NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CW 2180

CHASE BANK USA, N.A., AND DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR JP MORGAN MORTGAGE ACQUISITION TRUST 2007-CH3, ASSET BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-CH3

VERSUS

WEBELAND, INC., MALISE PRIETO, IN HER OFFICIAL CAPACITY AS CLERK OF COURT FOR ST. TAMMANY PARISH, AND RODNEY STRAIN, JR., IN HIS OFFICIAL CAPACITY AS SHERIFF AND EX-OFFICIO TAX COLLECTOR FOR ST. TAMMANY PARISH

Judgment Rendered: December 21, 2011

* * * * * * *

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2010-12725

Honorable Martin E. Coady, Judge

* * * * * * *

KUHN, J CONCURS & ASSIGNS REASONS

James M. Garner
John T. Balhoff, II
Alvin C. Miester, III
New Orleans, LA

Attorneys for
Plaintiffs – Respondents
Chase Bank USA, N.A., et al.

Christopher J. Davidson
John A.E. Davidson
Metairie, LA

Attorneys for
Defendant – Relator
Webeland, Inc.

Carter CJ dissents

McDonald, J. concurs for the reasons assigned by Judge Kuhn.

Malise Prieto Covington, LA	In Proper Person Defendant – Respondent In Her Official Capacity as Clerk of Court for St. Tammany Parish
Rodney Strain, Jr. Covington, LA	In Proper Person Defendant – Respondent In His Official Capacity as Sheriff and Ex-Officio Tax Collector for St. Tammany Parish

* * * * * *

BEFORE: CARTER, C.J., KUHN, GAIDRY, McDONALD, AND WELCH, JJ.

WELCH, J.

In this lawsuit seeking to annul a tax sale and a judgment confirming the tax sale filed by Chase Bank, USA, N.A. (Chase Bank), Webeland, Inc. seeks supervisory review of the trial court's denial of its motion for summary judgment and the overruling of its peremptory exceptions raising the objections of prescription, no cause of action, no right of action, and *res judicata*. For the reasons that follow, we grant the writ, maintain Webeland's exception of *res judicata* as to all of Chase Bank's claims related to the validity of the tax sale, and remand to the trial court for further proceedings.

PERTINENT FACTS AND PROCEDURAL HISTORY

On September 19, 2003, Clifford Keen and his wife, Vickie Keen, purchased a tract of immovable property on Shubert Lane in Covington, Louisiana (sometimes referred to as the "Shubert Lane property"). The sale was recorded in the St. Tammany Parish conveyance records within days of the act of sale. The act of sale identified the purchasers as "VICKIE SUE KEEN, ... WIFE OF/AND CLIFFORD LANE KEEN, JR." The act of sale listed the Keen's mailing address as P.O. Box 1037, Covington, Louisiana 70434. On December 20, 2004, the St. Tammany Parish sheriff/tax collector sent a tax notice and invoice for the Shubert Lane property to the Keens at the address listed in the act of sale. The notice was addressed to "KEEN, CLIFFORD L JR ETUX." The tax notice was returned to the sheriff stamped "NO SUCH NUMBER." On April 14, 2005, the sheriff mailed a delinquent tax notice by certified mail to the same post office box address, addressed again to Clifford Keen "ETUX." The notice was returned to the sheriff undelivered and stamped "NO SUCH NUMBER." The sheriff published notice of delinquent tax debtors identifying Clifford Keen "ETUX" on June 2, 2005.[1]

On June 8, 2005, the Shubert Lane property was sold by the sheriff at a tax

[1] It is disputed whether the sheriff published a prior notice on May 5, 2005, in that same newspaper.

sale to Jackson Title Corp. for delinquent taxes. The tax sale was recorded on June 24, 2005, in the St. Tammany Parish mortgage records. On April 12, 2006, Jackson Title Corp. sold the subject property to Webeland by quitclaim deed. The sale was recorded in the St. Tammany Parish mortgage records on April 28, 2006.

