

No.

IN THE
Supreme Court of the United States

DEK-M, NATIONWIDE, LTD.
Petitioner

v.

DAVID HILL, INDIVIDUALLY & D/B/A DOH OIL Co.,
CASSIE MOSELEY, DAVID MOSELEY, AND COLORADO
COUNTY CENTRAL APPRAISAL DISTRICT,
Respondents

On Petition For A Writ Of Certiorari
To The Supreme Court Of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the failure to ascertain and give actual notice to the current owner of real property subject to a tax sale violates due process.

**PARTIES TO THE PROCEEDING AND RULE
29.6 STATEMENT**

All parties to the proceeding are named in the caption. An entity named Jamex, Inc. was a defendant in this case in the early trial court proceedings, however they were nonsuited and did not participate in any appeals and are not a party to this Petition.

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner DEK-M Nationwide, Ltd. has no parent corporation, and no publically held company holds 10 percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner DEK-M Nationwide, Ltd. respectfully petitions for a writ of certiorari to review the judgment of the Texas 14th Court of Appeals and the Texas Supreme Court.

OPINIONS BELOW

The *per curiam* order of the Texas Supreme Court denying review is available in the Appendix at B and the order denying the motion for rehearing is available in the Appendix at H. The opinion of the appellate court is available at 2017 Tex.App. LEXIS 3338 and 2017 WL 1450016, it is also in the Appendix at A.

JURISDICTION

The last order of the Texas Supreme Court denying review was entered on December 15, 2017. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The due process clause of the 14th amendment is reproduced in the Appendix at M.

STATEMENT

On August 29, 2001 Walter Willis (“Willis”) was transferred an interest in a royalty deed for certain mineral rights located in Colorado County, Texas.¹ These 3 interests were for the oil, gas, and other mineral royalties produced including production payments and royalties paid in lieu of production. These interests are for the royalties only, not surface rights.

In March of 2010 the Colorado County Central Appraisal District (“CCCAD”) filed a lawsuit against Willis for unpaid property taxes on the royalty interests that he owned.²

The following month, on April 16, 2010, Kenneth D. Eichner, P.C. (“KDEPC”) filed a lawsuit against Willis to collect on a debt for unpaid professional services.³ On June 22, 2010 KDEPC obtained a final summary judgment against Willis on all of its claims.⁴ On July 23, 2010 KDEPC filed an abstract of judgment in the property records of Colorado County on the judgment it had obtained against Willis.⁵

On December 13, 2010, approximately 5 months after KDEPC filed its abstract of judgment, CCCAD obtained a final judgment against Willis on their tax claim.⁶

¹ See App. 24.

² See App. 51.

³ See App. 51 and App. 95.

⁴ See App. 51.

⁵ See App. 51.

⁶ See App. 51 and App. 2-4.

On December 31, 2010 KDEPC reduced its contractual post-judgment interest rate from 18% to 6%. In exchange Willis gave KDEPC a security agreement for his royalty interests that were secured by a deed of trust executed the next day on January 1, 2011.⁷ These instruments were recorded in the Colorado County property records on January 14, 2011.⁸ Contained within the deed of trust was an express warranty of title and an express representation from Willis that he would be responsible for paying all taxes.

However, Willis did not perform according to the terms of the security agreement and deed of trust, so on January 7, 2013 the Trustee began the nonjudicial foreclosure process on the deed of trust by posting public notice of a trustee's sale. The sale was conducted at 11:00 a.m. on February 5, 2013. The prevailing purchaser at the trustee's sale was Petitioner DEK-M Nationwide, Ltd. ("DEK-M"). On February 8, 2013 the trustee's deed was filed in the Colorado County property records and was recorded on February 13, 2013.⁹

CCCAD took no action whatsoever on its judgment against Willis for over two years. At no point in time did CCCAD file an abstract, *lis pendens*, or otherwise file any other document in the Colorado County property records that would indicate that it was asserting a judgment claim on the royalty interests.¹⁰

⁷ See App. 76.

⁸ See App. 96.

⁹ See App. 96.

¹⁰ See App. 96.

