Appeal Nos. 10-4127, 10-4134

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOHN NIKOLS, Plaintiff and Appellant, v. DAVID CHESNOFF, and GOODMAN & CHESNOFF, Defendants and Appellees.	**APPELLEES' PRINCIPAL AND RESPONSE BRIEF** (ORAL ARGUMENT NOT REQUESTED BY APPELLEES)

Appeal from the United States District Court, District of Utah, Central Division
Honorable Ted Stewart presiding
Case No. 2:10-cv-0004

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CORPORATE DISCLOSURE STATEMENT

There is no parent corporation or publicly held corporation that owns 10% or more of the stock of Appellee Goodman & Chesnoff.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction of this case pursuant to 28 U.S.C. § 1332(a)(1). The court of appeals has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291. On July 15, 2010, Appellees timely filed their cross-appeal of the district court's June 28, 2010 memorandum decision, which was a final judgment disposing of all the parties' claims.

STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals in the Tenth Circuit Court of Appeals. However, the Utah Court of Appeals rendered a decision in *Nikols v. Goodman & Chesnoff,* 206 P.3d 295 (Utah Ct. App. 2009) regarding the Utah state court proceedings, which involved the same set of facts and parties.

STATEMENT OF THE ISSUES

ISSUE # 1: Did the district court correctly rule that Appellant's claims of quiet title and equitable lien are barred by res judicata?

ISSUE # 2: Did the district court err in denying Appellees' motion for sanctions under Rule 11 by applying the legal standard set forth in Utah Code Ann. § 78B-5-825 rather than the standard set forth in Fed. R. Civ. Pro. 11?

STATEMENT OF THE FACTS

In late 2002, Appellant John Nikols' ("Nikols") son, Michael Nikols ("Michael"), was arrested for distribution of a controlled substance. App. 145. In its prosecution of Michael for federal drug crimes, the federal government seized many of Michael's assets, including four parcels of real property titled in his name and located around 4300 South State Street, Salt Lake City, Utah (the "Parcels"). App. 60.

In mid-2005, Michael hired Appellee David Z. Chesnoff ("Chesnoff") to represent Michael on the federal drug charges. App. 145. Michael signed an attorney engagement agreement with Chesnoff. *Id.* Nikols paid Chesnoff part of the engagement fee on behalf of Michael, but no one ever paid the remaining $190,000. *Id.* Michael eventually signed a plea agreement and began serving his sentence in a federal penitentiary.

In December 2005, Chesnoff brought a breach of contract claim in the Third District Court of Salt Lake County, State of Utah ("State Court") against Michael, alleging that Michael failed to pay Chesnoff pursuant to the attorney engagement agreement. *Id.* Also in December 2005, Chesnoff obtained a pre-judgment writ of attachment on the Parcels owned by Michael. *Id.* Michael and Nikols counterclaimed[1] against Chesnoff, alleging he committed legal malpractice in his

[1] Nikols originally filed a separate complaint against Chesnoff that was

representation of Michael on the federal drug charges and the federal seizure of the Parcels. App. 56-71. Nikols alleged in his Amended Answer and Counterclaim that Chesnoff owed a duty of care to Nikols to have the Parcels released from the federal seizure. App. 60-61. Nikols claimed that, although the Parcels had been titled in Michael's name since 1988 (the previous 17 years), the Parcels really belonged to Nikols and the federal government had no right to seize them. *Id.*

In August 2007, the State Court granted Chesnoff's motion for summary judgment, awarding him the $190,000 in unpaid legal fees against Michael and dismissing all of Nikols and Michael's claims against Chesnoff. App. 42-43. In the summary judgment order, the State Court ruled that the Parcels continued to be subject to Chesnoff's writ of attachment, but that Chesnoff could not execute his judgment lien against the Parcels until Nikols had an opportunity to present his claims regarding his alleged interest in the Parcels in a trial before the State Court. App. 45-46. The summary judgment order provided that both sides could conduct discovery prior to the trial on that issue. *Id.* Nikols never objected to the procedural process laid out by the State Court's summary judgment order, and both parties proceeded accordingly.

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consolidated with Chesnoff's action against Michael. Subsequent to that consolidation, Michael and Nikols filed their joint "Amended Answer and Counterclaim" against Chesnoff.

After both parties participated in discovery, Nikols, through his counsel, presented one legal theory—purchase money resulting trust—in support of his alleged interest in the Parcels in a trial conducted on April 1, 2008 before the State Court. App. 50. Both parties called and examined witnesses. App. 50-51. The State Court ultimately ruled in favor of Chesnoff, denying Nikols' objections to the writ of attachment and authorizing a writ of execution on the Parcels. App. 53. The State Court issued its Decision and Order Authorizing Writ of Attachment and Denying Motion for Discharge of Writ of Attachment ("Order Denying Discharge", App. 49-54) holding that:

- "The April 1, 2008 evidentiary hearing was the time a[nd] place for…Nikols to present evidence supporting his opposition to Chesnoff's Writ of Attachment...";
- at the time of the purchase of the Parcels, Nikols had titled the Parcels in Michael's name in order to avoid Nikols' creditors (including taxes due to the State of Utah);
- Nikols' previous representations to the State Court that approximately $350,000 in liens and judgments against him had been paid prior to 1988 was inaccurate;
- Nikols was not entitled to equitable relief;

- Nikols had failed to establish that he was the owner of the Parcels when Chesnoff attached them;
- Michael was the owner of the Parcels at the time of Chesnoff attached them;
- Chesnoff was entitled to execute his judgment against Michael on the Parcels owned by Michael; and
- the Order Denying Discharge was the final order on the matter. App. 51-52.

Nikols appealed the Order Denying Discharge to the Utah Court of Appeals. *Nikols,* 206 P.3d 295. Both sides, through their respective counsel, fully briefed the issues and argued the appeal in February 2009. In March 2009, the Utah Court of Appeals affirmed the State Court's decision. *Id.* at 299. Nikols did not petition the Utah Supreme Court for certiorari. The Order Denying Discharge thus became a final order under Utah law.

Subsequent to the Utah Court of Appeals decision, Chesnoff was able to proceed with a writ of execution on the Parcels, except for one problem. After Michael was incarcerated in December 2005, Judge Paul Cassell (Michael's federal criminal case judge) acknowledged some problems with statements he (Cassell) had made during Michael's plea negotiations. *See* federal docket 2:04-cr-00786-CW, docket no. 162. Michael was allowed to withdraw his guilty plea, was

released from prison, and was allowed a new trial. *Id.* The federal government put its *lis pendens* back on the Parcels (as well as other seized property) and claimed relation-back to the original seizure, which, if proved, would place the federal government's interest in the Parcels in a priority position to Chesnoff's writ of attachment. Because of the reinstated *lis pendens* on the Parcels, Chesnoff waited for Michael's criminal trial to conclude before proceeding with a writ of execution on the Parcels.