Thereafter, on December 21, 2006, the Keens executed a promissory note in the amount of $183,700.00, payable to Chase Bank. To secure repayment of the note, on that same day, the Keens granted Chase Bank a mortgage over the Shubert Lane property. Chase Bank's mortgage was recorded on January 30, 2007, in the St. Tammany mortgage records, over a year and a half after the tax sale was recorded.

Over three years following the tax sale, on September 12, 2008, Webeland filed an action to confirm and quiet title with respect to five parcels of property, including the Shubert Lane property, in the 22nd Judicial District Court for the Parish of St. Tammany. Webeland named the Keens and Chase Bank as defendants in the litigation. Webeland also sought to have Chase Bank's subsequently recorded mortgage on the Shubert Lane property erased from the public records. Chase Bank was served with the citation and the petition pursuant to the Louisiana Long Arm Statute. The record reflects that on September 30, 2008, a return receipt was signed by "J. Ransom" on behalf of Chase Bank. Chase Bank did not answer the lawsuit, file a reconventional demand therein, or participate in the proceeding in any way. Nor did Chase Bank institute a separate proceeding to attack the validity of the tax sale while the confirmation lawsuit was pending. On April 15, 2009, over six months after Chase Bank was served with notice of the lawsuit, Webeland filed a motion for a preliminary default, which was entered the following day. On April 23, 2009, a default judgment was entered in favor of Webeland and against the Keens and Chase Bank, confirming and quieting Webeland's title to the Shubert Lane property, and ordering the erasure of Chase

Bank's mortgage from the mortgage records. No appeal was taken from the April 23, 2009 judgment.

One year later, on April 23, 2010, Chase Bank and Deutsche Bank National Trust Company[2] (sometimes collectively referred to as "Chase Bank"), filed this lawsuit seeking to annul the June 8, 2005 tax sale and the April 23, 2009 judgment and to have its mortgage reinscribed on the mortgage records. Chase Bank urged that the tax sale was null for lack of constitutionally required pre-sale notice, specifically challenging the sheriff's use of the term "*et ux*," in the notices issued to refer to Vickie Keen and the sheriff's failure to advertise the property twice. Chase Bank urged that due to the lack of proper pre-sale notice to the Keens, the tax sale and its resulting tax deed were null and void and without any legal effect as to the Keens or Chase Bank, and sought to have the court nullify the tax sale and restore title to the property to the Keens.

Chase Bank also sought to annul the April 23, 2009 judgment on four grounds. First, Chase Bank urged that under Louisiana law, a null tax sale due to lack of proper pre-sale notice cannot be confirmed or quieted through an action to quiet title, and therefore, the April 23, 2009 judgment quieting Webeland's title is also null. Second, Chase Bank asserted that the judgment had been obtained through fraud or ill practices because Webeland knew that the Keens were not given proper pre-sale notice of the tax sale and Webeland purposefully obtained the April 23, 2009 judgment against the Keens and Chase Bank with full knowledge that the underlying tax sale was a nullity. Third, Chase Bank asserted that Webeland and its attorney obtained the April 23, 2009 judgment through fraud or ill practices because Webeland did not even own the Shubert Lane property at the time of the judgment, as it was sold by the sheriff to J.A. Resources at a tax

[2] The petition alleges that Chase Bank assigned the Keens' promissory note to Duetsche Bank. Apparently, the original assignment was lost and not recorded. The record reflects that a second assignment was executed on August 23, 2010, and filed in the mortgage records on August 26, 2010.

sale on July 13, 2007, for unpaid property taxes for 2006. Chase Bank also asserted that the default judgment was null under La. C.C.P. art. 1703 because it was different in kind from that demanded in the petition, noting that Webeland's petition to confirm its title incorrectly described the property as being in Section 32, whereas the judgment describes the property as being in Section 22.

