No. 04-21-00024-CV

IN THE COURT OF APPEALS
FOURTH DISTRICT OF TEXAS AT SAN ANTONIO

FFGGP, INC., as TRUSTEE FOR
WINDWARD TRACE 9131 LAND TRUST,
Appellant,

v.

MTGLQ INVESTORS, LP; RUSHMORE LOAN MANAGEMENT SERVICES, LLC; and U.S. BANK NATIONAL ASSOCIATION, as TRUSTEE OF TIKI SERIES IV TRUST,
Appellees.

ON APPEAL FROM 166TH JUDICIAL DISTRICT COURT BEXAR COUNTY, TEXAS
TRIAL COURT CAUSE NO. 2020-CI-02266
HONORABLE JOHN D. GABRIEL, JUDGE PRESIDING

MOTION FOR REHEARING

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SUMMARY OF THE ARGUMENT

Appellees MTGLQ Investors, LP ("MTGLQ"), Rushmore Loan Management Services, LLC ("Rushmore"), and U.S. Bank National Association, as trustee of TIKI Series IV Trust ("U.S. Bank") (collectively as "Appellees") file this Motion for Rehearing pursuant to Tex. R. App. P. 49.

Appellant's Live Complaint Does Not Support the Relief Granted by the Court in Reversing and Rendering Judgment. "The judgment of the court *shall* conform to the pleadings…". Tex. R. Civ. P. 301. In this regard, the Court erred in reversing and rendering judgment in favor of Appellant. Appellant's live pleading does not support the judgment rendered by the Court. Appellant's live complaint requested declaratory relief pursuant to the Uniform Declaratory Judgments Act. However, in quieting title in Appellant, the Court's judgment grants relief that must be supported by a claim for trespass to try title action brought under the Texas Property Code. The Court should remand this case to permit Appellant to properly plead its claim as well as permit Appellees to properly defend against such claim.

The Application of Res Judicata Violates U.S. Bank's Due Process Rights. The application of res judicata has its limits. The Court erred in rendering judgment against U.S. Bank beyond the bounds of permissibility given U.S. Bank's Fourteenth Amendment due process rights. At all relevant times during the underlying litigation, U.S. Bank was the real party in interest regarding the effected deed of trust.

However, U.S. Bank was never made a party to the underlying litigation. Instead, a default judgment was taken against a prior mortgagee, MTGLQ, even though MTGLQ transferred away its interest in the real property prior to its answer even being due in the underlying litigation. As such, MTGLQ had no real interest in the underlying lawsuit, did not know about the lawsuit, and resultingly did not defend against the lawsuit. The application of res judicata to a non-party (U.S. Bank), on the basis of privity with a party (MTGLQ), is limited by the non-party's Fourteenth Amendment due process rights. *See, Richards v. Jefferson Cnty, Ala.,* 517 U.S. 793, 794 (1996) ("[I]t would violate the Due Process Clause of the Fourteenth Amendment to bind litigants to a judgment rendered in an earlier litigation to which they were not parties and in which they were not adequately represented.").

ARGUMENTS & AUTHORITIES

I. REHEARING ISSUE NO. 1

Appellant's Live Complaint Does Not Support the Relief Granted by the Court in Reversing and Rendering Judgment.

The Court obviously has the authority to reverse and render judgment on the appeal of a case presenting dueling motions for summary judgment. As noted by the Supreme Court of Texas, an "appellate court's normal action is to reverse the trial court's judgment and remand the cause to the trial court." *See, Ackerman v. Vordenbaum,* 403 S.W.2d 362, 364 (Tex. 1996). However,

> *An exception* may occur when both parties moved for summary judgment and one such motion was granted, but the other denied. Then the appellate court should determine all questions presented, and may reverse the trial court judgment and render such judgment *as the trial court should have rendered*, including rendering judgment for the other movant.

Id. at 365 (emp. added).

The Court erred when it rendered judgment, declaring U.S. Bank's lien interest void[1], as the trial court was incapable of rendering such a judgment given the state of Appellant's pleadings at the time. As provided by the Supreme Court of Texas, a judgment not supported by the pleadings "is erroneous." *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex. 1983). A party may not be granted relief in the absence of pleadings to support that relief. *Id.*

In the court below, Appellant only pled for declaratory relief under the Uniform Declaratory Judgments Act (the "UDJA"), Tex. Civ. Prac. & Rem Code §37. (CR 5-14). Plaintiff sought relief under the UDJA that U.S. Bank's lien interest in the underlying real property is void. In other words, Appellant sought to remove a cloud on its title to the property and extinguish U.S. Bank's interest in the same. The Supreme Court of Texas has noted in *Martin v. Amerman*, that the Legislature provided the trespass-to-try-title statute as "the method of determining title … real property." *Martin v. Amerman*, 133 S.W.3d 262, 267 (Tex. 2004); *also see*, Tex.

