Appeal Nos. 10-4127, 10-4134

IN THE

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

John Nikols,

Plaintiff-Appellant,

v.

David Chesnoff, and Goodman & Chesnoff,

Defendant-Cross Appellant

Appeal from the United States District Court
for the District of Utah in Case No. 2:10-cv-00004
Judge Ted Stewart

APPELLANT'S OPENING BRIEF
ORAL ARGUMENT REQUESTED

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No prior appeals have been taken in this action, or to this Court from any related action.

INTRODUCTION

Appellant John Nikols ("Nikols") appeals the district court's ruling that an order entered by the District Court of Utah for the Third Judicial District ("State Court")—in post-judgment collection proceedings on a money judgment obtained by appellees David Z. Chesnoff and Goodman & Chesnoff (collectively, "Chesnoff") against Nikols' adult son, Michael John Nikols ("Michael")—is res judicata.

To satisfy his State Court judgment against Michael, Chesnoff obtained from the State Court writs of attachment and execution against four parcels of real estate ("Parcels") that everyone agrees were purchased by Nikols, not Michael. In post-judgment collection proceedings, the State Court denied Nikols' motion to discharge Chesnoff's writs. So Nikols commenced the quiet title action from which this appeal arises, to obtain a full and proper trial of his claim to be the Parcels' true owner. The district court ruled that Nikols' rights had already been conclusively adjudicated by the State Court and dismissed his complaint. Thus the central issue in this case is whether Chesnoff can seize—or rather, has seized—real property that he admits was bought and paid for by Nikols to satisfy his judgment against Nikols' adult son, Michael; and the issue on appeal is whether, as the district

court held, that misappropriation has already been conclusively and irremediably accomplished—whether injustice is res judicata.

This Court should reverse. Utah law determines the preclusive effect of the State Court's order, and according to the Supreme Court of Utah, the only rights that can be conclusively adjudicated in post-judgment collection proceedings are the judgment debtor's. Because the judgment debtor here is Michael, not Nikols, the State Court's order cannot preclude Nikols' claims.

JURISDICTIONAL STATEMENT

The district court exercised diversity jurisdiction under 28 U.S.C. § 1332(a)(1): The value of the Parcels exceeds $75,000; and there is complete diversity between Nikols, a citizen of Utah, and Chesnoff, citizens of Nevada. This Court has jurisdiction under 28 U.S.C. § 1291: The June 28, 2010 "Memorandum Decision and Order Granting Defendants' Motion to Dismiss" ("Decision") and "Judgment in a Civil Case" are final decisions of the district court. Nikols timely filed his "Notice of Appeal" in the district court on July 9, 2010.

STATEMENT OF ISSUE

Whether the district court erred by ruling that the State Court's order in summary post-judgment collection proceedings on Chesnoff's monetary judgment against Michael conclusively adjudicated Nikols' rights in the Parcels.

STATEMENT OF THE CASE

Nikols commenced this action on January 4, 2010, by filing a complaint stating three claims for relief: one to quiet his title to the Parcels, another to impress an equitable lien on the Parcels, and a third for relief under Utah's Occupying Claimants Act, Utah Code § 57-6-1 *et seq.* App. at 7.[1] Chesnoff moved to dismiss all three claims on February 1, 2010, on numerous grounds; and Nikols moved for summary judgment on the quiet title claim on February 23, 2010. App. at 2-3. On June 28, 2010, the district court granted Chesnoff's motion to dismiss, ruling that (1) the quiet title and equitable lien claims were barred by res judicata, and (2) Nikols had failed to state a claim under the Occupying Claimants Act. App. at 144. Nikols timely appealed. App. at 159.

[1] Record references are to the page number of the accompanying Appendix, accompanied (where applicable) with parallel pinpoint citations to the internal pagination of the district court's Decision.

STATEMENT OF FACTS

Nikols purchased his Parcels between 1991 and 1994, to improve parking and access for a larger commercial parcel he had purchased years earlier. App. at 78-80. Nikols has always held the larger parcel in his own name, but took title to the servient Parcels in Michael's name. *Id.*

Michael hired Chesnoff in July 2005 to defend him in a federal criminal proceeding, *United States v. Michael John Nikols*, No. 2:04-cr-768 (Cassell, J.[2]) in the district court. App. at 145, Decision at 2. In exchange for zealous representation, Michael agreed to pay Chesnoff $350,000; $160,000 upfront, and the balance later. *Id.* Chesnoff collected the initial payment, coerced Michael into a plea that was later set aside, then sued Michael in State Court for the $190,000 balance. App. at 86, 145-46, Decision at 2-3.