Then, on or about January 29, 2013 CCCAD sought and obtained an order of sale, the purpose of which was to sell Willis's royalty interests. CCCAD began posting notice of their upcoming sale on February 6, 2013 – the day after DEK-M purchased the same royalty interests. CCCAD continued posting subsequent notices for the next 3 weeks. At no point in time did CCCAD send any notice of the sale to either KDEPC – who held a recorded judgment lien and deed of trust on the same property – or to DEK-M who had just purchased the same interests and recorded its deeds in the Colorado County property records.¹¹

On March 5, 2013 – 28 days after DEK-M purchased the royalty interests – CCCAD conducted its sheriff's sale of the same property. David Hill, individually and d/b/a DOH Oil Company ("DOH") was the high bidder for Tract 4 and the Moseleys were the high bidders for the other 2 tracts. The sheriff signed deeds to DOH and the Moseleys on April 11, 2013. The sheriff deeds specifically provide that they are only transferring the rights to the interests that Willis had at the time. The sheriff then filed the deeds with the Colorado County property records on April 18, 2013.¹² The sheriff's deeds were recorded on April 19, 2013 – 65 days after the deeds to the same royalty interests were recorded by DEK-M.¹³

DEK-M was wholly unaware that any sheriff's sale had occurred and contacted the operator of the

¹¹ See App. 97.

¹² See App. 97.

¹³ See App. 98.

mineral lease to begin collecting royalty payments. It was only at this time that DEK-M was informed that DOH and the Moseleys were also claiming to be the owner of the royalty interests and that the operator would not issue payments to DEK-M.¹⁴

DEK-M brought this lawsuit against DOH and the Moseleys to establish its ownership of the royalty interests and to collect its royalty payments and a declaratory judgment against CCCAD to establish its rights to the property.¹⁵ CCCAD and DOH and the Moseleys moved for Summary Judgment asking the court to find in their favor on the following claims: adverse possession, tortious interference with contractual relations, conversion, trespass to try title, unjust enrichment, wrongful sale of property, negligence, breach of fiduciary duty, and DEK-M's request for declaratory judgment for failure to provide notice of the sale on due process grounds.¹⁶

DEK-M filed its Second Amended Original Petition on October 6, 2015.¹⁷ At that time, DEK-M asserted a new cause of action to quiet title and asserting an equitable lien.¹⁸ After DEK-M amended its claims to include a new cause of action, neither CCCAD nor DOH and the Moseleys file an amended motion for summary judgment to address this new claim.

¹⁴ See App. 77.

¹⁵ See App. 73-84.

¹⁶ See App. 85-86.

¹⁷ See App. 73.

¹⁸ See App. 79.

The trial court granted summary judgment in favor of Respondents on all claims.¹⁹ DEK-M appealed to the Texas 14th Court of Appeals. In their opinion, the appellate court skirted consideration of almost all issues – including the due process issue – instead focusing on whether or not there were un rebutted or unaddressed affirmative defenses that could have served as a basis for summary judgment.²⁰ In that respect, the appellate court missed that any affirmative defenses were waived or were inapplicable and ignored DEK-M's prophylactic supplemental briefing.

DEK-M appealed that determination to the Texas Supreme Court who ordered responses on all issues, but ultimately denied DEK-M's petition without considering the merits.²¹

REASONS FOR GRANTING THE PETITION

This petition involves a question of whether a taxing authority has a due process requirement to provide notice to a new record owner of real property before conducting a property tax sale. For the reasons stated herein, due process should require such an authority to determine who the record owner is and then provide them with notice so that they may assert their rights if they so choose.

I. THE DUE PROCESS CLAUSE REQUIRES NOTICE IF A STATE ACTOR SEEKS TO FORECLOSE ON REAL PROPERTY.

¹⁹ See App. 11; App. 12 and App. 13.

²⁰ See App 1-9.

²¹ See App. 10.

When a state actor seeks to take private property, this Court's precedents make clear that the due process clause of the Fourteenth Amendment requires a state actor to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983).

These requirements apply not just to the initial filing of an action, but to subsequent activities including foreclosure. In *Jones v. Flowers* this Court made clear the proposition that the "notice and opportunity for hearing" are required to be provided to the owner prior to the foreclosure of private property at a tax sale. 547 U.S. 220, 223 (2006). This Court ruled that that requirement extended to taking reasonable steps to provide notice of the impending sale.

