

RENDERED: JULY 21, 2017; 10:00 A.M.  
TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2015-CA-001322-MR

KENTUCKY TAX BILL SERVICING, INC.

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT  
HONORABLE WILLIAM EVANS LANE, JUDGE  
ACTION NO. 13-CI-90068

B&P APARTMENTS, INC.;  
JAMOS FUND I, LP;  
COMMUNITY TRUST BANK, INC.;  
PEOPLE'S EXCHANGE BANK OF BEATTYVILLE  
KENTUCKY, INC., D/B/A PEOPLE'S EXCHANGE BANK;  
CITY OF MT. STERLING, KENTUCKY;  
COUNTY OF MONTGOMERY, KENTUCKY

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: JONES, D. LAMBERT AND TAYLOR, JUDGES.

LAMBERT, D., JUDGE: This is an appeal from a summary judgment order dismissing a real estate foreclosure action. Kentucky Tax Bill Servicing, Inc. (KTBS) sought to enforce a tax lien against B&P Apartments (B&P), but the

Montgomery Circuit Court held KTBS's action barred under the doctrine of *res judicata*. After review, we reverse.

## I. FACTUAL BACKGROUND

B&P owned the real property situated at 221 Larkin Bay, Mount Sterling, Kentucky. In October 2008, KTBS acquired the 2006 property tax certificate of delinquency assessed against the Larkin Bay property.<sup>1</sup> Two years later, another creditor filed a rash of foreclosure actions against B&P. KTBS filed an answer/crossclaim in one of them styled as Case Number 10-CI-90318.

In March 2011, the circuit court consolidated all of the foreclosure actions into one. The case progressed in this manner until September 2011 when the circuit court granted summary judgment in favor of another creditor and ordered the judicial sale of some of B&P's properties. The proceeds from the sales did not satisfy B&P's outstanding debt. Hence, the circuit court entered a deficiency judgment in March 2012, designating it a final and appealable order. The circuit court also added a handwritten statement on the March 2012 judgment which read, "This case is hereby dismissed from the docket in its entirety." The Larkin Bay property was never sold.

In March 2013, KTBS initiated its own foreclosure action against B&P in an effort to satisfy its claimed statutory interest in the Larkin Bay property. B&P defended that KTBS's rights had been extinguished by the circuit court's March 2012 judgment. The circuit court accepted B&P's argument and granted

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<sup>1</sup> Although several of B&P's properties were located on Larkin Bay, "the Larkin Bay property" refers to the property located at 221 Larkin Bay for the purposes of this opinion.

summary judgment against KTBS. According to the circuit court, *res judicata* precluded KTBS from bringing the 2013 foreclosure action. KTBS followed with this appeal.

## II. STANDARD OF REVIEW

Summary judgment is only appropriate “to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991)(quoting *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)). Summary judgment involves questions of law exclusively; the lower court’s decision is therefore reviewed *de novo*. *Neighborhood Investments, LLC v. Kentucky Farm Bureau Mut. Ins. Co.*, 430 S.W.3d 248, 251 (Ky. App. 2014).

## III. DISCUSSION

On appeal, KTBS argues the circuit court improperly applied *res judicata* to the facts of the case. Specifically, KTBS claims that the circuit court’s March 2012 judgment did not fully adjudicate its rights. For the following reasons we agree.

As an affirmative defense that prevents repetitious suits, *res judicata* consists of two parts: 1) claim preclusion and 2) issue preclusion. *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 464–65 (Ky. 1998). The first part “bars a party from re-litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action.” *Id.* at 465. The second

“bars the parties from relitigating any issue actually litigated and finally decided in an earlier action.” *Id.* For the rule to apply, “(1) there must be an identity of parties between the two actions; (2) there must be an identity of the two causes of action; and (3) the prior action must have been decided on the merits.” *Miller v.*

*Administrative Office of Courts*, 361 S.W.3d 867, 872 (Ky. 2011). “A judgment on the merits is one which is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction or form . . . .” *Martin v. Personnel Bd.*, 959 S.W.2d 779, 780–81 (Ky. App. 1997).

Here, the first two elements of the test are easily met. KTBS was a party to the foreclosure and asserted its interest in the tax certificate during those proceedings. KTBS not only filed an answer/crossclaim in Case Number 10-CI-90318, which was eventually consolidated into Case Number 09-CI-90175, but also conceded this point on appeal. KTBS’s argument before this Court only concentrates on the third element by challenging whether the circuit court’s March 2012 deficiency judgment was on the merits.

On this point, we must answer in the negative. Although the March 2012 deficiency judgment clearly favored one creditor to the exclusion of all the others, it did not apply to KTBS’s interest in the Larkin Bay property. As the Larkin Bay property was never sold, there was no connection between the deficiency judgment and KTBS’s lien. Accordingly, the deficiency judgment did not finally resolve KTBS’s legal rights in the property. Summary judgment in

favor of B&P was inappropriate. The judgment is reversed and the case remanded for further foreclosure proceedings consistent with this opinion.

ALL CONCUR.

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