Because Michael held paper title to the Parcels, the Government had sought their forfeiture in the criminal proceedings against Michael. In an early hearing, Chesnoff had told Judge Cassell of the district court:

> I represent to you, Your Honor, that one of the strongest parts of the defense of this Indictment is to the forfeitures. The properties that have been seized were

[2] Hon. Paul Cassell presided over the criminal proceedings against Michael, but Hon. Ted Stewart presided over Nikols' later civil action against Chesnoff.

> purchased by [Michael's] father [i.e., by Nikols] in the '80s and the '90s.

App. at 133. But Chesnoff—despite his solemn representation to Judge Cassell that the federal government could not seize the Parcels because they were owned by Nikols rather than Michael—obtained from the State Court his own writ attaching the Parcels, by submitting an affidavit falsely averring that he was "unaware of any other persons or entities besides the federal government presently claiming an interest in any of the Real Property"; i.e., that he was unaware that Nikols, too, claimed an interest. App. at 129.

Chesnoff's only claims in the State Court were against Michael: Chesnoff never asserted any claims against Nikols. Michael counterclaimed against Chesnoff, for breach of contract and unjust enrichment; and Nikols joined in those counterclaims. App. at 66-68. The State Court granted Chesnoff summary judgment both on his claim against Michael, and on Michael's and Nikols' counterclaims against Chesnoff. App. at 42-45. Title to the Parcels was not at issue and was not decided on summary judgment: the State Court based its summary adjudication of Nikols' counterclaims, in particular, on its conclusions that Nikols had no contract with Chesnoff and Chesnoff owed no duties to Nikols. App. at 43-45.

After Chesnoff secured summary judgment on his contract claim against Michael, Nikols asked the State Court to discharge Chesnoff's attachment of the Parcels; arguing that Nikols was their true owner, notwithstanding Michael's paper title. App. at 50. However the State Court would not receive Michael's testimony in support of Nikols' motion because Michael did not waive his Fifth Amendment rights en toto.[3] Chesnoff's counsel leveraged that ruling to protect Chesnoff from cross-examination that would have disclosed his own contrary prior representations in the federal criminal proceedings.[4] Compounding the prejudice, the State Court replaced the corroborating testimony from Michael and Chesnoff with an adverse inference. App. at 52.

Based on the resulting incomplete record and distorting inference, the State Court ruled that Nikols had not proven a purchase money resulting trust by clear and convincing evidence, and thus denied his motion. App. at

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[3] *See Nikols v. Goodman & Chesnoff*, 206 P.3d 295, 300-02 & n. 1 (Utah App. 2009) (Davis, J., dissenting) ("The trial court told Son that should he choose to testify and then invoke his Fifth Amendment privilege in response to any question, the entirety of his testimony—without regard to the specific questions asked—would be stricken").

[4] *See id.* ("It is clear that it was in Chesnoff's best interest to avoid testifying that he had previously stated on the record during Son's federal criminal proceedings that the Properties belonged to Plaintiff. And Chesnoff's counsel vigorously worked to create a situation whereby such testimony would come in only at great cost to Son.").

52. The order denying discharge of the writ was affirmed on appeal by a fractured panel of the Utah Court of Appeals.[5]

On December 10, 2009, the Salt Lake County Sheriff posted a "Notice of Real Estate Sale." App. at 94. On January 4, 2010, Nikols commenced this action to quiet his title to the Parcels. App. at 7. An auction was held pursuant to the State Court's writ of execution on January 12, 2010, which Chesnoff won by bidding his judgment against Michael. App. at 147, Decision at 4. Chesnoff thereafter moved to dismiss this case, arguing inter alia that the State Court proceedings on his judgment against Michael are res judicata as to Nikols' ownership; and the trial court granted Chesnoff's motion. App. at 144.

[5] Two judges voted to affirm, based on mutually contradictory analyses of the record; and the third voted to reverse. One judge would have reversed because the trial court had erroneously adopted an "all-or-nothing approach . . . regarding the exercise of [Michael's] Fifth Amendment rights." *Nikols,* 206 P.3d at 302 (Davis, J., dissenting). Another judge was likewise "troubled by the [state] court's restrictions on [Michael's] invocation of the Fifth Amendment," but concurred in the result on the ground that no purchase money trust could arise if the Parcels had been placed in Michael's name to defraud Nikols' creditors. *Id.* at 299-300 (McHugh, J., concurring in the result). The lead opinion rejected both the dissent's conclusion that Michael's Fifth Amendment privilege had been impermissibly burdened, *id.* at 298-99, and the concurrence's conclusion that an attempt to defraud Nikols' creditors had been shown, *id.* at 297 n. 1; but concluded that Nikols' uncorroborated parol did not rise to the level of clear and convincing evidence, *id.* at 299.