In *Jones*, the homeowner purchased the property at issue in 1967 and lived there until 1993 when he separated from his wife and moved out. In April 2000 the state attempted to send Jones a certified letter to notify him of delinquent taxes and to inform him that that if he did not redeem the property within 2 years it would be sold. *Id.* at 226. The notice was returned unclaimed. *Id.* Two years later the state again tried to send notice by certified mail that the property was to be sold if Jones did not pay his taxes. *Id.* This notice was also returned unclaimed. *Id.* Since Jones did not pay his taxes, the property was sold. Flowers purchased the property and had an unlawful detainer notice

delivered to the property. *Id.* When Jones was made aware of the tax sale, he filed suit alleging that the failure to give him proper notice of the sale raised due process arguments. *Id.*

In determining whether the notice was sufficient, this Court found that notice must be “reasonably calculated, ***under all the circumstances***, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* (emphasis added) In response, the state argued that it had complied with the statutory requirements and that notice was therefore proper. *Id.* This Court noted that it had previously “required the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case” and that since the state had the letters returned, the state was aware that notice had not been given to the property owner. *Id.* at 230. In light of this, the Court found that – despite complying with the statutory requirements – the efforts used were insufficient to satisfy due process. *Id.* at 239.

Similarly, in *Mennonite*, this Court examined the rights of a mortgagee under similar circumstances. There, the state actor urged that compliance with the state’s statutory requirements were sufficient to meet the due process requirement. This Court determined that when a party with a property interest’s identity is reasonably ascertainable, notice by mail or other means should be used to ensure actual notice. 461 U.S. 791. In *Mennonite*, the mortgagee brought suit alleging that

its due process rights were violated when it did not receive notice that the property it had a mortgage interest in was to be sold for unpaid taxes. At the time, state law did not require notice of the sale to be delivered to mortgagees, only the property owners. In determining whether notice was required the court found that the mortgagee possesses a lien and has “a substantial property interest that is significantly affected by a tax sale.” *Id.* at 798.

The court further found that “[s]ince a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale...When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service.” *Id.* The court therefore found that, despite complying with the statutory requirements, the government denied the mortgagee due process by failing to provide notice of the sale.

This Court, and other federal courts, require diligent efforts to notify parties with “a substantial property interest” of a tax sale. *Id.*; *see also Davis Oil Co. v. Mills*, 873 F.2d 774, 780-81 (5th Cir. 1989); *Verba v. Ohio Casualty Ins. Co.*, 851 F.2d 811, 816 (6th Cir. 1988); *Walker v. New Orleans City*, 2018 U.S. App. LEXIS 1304, *4 (5th Cir.); *Harris v. Gaul*, 572 F.Supp. 1554, 1561 (N.D. Ohio 1983); *Kelber, LLC v. WVT, LLC, Oak Hall*, 213 F.Supp.3d 789, 798 (N.D. West Virginia 2016). In *Kelber* the owner of certain real property was faced with the exact same situation as DEK-M is here. There, the owner never

received notice of a delinquent tax sale and the property was sold. 213 F.Supp.3d at 791-92. The district court applied this Court's due process holdings in *Jones* and determined that the failure to provide notice was a due process violation. *Id.* at 806.

In the instant matter, the issue is not one of whether or not DEK-M received sufficient notice of the tax sale so as to protect its ownership interests, rather, the issue is that DEK-M received no notice of any kind from CCCAD although it was entitled to under the due process clause. This is despite the fact that DEK-M was the record owner at the time of the tax sale having recorded its title from the prior foreclosure sale some 20 days prior to the tax sale. As a party with a substantial property interest, DEK-M should have received notice of the sale pursuant to this Court's holding in *Jones*. The failure of CCCAD to notify DEK-M therefore constituted a due process violation which must be rectified.

A. DEK-M Was A Good Faith Purchaser And Record Owner Of The Royalty Interests.

In Texas, oil and gas interests are considered to be "real property" so long as the mineral interests are in place and are not being produced. *Humble Oil & Ref. Co. v. West*, 508 S.W.2d 812 (Tex. 1974). Once the mineral interests are produced they are then considered to be personal property. *Id.* This means that the recording of conveyance documents relating to oil and gas royalty interests fall under the general rules concerning real property. *See id. supra. See*

also, *Mem'l Park Med. Ctr. Inc. v. River Bend Dev. Group, L.P.*, 264 S.W.3d 810 (Tex.App.—Eastland, 2008, no pet.). So long as DEK-M followed the rules for recording its royalty interests in the real property records, it is entitled to the same presumptions as it would be if it were recording a real property deed.