[1] *See*, Judgment rendered on January 12, 2022 in this appeal.

Prop. Code §22.001(a). Reiterating its holding in *Martin,* the Supreme Court of Texas stated again in *Coinmach Corp. v. Aspenwood Apartment Co.,*

> We have previously held that, when "the trespass-to-try-title statute governs the parties' substantive claims …, [the plaintiff] **may not proceed alternatively under the Declaratory Judgments Act.**

Coinmach Corp. v. Aspenwood Apartment Co., 417 S.W.3d 909, 926 (Tex. 2013).

The distinction between trespass to try title actions and UDJA actions, in the context of real estate litigation, is significant. As explained by the Houston Court of Appeals [14th Dist.], "A trespass to try title action is a procedure by which competing claims to title or the right to possession of real property may be adjudicated." *Aquaduct, L.L.C. v. McElhenie,* 116 S.W.3d 438 (Tex. App.—Houston [14th Dist.] 2003). The *Aquaduct* Court noted that trespass to try title actions are used to *clear title,* in other words used when a party seeks judgment "declaring title quieted and removing, annulling, and holding for naught all clouds on title." *Id.* at 444-445.

In contrast to a trespass to try title action, an action for declaratory relief can be used in limited circumstances when real estate interests are involved. The UDJA can be used by the courts to declare matters such as the superiority of competing lien rights, but it cannot be used to "declare title" as such an act is only proper under a trespass to try title claim. *See, Red Rock Properties 2005 Ltd. v. Chase Home Finance, L.L.C,* No. 14-08-00352-CV, 2009 WL 1795037, at *6 (Tex. App.—Houston [14th Dist.] June 25, 2009)("The central issue in this case was not a "cloud

on title" as a trespass to try title action is intended to address. The trial court's judgment did not declare title, but rather construed the terms of … Chase's deed of trust and determined … superiority of two lienholders); also see, *I-10 Colony Inc. v. Chao Kuan Lee,* 393 S.W.3d 467, 477 (Tex. App.—Houston [14th Dist.] 2012)(dignity to be afforded competing interests in real property was proper relief under the UDJA because the relief "only prospectively implicated title."); *also see, Chase Home Finance, L.L.C. v. Cal Western Reconveyance Corp.,* 309 S.W.3d 619, 634 (Tex. App.—Houston [14th Dist.] 2010)(requested relief was properly cast as a declaratory judgment action and not a trespass try title action because what the litigant sought "not a judgment quieting or adjudicating title; rather it is a judgment determining the validity of competing instruments and resolving a dispute between two purported lienholders.").

In contrast to what relief can be granted under a UDJA action as pled by Appellant, the Court granted relief quieting and adjudicating title despite the non-existence of a trespass to try title claim. Specifically, the Court erred in its judgment in determining "any deed of trust … is void" and "U.S. Bank's … Assignment of Deed of Trust … is … extinguished…". *See,* Court's Judgment entered on January 12, 2022.

The Court should reverse its election to render judgment in favor of Appellant and instead remand this case for further proceedings upon the parties pleading the appropriate causes of action.

II. REHEARING ISSUE NO. 2

The Application of Res Judicata Violates U.S. Bank's Due Process Rights.

It is a fundamental principle of American jurisprudence that a person cannot be bound by a judgment in litigation to which he was not a party. *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996). One exception to this principle is the doctrine of res judicata. *Id.* However, the application of res judicata has its limits. The application of res judicata to a non-party on the basis of privity with a party is limited by the non-party's Fourteenth Amendment due process rights. *See, Richards*, 517 U.S. at 794. Simply stated, res judicata cannot bind a party to the acts of a prior litigant, when that prior litigant had no justiciable controversy in the prior litigation.

It is a violation of a litigant's due process rights to bind a litigant to a judgment rendered in an earlier litigation to which the litigant was not a party and in which the litigant was not adequately represented. *Id.* The foregoing is true because barring a subsequent suit where the non-party had no notice or adequate representation deprives the non-party of their "chose in action" which is held to be a protected property interest in its own right. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-430 (1982).

While U.S. Bank is the successor assignee of the (court voided) deed of trust from MTGLQ, that fact does not mean that U.S. Bank was in "privity" with MTGLQ for purposes of res judicata to be imputed to U.S. Bank from the prior litigation. For res judicata purposes, "[p]rivity connotes those who are so connected with a party to the judgment as to have such an identity of interest **that the party to the judgment represented the same legal right**." *Fiallos v. Pagan-Lewis Motors, Inc.,* 147 S.W.3d 578, 585 (Tex. App.—Corpus Christi, 2004)(emp. added). **Privity cannot exist where the parties hold conflicting positions.** *See e.g., Employers Cas. Co. v. Block,* 744 S.W.2d 940, 943 (Tex. 1988)(emp. added).