SUMMARY OF ARGUMENT

The district court ruled that Nikols' claims "are barred by res judicata." App. at 155, Decision at 12. "The *res judicata* effect of state court decisions … is a matter of state law," *Heck v. Humphrey*, 512 U.S. 477, 480 n. 2, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994); *see also* 28 U.S.C. § 1738, and the controlling Utah authority is *Brigham Young University v. Tremco Consultants, Inc.*, 156 P.3d 782, 791 (Utah 2007) .[6]

Tremco clearly distinguishes an order in post-judgment collection proceedings from a final judgment entered in a civil action. The district court erred by disregarding this basic distinction. Under *Tremco*, the only rights that can be adjudicated in post-judgment collection proceedings are the judgment debtor's. Because Nikols was not the judgment debtor, his rights could not have been adjudicated by the State Court's order, and the district court erred by ruling that they were.

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[6] Although state law dictates the criteria to be applied to determine the preclusive effect of the State Court's order, federal law determines whether the district court's application of those criteria is reviewed de novo or for abuse of discretion, *Andrews v. Columbia Gas Transmission Corp.*, 544 F.3d 618, 625 n. 7 (6th Cir. 2008); and as a matter of federal law, "[t]he application of res judicata is a question of law" reviewed without deference to the district court. *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005). As it happens, Utah law prescribes the same standard. *See, e.g., Grynberg v. Questar Pipeline Co.*, 70 P.3d 1, 7 (Utah 2003) ("A district court's application of res judicata presents a question of law, which we review for correctness").

The district court reasoned that the State Court gave Nikols due process before entering its order, and therefore that order constitutes a final judgment. But whether a final judgment was entered and whether due process was afforded are two separate issues, and the district court erred by collapsing them into a single inquiry. Moreover even if Nikols was afforded all of the process due to a party challenging a writ in post-judgment collection proceedings, Utah law requires more process than that before the rights of a stranger to the judgment are adjudicated, and the process afforded was insufficient to the latter purpose.

Nikols is not challenging the State Court's order, or the Utah Court of Appeals' affirmance. The State Court had to decide whether to discharge Chesnoff's writ; and the Utah Court of Appeals affirmed that the State Court, on the record before it, was not required to. *Tremco* did not require any different result and Nikols does not challenge either disposition.

What *Tremco* forbids is the ascription of preclusive effect to the State Court's order, to prevent Nikols from now obtaining a proper adjudication of his rights in "a civil action . . . commencing with the filing of a summons and complaint and not the abbreviated post-judgment collection procedures of rule 69." *Tremco*, 156 P.3d at 790. Because the district court's elevation of the State Court's order in post-judgment collection proceedings to the

dignity of a judgment is contrary to Utah law as declared by Utah's highest court, this Court should reverse.

ARGUMENT

I.
THERE IS NO RES JUDICATA BECAUSE THERE WAS NO FINAL JUDGMENT

The district court began its analysis by quoting the following standard:

> 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 not have a full and fair opportunity to litigate the claim in the prior suit.

App. at 151-52, Decision at 8-9 (quoting *MACTEC*, 427 F.3d at 831). "The *res judicata* effect of state court decisions … is a matter of state law," *Heck*, 512 U.S. at 480 n. 2, and the standard quoted by the district court is "Tenth Circuit law," *MACTEC*, 427 F.3d at 831, not Utah law. At this general level, substituting "Tenth Circuit law" for Utah law was harmless error because Utah law gives the same recitation of elements, albeit (sometimes) in different order:

> Claim preclusion bars a cause of action only if the suit in which that cause of action is being asserted and the prior suit satisfy three requirements. First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

Madsen v. Borthick, 769 P.2d 245, 247 (Utah 1988). But the district court prejudicially departed from Utah law in its interpretation and application of the "final judgment" element, in particular.

As the district court correctly observed, "[c]oncerning the first element, the issue is whether the [State Court's] post-judgment determination of Plaintiff's property interest in the parcels constitutes a final judgment." App. at 152, Decision at 9. If the post-judgment order is not a final judgment then there can be no preclusion. As explained below, under Utah law the State Court's post-judgment order is not a final judgment, and thus giving it preclusive effect was error.

A. A Due Process Limitation Prescribed by Federal Law Was Improperly Substituted for the Final Judgment Requirement of Utah Law

The district court began its explication of the "final judgment" element with the unobjectionable proposition that "[a] final judgment requires due process of law." App. at 152, Decision at 9. However, the district court then converted this requirement into a definition of "final judgment": "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." *Id.*

This transformation of the due process *requirement* into a full and complete *definition* of "final judgment" was error.