In June 2009, Michael pled guilty again, essentially to the same charges that he pled guilty to in 2005. *See* fed. docket 2:04-cr-00786-CW, docket no. 248. In November 2009, Michael was sentenced and soon thereafter, the federal government released its *lis pendens* on the Parcels. *Id.* at docket no. 266. In November 2009, Chesnoff obtained a writ of execution from the State Court against the Parcels. App. 72-76. The Salt Lake County Sheriff served the writ on both Michael and Nikols on December 3, 2009 and set the sheriff's sale for January 12, 2010. *Id.* On December 15, 2009, both Nikols and Michael filed *pro se* objections to the writ of execution with the State Court. App. 147. The State Court scheduled hearings on the objections for January 6, 2010. *Id.*

Nikols then hired new counsel to file a complaint ("Federal Complaint") (the case below) in the U.S. District Court of Utah ("District Court") on January 4, 2010, alleging the same facts and legal theory (purchase money resulting trust) that

had been presented at the April 1, 2008 State Court trial, but also adding some new legal theories, namely adverse possession, equitable lien, and a claim under the Utah Occupying Claimants Act. App. 7-13. Nikols' current counsel appeared at the January 6, 2010 State Court hearing and argued on behalf of Nikols. At the January 6, 2010 hearing, the State Court denied all of Nikols and Michael's objections to the writ of execution and authorized the January 12, 2010 sheriff's sale to proceed. App. 147.

Nikols then filed a motion for emergency writ to stay the sheriff's sale in the Utah Supreme Court on January 7, 2010, which was transferred to the Utah Court Appeals, and denied on January 11, 2010. *Id.* Nikols then filed a motion for temporary restraining order with the District Court on January 11, 2010. App. 2, at docket no. 6. The District Court denied Nikols' motion on January 12, 2010. *Id.* at docket no. 9. On January 12, 2010, Chesnoff credit bid his judgment at the sheriff's sale of the Parcels and became the owner of the Parcels, subject to Nikols' 180-day right of redemption. App. 147. On June 28, 2010, the District Court granted Chesnoff's motion to dismiss the Federal Complaint in its entirety. App. 5, at docket no. 40. On July 9, 2010, Nikols filed this appeal. *Id.* at docket no. 42. On July 12, 2010, Nikols' right of redemption expired and a sheriff's deed was issued to Chesnoff for the Parcels. On July 15, 2010, Chesnoff filed this cross-appeal. *Id.* at docket no. 45.

SUMMARY OF THE ARGUMENT

The District Court correctly ruled that res judicata bars Nikols' quiet title and equitable lien claims against Chesnoff because the Order Denying Discharge is a final judgment on the merits and Nikols received the required due process under Utah law.

Under Utah law "[a] judgment or order, once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition." *Copper State Thrift & Loan v. Bruno*, 735 P.2d 387, 390 (Utah Ct. App. 1987). A final judgment generally "ends the litigation on the merits and leaves nothing for the court to do[.]" *Olson v. Salt Lake City Sch. Dis.t,* 724 P.2d 960, 964-65 (Utah 1986).

After the State Court afforded both parties the opportunity to conduct discovery on the issue of Nikols' interest in the Parcels, Nikols, through his counsel, presented his claim of purchase money resulting trust before the State Court at trial on April 1, 2008. App. 50. Both sides were allowed to call and cross-examine witnesses. App. 51. At the close of the evidence, the trial court ruled in favor of Chesnoff, and issued the Order Denying Discharge stating that: "[t]he April 1, 2008 evidentiary hearing was the time a[nd] place for John Nikols to present evidence" in support of his claim "that a resulting trust in his favor existed." App. 51. The Order Denying Discharge further stated that it was the

"final order on [the] matter." App. 53. Nikols then appealed the Order Denying Discharge to the Utah Court of Appeals, which affirmed the State Court's ruling. *Nikols*, 206 P.3d at 299.

The State Court Order Denying Discharge ended the litigation regarding Nikols' claim of an interest in the Parcels because it disposed of the only legal theory Nikols presented in support of his alleged interest in the Parcels. That order was never vacated or modified. The State Court had already resolved Chesnoff's claims against Michael, and Michael and Nikols' claims against Chesnoff in the summary judgment order. App. 39-47. Therefore, the Order Denying Discharge was a final judgment under *Copper State* and *Olson*.

En route to the State Court's issuance of the Order Denying Discharge, Nikols was afforded all the due process protections required under Utah law, namely, notice, discovery, trial, calling witnesses, cross-examining witnesses, and an appeal. Therefore, not only was the State Court's Order Denying Discharge a final judgment on the merits, it also provided the requisite due process under Utah law and is now subject to the preclusive effects of res judicata.

Nikols relies heavily, and almost exclusively, on *Brigham Young Univ. v. Tremco Consultants, Inc.*, 156 P.3d 782 (Utah 2007) ("*Tremco II*") for the proposition that the due process he received en route to the State Court's issuance of Order Denying Discharge was inadequate for purposes of res judicata.

Specifically, Nikols asserts that because Nikols' challenge to Chesnoff's writ of attachment was not a "civil action" it did not result in a final judgment. However, *Tremco II* is distinguishable from the facts of this case.

In *Tremco II*, the trial court attributed plaintiff's judgment against the corporate defendant to non-parties after plaintiff argued very specific legal theories, i.e. alter ego and fraudulent transfer, warranted the attribution. The court refused to allow the non-parties the opportunity to defend themselves against those claims. In contrast, Chesnoff had a judgment against Michael and sought to execute that judgment on the Parcels owned by Michael. However, Chesnoff never sought to attribute his State Court judgment to Nikols, nor did Chesnoff attempt to execute on property titled in Nikols' name, as was the case in *Tremco II*. The Parcels were titled in Michael's name, not Nikols. Furthermore, Nikols was one of the named parties in the State Court case and was afforded every opportunity to prove his claim of interest in Michael's property. He failed to do so. Therefore, the facts in *Tremco II* are completely different than the facts in the instant case.

Finally, the District Court erred by analyzing Chesnoff's motion for rule 11 sanctions under the Utah bad faith litigation statute rather than under the standard set forth in Fed. R. Civ. Pro. 11. That is, the District Court applied the standard set forth in Utah Code Ann. § 78B-5-825 instead of the standard set forth in Fed. R.

Civ. Pro. 11. In its analysis, the District Court held that "[w]hile Defendant has made a fair showing that this suit has no merit, he has not met his burden establishing that it was not brought in good faith." However, if analyzed under the three subparts of Rule 11(b), "good faith" need not be shown. Therefore, although the District Court found that there was no bad faith, sanctions could still apply under Rule 11.

ARGUMENT

I. THE U.S. DISTRICT COURT CORRECTLY RULED THAT RES JUDICATA BARS NIKOLS' QUIET TITLE AND EQUITABLE LIEN CLAIMS AGAINST CHESNOFF.

The term *res judicata* refers generally to the preclusive effects of judgments previously entered, and consists of two branches: claim preclusion and issue preclusion. *Brigham Young Univ. v. Tremco Consultants, Inc.,* 110 P.3d 678, 686 (Utah 2005) ("*Tremco I*"). "In general terms, claim preclusion bars a party from prosecuting in a subsequent action a claim that has been fully litigated previously." *Id.* Claim preclusion serves "vital public interests," including fostering reliance on prior adjudications, preventing inconsistent decisions, relieving parties of the cost and vexation of multiple lawsuits, and conserving judicial resources. *Office of Recovery Servs. v. V.G.P.,* 845 P.2d 944, 946 (Utah Ct. App. 1992) (citations omitted).