In its petition, Chase Bank further sought the reinstatement of its mortgage on the basis of the nullity of the tax sale and the April 23, 2009 judgment. Lastly, Chase Bank urged that it is entitled to damages as the result of the improper cancellation of its mortgage. Chase Bank asserted that the April 23, 2009 judgment was not a final, appealable judgment as Webeland's petition to quiet title named seven identifiable defendants, but the judgment addressed only Webeland's claims against four defendants. Because Webeland failed to have the court designate the judgment as a partial final judgment, Chase Bank insists, the appeal delays never began to run and Webeland's cancellation of Chase Bank's mortgage over the property was premature.

Webeland filed exceptions of no cause of action, no right of action, *res judicata*, prescription, and a motion for summary judgment. In its exception of no cause of action, Webeland asserted that Chase Bank admitted that its mortgage was executed after the tax sale was filed of record, and as a consequence, Chase Bank was deemed to take title subject to the public records and therefore had no cause of action to annul the tax sale. In support of its exception of no right of action, Webeland argued that Chase Bank did not fall in the class of persons disadvantaged by the lack of notice of a tax sale because it is presumed to have notice of the sale by virtue of the public records doctrine. Moreover, Webeland urged, Chase Bank had no right to assert the constitutional due process rights of third parties, the Keens, when it was accorded by law over six months from the date of service of the petition to confirm the tax title to present any objection it

may have had to the cancellation of its mortgage.

In support of its exception of prescription, Webeland argued that Chase Bank's claim of nullity has prescribed by operation of La. R.S. 47:2287[3] because notice of the quiet title action was served on Chase Bank on September 30, 2008, thereby requiring Chase Bank to initiate an annulment action within six months, or by March 31, 2009. Webeland points out in brief that it waited six months before taking any action in the confirmation lawsuit.

In support of its *res judicata* exception, Webeland urged that Chase Bank is precluded from re-litigating the issues of notice of the tax sale resolved by the final judgment confirming and quieting Webeland's title and ordering the cancellation of Chase Bank's mortgage. Webeland submitted an "Affidavit of Long Arm Statute Service," in which the affiant attested that she transmitted citation and the petition to Chase Bank on September 24, 2008. The affidavit of service contains a certified receipt addressed to Chase Bank that was signed by J. Ransom on September 30, 2008.[4]

Webeland's motion for summary judgment attacked Chase Bank's claims of: (1) lack of notice; (2) nullity of the confirmation judgment on the basis that it was obtained by fraud or ill practices; (3) nullity of the confirmation judgment under La. C.C.P. art. 1703; and (4) the alleged non-finality of the judgment confirming the tax title and cancellation of Chase' Bank's mortgage inscription.

Webeland also filed a reconventional demand against Chase Bank, alleging unfair trade practices and abuse of process. Chase Bank responded by filing peremptory exceptions raising the objections of prescription, no right of action, and

---

[3] Former La. R.S. 47:2228 provided that, after a lapse of six months from the date of service of the petition to quiet title and citation, judgment quieting title shall be entered "if no proceeding to annul the sale has been instituted."

[4] Also appearing in the record is a "Cash Sale Without Warranty Deed" dated June 24, 2010, by which Clifford and Vickie Keen transferred their interest in the Shubert Lane property to Webeland. This instrument was recorded the same day.

no cause of action.

Following a hearing, the trial court denied Webeland's motion for summary judgment and overruled all of Webeland's exceptions. In written reasons for judgment, the trial court found that identifying Vickie Keen as "*et ux*" in the pre-sale notices was insufficient under Louisiana law to give her notice of the tax sale. The court ruled that because pre-sale notice was improper, the 2005 tax sale was an "absolute nullity" under La. C.C. art. 2030, which provides that contracts violating a rule of public order are absolutely null. The court further held that the tax sale, being an "absolute nullity," could not be confirmed, and overruled the exceptions of no cause of action and denied the motion for summary judgment on that basis. Additionally, the court overruled exception of prescription upon finding that prescription does not run against "absolutely null" acts pursuant to La. C.C. art. 2032. In overruling the *res judicata* exception, the trial found that an "absolutely null" judgment based on an "'absolutely null' tax sale" is not valid and cannot support an exception of *res judicata*. Finding that La. C.C. art. 2030 allows any person or even the court on its own motion to invoke an absolute nullity, the court overruled Webeland's exception of no right of action.