The due process *requirement* appears in this Court's *MACTEC* opinion, from which (as noted above) the district court drew its formulation of res judicata. In *MACTEC*, this Court first explained:

> Under Tenth Circuit law, 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 these requirements are met, res judicata is appropriate unless the party seeking to avoid preclusion did not have a "full and fair opportunity" to litigate the claim in the prior suit.

MACTEC, 427 F.3d at 831 (citations omitted). Then, in a footnote, this Court further clarified:

> In a number of our cases, we have characterized the "full and fair opportunity to litigate" as a fourth requirement of res judicata. However, as we noted in *Yapp,* the absence of a full and fair opportunity to litigate is more appropriately treated as an exception to the application of claim preclusion when the three referenced requirements are met.

Id. at n. 6 (citations omitted); *see also Conopco, Inc. v. Roll Int'l*, 231 F.3d 82, 87 (2nd Cir. 2000) ("If the proceedings of a state trial court comported with due process, every federal court must afford the final judgment entered therein the same preclusive effect it would be given in the courts of that state.").

This Court has recognized that "the absence of a full and fair opportunity to litigate is … *an exception* to the application of claim preclusion *when the three referenced requirements*"—viz., "(1) a final judgment . . . (2) identity of the parties . . . and (3) identity of the cause of action"—"are met." *MACTEC*, 427 F.3d at 831 n. 6 (emphasis added). Thus "a full and fair opportunity to litigate"—i.e., due process—is not a *substitute* for any of those "referenced requirements" but is instead a separate issue. In particular, "final judgment" must mean something more (or at least other) than "proceedings [that] provide for due process," and the district court erred by equating the two. *See* App. at 152, Decision at 9.

The district court's equation of due process with final judgment is an unsound interpretation of federal law, as set forth in *MACTEC*. More importantly, it is also at odds with Utah law, as developed inter alia in *Buckner v. Kennard*, 99 P.3d 842 (Utah 2004). The issue in *Buckner* was whether to give nonmutual preclusive effect to arbitration decisions. *Buckner* adopted "a bright-line rule" "that nonmutual preclusive effect will not be given to arbitration decisions unless the parties have expressly so agreed" inter alia because under the competing "case-by-case approach," "[a] determination of this issue would depend on whether a reviewing court finds that the arbitration proceedings offered the losing party a full and fair

opportunity to litigate." *Id.* at 849. Parties should not be left without guidance as to the preclusive effect of a proceeding until some other court decides whether "the losing party [had] a full and fair opportunity to litigate." Fairness requires that the parties know the preclusive effects of a proceeding—i.e., whether or not they have been "called upon to defend their interests in the manner afforded a defendant in a civil action," *Tremco*, 156 P.3d at 789—before and during a proceeding, not after.

B. Under Utah Law, the State Court's Order Is Not a Final Judgment

1. Utah Law Draws a Bright Line between Orders in Post-Judgment Collection Proceedings and Final Judgments Entered in Civil Actions

The district court's res judicata ruling is predicated on an order entered by the State Court in post-judgment collection proceedings "[i]n April 2008, following post-judgment discovery and hearing." App. at 146, Decision at 3. Earlier, "[i]n August 2007," the State Court had entered a judgment "awarding [Chesnoff] $190,000 in fees" against Michael, not Nikols, App. at 145, Decision at 2; but that judgment is against Michael, only, and has nothing to do with the district court's ruling that Nikols' claim is precluded. The district court's characterization of the State Court's post-judgment order as a final judgment cannot be reconciled with *Tremco*, in which the Supreme Court of Utah drew a bright line between a judgment

entered at the conclusion of a civil action that establishes liability, on the one hand, and post-judgment collection procedures to enforce an adjudicated liability, on the other.

In *Tremco*, Brigham Young University ("BYU") first obtained a judgment against SoftSolutions, Inc., and then obtained a supplemental order in post-judgment collection proceedings authorizing BYU to satisfy its judgment from assets held by Kenneth W. Duncan, an officer of SoftSolutions, and other associated individuals and entities. The Supreme Court of Utah reversed, ruling that "Duncan et al. were denied their requisite measure of due process of law when the district court extended liability to them for the SoftSolutions judgment under the provisions of the July 2002 supplemental order," *Tremco*, 156 P.3d at 788, because "Duncan et al.," like Nikols, "have never been called upon to defend their interests in the manner afforded a defendant in a civil action," *id.* at 789. As explained below, the district court's reasoning and conclusions contravene *Tremco*'s.