"If a party fails, purposely or negligently, to make good his cause of action by all proper means within his control, he will not afterward be permitted to deny the correctness of that determination, nor to relitigate the same matters between the same parties." *Am. Estate Mngt. Corp. v. Int'l Inv. and Dev. Corp*., 986 P.2d 765, 768 (Utah Ct. App. 1999).

In this case, claim preclusion operates as a complete bar to Nikols' claim of interest in the Parcels because the Order Denying Discharge is a final judgment on

the merits and Nikols was afforded due process as required by *Tremco II*. "The question of application of res judicata to the facts, viewed in the light most favorable to the nonmoving party, is a pure question of law to be reviewed de novo." *U.S. v. Power Engineering Co*., 303 F.3d 1232, 1240 (10th Cir. 2002).

A. Claim Preclusion Bars All of Nikols' Claims to the Parcels Because the State Court Judgment Was Final and on the Merits.

For claim preclusion to apply, three requirements must be met:

> (1) The subsequent action must involve the same parties, their privies, or their assigns as the first action, (2) the claim to be barred must have been brought or have been available in the first action, and (3) *the first action must have produced a final judgment on the merits of the claim*.

Tremco I, 110 P.3d at 686 (emphasis added). "If these three requirements are met, the result in the prior action constitutes the full relief available to the parties on the same claim or cause of action." *Am. Estate*, 986 P.2d at 767.

Nikols tacitly concedes the first and second elements of claim preclusion by failing to even address them in his principal brief.[2] Nikols' only contention is that the State Court proceedings did not produce a "final judgment on the merits" as to Nikols' interest in the Parcels for res judicata purposes.

[2]But even if Nikols has not conceded the first two elements, the State Court trial, which was held on April 1, 2008, and the resulting Order Denying Discharge, satisfied the first two elements of claim preclusion under Utah law because the parties (i.e. Nikols and Chesnoff) are the same and Nikols is asserting the same claim (i.e. ownership of the Parcels) that was brought in the State Court.

Under Utah law a final judgment generally "ends the litigation on the merits and leaves nothing for the court to do[.]" *Olson,* 724 P.2d at 964-65. "A judgment or order, once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition." *Copper State*, 735 P.2d at 390.

The Order Denying Discharge is a final judgment on the merits of the issues presented at the April 1, 2008 trial. App. 48-54. In December 2005, Chesnoff sued Michael and obtained a pre-judgment writ of attachment on the Parcels. App. 145. Thereafter, Nikols sued Chesnoff for malpractice, alleging that Chesnoff owed him (Nikols) a duty to protect Nikols' interest in the Parcels, even though Chesnoff never represented Nikols. Nikols' case against Chesnoff was then consolidated with Chesnoff's case against Michael. Nikols and Michael then filed a joint Amended Answer and Counterclaim against Chesnoff, directly placing the ownership of the Parcels at issue by stating that "[a]s part of…[Michael's] federal [criminal] case, prosecutors seized and sought to effect forfeiture of certain real…property *belonging to [Michael]*, and that Chesnoff "failed to file any motions challenging the forfeiture proceedings[.]" App. 60, 64 (emphasis added). The State Court heard all the parties' claims on summary judgment and entered judgment in Chesnoff's favor, dismissing both Nikols and Michael's claims against Chesnoff and entering judgment against Michael for the unpaid portion of

Chesnoff's fee. App. 40-47. The State Court converted the prejudgment writ of attachment on the Parcels to a post-judgment writ, but stayed Chesnoff's execution on the Parcels, pursuant to Utah R. Civ. Pro. 64(c)(2), pending discovery and a trial on Nikols' claim of ownership in the Parcels. App. 45-46.

After both parties participated in discovery, including the depositions of Michael and Nikols, Nikols presented his claim of purchase money resulting trust regarding the Parcels before the State Court at trial on April 1, 2008. App. 50. Both sides called and cross-examined witnesses at the trial. App. 51. At the close of the evidence, the trial court ruled in favor of Chesnoff, and issued the Order Denying Discharge holding that:

- "The April 1, 2008 evidentiary hearing was the time a[nd] place for John Nikols to present evidence supporting his opposition to the Writ of Attachment and, specifically, to present evidence supporting his claim that a resulting trust in his favor existed";
- at the time of purchase, Nikols had titled the Parcels in Michael's name in order to avoid Nikols' creditors (including taxes due to the State of Utah);
- Nikols' previous representations to the court that approximately $350,000 in liens and judgments against him had been paid prior to 1988 was inaccurate;
- Nikols was not entitled to equitable relief;

- Nikols had failed to establish that he was the owner of the Parcels when Chesnoff attached them;
- Michael was the owner of the Parcels at the time of Chesnoff's writ of attachment;
- Chesnoff was entitled to execute his judgment against Michael on the Parcels owned by Michael; and
- the Order Denying Discharge was the final order on the matter. App. 51-53.

Nikols then appealed the Order Denying Discharge to the Utah Court of Appeals. *Nikols*, 206 P.3d 295. Both sides fully briefed the issues and argued the appeal (through counsel) in February 2009. In March 2009, the Utah Court of Appeals affirmed the State Court's decision. *Id*. at 299. Nikols did not petition the Utah Supreme Court for certiorari.

Upon Nikols' failure to petition the Utah Supreme Court for certiorari, the the Order Denying Discharge became a final judgment under Utah law for res judicata purposes. The order disposed of the only legal theory Nikols presented in support of his alleged interest in the Parcels, thus ending the litigation between the parties. *Olson,* 724 P.2d at 964-65. That order was never vacated or modified. *Copper State*, 735 P.2d at 390. The State Court also intended the Order Denying Discharge to be final by stating that it was the "final order on [the] matter." App.

53. Moreover, under Utah law, appeals as of right typically may be taken only from final orders or judgments. *See* Utah R. App. P. 3(a); *see also Bradbury v. Valencia*, 5 P.3d 649, 651 (Utah 2000) (Generally, an appeal taken from an order that is not final is improper and the court must dismiss it *sua sponte*). If the Order Denying Discharge was not a final judgment, no appeal would have been entertained by the Utah Court of Appeals. Nikols never claimed in the state court appeal that the Order Denying Discharge was not a final judgment.

Furthermore, when title to real property is at issue with respect to res judicata, Utah law holds that "the need for finality is at its apex." *Am. Estate*, 986 P.2d at 767 (citation omitted); s*ee also Bagley v. Moxley,* 555 N.E.2d 229, 232 (Mass. 1990) ("[P]laintiffs were not entitled to pursue their claim of ownership through piecemeal litigation, offering one legal theory to the court while holding others in reserve for future litigation should the first prove unsuccessful.").

Other than his arguments related to *Tremco II*, which are addressed below, Nikols has failed to show any reason why the Order Denying Discharge is not a final judgment under Utah law for res judicata purposes.