To be crystal clear, the summary judgment evidence before the Court was that MTGLQ transferred away its interest in the deed of trust on **November 26, 2019.** (CR 105).[2] In contrast, MTGLQ's answer was not even due until **December 13, 2019**. (CR 422). In short, Appellant took a judgement against a defendant with no interest in the litigation at the time the judgment was taken.

As stated by the Supreme Court of Texas, to determine whether subsequent plaintiffs are in privity with prior plaintiffs, we examine the interests the parties shared. *See Texas Real Estate Com'n v. Nagle,* 767 S.W.2d 691, 694 (Tex.1989).

[2] The mere existence of the assignment from MTGLQ to U.S. Bank reflecting that MTGLQ transferred away its interest in the Property as of November 26, 2019, creates a factual controversy that makes the grant of summary judgment improper. The foregoing fact must "be construed in favor of the non-movant [U.S. Bank], to whom every reasonable inference is allowed and on whose behalf all doubts are resolved." *Alvarez v. Anesthesiology Assocs.*, 967 S.W.2d 871, 874 (Tex. App.—Corpus Christi 1988, no pet.).

Privity exists if the parties share an identity of interests in the basic legal right that is the subject of the litigation. *Id.* MTGLQ and U.S. Bank did not share an identity of interest in the same basic legal right, because MTGLQ had no interest in the basic legal right to be protected while U.S. Bank possessed that basic legal right.

A required element of proof of a defense of res judicata requires a showing of "identity of parties or those in privity with them." *See, Amstadt,* 919 S.W.2d at 652. At a cursory level, MTGLQ and U.S. Bank share some level of privity given U.S. Bank is subsequent assignee of the deed of trust by way of assignment. However, res judicata looks beyond such cursory levels and defines privity (for purposes of application of the doctrine) as "privity being an identity of legal interests" at stake. "Privity does not exist merely when persons are interested in the same question, but requires an identity of interest in the legal right actually litigated." *Benson v. Wanda Petroleum Co.,* 468 S.W.2d 361 (Tex. 1971).

The Court recognized within its Opinion that "At the time the First Lawsuit was filed, appellant's original petition identified all *apparent* record owners of an interest in the Property." *Opinion,* at 5 (emp. added). Merely because Appellant did all it could do in identifying *apparent* owners does not mean that the actual owner's Fourteenth Amendment due process rights should be violated. The summary judgment evidence before the Court reflects that Appellant did its best to identify the beneficiaries under the relevant deeds of trust. The summary judgment evidence,

construed in the light most favorable to U.S. Bank, also reflects that despite best efforts, an error harmful to U.S. Bank occurred.

The Court intimated in its Opinion that MTGLQ and U.S. Bank executed the assignment at issue, backdating the assignment, to create a new right in the Property by reviving the voided deed of trust lien.[3] *See, Opinion,* at 12. No evidence within the record suggests any such motive on the part of Appellees, with such a factual conclusion being drawn by the Court contrary to the inferences afforded nonmovants' to a summary judgment motion. A more likely explanation for the retroactively dated assignment is that U.S. Bank obtained the loan, along with a bundle of loans, well before Appellant even filed its first lawsuit (with an assignment not being recorded at that time due to accident, mistake, or some other reason). Remand to the Trial Court would allow the complete development of this issue for examination by the Trial Court on a more properly developed record regarding the relevant facts surrounding when, and under what circumstances, U.S. Bank came to

[3] U.S. Bank respectfully suggests that the Court's reliance on *Cromwell v. Bexar Cnty,* 351 S.W.3d 114 (Tex. App.—San Antonio 2011, no pet.) is misplaced for the proposition for which it has been cited. While U.S. Bank understands the concept cited within *Cromwell,* from two out of state jurisdictions, that contracts cannot be given retroactive effect to negate rights of third parties, those cases also involve intentional conduct undertaken with the purpose of gaining an unjust advantage. No such circumstance exists in this case. Additionally, the third parties who were injured by the "retroactive" dating, had an actual justiciable interest in the controversy. In contrast, Texas caselaw is replete with examples explaining that borrowers, and their assigns, have no standing to assert defects with assignments between mortgagees as the assignment is operative only between the mortgagees.

be the assignee of the deed of trust. The protection of U.S. Bank's due process rights deserve at least the ability to be heard on the topic.

CONCLUSION

WHEREFORE, Appellees respectfully request that this Court withdraw its previous Opinion in this appeal and remand this case for further proceedings.

Respectfully Submitted:

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CERTIFICATE OF COMPLIANCE

Appellees certify that this Motion for Rehearing (when excluding the caption, table of contents, table of authorities, signature, certificate of compliance, and certificate of service) contains: 2,381 words.

/s/ *Shelley L. Hopkins*
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CERTIFICATE OF SERVICE

Pursuant to Texas Rules of Appellate Procedure, I certify that a true and correct copy of the foregoing has been sent on this the 10th day of February 2022 to all parties of record the method indicated below.

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