“A conveyance of real property...is void as to...a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law.” Tex. Prop. Code § 13.001(a). However, if the subsequent purchaser has notice of the prior conveyance, then that earlier conveyance is not void and will be superior. As stated above, notice can take two forms: actual and constructive. Actual notice rests on personal information or knowledge whereas constructive notice is notice the law imputes to a person not having personal information or knowledge. *Madison v. Gordon*, 39 S.W.3d 604, 606 (Tex. 2001). A recorded instrument in a grantee’s chain of title will generally create an irrebuttable presumption of notice. *Ford v. Exxon Mobil Chem. Co.*, 235 S.W.3d 615, 617 (Tex. 2007). The Texas Property Code provides that an “instrument that is properly recorded in the proper county is notice to all persons of the existence of the instrument.” Tex. Prop. Code § 13.002. If an instrument concerning real property is therefore properly filed, in the proper county, all persons who would take the property after filing do so with notice of the prior conveyance. *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903 (Tex. 1982).

This means that at the March 5, 2013 sheriff's sale the Respondents had had constructive notice for no less than 20 days of DEK-M's prior claim to the 3 royalty interests. Yet, Respondent CCCAD failed to advise DEK-M, in any way, that the royalty interests it had recently purchased were purportedly being sold. This prevented DEK-M from being able to "present [its] objections" to the sale as required by due process. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("[t]his [due process] right to be heard has little reality or worth unless one is informed that the matter is pending and can choose...whether to appear or default, acquiesce or contest.").

B. DEK-M's Remaining State Law Claims.

As the record owner of the royalty interests DEK-M also asserted several state law claims establishing its right to ownership of the same. Petitioner is aware, and respects, that this Court disfavors involving itself in state law issues, however, a manifest error of procedural and substantive law occurred at the state level which the state courts have ignored and allowed to stand and which Petitioner must, for the sake of completeness, bring in this Petition.

1. *DEK-M's New Claims Survived Summary Judgment.*

DEK-M amended its petition prior to the summary judgment hearing in this case. In the amended petition additional claims to quiet title and

for an equitable lien were asserted. Respondents did not amend their motions for summary judgment to address those new claims. Under Texas law, when a motion for summary judgment fails to address a cause of action then that unchallenged cause of action survives. *Johnson v. Rollen*, 818 S.W.2d 180 (Tex.App.—Houston [1st Dist.] 1991, no writ).

“[O]ne may not be granted judgment as a matter of law on a cause of action not address in a summary judgment proceeding.” *Chessher v. S.W. Bell Tel. Co.*, 658 S.W.2d 563, 564 (Tex. 1983). Neither of DEK-M’s claims was derivative of its other causes of action, rather, they are distinct and separate. See *Wilson v. Davis*, 305 S.W.3d 57, 73 (Tex.App.—Houston [1st Dist.] 2009, no pet.) (cautioning against retroactively finding unchallenged causes of action to be addressed). As a matter of law, “[a] suit to remove cloud from title or suit to quiet title is different from an action in trespass to try title. A suit in trespass to try title is statutory and accords a legal remedy, while a suit to remove cloud or to quiet title accords an equitable remedy.” *Katz v. Rodriguez*, 563 S.W.2d 627, 629 (Tex.Civ.App.—Corpus Christi 1977, no writ). The elements of a suit to quiet title are that the “cloud” on title: “(1) created a hindrance to [] title, having the appearance of a better right to title than his own, that (2) appears to be valid on its face, and that (3) for reasons not apparent on its face, is not valid.” *Ellis v. Buentello*, 2012 Tex. App. LEXIS 6803 (Houston [1st Dist.] no pet).

Respondents’ failure to challenge *two* of DEK-M’s causes of action means that those two claims are

still active. The trial court and the reviewing appellate courts erred by turning a partial summary judgment into a final summary judgment.

2. *As A Matter Of Law The Royalty Interests Are Owned By Petitioner.*

Even without the due process violation, DEK-M was still the proper owner of the royalty interests at issue because the sale at the tax foreclosure could not transfer any interest. “A sheriff’s sale only conveys the right, title and interest that the judgment debtor had in the property...[and] is in the nature of a quitclaim deed because it contains no warranty of title and conveys only whatever interest the judgment debtor had in the property.” *Apex Fin. Corp. v. Garza*, 155 S.W.3d 230, 236 (Tex.App. – Dallas, 2004 pet denied) *citing Rogers v. Ricane Enters., Inc.*, 884 S.W.2d 763, 769 (Tex. 1994).