B. Nikols Received the Full Spectrum of Due Process Rights to Which He Was Entitled Under Utah Law.

Nikols contends that the Order Denying Discharge was not a final judgment for purposes of res judicata because the procedure en route to the order did not provide the due process protections afforded by *Tremco II*. Nikols argues that

although the State Court April 1, 2008 trial provided him a certain amount of due process with respect to his claimed interest in the Parcels, *Tremco II* required that he receive more due process before res judicata could operate to preclude his claimed interest in the Parcels. Nikols' reliance on *Tremco II* is misplaced because the facts of *Tremco II* are distinguishable from the facts at hand.

1. **Nikols Was a Party to the Litigation and Was Afforded the Full Spectrum of Due Process Rights Under Utah Law.**

A significant distinguishing fact of *Tremco II* is that the defendants objecting on due process grounds ("Duncan et al.") were never parties to the litigation that produced the judgment against them. 156 P.3d at 785. When they sought to intervene, the court denied their request, thus offending principles of due process by providing no meaningful opportunity to be heard. *Id.* In the instant case, Nikols was a named party in the State Court proceeding. He chose to join Chesnoff's proceedings against Michael, which directly involved the Parcels.[3] Nikols was also afforded all due process protections with respect to his claims against Chesnoff's writ of attachment on the Parcels. With respect to due process rights, *Tremco II* states as follows:

> That due process of law is owed in every instance is a self-evident proposition. Measuring the amount of process that is due in any particular setting is more difficult. Nevertheless, we long ago succinctly summarized the fundamental features of

[3] Subsequent to filing his State Court complaint against Chesnoff, Nikols stipulated to a consolidation of his case with Chesnoff's case against Michael.

> due process, observing that it requires that notice be given to the person whose rights are to be affected. It hears before it condemns, proceeds upon inquiry, and renders judgment only after trial. *The bare essentials of due process thus mandate adequate notice to those with an interest in the matter and an opportunity for them to be heard in a meaningful manner*.

Tremco II, 156 P.3d at 788 (citations and internal quotations omitted) (emphasis added).

Nikols, a named party to all the State Court proceedings, received notice of Chesnoff's attachment to the Parcels owned by Michael and received a full evidentiary trial pursuant to Utah R. Civ. Pro. 64(c)(2) regarding his claimed interest in the Parcels. Nothing more was due Nikols under Utah due process law, including *Tremco II*.

Nikols was provided the full spectrum of due process rights with respect to the writ of attachment and the Parcels, namely notice, discovery, trial, calling witnesses, cross-examining witnesses, and an appeal. Therefore, not only was the State Court's Order Denying Discharge a final judgment on the merits, the process provided en route to the order meets the requisite due process under Utah law and now provides the preclusive effects of res judicata.

2. ***Tremco II*, Upon Which Nikols' Heavily Relies, is Distinguishable and Therefore Inapplicable to the Determination of Whether Nikols Received Adequate Due Process.**

In *Tremco II*, the court, in a post-judgment collection proceeding, and under alter ego and fraudulent transfer theories, extended liability for a judgment against one party to additional parties, Duncan et al., who were never joined as parties to the action in question. 156 P.3d at 785. When Duncan et al. sought to intervene and assert their rights with respect to the judgment extended to them, the court denied their motion, essentially providing them no due process with respect to the alter ego and fraudulent transfer claims. *Id.* The Supreme Court of Utah reversed the trial court's decision denying Duncan et al.'s motion to intervene stating:

> [I]t is apparent that a claim founded on either [alter ego or fraudulent transfer] theory is a civil action that must be prosecuted in the manner prescribed in the Utah Rules of Civil Procedure, commencing with the filing of a summons and complaint and not the abbreviated post-judgment collection procedures of rule 69. Such a cause of action must then be prosecuted in a civil action commenced by the filing of a complaint and including the right of a defendant to receive service of process, conduct discovery, enjoy the protections afforded by a trial—including a jury trial and the allocation of the burden of proof—and the right to appeal. Duncan et al. never received these protections.

Id. at 789-790.

In contrast to *Tremco II*, Chesnoff never sought to enforce his judgment against Nikols. That is, Chesnoff obtained a judgment against Michael and sought

to enforce it against Michael's property. Chesnoff then defended himself against Nikols' claims that Nikols owned the Parcels, not Michael, the record owner. *Tremco II* would only apply if Chesnoff sought to collect his judgment against Michael by attaching property in Nikols' name. If that were the case, *Tremco II* would require Chesnoff to bring a civil complaint against Nikols, alleging some legal theory similar to alter ego or fraudulent transfer, and proceed through the regular discovery process as provided in the Utah Rules of Civil Procedure. However, Chesnoff did not have to sue Nikols in order to dispose of Nikols' unrecorded, vague claim that Nikols owned the Parcels titled in Michael's name. The burden was on Nikols to prove his interest in Michael's property at the April 2008 trial. He failed to do so and lost at trial and on appeal. Therefore, *Tremco II* is distinguishable from this case.

C. Any Balance of Equity or Injustice Tips in Chesnoff's Favor, Not Nikols.

Nikols argues that *Baxter v. Utah Dept. of Transp.*, 705 P.2d 1167 (Utah 1985) requires this court to "resolve all doubts in favor of permitting parties to have their day in court on the merits of a controversy." *Id.* at 1169. However, there is no doubt that Nikols was afforded his day in court on the merits. The court in *Baxter* merely stated that Utah law declines to extend res judicata to the rights of "a party who does nothing more than appear as a witness…in the action." *Id.* at 1169. Such is far from the facts of this case. Nikols was not only a party to the

State Court proceedings, he was represented by competent counsel who represented him through the post-judgment discovery process and put on witnesses and evidence at a full day trial before the State Court. Then Nikols was afforded an appeal to the Utah Court of Appeals, with full briefing and oral argument by counsel. Nikols is clearly seeking a second day in court to retry the same facts that have already been litigated. Utah law does not give Nikols a second chance to do what he neglected to do the first time. *Am. Estate*, 986 P.2d at 768 ("If a party fails, purposely or negligently, to make good his cause of action…he will not afterward be permitted…to relitigate the same matters between the same parties.").

Nikols also cites *McBride v. Jones*, 615 P.2d 431 (Utah 1980) stating "when it appears that an egregious deception or oppression may have been practiced, it should neither be condoned nor rewarded." *Id.* at 433. Nikols cites this in support of his accusation that Chesnoff committed perjury to the State Court in order to obtain the prejudgment writ of attachment on the Parcels. Such an accusation is serious, misplaced, and defames Chesnoff's character.

Chesnoff never represented to Judge Cassell (the judge in Michael's federal criminal case) that Nikols owned the Parcels. The issue before Judge Cassell was not who owned the Parcels, but whether they were purchased with the proceeds of Michael's criminal activities. Chesnoff stated to Judge Cassell as follows:

> One of the strongest parts of the defense of this Indictment is to the forfeitures. The properties that have been seized were

> purchased by Mr. Nikols' father in the '80s and the '90s…[H]is father is prepared at the appropriate time to testify *as to how those properties were purchased, which is from money he earned working every day as hard as he could in his restaurant business and other ventures that were legitimate ventures*.

App. 133 (emphasis added). Chesnoff never represented that Nikols owned the Parcels. He represented that the purchase price for the Parcels was paid by Nikols from his legitimate businesses—rather than from Michaels' drug money. That fact has never been disputed in this case. Nikols paid the purchase price, but the Parcels were titled in Michael's name in order to avoid Nikols' creditors, whose claims exceeded $350,000. App. 51; *Nikols*, 206 P.3d at 299. The State Court ruled that, under those facts and the law, Michael was the owner, not Nikols.

Chesnoff also stated in his affidavit before the State Court on the prejudgment writ of attachment that he was "unaware of any other persons or entities besides the federal government presently claiming an interest in any of the [Parcels]". App. 129. That was completely true—the Parcels were clearly owned by Michael, not Nikols. Michael had owned the Parcels for 17 years. Chesnoff had only attempted to release the Parcels from the federal seizure on the basis that they were purchased with Nikols' legitimate money, not Michael's drug money.

Furthermore, Nikols is the one with unclean hands in this case. He admitted to the State Court and in his appeal to the Utah Court of Appeals that he placed the Parcels in Michael's name for the purpose of avoiding Nikols' creditors. *Nikols*,

206 P.3d at 299 (McHugh, J., concurring in result). Judge McHugh stated she would hold that Nikols is not entitled to the equitable protections of a purchase money resulting trust because he came to the court with unclean hands. *See id.* at 300 (*citing Horton v. Horton,* 695 P.2d 102, 107 (Utah 1984) ("It is generally accepted that he who seeks equity must do equity."); *Hone v. Hone,* 95 P.3d 1221, 1223 (Utah Ct. App. 2004) ("[A] party who seeks an equitable remedy must have acted in good faith and not in violation of equitable principles.").

II. THE U.S. DISTRICT COURT ERRED BY ANALYZING CHESNOFF'S MOTION FOR RULE 11 SANCTIONS UNDER A UTAH BAD FAITH LITIGATION STATUTE RATHER THAN UNDER THE STANDARD SET FORTH BY FED. R. CIV. PRO. 11.

In response to the Federal Complaint filed in the District Court on January 4, 2010, Chesnoff filed a motion to dismiss pursuant Fed. R. Civ. Pro. 12(b)(6). App. 2-3, docket nos. 10-11. Included within Chesnoff's motion to dismiss was a request for attorney fees pursuant to Utah Code Ann. § 78B-5-825, for an action filed without merit and in bad faith. *Id.* On February 26, 2010, Chesnoff also brought a separate motion for sanctions against Nikols and his counsel under Fed. R. Civ. Pro. 11. App. 3, docket nos. 22-23.

On June 28, 2010, the District Court granted Chesnoff's motion to dismiss the Federal Complaint in its entirety. App. 5, docket no. 40. The District Court also denied Chesnoff's motion for sanctions under Rule 11, but applied the legal

standard set forth in Utah Code Ann. § 78B-5-825 as requested in the motion to dismiss.

This court reviews the District Court's failure to analyze the motion for sanctions under Rule 11 de novo. *Dang v. UNUM Life Ins. Co. of America*, 175 F.3d 1186, 1189 (10th Circuit 1999) (questions of law reviewed de novo).

Utah Code Ann. § 78B-5-825 states as follows: "In civil actions, the court shall award reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith…" To determine whether a claim is without merit, Utah courts look to whether it was "frivolous or of little weight or importance having no basis in law or fact." *In re Olympus Const., L.C.*, 215 P.3d 129, 134 (Utah 2009) (citations and internal quotations omitted). The Utah Supreme Court has stated three factors in determining good faith under the statute: "(1) [a]n honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question will hinder, delay, or defraud others." *Still Standing Stable, LLC v. Allen*, 122 P.3d 556, 560 (Utah 2005).

Fed. R. Civ. Pro. 11 has a separate and distinct standard from § 78B-5-825. There are notable differences between the two standards. Pursuant to Rule 11, an attorney who presents a pleading, written motion, or other paper to the court:

> certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
>
> (b)(1) it is not being presented for an improper purpose . . . ;
>
> (b)(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; and
>
> (b)(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .

See Fed R. Civ. P. 11(b).

"Rule 11 mandates sanctions against attorneys and/or their clients when pleadings, motions, or other signed papers in the district court are not grounded in fact, are not warranted by existing law or good faith argument for its extension, or are filed for an improper purpose." *Monument Builders of Greater Kansas City, Inc. v. Am. Cemetery Ass'n of Kansas*, 891 F.2d 1473, 1484-85 (10th Cir. 1989). Thus, each subpart of Rule 11(b) furnishes a distinct basis for finding a violation of Rule 11. *See id.* Even pleadings containing both frivolous and non-frivolous claims may violate Rule 11. *See Dodd Ins. Svcs., Inc. v. Royal Ins. Co. of Am.*, 935 F.2d 1152, 1158 (10th Cir. 1991). "In deciding whether to impose rule 11 sanctions, a district court must apply an objective standard; it must determine whether a reasonable and competent attorney would believe in the merit of an argument." *Id.* at 1155 (citations omitted).

In analyzing Chesnoff's motion for sanctions under Rule 11, the District Court applied the § 78B-5-825 standard and held that "[w]hile Defendant has made a fair showing that this suit has no merit, he has not met his burden establishing that it was not brought in good faith." However, if analyzed under the three subparts of Rule 11(b), "good faith" need not be shown. Therefore, although the District Court found that there was no bad faith, Rule 11 sanctions could still apply.

The claims in Nikols' Federal Complaint are clearly barred by res judicata, as set forth above. Nikols' counsel should have told Nikols that there are no second chances. Further, Nikols' claim that he is entitled to recover money against Chesnoff under Utah's Occupying Claimants statute or equitable lien doctrine had no evidentiary or legal support. Judge Stewart did not even allow oral argument on those issues, by either side. App. 162. Moreover, Nikols himself did not address Occupying Claimants claim in his appeal brief, and thus has abandoned that cause of action altogether. Therefore, it appears that everyone knew—even Nikols' own counsel—that the Occupying Claimants claim had no merit.

This court should reverse that portion of the District Court's ruling denying Chesnoff's motion for sanctions under Rule 11 and remand for further consideration under the appropriate standard.

CONCLUSION

Based on the foregoing arguments, this Court should (1) affirm the District Court's ruling granting Chesnoff's motion to dismiss and (2) remand the issue of sanctions to the District Court for review under the Rule 11 standard.

ORAL ARGUMENT STATEMENT

Oral argument is not requested by Chesnoff.

DATED this 12th day of November, 2010.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,264 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 14-point Times new Roman

DATED this 12th day of November, 2010.

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CERTIFICATE OF DIGITAL SUBMISSIONS

I certify that 1) all required privacy redactions have been made; 2) with the exception of those redactions, every document submitted in digital form or scanned PDF format is an exact copy of the written document filed with the Clerk; and 3) the digital submissions have been scanned for viruses with Symantec AntiVirus, version 10.1.4.4000, updated 11/10/2010, and, according to the program, are free of viruses.

DATED this 12th day of November, 2010.

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CERTIFICATE OF SERVICE

I, Scott O. Mercer, hereby certify that on this 12th day of November, 2010, I sent one copy of the foregoing **Appellees' Principal and Response Brief** to the individuals listed below by the method indicated below:

/s/ Scott O Mercer

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ATTACHMENT

ORDERS ON APPEAL

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

JOHN NIKOLS, an individual Plaintiff, v. DAVID CHESNOFF, an individual; and GOODMAN & CHESNOFF, a Nevada professional corporation Defendants.	MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS Case No. 2:10-CV-0004-TS

I. INTRODUCTION

This matter is before the Court on Defendants' Motion to Dismiss. Defendants argue that the equitable lien and Occupying Claimant Act claims should be dismissed due to a failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6); that the quiet title and equitable lien claims should be dismissed pursuant to res judicata; that the abstention doctrine bars jurisdiction in this case pursuant to *Younger v. Harris*;[1] and that the quiet title, equitable lien, and Occupying Claimant Act claims should be dismissed due to a failure to join an indispensable party pursuant to Rule 12(b)(7). Defendants also motion for attorney fees and costs incurred in litigation on the ground that Plaintiff's claims were brought without merit and in bad faith. For the reasons discussed below, the Court dismisses Plaintiff's Occupying Claimant Act

[1] 401 U.S. 37 (1971).

claim pursuant to Rule 12(b)(6). Further, the Court finds that Plaintiff's equitable lien and quiet title claims are barred by res judicata. In addition, because the Court finds that all three claims were reasonably brought, it denies Defendants' motion for attorney fees.

II. BACKGROUND FACTS

The following facts are undisputed. In 2002, Michael Nikols ("Michael") was arrested for distribution of a controlled substance. In 2005, Michael hired David Chesnoff ("Defendant") to represent him, entering into an attorney-client retainer agreement with Defendant. Michael agreed to pay Defendant $350,000 to represent him in *United States v. Michael John Nikols,*[2] regardless of the outcome.[3] John Nikols ("Plaintiff"), Michael's father, paid $160,000 of the fee, but the remaining $190,000 went unpaid.[4] In 2005, Michael pled guilty to distribution of a controlled substance.

In December of 2005, Defendant, concerned that he may never receive the remaining amount of his retainer fee, obtained a prejudgment writ of attachment in state court on four parcels ("the Parcels") in Murray, Utah, which were titled in Michael's name at the time.[5] On January 31, 2006, after the prejudgment writ of attachment, Michael transferred his interest in the Parcels by quitclaim deed to Plaintiff. In August 2007, a Utah state court granted Defendant's Motion for Summary Judgment, awarding him the $190,000 of unpaid fees.[6] The state court further held that the prejudgment writ of attachment would continue as a post-judgment writ of

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[2] No. 2:04-CR-00786 PGC.

[3] Docket No. 11, at 3.

[4] *Id.*

[5] *Id*.

[6] *Id*. at 4.

attachment on the Parcels.[7] The state court, however, prohibited execution of the attachment until Plaintiff, who claimed true ownership of the Parcels, could conduct discovery and assert his claims to an interest in the Parcels.

In April 2008, following post-judgment discovery and hearing, the state court held that Plaintiff failed to meet his burden of establishing that a resulting trust existed with respect to the Parcels.[8] The state court further held Michael to be the owner when Defendant attached the Parcels in December 2005. As a result, Defendant was entitled to proceed with the execution of the attachment.[9] Plaintiff appealed and, in a March 2009 decision, the Utah Court of Appeals affirmed the trial court's decision.[10]

Before Defendant was able to proceed with the writ of execution on the Parcels, the federal government put a *lis pendens* on the Parcels, claiming relation back to the original seizure, which, if proved, would put the federal government interest in the Parcels prior to Defendant's writ of attachment. In June 2009, after having been granted a new trial in his federal criminal case, Michael again pled guilty to distribution of a controlled substance. The following November he was sentenced and the federal government released its *lis pendens*.

In December 2009, Defendant, after waiting for the federal government to release its *lis pendens* on the Parcels, obtained a writ of execution on the Parcels.[11] The Salt Lake County Sheriff served the writ on both Michael and Plaintiff on December 3, 2009, and set the sheriff's

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[7] *Id*.

[8] *See* Docket No. 11, Ex. C at 4.

[9] *Id.*

[10] *Nikols v. Chesnoff*, 206 P.3d 295 (Utah Ct. App. 2009).

[11] Docket No. 11, Ex. E.

sale for January 12, 2010. In response, both Michael and Plaintiff filed *pro se* objections to the writ in Utah state court. On January 6, 2010, the state court denied all of the Plaintiff's objections presented by Michael and authorized the January 12, 2010 sheriff's sale to proceed.[12] Subsequently, Plaintiff filed a motion for emergency writ to stay the sheriff's sale in the Utah Supreme Court. The motion was transferred to the Utah Court of Appeals and subsequently denied.[13] Plaintiff then filed a motion for a temporary restraining order in this Court on January 11, 2010. This Court denied Plaintiff's motion on January 12, 2010. On January 12, 2010, Defendant credit bid his judgment at the sheriff's sale of the Parcels.

III. PRESENT MOTION

In this instant case, Plaintiff alleges claims asserting his ownership of the Parcels. His claims seek: (1) to quiet his title in the Parcels, specifically seeking declaration of his title as superior to Defendant's; (2) an equitable lien on the Parcel superior to any interest Defendant claims; and (3) to recover the value of the improvements Plaintiff made to the Parcels after he bought them and before Defendant attached them, pursuant to the Occupying Claimants Act (hereinafter "the Act").[14]

In response, Defendant argues that (1) all of Plaintiff's claims should be dismissed due to his failure to join an indispensable party (Michael), pursuant to Fed. R. Civ. P. 12(b)(7); (2) Plaintiff's claims to equitable lien and the Occupying Claimant Act should be dismissed due to a failure to state a claim upon which relief can be granted; (3) this Court should abstain from exercising jurisdiction pursuant to the abstention doctrine; (4) Plaintiff's claims to quiet title and

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[12] *See* Docket No. 11, Ex. H at 9-13.

[13] *See* Docket, case no. 20100046-CA.

[14] UTAH CODE Ann. § 57-6-1.

equitable lien should be precluded pursuant to res judicata; and (5) Defendant should be awarded attorney fees and costs incurred pursuant to Utah Code Ann. § 78B-5-825.

IV. SUBJECT MATTER JURISDICTION

Jurisdictional provision are set forth in 28 U.S.C.S. § 1332(a), which provides that "district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States . . . ." "A case falls within the federal district court's original jurisdiction only if diversity of citizenship among the parties is complete, i.e., only if there is no plaintiff and no defendant who are citizens of the same State."[15] Here, there is a civil action, it involves an amount in controversy exceeding $75,000, and there is diversity of citizenship among the parties, the Plaintiff and the Defendants being from Utah and Nevada, respectively. Therefore, this Court has subject matter jurisdiction over the instant case.

V. OCCUPYING CLAIMANT CLAIM

A. 12(b)(6) Motion to Dismiss Standard

An assessment of a 12(b)(6) Motion to Dismiss requires the court to "look for plausibility in the complaint."[16] Under this standard, "a complaint must include enough facts to state a claim to relief that is plausible on its face."[17] Thus, for a Rule 12(b)(6) motion to succeed, it must appear that the plaintiff has failed to include enough facts to state a claim to relief that is plausible on its face. Additionally, in resolving a 12(b)(6) motion, a court may not consider matters outside the pleadings, unless those documents are attached to the complaint or are

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[15] 28 U.S.C.S. § 1332(a).

[16] *Teigen v. Renfrow*, 511 F.3d 1072, 1078 (10th Cir. 2007) (quotations omitted).

[17] *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007).

referenced in the complaint.[18] If it does consider matters outside the pleadings, the Court must convert the motion to dismiss into a motion for summary judgment while providing the parties with notice so that all factual allegations may be met with countervailing evidence.[19] However, the Court may take judicial notice of records from state proceedings in resolving a motion to dismiss without converting the motion into one for summary judgment.

Plaintiff has submitted the state court orders and requested that the Court take judicial notice. Defendant has not objected and has addressed these orders. Thus, the Court will take judicial notice of the state court material and considers them without converting the motion to dismiss to one for summary judgment.[20]

B. Discussion

Defendant argues that the Plaintiff failed to state a claim upon which relief can be granted because the Occupying Claimant Act (the Act) does not apply to Defendant's judgment lien. The Act states:

> Where an occupant of real estate has color of title to the real estate, and in good faith has made valuable improvements on the real estate, and is afterwards in a proper action found not to be the owner, no execution shall issue to put owner in possession of the real estate after the filing of a complaint as hereinafter provided, until the provisions of this chapter have been complied with.[21]

For the Act to apply to Defendant, he would have to be the "owner" of the Parcels. The question is whether Defendant's writ of attachment makes him an "owner" of the Parcels within the meaning of the Act. If it does, Plaintiff has an actionable claim upon which relief can be

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[18] *See Prager v. LaFaver*, 180 F.3d 1185, 1189 (10th Cir. 1999).

[19] *See Price v. Philpot*, 420 F.3d 1158, 1167 (10th Cir. 2005) (quotations omitted).

[20] *See Tal v. Hogan*, 453 F.3d 1244, 1265 n. 24 (10th Cir. 2006).

[21] UTAH CODE Ann. § 57-6-1.

granted. If not, Plaintiff cannot recover against the Defendant under the Act, and a 12(b)(6) dismissal of the claim would be appropriate.

In answering this question, the Court must view the facts in the light most favorable to the nonmoving party. Defendant in this case is not a title holder of the Parcels. Michael was the record holder prior to 2006 when he conveyed his interest in the Parcels to Plaintiff via quitclaim deed. Plaintiff was the record owner between that quitclaim deed in 2006 until the execution sale after this case was filed. Defendant instead has a post-judgment writ of attachment, entitling him to the proceeds from a sheriff's sale of the property. Defendant cites the Supreme Court of Utah in clarifying that the Act's purpose is "to entitle the bona fide claimant . . . to recover value of improvements to the extent that they unjustly enrich the record owner."[22]

Plaintiff counters that Defendant's judgment lien is tantamount to ownership. Plaintiff cites the Supreme Court of Utah which defined ownership as "a collection of rights to possess, to use and to enjoy property, including the right to sell and transmit. . . . [T]he term owner is often used to characterize the possessor of an interest less than that of absolute ownership."[23] Under this analysis, the question becomes whether Defendant's judgment lien grants him the right to possess, use and enjoy the property, and the right to sell and transmit it. Plaintiff argues that Defendant's judgment lien does grant such rights, therefore making him an owner for the purposes of the Act.

Defendant points out, however, that it is not Defendant but the court and the sheriff who have the authority to sell the Parcels to satisfy the judgment. Moreover, *Jeff,* as relied on by

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[22] *Reimann v. Baum*, 203 P.2d 387, 392 (Utah 1949).

[23] *Jeff v. Stubbs*, 970 P.2d 1234, 1241-42 (Utah 1998) (quoting 63C Am. Jur. 2d Property § 26 (1997)).

Plaintiff, is distinguishable from the instant case. In *Jeff*, the question was whether an occupying claimant with a good faith belief in a life interest could recover for improvements against the fee simple record owner. Here, the question is whether the holder of a judgment lien is an owner. The Court therefore does not find *Jeff* applicable.

Further, in a diversity case such as this one, the court applies the law of the forum state. Therefore, this Court "defer[s] to the most recent judgments of the [Utah] Supreme Court, and if no controlling precedent exists, [this Court] attempt[s] to predict how that court would rule."[24] Due to an absence of case law construing a judgment lien holder as an "owner," the Court predicts that the Utah Supreme Court would not so construe the Act. Plaintiff cites no case law from any jurisdiction holding a judgment lien holder to be an "owner" of real property within the meaning of the Act nor does he cite any other authority for such an interpretation. Plaintiff has therefore failed to state a set of facts to make relief plausible on its face. Defendant's 12(b)(6) motion to dismiss the claim under the Occupying Claimant Act will be granted.

VI. EQUITABLE LIEN AND QUIET TITLE CLAIMS

A. Res Judicata Standard

Defendant argues that Plaintiff should be precluded from bringing claims to quiet title and equitable lien pursuant to Fed. R. Civ. P. 8(c)(1), the doctrine of res judicata or claim preclusion. The doctrine of res judicata holds that a party is prohibited from

> [r]elitigating a legal claim that was or could have been the subject of a previously issued final judgment. Claim preclusion applies when three elements exist: (1) a final judgment on the merits in an earlier action; (2) identity of the parties in the two suits; and (3) identity of the cause of action in both suits. If the requirements are met, res judicata is appropriate unless the party seeking to avoid preclusion did

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[24] *Safeco Ins. Co. of America v. Hilderbrand*, 602 F.3d 1159, 1163 (10th Cir. 2010) (citing *Kansas Wankier v. Crown Equip. Corp.,* 353 F.3d 862, 866 (10th Cir. 2003) and *Long v. St. Paul Fire & Maine Ins. Co.*, 589 F.3d 1075, 1081 (10th Cir. 2009)).

not have a full and fair opportunity to litigate the claim in the prior suit.[25]

B. Discussion

Concerning the first element, the issue is whether the post-judgment determination of Plaintiff's property interest in the parcels constitutes a final judgment. A final judgment requires due process of law. If the post-judgment proceedings provide for due process, then the post-judgment constitutes a final decision. If the post-judgment did not, there is no final decision, and the first element would not be satisfied.

Plaintiff argues that the post-judgment decision did not afford due process of law, and is therefore not a final decision.[26] Plaintiff cites *Tremco*,[27] holding that a final decision or a civil action is "a proceeding subject to the full spectrum of due process."[28] In contrast, a post-judgment collection proceeding is not required to prescribe to the full spectrum of due process.

Plaintiff further cites *Tremco*, holding that a "violation of due process occurs if a court permits a cause of action to proceed under those rules promulgated to assist in the collection efforts of the judgment creditor."[29] Plaintiff argues that the post-judgment hearing did not comply with due process of law, preventing Plaintiff from a full and fair opportunity to litigate the suit, thereby barring the application of claim preclusion to Plaintiff's instant claims.

Defendant counters that Plaintiff's post-judgment proceeding afforded him the full spectrum of due process. Defendant points out that the trial court granted Plaintiff the

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[25] *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 1985).

[26] Docket No. 24, at 10-11.

[27] *Brigham Young University v. Tremco Consultants, Inc.,* 156 P.3d 782 (Utah 2007).

[28] *Id.* at 790.

[29] *Id.*

opportunity to present his claims to the court regarding his interest in the Parcels. The post-judgment proceeding included discovery, an evidentiary hearing, and an appeal.[30] After the Utah Court of Appeals affirmed the trial court's decision, Plaintiff did not file a petition for writ of certiorari with the Utah Supreme Court. At this point, Defendant argues, the decision became a final judgment because it afforded Plaintiff due process.

Tremco is distinguishable from the instant case. In *Tremco*, the post-judgment proceeding involved the court extending liability to third parties never joined in the suit, clearly violating those third parties' due process rights. Here, on the other hand, Plaintiff was both a named party in the post-judgment proceeding and was afforded full due process rights through the discovery, hearing, and appellate process involved in the state court challenge to the writ of attachment.

Further, in the present case, unlike *Tremco*, the judgment debtor, Michael, was the record owner of the property. State law provides a procedure for claimants to an interest in the property to oppose the enforcement of the judgment lien by a writ of execution. Plaintiff took full advantage of that procedure. If he had an objection to the jurisdiction of the state court to determine that he had not met his burden on that issue, he should have raised it in the appeal to the Utah appellate courts. Unlike the *Tremco* parties, he did not raise this issue in his appeal of the state court's determination in the post-judgment proceeding that he had not shown a purchase money relating trust.[31] Because he did not contest jurisdiction to the proceeding, and because the proceeding included discovery, an evidentiary hearing, and an appeal, this Court finds that the judgment procedure was a final judgment.

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[30] Docket No. 26, at 7. *See also* Order Denying Discharge, Ex. B; *Nikols v. Chesnoff*, 206 P.3d 295 (Utah Ct. App. 2009).

[31] *Nikols v. Chesnoff*, 206 P.3d 295 (Utah Ct. App. 2009).

The second element is whether the identites of the parties are the same in both suits. This element is easily satisfied, as Nikols and Chesnoff are respectively the Plaintiff and Defendant in both suits.

The third element is whether the cause of action is the same in both cases. In determining whether the cause of action is the same, the Tenth Circuit applies the "transactional approach," which constitutes determining whether the causes of action involved include "all claims or legal theories of recovery that arise from the same transaction, event, or occurrence."[32] Plaintiff argues that the "transaction approach" is the wrong standard, and that the Court should apply the "identity of facts or evidence test," which requires the court to focus on whether "[t]he two causes of action rest on a different state of facts and evidence of a different kind or character is necessary to sustain the two causes of action."[33] Regardless of which standard this Court applies, the underlying rationale of claim preclusion, as articulated by the Supreme Court, is that "the final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."[34]

In the instant case, the causes of action brought in this later suit could have been raised in the previous state proceeding. In the language of the "transactional approach," the quiet title and equitable lien claims arise out of the same transaction as Plaintiff's purchase money resulting theory. All three claims involve Plaintiff's having purchased, paid taxes, and possessed the Parcels. Further, applying "the identity of facts or evidence test," the quiet title and equitable lien claims rely on the same state of facts and evidence as did the purchase money resulting trust

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[32] *Nwonsun v. General Mills Restaurants*, 124 F.3d 1255, 1257 (10th Cir. 1997).

[33] *Searle Bros. v. Searle*, 588 P.2d 689, 690 (Utah 1978).

[34] *Allen v. McCurry*, 449 US 90, 94 (1980).

claim. While these claims are based on different legal theories, they rest on the same set of facts. Lastly, Plaintiff clearly had the opportunity to bring these claims in the previous state proceeding, but failed to do so. It is clear that the causes of action are identical according to both the "transactional" and "the identity of facts" tests, thereby meeting the third element. Therefore, these claims are barred by res judicata.

VII. ATTORNEY FEES

Defendant argues that he should be awarded attorney fees and costs incurred in defending this suit pursuant to Utah Code Ann. § 78B-5-825. In a case brought to this Court on diversity, the matter of attorney fees is a substantive legal issue and is therefore controlled by state law.[35] Utah Code Ann. § 78B-5-825 states that reasonable attorney fees shall be awarded "to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith."[36] Thus, in order to be awarded attorney fees, (1) the moving party must prevail, (2) the claim must be asserted by the non-moving party without merit and (3) the claim must not be brought in good faith. While Defendant has made a fair showing that this suit has no merit, he has not met his burden establishing that it was not brought in good faith. To establish good faith, the Utah Supreme Court has stated three factors: (1) "an honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question hinder, delay, or

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[35] *See Cowley v. Porter,* 2005 UT App 518, ¶ 50 (Utah Ct. App. 2005) (quoting *In re Discipline of Sonnenreich*, 2004 UT 3, ¶ 46 (Utah 2004)).

[36] UTAH CODE ANN. § 78B-5-825. *See also Hermes Assoc. v. Park's Sportsman*, 813 P.2d 1221, 1225 (Utah Ct. App. 1991).

defraud others."[37] Defendant has failed to show that Plaintiff did not have an honest belief in the propriety of his suit or an intent to take unconscionable advantage of others. Plaintiff could very well be making a good faith effort to protect his alleged property interest in the Parcels via any available legal means. While his suit lacks merit, it cannot be said that Plaintiff is acting in bad faith. Therefore, Defendant's motion for attorney fees is denied.

VIII. CONCLUSION

It is therefore

ORDERED that Defendant's Motion to Dismiss the Occupying Claimant Act claim (Docket No. 10) pursuant to Rule 12(b)(6) is GRANTED. It is further

ORDERED that Defendant's Motion to Dismiss the equitable lien and quiet title claims (Docket No. 10) pursuant to the doctrine of Res Judicata is GRANTED. It is further

ORDERED that Defendant's Motion for Sanctions is DENIED. It is further

ORDERED that all other pending motions are moot. The clerk of the court is directed to close this case.

DATED June 28, 2010

BY THE COURT:

TED STEWART
United States District Judge

[37] *Still Standing Stable, LLC v. Allen,* 2005 UT 46 (Utah 2005).

AO 450 (Rev.5/85) Judgment in a Civil Case

United States District Court

Central Division for the District of Utah

John Nikols

V.

David Chesnoff and Goodman & Chesnoff

JUDGMENT IN A CIVIL CASE

Case Number: 2:10 cv 004 TS

IT IS ORDERED AND ADJUDGED

that judgment be entered in favor of the defendants and plaintiff's cause of action is dismissed.

June 28, 2010
Date

D. Mark Jones
Clerk of Court

(By) Deputy Clerk