As *Tremco* pointed out, "rules of civil procedure lend operational expression to the abstract constitutional promise of due process." *Tremco*, 156 P.3d at 788. Because "[t]he same process is not . . . due everyone who comes before the court," *id.* at 788, Utah's rules prescribe distinct procedures by which liability may be established, on the one hand, and by

which it may be enforced, on the other. Liability may only be established by entry of judgment on a claim, and "a claim . . . 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." *Tremco*, 156 P.3d at 790. But "[o]nce a judgment has been entered against a party, he is exposed to a deprivation of his property with few opportunities to object or seek judicial intervention on his behalf." *Id.*

"A judgment debtor appears in court having consumed his ration of due process and with his property exposed in summary proceedings." *Id.* at 788. Here, Nikols did not come into the State Court's post-judgment collection proceedings as "[a] judgment debtor . . . having consumed his ration of due process." The judgment debtor was Michael, not Nikols.

2. Because Nikols' Post-Judgment Challenge to Chesnoff's Writ Was Not a Civil Action it Did Not Result in a Final Judgment

The district court nevertheless held that because Nikols "took full advantage" of the procedure provided by Utah law "for claimants to an interest in property to oppose . . . a writ of execution," "the . . . procedure was a final judgment." App. at 153, Decision at 10. This reasoning stands

rejected by *Tremco*; which, while acknowledging that "Rule 69 (h)(1)[7] recognized the possibility that the party who held the property subject to execution might object to the execution and extended to him the right to challenge the validity of the writ of execution," went on to hold: "This provision was not intended, however, to provide an alternative form of summary adjudication of claims that would otherwise be required to be prosecuted as civil actions." *Id.* at 791.

Because the procedures Nikols employed to object to and challenge Nikols' writ "[were] not intended . . . to provide an alternative form of summary adjudication of claims that would otherwise be required to be prosecuted as civil actions," *id.* at 791, it was wrong to hold that Nikols' invocation of those procedures somehow effected "summary adjudication" of his claims. Nikol's post-judgment objection and challenge to "the validity of the writ" is no substitute for a final judgment entered on a claim "prosecuted in the manner prescribed in the Utah Rules of Civil Procedure, commencing with the filing of a summons and complaint." *Tremco*, 156 P.3d at 790.

[7] The Utah Rules of Civil Procedure governing collection procedures were reorganized in November 2004. *See Tremco,* 156 P.3d at 785 n. 2. The hearing provisions formerly comprising rule 69(h) now appear in rule 64E(d).

C. Even if Due Process Were the Standard, Nikols Did Not Receive the Full Spectrum of Due Process Required for a Final Judgment

As explained above, the district court erred by collapsing two distinct requirements for res judicata—the final judgment element and the due process limitation—into the single inquiry: was there due process. The district court also erred by equating the State Court's post-judgment order with a final judgment: under *Tremco*, an order in post-judgment collection proceedings is not a final judgment. But even if the district court's major premise—that any ruling entered after enough process constitutes a final judgment—could be sustained, still this Court should reverse because the district court's minor premise—that the post-judgment proceedings in the State Court afforded the full process due—is incorrect.[8]

To afford due process

> a cause of action must . . . 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.

Tremco, 156 P.3d at 790. The State Court proceedings relied on by the district court failed to provide sufficient process to support entry of a final

[8] Sufficiency of process "is a question of law subject to de novo review." *Public Serv. Co. of Okla. v. N.L.R.B.*, 318 F.3d 1173, 1182 (10th Cir. 2003).

judgment, and hence the application of res judicata, in at least two respects. First, Chesnoff presented no complaint to the district court, either by or against Nikols, which placed his ownership of the Parcels at issue. Thus Nikols was never "called upon to defend [his] interests in the manner afforded a defendant"—or a plaintiff, for that matter—"in a civil action." *See Tremco*, 156 P.3d at 789.

Second, the absence of a complaint placing Nikols' ownership of the Parcels at issue also worked a further forfeiture of Nikols' right to trial by jury. Nikols was (and is) entitled to a jury trial.[9] But like its federal counterpart, Utah Rule of Civil Procedure 38 requires that a jury be demanded in a pleading.[10] Because Nikols' ownership was not put at issue

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[9] *See* Utah Code § 78B-5-101 ("In actions for the recovery of specific real or personal property, with or without damages . . . an issue of fact may be tried by a jury, unless a jury trial is waived or a reference is ordered."); *Hansen v. Stewart*, 761 P.2d 14, 15 (Utah 1988) ("There is a right to a jury trial on all questions of fact in any action to determine the right to possession of real property"); *Holland v. Wilson*, 327 P.2d 250, 251 (Utah 1958) ("an action to quiet title is an action at law and either side upon request is entitled to a jury trial"); *Norback v. Board of Directors of Church Extension Soc.*, 37 P.2d 339, 344 (Utah 1934) ("The questions of whether or not . . . the use has been open, adverse, continuous, visible, notorious, and under claim of right with knowledge and acquiescence, and not merely permissive or by license, are the basic facts to be established, and the plaintiff had a right to have them submitted to a jury.").