Webeland filed a writ application with this court seeking supervisory review of the overruling of its exceptions and the denial of its motion for summary judgment. On March 23, 2011, the trial court heard Chase Bank's objections to Webeland's reconventional demand, but took the matter under advisement pending this court's ruling on Webeland's writ application. On May 2, 2011, this court granted a writ of certiorari and ordered that new briefs be filed, the record be forwarded to this court, and the matter be set for oral argument. **Chase Bank USA v. Webeland, Inc.**, 2010-2180 (La. App. 1st Cir. 5/2/11)(unpublished writ action).

DISCUSSION

In its brief, Webeland asserts five assignments of error, as follows:

1. The trial court erred in failing to find that the plaintiff's alleged claim had prescribed under the six month prescriptive period set forth in Louisiana Revised Statute 47:2287.

2. The trial court erred in its failure to dismiss the plaintiff's suit for failure to state a cause of action, since the plaintiff admits in its own petition that it obtained a mortgage on the property that was already sold to Webeland for unpaid taxes.

3. The trial court erred in allowing Chase Bank to stand in the shoes of the Keens to assert the constitutional rights of a third party.

4. The trial court erred in failing to dismiss this case on the basis of *res judicata*, since all the issues raised in this suit have already been confirmed by a validly obtained final judgment.

5. The trial court erred in failing to grant summary judgment in favor of Webeland since there are no genuine issues of material fact that the issue of notice was resolved by prior judgment, that the Keens already entered into a settlement with Webeland regarding the tax sale, and the Keens already transferred their ownership interest to Webeland, precluding any notice argument on behalf of the Keens.

Because we find merit in Webeland's fourth assignment of error, we pretermit discussion of its remaining assignments of error.

Res Judicata

The doctrine of *res judicata*, codified in La. R.S. 13:4231, bars relitigation of all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation. See La. C.C.P. art. 425. It applies to all such matters that have been previously litigated and decided, as well as those that have never been litigated but should have been advanced in an earlier suit. **Stroscher v. Stroscher**, 2001-2769 (La. App. 1st Cir. 2/14/03), 845 So.2d 518, 525. Implicit in the concept of *res judicata* is that a party had the opportunity to raise a claim in the first adjudication but failed to do so. *Id.*

The doctrine of *res judicata* is based on the conclusive legal presumption afforded to a thing previously adjudged between the same parties. **Labiche v. Louisiana Patients' Compensation Fund Oversight Board**, 98-2880 (La. App. 1st Cir. 2/18/00), 753 So.2d 376, 380. A final judgment acquires the authority of a

"thing adjudged" as to those issues presented in the pleadings and conclusively adjudicated by the court. **Lee v. Twin Brothers Marine Corporation**, 2003-2034 (La. App. 1st Cir. 9/17/04), 897 So.2d 35, 37.

Res judicata is *stricti juris* and may not be invoked unless all of its essential elements are present and each necessary element has been established beyond all question. The doctrine is not discretionary, and mandates the effect to be given to final judgments. **Stroscher**, 845 So.2d at 525. Under La. R.S. 13:4231[5], a second action is precluded when all of the following criteria are satisfied:

> (1) the judgment is valid;
>
> (2) the judgment is final;
>
> (3) the parties are the same;
>
> (4) the cause or causes of action asserted in the second suit existed at the time of final judgment in the first litigation; and
>
> (5) the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation.

Burguieres v. Pollingue, 2002-1385 (La. 2/25/03), 843 So.2d 1049, 1053.

The "valid judgment" element requires that the judgment in the first litigation be rendered by a court with jurisdiction over the subject matter after proper notice was given. *Id.* The St. Tammany Parish district court had subject matter jurisdiction over Webeland's lawsuit seeking to confirm its tax title and

---

[5] Louisiana Revised Statutes 13:4231 provides as follows:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

erase Chase Bank's mortgage from the public records, and the record reflects that Chase Bank was served with notice of the lawsuit. We further note that Chase Bank does not attack the propriety of the notice of the confirmation proceeding in its nullity action. Therefore, we find that for the purpose of the *res judicata* exception, it is undisputed that Chase Bank had proper notice of the confirmation proceeding.

A final judgment, for the purposes of *res judicata*, "is one that disposes of the merits in whole or in part." *Id.* The judgment confirming Webeland's title as to the Keens and ordering the erasure of Chase Bank's mortgage from the public records is clearly a final judgment as to the Keens and Chase Bank as the judgment entirely disposed of Webeland's claims and granted Webeland all of the relief it sought against the Keens and Chase Bank. Chase Bank did not appeal the default judgment, nor is there any evidence showing that any of the defendants in the quiet title litigation filed an appeal of the default judgment.

The third requirement of *res judicata* is that the parties in both suits are the same. The parties are the same in both suits when they appear in the same capacities in both suits. **Burguieres**, 843 So.2d at 1053-1054. Webeland initiated the first lawsuit to quiet title and erase Chase Bank's mortgage from the public records in its capacity of the owner of property purchased at a 2005 tax sale; it defends the instant litigation in that same capacity. Chase Bank was made a party in the first litigation as the holder of a mortgage on the property sold at the 2005 tax sale; it pursues the instant action as a holder of a mortgage on the property sold at the 2005 tax sale. Therefore, the requirement that the parties be the same in both lawsuits is clearly met.

We further find that the fourth and fifth elements of *res judicata*, that the cause or causes of action asserted in the second suit existed at the time of final judgment in the first litigation and arise out of the transaction or occurrence that

was the subject matter of the first litigation, are met. Chase Bank's cause of action for nullity of the tax sale and reinscription of its mortgage arises out of the 2005 tax sale and questions the validity of the tax sale through which Webeland claims its title. Webeland's action to confirm the tax title and have Chase Bank's mortgage erased from the public records arises from the same tax sale. Moreover, any challenge Chase Bank may have had to the invalidity of the tax sale based on improper notice could have been raised by Chase Bank in the confirmation proceeding or in a separate proceeding after Chase Bank was served with notice of Webeland's confirmation lawsuit. See La. R.S. 47:2228. Chase Bank did neither, but waited until a year after the default judgment had been rendered to contest the tax sale. We find that because Chase Bank clearly had an opportunity to contest the validity of the tax sale and the erasure of its mortgage from the public records based on improper notice in the first litigation, but failed to do so, pursuant to La. R.S. 13:4231, any cause of action Chase Bank may have had attack the validity of the tax sale and erasure of its mortgage based on improper notice has been extinguished and merged into the final default judgment.

Because all of the requirements for the application of *res judicata* have been met, the April 23, 2009 final judgment, as to Webeland and Chase Bank, has acquired the authority of a "thing adjudged." Nevertheless, Chase Bank asks this court to ignore the preclusive effect of *res judicata*. It relies on **Sutter v. Dane Investments, Inc.**, 2007-1268 (La. App. 4th Cir. 6/4/08), 985 So.2d 1263, writ denied, 2008-2154 (La. 11/14/08), 996 So.2d 1091, in which the court, under similar circumstances, refused to give a judgment confirming a tax title preclusive effect in a subsequent lawsuit seeking to annul a tax sale.

We disagree with the holding in **Sutter**. By disregarding the preclusive effect of *res judicata*, the court in **Sutter** cast doubt upon the efficacy of a suit to quiet a tax title. See Peter S. Title, *Louisiana Real Estate Transactions*, v. 17 § 23.

And while we recognize that the legislature has authorized relief from the *res judicata* effect of a judgment when "exceptional circumstances" are present, we do not find such to be present in this case. See La. R.S. 13:4232A(1). Chase Bank is presumed to have had notice of the tax sale, which had been recorded in the St. Tammany Parish mortgage records before the Keens granted Chase Bank a mortgage over the subject property. Furthermore, Chase Bank was made a defendant in and received notice of the confirmation proceeding, but simply chose not to take any action to contest the tax sale. The safety net provided by La. R.S. 13:4232A(1) is no substitute for Chase Bank's unjustified failure to take action to protect its mortgage interest in the Shubert Lane property before the judgment confirming Webeland's tax title was finally adjudicated. See **Mandalay Oil & Gas, L.L.C. v. Energy Development Corp.**, 2001-0993 (La. App. 1st Cir. 8/4/04), 880 So.2d 129, 143-144, writ denied, 2004-2426 (La. 1/28/05), 893 So.2d 72; **Centanni v. Ford Motor Company.**, 93-1133 (La. App. 3rd Cir. 1994), 636 So.2d 1153, 1156, writ denied, 94-1949 (La. 10/28/94), 644 So.2d 656.

This court has previously taken the position that all alleged nullities must be asserted in defense of an action to confirm a tax title when such an action is instituted; otherwise, they become *res judicata* as between the parties to the confirmation suit and their heirs and assigns. See **Warner v. Garrett**, 268 So.2d 92, 97-98 (La. App. 1st Cir. 1972). We reaffirm that position today, and hold that the final judgment confirming Webeland's title and ordering the erasure of Chase Bank's mortgage bars Chase Bank from attacking the validity of the tax sale and seeking reinstatement of its mortgage in this lawsuit. Therefore, the trial court erred in overruling Webeland's exception of *res judicata* as to those claims.

DECREE

For the foregoing reasons, we grant the writ, reverse the October 11, 2010 judgment of the trial court in part, and maintain Webeland Inc.'s peremptory

exception raising the objection of *res judicata* as to all claims in the petition related to the validity of the 2005 tax sale. That portion of Chase Bank, USA, N.A.'s petition for nullity of the tax sale, reinstatement of mortgage, and nullity of the default judgment based on the 2005 tax sale, are hereby dismissed with prejudice. The case is remanded to the trial court for further proceedings consistent with this opinion.

WRIT GRANTED; REVERSED IN PART; PEREMPTORY EXCEPTION OF *RES JUDICATA* MAINTAINED; DISMISSED WITH PREJUDICE IN PART; AND REMANDED.

CHASE BANK, USA, N.A., ET AL.

VERSUS

WEBELAND, INC., ET AL.

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

NO. 2010 CW 2180

KUHN, J., concurring.

I concur in the dismissal with prejudice of that portion of Chase Bank's petition for nullity of tax sale, reinstatement of mortgage, and nullity of default judgment that is based on the 2005 tax sale. Chase Bank was served on September 30, 2008, with notice of the suit filed by Webeland to quiet and confirm title to the Shubert Lane property, as well as for erasure from the public records of Chase Bank's mortgage on that property. Chase Bank had six months from the date it was served with the suit to quiet title to either file a proceeding to annul the tax sale or to file and serve a reconventional demand attacking the validity of the tax sale. See ***Smitko v. Gulf South Shrimp, Inc.***, 10-0531, p. 5 (La. App. 1st Cir. 10/19/11), ____ So.3d ____. See also La. Const. art. 7, §25(C). It failed to take either action within the requisite six-month period. Instead, Chase Bank filed the present suit to annul the tax sale and default judgment more than eighteen months after it received notice of the tax sale. Since Chase Bank did not timely file a suit to annul or a reconventional demand attacking the validity of the tax sale, its claim of nullity was not properly preserved. Accordingly, Webeland's peremptory exception raising the objection of prescription should have been maintained. See ***Smitko v. Gulf South Shrimp, Inc.***, 10-0531 at p. 6.