The Texas Tax Code recognizes this principle and provides that a deed from a sheriff’s sale only transfers title “to the interest owned by the defendant in the property subject to the foreclosure...” Tex. Tax Code § 34.01(n). The “defendant” that the code references is the defendant to the underlying tax suit. If the defendant to the tax suit does not own the property at the time of the sheriff’s sale, then nothing can be transferred. *See Mem’l Park Med. Ctr. Inc.*, 264 S.W.3d at 812. Since DEK-M’s received title a month prior to the tax sale DEK-M is clearly the rightful owner, for at least the one month, for which it never received royalties.

3. *No Arguments Were Waived.*

The appellate court skirted consideration of these issues, instead choosing to focus on whether or not there were un rebutted or unaddressed affirmative defenses that could have served as the basis for granting summary judgment. In that respect, the appellate court missed that any affirmative defenses were waived or were inapplicable and ignored DEK-M's prophylactic supplemental briefing.

Specifically, Respondents included a section in their motions for summary judgment that listed various possible affirmative defenses to the claims in DEK-M's First Amended Petition. All of the defenses argued relied on there being some kind of privity between Willis, KDEPC and DEK-M. Specifically, Respondents argued accord and satisfaction, *res judicata*, election of remedies, waiver and estoppel. However, at the summary judgment hearing counsel for Respondents judicially admitted that there was no such link.²² Once that admission was made, Respondents conceded their affirmative defenses. *Ellis v. Buentello* at *15.

As each of the alleged defenses rested on Willis, KDEPC and DEK-M being in privity based on

²² See App. 126-128. Specifically, counsel for CCCAD stated that "...KDE, P.C. was not a defendant in the [tax] lawsuit, and DEK-M certainly wasn't a defendant in the lawsuit." See *Estate of Guerrero*, 465 S.W.3d 693, 705 (Tex.App.—Houston [14th Dist.] 2015, pet. denied) (stating that a judicial admission results when a party makes a statement that conclusively disproves...a defense).

the tax suit the Respondents waived any such defensive argument by admitting that KDEPC and DEK-M were not involved in that matter. The affirmative defenses argued by Respondents were therefore waived and could not have served as a basis for summary judgment.

Moreover, none of the affirmative defenses that were claimed were applicable once DEK-M amended its pleadings after the summary judgments were filed, but before the hearing. A defense of accord and satisfaction requires a showing that there is a new contract, whether express or implied, wherein the parties agree to discharge a preexisting obligation. *Jenkins v. Henry C. Beck Co.*, 449 S.W.2d 454, 455 (Tex. 1969). There was never any agreement or contract between DEK-M and CCCAD, DOH or the Moseleys and there was no allegation of the same. Accord and satisfaction did not exist in any manner and could not have therefore constituted a basis for summary judgment in the trial court.

By the same token, *res judicata*, election of remedies, waiver, and estoppel also were not applicable to DEK-M's claims since they all would have required DEK-M to have been a party to an earlier lawsuit or have the opportunity to chose between remedies. *See Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996) (*res judicata* requires an earlier lawsuit on claims that were raised or could have been raised in the first. DEK-M could not have raised its claims in an earlier lawsuit because they did not arise until after the sheriff's sale in March 2013); *Bacanegra v. Aetna Life Ins. Co.*, 605 S.W.2d 848, 851 (Tex. 1980) (election of

remedies requires a choice between two or more remedies; DEK-M had only one); *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008) (waiver requires relinquishment of a known right. DEK-M had no rights prior to its purchase of the royalty interests); and *Turnage v. JPI Multifamily, Inc.*, 64 S.W.3d 614, 617 (Tex.App.—Houston [1st Dist.] 2001, no pet.) (estoppel requires two lawsuits where the facts or issues in the second are the same as the first. As with *res judicata* no earlier lawsuit existed). This never happened, and, moreover, this was judicially admitted by counsel for respondents in the summary judgment hearing.

As a result, not only was there less than a scintilla of evidence on the alleged affirmative defenses, they were waived and as such could not have served as the basis of the trial court's judgment. The appellate court erred in this regard and sidestepped consideration of the harder legal issues properly preserved and properly raised.

CONCLUSION

It is for the reasons stated herein above that Petitioner respectfully requests that the Court grant its petition for a writ of certiorari.

Respectfully submitted,

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March 15, 2018