[10] Utah's rule, titled "Jury trial of right," provides in part:

> (b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by paying the statutory jury fee and

by a complaint tried to judgment, Nikols could not demand and did not receive the trial by jury to which he was (and still is) entitled.

At least two essential elements required in any civil action by Utah due process law—a complaint and jury trial—were not afforded by the State Court proceedings to which the district court assigned preclusive effect. Thus the district court erred by ruling that those proceedings provided sufficient process to constitute a final judgment under Utah law—even if due process, alone, were sufficient to convert what would otherwise be an order in post-judgment collection proceedings into a final judgment.

D. No Sound Reason Was Given for Characterizing the State Court's Order as a Final Judgment

The district court gave two reasons for equating the State Court's order in post-judgment collection proceedings with a final judgment: "[b]ecause [Nikols] 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." App. at 153, Decision at 10. In other words, according to the district court,

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> serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. . . .
> (d) Waiver. The failure of a party to pay the statutory fee, to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. . . .

the State Court procedure afforded due process; and if Nikols thought otherwise, "[i]f [Nikols] had an objection to the jurisdiction of the state court," then "he should have raised it in the appeal to the Utah appellate courts." *Id.* The district court also concluded that "*Tremco* is distinguishable from the instant case." App. at 153, Decision at 10. But as explained above, Nikols was not afforded the full spectrum of process required to support a final judgment. And as explained below, the State Court had and did not exceed its jurisdiction to rule on Nikols' challenge to Chesnoff's writ. Finally, *Tremco* was not successfully distinguished.

1. Nikols Had No Ripe Objection to the State Court's Jurisdiction

As noted above, the district court found "that the [State Court's post-] judgment procedure was a final judgment," notwithstanding *Tremco*, because "[u]nlike the *Tremco* parties, [Nikols] did not raise this issue"—i.e., the jurisdiction of the State Court—"in his appeal of the state court's determination in the post-judgment proceeding." App. at 153, Decision at 10. Nikols did not raise the issue because in this case, unlike *Tremco*, there was no issue to raise.

Here the judgment debtor, Michael, held legal title to the Parcels when they were attached. App. at 153, Decision at 10. In the post-judgment proceedings, Nikols asked the State Court to discharge the writ, arguing that

Michael's legal title was not supported by any equitable interest. App. at 50. Nikols could not have objected to the State Court's jurisdiction because Michael's legal title gave Chesnoff something to attach and the State Court had jurisdiction to entertain Nikols' challenge to Chesnoff's writ.[11]

In *Tremco*, by contrast, the judgment debtor did not hold even legal title to the assets at issue in the post-judgment collection proceedings. Instead, BYU simply and baldly "claimed that . . . it was entitled to execute against the property of Duncan et al. to satisfy the Soft-Solutions judgment." *Tremco*, 156 P.3d at 785. Thus there was no interest of the judgment debtor to attach or weigh other than what the trial court would have created by adjudicating the legal title and equitable rights of strangers to the judgment. The *Tremco* trial court had no material to ground its jurisdiction other than what its own orders ostensibly created.

The teaching of *Tremco* is that the jurisdiction of Utah's trial courts in post-judgment collection proceedings does not extend beyond the judgment

[11] The State Court's order includes language which may suggest that it thought it was deciding more than whether to discharge Chesnoff's writ. But only the State Court's order regarding the writ was appealable; what it said about anything else was unappealable dicta. *Cf. Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 n. 7, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982) ("we review judgments, not statements in opinions").

debtor's interests.[12] This teaching is embodied in the applicable Utah Rules of Civil Procedure and was scrupulously observed in the execution process: The "Notice of Real Estate Sale" pursuant to which the January 12, 2010 auction was held described what would be sold as "all right, title and interest of said defendant, Michael John Nikols" in the Parcels, App. at 94; and pursuant to Utah Rule of Civil Procedure 69B, Chesnoff obtained from the sale only "a certificate . . . containing . . . (i)(3) a statement that all right, title, interest of the defendant in the property is conveyed to the purchaser." There was no jurisdictional defect in the State Court proceedings because *Nikols*' rights in the Parcels were not impaired until the district court gave preclusive effect to the State Court's order in *this* case.

Here, the State Court refused to discharge Chesnoff's writ because it concluded that Nikols did not present clear and convincing evidence that Michael held the Parcels in a purchase money resulting trust for Nikols' benefit. In that context and for that purpose *only*, the State Court had jurisdiction to pass on Nikols' evidence. Jurisdiction was not exceeded and

[12] *See Tremco*, 156 P.3d at 788 ("A judgment debtor appears in court . . . with his property exposed in summary proceedings."), 790 ("*Once a judgment has been entered against a party*, he is exposed to a deprivation of his property with few opportunities to object or seek judicial intervention on his behalf [emphasis added]"; "An opportunity for due process mischief arises when a judgment creditor attempts to utilize collection procedures to acquire property . . . in which a non-party claims an interest.").

Nikols was not deprived of due process until the State Court's order was stretched beyond its context, beyond Michael's rights, to foreclose Nikols'.

2. *Tremco* Is Not Distinguishable

According to the district court, "*Tremco* is distinguishable from the instant case" in two respects. App. at 153, Decision at 10. First, "[i]n *Tremco*, the post-judgment proceeding involved the court extending liability to third parties never joined in the suit," whereas here Nikols was "a named party in the post-judgment proceeding." *Id.* Second, "in the present case, unlike *Tremco*, the judgment debtor, Michael, was the record owner of the property." *Id.* As explained below, neither is a valid ground of distinction.

a. *Tremco* Is Not Distinguished by Nikols' Status as a Party to the State Court Proceedings

The district court found *Tremco* inapposite because Nikols was "a named party in the post-judgment proceeding." App. at 153, Decision at 10. In *Tremco*, "[t]he due process issue . . . rest[ed] on a framework of two procedural facts. First, Duncan et al. were not named parties . . . . Second, nowhere . . . does BYU state a cause of action against any of the Duncan individuals or entities." *Tremco*, 156 P.3d at 788. Each gave rise to a distinct deprivation of due process:

- Because Duncan et al. were not named parties they did not receive service of process, *see id.* at 789 ("a court only acquires jurisdiction over a party through proper service of process, which provides notice to the defendant that he is being sued and that he must appear and defend himself"); and
- Because "Duncan et al. . . . have never been called upon to defend their interests in the manner afforded a defendant in a civil action," *id.* at 789, they did not receive "the full array of due process associated with a civil action," *id.* at 791; *see also id.* at 790 ("a civil action [is] commenced by the filing of a complaint and includ[es] 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").

Here, the fact that Nikols was a named party meant the State Court already had jurisdiction over him—it excuses the absence of a summons and obviated the need for service of process—but that is all. Although Nikols was a party to the State Court action, the controlling fact is that Nikols was and is a stranger to the judgment Chesnoff seeks to enforce. A party is not "exposed to a deprivation of his property with few opportunities to object or

seek judicial intervention in his behalf," in accordance with "those rules promulgated to assist in the collection efforts of a judgment creditor," unless and until "a judgment has been entered against [him]," *Tremco*, 156 P.3d at 790; and Chesnoff's judgment is against Michael, not Nikols. Because *Nikols* was "never . . . called upon to defend [his] interests in the manner afforded a defendant in a civil action," *Tremco*, 156 P.3d at 789, he did not receive "the full array of due process associated with a civil action," *id.* at 791.

Again, Nikols is not arguing he was denied the process he was due as the challenger of a writ in post-judgment collection proceedings, where the only issue was whether the trial court would discharge Chesnoff's writ attaching Michael's legal title. But because Nikols' ownership has never been tried in a civil action, which "means a proceeding subject to the full spectrum of due process safeguards," *Tremco*, 156 P.3d at 791, Nikols still has not received all the process he is due before his rights as the Parcels' undisputed purchaser and sole possessor could be cut off. The State Court's order did not violate Nikols' due process rights. But the district court's ascription of preclusive effect to that order does. *See Richards v. Jefferson County*, 517 U.S. 793, 797, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996)

("extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is 'fundamental in character'").

b. Michael's Record Ownership Does Not Defeat Nikols' Right to a Trial on the Merits

The second distinction marked by the district court is that "in the present case, unlike *Tremco*, the judgment debtor, Michael, was the record owner of the property." App. at 153, Decision at 10. But property rights are property rights, whether evidenced by record ownership, arising from a purchase money resulting trust, or acquired through adverse possession. Although Michael's record ownership might create certain presumptions sufficient to justify the State Court's writs of attachment and even execution, it does not extinguish either Nikols' property rights, whatever those are; or his attendant due process rights. *See Holland*, 327 P.2d at 252 ("the mere fact that the naked legal title rests in the United States of America is not sufficient to deprive plaintiff of his right to have a jury adjudge the issues of fact in determining the beneficial title and the right to possession of the mining claims").

As noted above, Michael's paper title does explain why the State Court had jurisdiction both to issue Chesnoff's writ and to hear Nikols'

challenge to that writ. But it does not transform the State Court's order into a final judgment.

II.
UTAH LAW DISFAVORS THE APPLICATION OF RES JUDICATA TO PERPETUATE INJUSTICE

As set forth above, the district court's ruling does not comport with the letter of Utah law, which (1) clearly distinguishes an order in post-judgment collection proceedings from a final judgment entered in a civil action, (2) permits only the judgment debtor's rights to be adjudicated in post-judgment proceedings, and (3) requires more process than Nikols was afforded before his rights can be cut off. Its ruling also violates the spirit of that law, which "resolve[s] all doubts in favor of permitting parties to have their day in court on the merits of a controversy." *Baxter v. Department of Transportation*, 705 P.2d 1167, 1169 (Utah 1985).

Utah is self-consciously moderate in its res judicata jurisprudence. Thus, e.g., *Baxter* first "recognize[d] that a few jurisdictions hold that a party who does nothing more than appear as a witness is bound by the action, especially where the witness could have intervened"; but went on to hold: "We decline to follow those jurisdictions since we resolve all doubts in favor of permitting parties to have their day in court on the merits of a controversy." *Baxter*, 705 P.2d at 1169.

Moreover, "doctrines designed to establish the stability of judgments and decrees must yield to the overriding principle that in our system of justice the essential integrity of the adjudicatory process must be preserved," and "[o]ne who would destroy that integrity cannot plead as a defense that his fraud on the system of justice must be protected in the name of preserving judgments." *St. Pierre v. Edmonds*, 645 P.2d 615, 618 (Utah 1982).

> [T]he courts should not forsake the interests of justice; and when it appears that an egregious deception or oppression may have been practiced, it should neither be condoned nor rewarded. . . . Accordingly . . . where . . . there is a substantial likelihood . . . that a party was so cheated, imposed upon, or unfairly dealt with that it should shock the conscience of the court to allow it to stand, the court should resolve doubts in favor of permitting the parties to present their evidence and have the issues determined.

McBride v. Jones, 615 P.2d 431, 433 (Utah 1980).

Here, Chesnoff admits that Michael, not Nikols, is his sole judgment debtor; and that Nikols, not Michael, bought and paid for the Parcels by which he seeks to have the judgment satisfied. App. at 20, 133. Chesnoff tried to elbow the federal government aside in Michael's federal criminal case by solemnly advising Judge Cassell of the district court that the Parcels were Nikols', not Michael's; then obtained from the State Court his own writ attaching the Parcels to satisfy his own claim against Michael by submitting

a perjurious affidavit falsely swearing that he was "unaware of any other persons or entities besides the federal government presently claiming an interest in any of the Real Property." App. at 129, 133. And Chesnoff persuaded the State Court to make what two of the three judges of the Utah Court of Appeals that reviewed the State Court's order recognized were questionable rulings, at best, regarding his own former client's Fifth Amendment rights; then substitute an adverse inference for what everyone knew would have been the corroborating testimonial evidence from Michael and Chesnoff that was thus suppressed. App. at 52. *Nikols*, 206 P.3d at 299 (McHugh, J., concurring in the result), 302 (Davis, J., dissenting). In such circumstances, the policy of Utah law is to restrict res judicata to its narrowest confines (if not to disregard it altogether).

CONCLUSION

This Court should reverse and order Nikols' quiet title claim reinstated because, as a matter of Utah law, the State Court's order in post-judgment collection proceedings was not a final judgment.

ORAL ARGUMENT STATEMENT

Oral argument is requested to ensure that any shortcomings in counsel's written presentation are revealed and corrected in colloquy with the Court.

Respectfully submitted on this 13th day of October, 2010.

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements and Type Style Requirements

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,151 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirement of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 14-point Times New Roman.

DATE: October 13, 2010

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CERTIFICATE OF SERVICE

I certify that on this 13th day of October, 2010, a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** was filed with the court and served via ECF and U.S. Mail and Federal Express on the parties set forth below:

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I certify that on this 13th day of October, 2010, I caused the foregoing **APPENDIX** to be served by U.S. Mail and Federal Express on the parties set forth below for delivery on October 14, 2010:

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CERTIFICATE OF DIGITAL SUBMISSION

The undersigned certifies with respect to this filing that no privacy redactions were necessary. This Appellant's Opening Brief, submitted in digital form, is an exact copy of the written document filed with the Clerk. The digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program (using McAfee which is updated daily) and, according to the program, is free of viruses.

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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