIEW

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo.*" Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461

. . . Price also altered records, and that Mr. Slaughter and Mr. Carpenter failed to adequately supervise Ms. Price.

[4] In the same order, the circuit court also denied a Rule 60(b) motion filed by petitioners for the court to reconsider its dismissal of their action in No. 10-C-427.

[5] In their reply brief, petitioners concede that Mr. Nwoko's attorney Mr. Glance should be dismissed as a defendant.

S.E.2d 516 (1995). In regard to the circuit court's order granting Mr. Nwoko summary judgment on his counterclaim, review is also de novo. *See* Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994) ("A circuit court's entry of summary judgment is reviewed *de novo*.").

DISCUSSION

This Court set forth the elements of res judicata in Syllabus Point Four, *Blake v. Charleston Area Medical Center, Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997):

> Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. 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.

The *Blake* Court further stated that "an exception to the preclusion of claims that previously could have been determined exists where the party bringing the subsequent lawsuit claims that fraud, mistake, concealment, or misrepresentation by the defendant of the second suit prevented the subsequent plaintiff from earlier discovering or litigating his/her claims." 201 W.Va. at 477, 498 S.E.2d at 49. As is clear from the language of *Blake*, however, the defendant's alleged misrepresentation must have "prevented" the claim from being brought in the first action. This is not true in the cases between the parties here.

The claim in No. 08-P-73 was that rather than applying petitioners' tax payment to Lot 21A, Fourth Street, the Sheriff's Office misapplied the payment to another property, in which they had an interest. Petitioners make the same claim in No. 10-C-427; the only difference in the case at bar is that now, petitioners allege that the Sheriff's Office misapplied the tax payment with malicious intent. Whether resulting from negligence, gross negligence, or deliberate intent, petitioners' claim is identical in both No. 08-P-73 and No. 10-C-427. Even if the circuit court had erred in ruling in Mr. Nwoko's favor in No. 08-P-73, it would not mean that No. 10-C-427 could not now be barred. *See Lloyd's, Inc. v. Lloyd*, 225 W.Va. 377, 385, 693 S.E.2d 451, 459 (2010) (stating that an error by the court in the first action does not protect the second action from being barred by res judicata.) Therefore, this Court concludes that the circuit court did not err in dismissing petitioners' action in No. 10-C-427 based upon the doctrine of res judicata. Because the circuit court's application of res judicata was not erroneous, this Court concludes that the circuit court did not err in also granting Mr. Nwoko summary judgment on his counterclaim that he is entitled to immediate possession of Lot 21A, Fourth Street.

For the foregoing reasons, we find no error in the decisions of the circuit court and its February 22, 2011 order dismissing petitioners' civil action, and its March 29, 2011 order granting Mr. Nwoko summary judgment on his counterclaim, are affirmed.

Affirmed.

ISSUED: September 4, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh