

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No.: DA 18-0677

WILLIAM M. RUSSELL,

Plaintiff and Appellant,

vs.

360 Reclaim, LLC, a Montana Limited
Liability Company; and KS VENTURES,
LLC, an Arizona Limited Liability Company,

Defendants and Appellees.

APPELLEE 360 Reclaim, LLC's RESPONSE BRIEF

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STATEMENT OF THE CASE

The District Court action is captioned *William M. Russell v. 360 Reclaim, LLC, a Montana limited liability company and KS Ventures, LLC an Arizona limited liability company*, Montana Eleventh Judicial District Court, Flathead County, Montana Civil Cause No. DV-18-733A (“FCDC DV-18-733A”). KS Venture, LLC (“KSV”) has not been served in the action. The action arises from a prior district court case captioned *KS Ventures, LLC, an Arizona limited liability company v. William M. Russell et al.*, Montana Eleventh Judicial District Court, Flathead County, Montana Civil Cause No. DV-16-389B (“FCDC DV-16-389B”), wherein a Final Amended Judgment was entered in a foreclosure action which included the foreclosure and sale of Parcel 4, a scrap yard, located in Flathead County, Montana owned by William M. Russell (“Appellant” or “Russell”). With respect to possession during the redemption period, the Judgment stated:

The successful purchaser of Parcel(s) of Mortgaged Property at the Sheriff’s Sale will be entitled to possession of said Parcel(s) during the redemption period beginning 10 days following the Sheriff’s Sale. (FCDC DV-18-733A, R@8) (App. 1, Ex. 1, ¶ 14)

On May 4, 2018, Russell appealed the Final Amended Judgment in FCDC DV-16-389B to this Court in Montana Supreme Court Case No. DA 18-0238 (“MTSC DA 18-0238”). Ultimately the scrap yard, Parcel 4, was sold at a Sheriff’s Sale on

June 1, 2018 to 360 Reclaim, LLC (“360 Reclaim”) the Appellee herein. On June 4, 2018, Russell filed Defendant’s Emergency Notice and Petition for Emergency Declaratory Judgment and Order with the District Court in FCDC DV-16-389B seeking an order enforcing his alleged right to possession of the scrap yard under Mont. Code Ann., § 27-8-202 and Mont. Code Ann., § 71-1-229. (FCDC DV-16-389B, R@127.) In doing so, Russell failed to properly and timely seek a stay under the Montana Rules of Appellate Procedure. M.R.App.P. 22(2). *Id.* The District Court declined to act on the request. *See* FCDC DV-16-389B.

Next on June 11, 2018, Russell filed an Emergency Notice and Petition Requesting Declaratory Judgment and Order before this Court also seeking possession of the scrap yard. (MTSC DA 18-0238, R@Motion dated 06/11/2018.) On June 25, 2018, this Court denied Russell’s Emergency Notice and Petition Requesting Declaratory Judgment and Order, finding that Russell had failed to properly seek a stay of enforcement from the District Court in FCDC DV-16-389B. M.R.App.P. 22(2). (MTSC DA 18-0238, R@Order dated 06/26/2018.)

On July 17, 2018, Russell filed the case from which this appeal arises (FCDC DV-18-733A) alleging the exact issue he raised at both the District Court (FCDC DV-16-389B) and Montana Supreme Court (MTSC DA 18-0238) levels; to wit, alleging a right to possession of the scrap yard property during the redemption period. (FCDC DV-18-733A, R@1.) Russell filed his opening brief

before this Court in MTSC DA 18-0238 on August 20, 2018, but did not specifically address the issue of possession which he previously raised at the District Court level (FCDC DV-16-389B) and with the Montana Supreme Court on emergency motions. (MTSC DA 18-0238, R@Opening Brief dated 08/20/2018.) Ultimately, this Court denied his appeal on January 8, 2019. (MTSC DA 18-0238, R@Opinion dated 01/08/2019.)

360 Reclaim moved the District Court to dismiss this matter under Mont.R.Civ.P. 12(b)(6). The District Court entered its Order Granting Defendant 360 Reclaim's Motion to Dismiss in FCDC DV-18-733A on November 1, 2018, finding that Russell was collaterally estopped from re-litigating the issue of possession during the redemption period. (FCDC DV-18-733A, R@14.) It is this Order from which Russell now appeals.

STATEMENT OF FACTS

Appellee/Defendant 360 Reclaim, LLC ("360 Reclaim") is a Montana limited liability company registered and in good standing with the Montana Secretary of State's office. Its managing member is Larry Matson.

Appellant/Plaintiff, William M. Russell, is an individual ("Appellant" or "Russell"). KS Ventures, LLC ("KSV") is an Arizona limited liability company that obtained an Amended Final Judgment against Russell in FCDC DV-16-389B

based upon the foreclosure of a Deed of Trust dated June 14, 2013, recorded June 25, 2013 as Document No. 201300015492, Flathead County, Montana. (FCDC DV-18-733A, R@8) (App. 1, Ex. 1)

Since the filing of the original complaint in FCDC DV-16-389B on May 5, 2016, KSV, the Plaintiff therein, consistently requested that the successful purchaser at the Sheriff's Sale be entitled to possession of the real property purchased during the redemption period. (FCDC DV-18-733A, R@8) (App. 1, Exs. 2, 3, 4) Russell appeared and defended in that action. However, Russell never claimed the scrap yard as his homestead during the underlying action. *See* FCDC DV-16-389B and MTSC DA-18-0238.

Ultimately, KSV obtained an Amended Final Judgment against Russell on March 14, 2018, granting, among other things, a decree of foreclosure and order of sale on certain real property owned by Russell and located in Flathead County Montana. That property included the scrap yard (Parcel 4) more particularly described as:

TRACT A OF CERTIFICATE OF SURVEY NO. 17584, LOCATED IN THE WEST HALF OF THE NORTHEAST QUARTER OF SECTION 15, TOWNSHIP 30 NORTH, RANGE 20 WEST, P.M.M., FLATHEAD COUNTY, MONTANA

(the "Property" or "scrap yard"). (FCDC DV-18-733A, R@8) (App. 1, Ex. 1)

The Amended Final Judgment directed the sale of all the real property,

including the scrap yard, at a Sheriff's Sale. On May 4, 2018, Russell filed an appeal in FCDC DV-16-389B. (MTSC DA 18-0238, R@Notice of Appeal dated 05/04/2018) The Sheriff's Sale was held on June 1, 2018. 360 Reclaim purchased the scrap yard (Parcel 4) at the sale and received a Sheriff's Certificate of Sale evidencing the purchase. (FCDC DV-18-733A, R@8) (App. 1, Ex. 6) The Amended Final Judgment, paragraph 14, provides:

The successful purchaser of Parcel(s) of Mortgaged Property at the Sheriff's Sale will be entitled to possession of said Parcel(s) during the redemption period beginning 10 days following the Sheriff's Sale. (FCDC DV-18-733A, R@8) (App. 1, Ex. 1, ¶ 14)

On June 1, 2018, 360 Reclaim notified Russell, via hand-delivery at the Flathead County Detention Facility where he was detained, of its intent to assume possession of the scrap yard beginning ten (10) days following the sale and demanded that he vacate the scrap yard property. (FCDC DV-18-733A, R@8) (App. 1, Ex. 7) Thereafter, 360 Reclaim took possession of the scrap yard following the ten (10) day grace period, as allowed by order of the Court in Flathead County, Montana Cause No. DV-16-389B. (FCDC DV-18-733A, R@8) (App. 1, Ex. 1, ¶ 14)

On June 4, 2018, Russell filed Defendant's Emergency Notice and Petition for Emergency Declaratory Judgment and Order with the District Court in FCDC DV-16-389B seeking an order enforcing his alleged right to possession of the scrap

yard under Mont. Code Ann., § 27-8-202 and Mont. Code Ann., § 71-1-229. (FCDC DV 16-389B, R @ 127.) In doing so, Russell failed to properly seek a stay under the Montana Rules of Appellate Procedure. M.R.App.P. 22(2). *Id.* The District Court declined to act on the request. *See* FCDC DV-16-389B.

On June 11, 2018, Russell filed an Emergency Notice and Petition Requesting Declaratory Judgment and Order before this Court also seeking possession of the scrap yard. (MTSC DA 18-0238, R@Motion dated 6/11/2018 and FCDC DV-18-733A, R@8) (App. 1, Ex. 8) KSV responded confirming that since the filing of the original complaint in FCDC DV-16-389B on May 5, 2016, (and in subsequent filings) it had consistently requested that the successful purchaser at any Sheriff's Sale be entitled to possession of the real property purchased at the sale during the redemption period. (FCDC DV-18-733A, R@8) (App. 1, Ex. 9) It further noted that in an appellate brief filed before this Court, Russell had also claimed a "rock quarry" as his residence. And, in Flathead County Cause No. DV-17-476C ("FCDC DV-17-476C"), yet another action involving Russell as a named party, the District Court determined Russell had been wrongfully residing in the common area clubhouse at the Sweetgrass Ranch Subdivision. *Id.* On June 25, 2018, this Court denied Russell's Emergency Notice and Petition Requesting Declaratory Judgment and Order and found he had

violated M.R.App.P. 22(1)(a) and 22(1)(c). (MTSC DA 18-0238, R@Order dated 6/26/2018.)

Russell lodged his Opening Brief before the Montana Supreme Court in FCDC DV-16-389B on or about August 20, 2018. (MTSC DA 18-0238, R@Appellant Brief dated 8/20/2018.). Russell filed the instant action on July 17, 2018. (MTSC DA 18-0677, R@1.) Russell failed to serve KSV in this matter. Then 360 Reclaim moved the District Court to dismiss this action pursuant to Mont.R.Civ.P. 12(b)(6). (FCDC DV-18-733A, R@8.) The District Court entered its Order Granting Defendant 360 Reclaim, LLC's Motion to Dismiss on November 1, 2018, finding that Russell was collaterally estopped from relitigating the issue of possession during the redemption period. (FCDC DV-18-733A, R@14.) Ultimately, this Court denied Russell's appeal in MTSC DA 18-0238 on January 8, 2019. (MTSC DA 18-0238, R@Opinion dated 1/8/2019.)

STANDARD OF REVIEW

The Supreme Court reviews a district court's ruling on motions to dismiss under Mont.R.Civ.P. 12(b)(6) as follows:

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. A motion to dismiss under Rule 12(b)(6), M.R.Civ.P., has the effect of admitting all well-pleaded allegations in the complaint. In considering the motion, the complaint is construed in the light

most favorable to the plaintiff, and all allegations of fact contained therein are taken as true.

Bar OK Ranch, Co. v. Ehlert, 2002 MT 12 , ¶ 31, 308 Mont. 140, , ¶ 31, 40 P.3d, 378, ¶ 31, citing *Cut Bank v. Tom Patrick Const. Inc.*, 1998 MT 219, ¶ 6, 290 Mont. 470, ¶ 6, 963 P.2d 1283, ¶ 6 (citation omitted). The District Court's determination that Russell's complaint failed to state a claim because he was collaterally estopped from relitigating the issue of possession during the redemption period is a conclusion of law. The Court's standard of review is whether the tribunal's interpretation of the law is correct. *Id.*

SUMMARY OF ARGUMENT

The District Court properly concluded that Russell's complaint failed to state a claim because he was collaterally estopped from re-litigating the issue of possession during the redemption period. The party seeking to bar a claim based on the doctrine of collateral estoppel must satisfy the following four elements:

- (1) the identical issue raised was previously decided in a prior adjudication;
- (2) a final judgment on the merits was issued in the prior adjudication;
- (3) the party against whom collateral estoppel is now asserted was a party or in privity with a party to the prior adjudication; and
- (4) the party against whom preclusion is asserted must have been afforded a full and fair opportunity to litigate any issues which may be barred.

Kubacki v. Molchan 2007 MT 306, ¶ 12, 340 Mont. 100, 172 P.3d 594.

Paragraph 14 of the Amended Judgment expressly states:

The successful purchaser of Parcel(s) of Mortgaged Property at the Sheriff's Sale will be entitled to possession of said Parcel(s) during the redemption period beginning 10 days following the Sheriff's Sale. (FCDC DV-18-733A, R@8) (App. 1, Ex. 1, ¶ 14)

Russell appealed the Amended Final Judgment on May 4, 2018. (MTSC DA 18-0238, R@17) On June 1, 2018, 360 Reclaim purchased the scrap yard at the Sheriff's Sale under the terms of the Final Amended Judgment which entitled it to possession during the redemption period beginning 10 days following the sale.

Russell filed his Emergency Notice and Petition for Emergency Declaratory Judgment and Order with the District Court in FCDC DV-16-389B on June 4, 2018, seeking an order enforcing his alleged right to possession of the scrap yard during the redemption period under Mont. Code Ann., § 27-8-202 and Mont. Code Ann., § 71-1-229. (FCDC 16-389B, R@127) In doing so, Russell failed to properly seek a stay under the Montana Rules of Appellate Procedure. M.R.App.P. 22(2). *Id.* The District Court declined to act on the request. *See* FCDC DV-16-389B.

On June 11, 2018, Russell filed an Emergency Notice and Petition Requesting Declaratory Judgment and Order in MTSC DA 18-0238 again

expressly requesting possession of the scrap yard during the redemption period. (MTSC DA 18-0238, R@Emergency Notice dated 06/11/2018) On June 25, 2018, this Court denied Russell's Emergency Notice and Petition Requesting Declaratory Judgment and Order and found he had violated M.R.App.P. 22(1)(a) and 22(1)(c). (MTSC DA 18-0238, R@Order dated 6/26/2018) The issue raised in Russell's Emergency Notice and Petition Requesting Declaratory Judgment and Order is identical to the issue at hand; specifically, his alleged right to possession during the redemption period.

ARGUMENT

I. THE DISTRICT COURT DID NOT MISAPPREHEND, OR MISCONSTRUE, FACTS RELATING TO ITS DECISION TO DISMISS THE ACTION PURSUANT TO MONT.R.CIV.P. 12(B)(6).

The District Court properly found:

Further, the statutory rights Russell has alleged entitle him to possession in this *Complaint* are identical to the statutory rights alleged in his ongoing appeal to the Montana Supreme Court, as evidenced in his *Emergency Notice and Petition Requesting Declaratory Judgment and Order*. The Court finds this element is met. (FCDC DV-16-389, R@14, p. 3)

Russell attempts to distort the District Court's order to support his appeal claiming that the relief sought in this matter is not identical to the issue on appeal to the MTSC DA 18-0238. (MTSC DA 18-0677, R@Opening Brief dated 02/20/2019)

and 03/04/2019) The evidence of record demonstrates otherwise. Paragraph 14 of the Amended Judgment expressly states:

The successful purchaser of Parcel(s) of Mortgaged Property at the Sheriff's Sale will be entitled to possession of said Parcel(s) during the redemption period beginning 10 days following the Sheriff's Sale. (FCDC DV-18-733A, R@8) (App. 1, Ex. 1, ¶ 14)

Russell appealed the Amended Final Judgment on May 4, 2018. (MTSC DA 18-0238, R@Notice of Appeal dated 05/04/2018.) On June 1, 2018, 360 Reclaim purchased the scrap yard at the Sheriff's Sale under the terms of the Final Amended Judgment which entitled it to possession during the redemption period beginning 10 days following the sale. It was not until 360 Reclaim notified Russell on June 1, 2018, via hand-delivery to the Flathead County Detention Facility, to vacate the scrap yard property, that Russell claimed a right of possession to the scrap yard property alleging it was his residence. (FCDC DV-18-733A, R@8) (App. 1, Ex. 7)

Russell filed his Emergency Notice and Petition for Emergency Declaratory Judgment and Order with the District Court in FCDC DV-16-389B on June 4, 2018, seeking an order enforcing his alleged right to possession of the scrap yard during the redemption period under Mont. Code Ann., § 27-8-202 and Mont. Code Ann., § 71-1-229. (FCDC DV-16-389B, R@127) In doing so, Russell failed to properly seek a stay under the Montana Rules of Appellate Procedure. M.R.App.P.

22(2). *Id.* The District Court declined to act on the request. *See* FCDC DV-16-389B.

On June 11, 2018, Russell filed an Emergency Notice and Petition Requesting Declaratory Judgment and Order in MTSC DA 18-0238 again expressly requesting possession of the scrap yard during the redemption period. (MTSC DA 18-238, R@ Motion dated 6/11/2018 and FCDC DV-18-733A, R@8) (App. 1, Ex. 8) KSV responded confirming that since the filing of the original complaint in FCDC DV-16-389B on May 5, 2016, (and in subsequent filings) it had repeatedly requested that the successful purchaser at any Sheriff's Sale be entitled to possession of the real property purchased at the sale during the redemption period. (FCDC DV-18-733A, R@8) (App. 1, Ex. 9, p. 6) It further noted that in another case before this Court Russell had also claimed a "rock quarry" as his residence. And again in FCDC DV-17-476C, the District Court determined Russell had been wrongfully residing in the common area clubhouse at Sweetgrass Ranch in 2017. *Id.*

Thereafter on July 17, 2018, Russell filed this action once again seeking possession of the scrap yard during the redemption period despite the fact he had already presented the issue to both the District Court and the Montana Supreme Court. (FCDC DV-18-733A, R@1). Russell filed his opening brief in MTSC DA 18-0238 on August 20, 2018. However, as Appellee has acknowledged, he did not

further address the issue in his opening brief. He had already voluntarily and of his own accord, raised the issue of possession to the scrap yard at both the District Court and Supreme Court level. He did not like the prior rulings so he filed yet another action in district court. (FCDC DV-18-733A, R@1). Clearly, the District Court did not misapprehend or misconstrue the facts supporting its Order. Russell's claimed statutory rights to possession of the scrap yard during the redemption period are identical to those asserted in FCDC DV-16-389B and MTSC DA 18-0238.

Next, Russell takes issue with the District Court's finding that "[t]he statutory rights he alleged entitle him to possession in this *Complaint* are identical to the statutory rights alleged in his ongoing appeal to the Montana Supreme Court, as evidenced in his *Emergency Notice and Petition Requesting Declaratory Judgment and Order*. Again, the previous facts prove that Russell's alleged rights in this action are identical to those litigated in FCDC DV-16-389B and MTSC DA 18-0238.

On June 4, 2018, Russell admits that he filed an emergency request for declaratory judgment with the District Court in FCDC DV-16-389B seeking possession of the scrap yard. (MTSC DA 18-0238, R@Motion dated 6/11/2018) The District Court declined to act on the request. *See* FCDC DV-16-389B. And, on June 11, 2018, Russell petitioned this Court for the same relief expressly

alleging a right to possession of the scrap yard during the redemption period. (MTSC DA 18-0238, R@Motion dated 6/11/2018.) On June 25, 2018, this Court denied Russell's Emergency Notice and Petition Requesting Declaratory Judgment and Order and found he had violated M.R.App.P. 22(1)(a) and 22(1)(c). (MTSC DA 18-0238, R@Order dated 6/26/2018.) The issue raised in Russell's Emergency Notice and Petition Requesting Declaratory Judgment and Order is identical to the issue at hand; to wit, his alleged right to possession during the redemption period. Neither the courts, nor parties, are responsible for how Russell chose to further raise, or not raise, that issue in his briefing.

Finally, Russell challenges the District Court's finding that he acknowledged that he "is appealing the matter currently." (MTSC DA 18-0677, R@Opening Brief dated 02/20/2019 and 03/04/2019). Again, Russell clearly and expressly raised the issue regarding his alleged right of possession to both the District Court in FCDC DV-16-389B and before this Court in MTSC DA 18-0238. *Id.* While he may not have chosen to raise the issue in his opening brief, he clearly recognized his alleged right and presented it to both the District Court (FCDC DV-16-389B) and Montana Supreme Court (MTSC DA-18-0238) for adjudication and as such has been given the full opportunity to litigate the issue. The District Court properly held that Russell was collaterally estopped from bringing the claim yet again. The Court should affirm the District Court's order.

II. THE DISTRICT COURT DID NOT ERR IN FINDING THAT RUSSELL IS COLLATERALLY ESTOPPED FROM PURSUING THIS ACTION.

In the alternative, Russell argues that the collateral estoppel elements have not been satisfied. In Montana, collateral estoppel, or issue preclusion, bars relitigation of issues raised and decided in prior proceedings. The party seeking to bar a claim based on the doctrine of collateral estoppel must satisfy the following four elements:

- (1) the identical issue raised was previously decided in a prior adjudication;
- (2) a final judgment on the merits was issued in the prior adjudication;
- (3) the party against whom collateral estoppel is now asserted was a party or in privity with a party to the prior adjudication; and
- (4) the party against whom preclusion is asserted must have been afforded a full and fair opportunity to litigate any issues which may be barred.

Kubacki v. Molchan 2007 MT 306, ¶ 12, 340 Mont. 100, 172 P.3d 594. The test is conjunctive. All four elements must be satisfied for collateral estoppel to apply. Russell, as the party attempting to defeat application of the doctrine of collateral estoppel, bears the burden of establishing the absence of a full and fair opportunity to litigate. *Baltrusch v. Baltrusch*, 331 Mont 281, 130 P.3d 1267, 1274-1275 (2006). Collateral estoppel applies to all questions, including relitigation of factual matters necessary for the prior judgment. *Estate of Eide v. Tabbert*, 272 Mont. 180, 184, 900 P.2d 292, 295 (1995) citing *Haines Pipeline Const. v. Montana Power*, 265 Mont. 282, 288, 876 P.2d 632, 636 (1994). Here, the facts

demonstrate that Russell is collaterally estopped from relitigating his alleged right to possession during the redemption period.

1. THE ISSUE REGARDING RUSSELL’S ALLEGED RIGHT TO POSSESSION WAS PREVIOUSLY RAISED, AND DECIDED IN FLATHEAD COUNTY CAUSE NO. DV-16-389B.

This appeal is another attempt by Russell to take yet another bite at the proverbial apple. Challenging application of the doctrine of collateral estoppel, Russell argues that the precise *issue* regarding Russell’s alleged right to possession of the scrap yard was not decided in FCDC DV-16-389B and therefore the doctrine of collateral estoppel does not apply. Specifically, Russell takes issue with KSV’s prayer for relief asking “*that the purchaser at said sale be entitled to immediate possession of the property as allowed by law*” focusing on the “as allowed by law” language. (MTSC DA 18-0677, R@Opening Brief dated 02/20/2019 and 03/04/2019).

The evidence of record supports the District Court’s finding that Russell’s right to possession was raised previously in FCDC DV-16-389B. From filing of the original complaint on May 6, 2016, KSV consistently requested that the successful purchaser at the Sheriff’s Sale be entitled to possession of the property purchased during the redemption period. That property included the scrap yard (Parcel 4). (FCDC DV-18-733A, R@8) (App. 1) Russell filed responsive pleadings in that case and was fully aware of the issue. Based upon the evidence

of record, the District Court in DV-16-389B determined in its Amended Final Judgment that respective purchasers would be entitled to possession during the redemption period:

The successful purchaser of Parcel(s) of Mortgaged Property at the Sheriff's Sale will be entitled to possession of said Parcel(s) during the redemption period beginning 10 days following the Sheriff's Sale. (FCDC DV-18-733A, R@8) (App. 1, Ex. 1, ¶ 14)

Russell appealed the Amended Final Judgment in MTSC DA 18-0238 and expressly addressed his alleged right to possession.

On June 4, 2018, Russell admits that he filed an emergency request for declaratory judgment with the District Court in FCDC DV-16-389B seeking possession of the scrap yard. (MTSC DA 18-0677, R@Opening Brief dated 02/20/2019 and 03/04/2019). The District Court declined to act on the request. *Id.* And, on June 11, 2018, Russell petitioned this Court for the same relief expressly alleging a right to possession of the scrap yard during the redemption period. (MTSC DA 18-0238, R@Motion dated 6/11/2018.) KSV responded confirming that since the filing of the original complaint in FCDC DV-16-389B on May 5, 2016, (and in subsequent filings) the Plaintiff, KSV, consistently requested that the successful purchaser at any Sheriff's Sale be entitled to possession of the real property purchased at the sale during the redemption period. (FCDC DV-18-733A, R@8) (App. 1, Exs. 2, 3, 4) It further noted that in yet another appellate brief filed

before this Court, Russell claimed a “rock quarry” as his residence. And in FCDC DV-17-476C the District Court determined Russell had been wrongfully residing in the common area clubhouse at Sweetgrass Ranch. (MTSC DA 18-0238, R@Response to Motion-Stay dated 06/15/2018.) On June 25, 2018, this Court denied Russell’s Emergency Notice and Petition Requesting Declaratory Judgment and Order and found he had violated M.R.App.P. 22(1)(a) and 22(1)(c). (MTSC DA 18-0238, R@Order dated 6/26/2018.)

This Court has analyzed the application of the doctrine of collateral estoppel and the issues or questions to which it may apply, holding:

The term “issue” does not equate with the elements of a cause of action. This Court has previously declared that “[t]he bar that arises from collateral estoppel extends to all questions essential to the judgment and actively determined by a prior valid judgment.” *Brault v. Smith* (1984), 209 Mont. 21, 26, 679 P.2d 236, 238. Collateral estoppel also prevents relitigation of determinative facts which were actually or necessarily decided in a prior action. *Boyd*, 833 P.2d at 151. In addressing whether a change in legal theory precludes the collateral estoppel bar, Moore’s Federal Practice states:

A new contention is not, however, necessarily a new issue. If a new legal theory or factual assertion put forward in the second action is “related to the subject-matter and relevant to the issues” that were litigated and adjudicated previously, “so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged.” (Citations omitted.)

Vol. 1B, Moore’s Federal Practice ¶ 0.443[2], at 760.

Haines Pipeline Const. v. Montana Power, 265 Mont. 282, 288-289, 876 P.2d 632, 636-637 (1994).

In 1998, the Court reaffirmed its holding:

As we have previously declared, “the term ‘issue’ does not equate with the elements of a cause of action.” (Citation omitted.) Rather, “collateral estoppel extends to all questions essential to the judgment and actively determined by a prior valid judgment.” (Citation omitted.) It bars the “relitigation of determinative facts which were actually or necessarily decided in a prior action.” (Citation omitted.) We have also declared that if a new legal theory put forward in a second action is related to the subject-matter and relevant to the issues that were previously decided, collateral estoppel will bar the second action because it could have been raised, even though it was not expressly pleaded. (Citation omitted.) *Rafanelli v. Dale*, 1998 MT 331, 292 Mont. 277, 971 P.2d 371, 374 (1998).

Russell acknowledges that the Final Amended Judgment ordered that the purchaser(s) at the sale would be entitled to possession. (MTSC DA 18-0677, R@Appellant’s Brief dated 2/20/2019.) And he clearly addressed the exact issue in both FCDC DV-16-389B and MTSC DA 18-0238 by filing Emergency Notice and Petitions Requesting Declaratory Judgment and Order seeking possession of the scrap yard in both forums. (MTSC DA 18-0238, R@Motion dated 6/11/2018 and FCDC DV-16-389B, R@127.) Despite that, he argues that the “right” of possession was not litigated. In doing so, Russell relies upon the principle established in Montana case law which acknowledges that collateral estoppel requires that the issue at hand must have been litigated in a prior action. What he fails to apply in his analysis is that a new contention is not necessarily a new issue.

Collateral estoppel also prevents relitigation of determinative facts which were actually or necessarily decided in a prior action. *Haines*, supra. at 636-637.

Here, the issue regarding possession in the foreclosure proceeding during the redemption period was essential and necessary to the judgment and was actively determined by the Amended Final Judgment. Mont. Code Ann., § 71-1-229 allows a debtor to retain possession of property occupied as his or her residence during the one-year redemption period. Obviously, whether or not a purchasing party would be entitled to possession of the foreclosed property is a question essential to the judgment. KSV consistently requested in its foreclosure pleadings that the successful purchaser at the June 1, 2018, Sheriff's Sale be entitled to possession of the property purchased during the redemption period, including the scrap yard property. (FCDC DV-18-733A, R@8) (App. 1, Exs. 2, 3, 4) The purchaser at the foreclosure proceeding is entitled to know if they will receive immediate possession of the subject property or if possession is delayed for a year. Who has the right to possession of foreclosed property is a question essential to the judgment. Russell's argument is illogical and is simply an attempt to relitigate issues already decided in FCDC DV-16-389B.

2. A FINAL JUDGMENT ON THE MERITS WAS ISSUED IN FC-DV-16-389B

Next, Russell claims the judgment was not final as to his alleged right to possession of the scrap yard. Based upon the evidence of record, the Court in

FCDC DV-16-389B determined in its Amended Final Judgment that respective purchasers would be entitled to possession during the redemption period:

The successful purchaser of Parcel(s) of Mortgaged Property at the Sheriff's Sale will be entitled to possession of said Parcel(s) during the redemption period beginning 10 days following the Sheriff's Sale. (FCDC DV-18-733A, R@8) (App. 1, Ex. 1, ¶ 14)

On May 4, 2018, Russell appealed the Amended Final Judgment in DA 18-0238. (MTSC DA 18-0238, R@Notice of Appeal dated 5/4/2018.) He acknowledged finality of the right to possession as determined in FCDC DV-16-389B when he filed an Emergency Notice and Petition Requesting Declaratory Judgment and Order seeking possession of the scrap yard in before both the District Court (FCDC DV-16-289B) and the Montana Supreme Court (MTSC DA 18-0238). (FCDC DV-16-389B, R@127 and MTSC DA 18-0238, R@Motion dated 6/11/2018.) In response to his filing in MTSC DA 18-0238, KSV confirmed that since the filing of the original complaint in FCDC DV-16-389B on May 5, 2016, (and in subsequent filings) it had consistently requested that the successful purchaser at any Sheriff's Sale be entitled to possession of the real property purchased at the sale during the redemption period. ((FCDC DV-18-733A, R@8) (App. 1, Exs. 2, 3, 4) It further noted that in another appeal before this Court involving Russell he had claimed a "rock quarry" as his residence. And in FCDC DV-17-476C the District Court determined Russell had been wrongfully residing in the clubhouse at

Sweetgrass Ranch. (MTSC DA 18-0238, R@Response to Motion-Stay dated 06/15/2018.) On June 25, 2018, this Court denied Russell’s Emergency Notice and Petition Requesting Declaratory Judgment and Order and found he had violated M.R.App.P. 22(1)(a) and 22(1)(c). (MTSC DA 18-0238, R@Order dated 6/26/2018.)

Relying on federal circuit case law, the Court has analyzed application of the doctrine of collateral estoppel and recognized that an appeal need not be exhausted before applying the doctrine of collateral estoppel:

...a judgment that has not been entered as a final judgment because of the pendency or future availability of an appeal may nevertheless have full collateral estoppel effect. *Pharmacia & Upjohn Co. v. Mylan Pharmaceuticals, Inc.* (Fed.Cir.1999), 170 F.3d 1373, 1381 (addressing finality when an appeal is pending); *see also Burlington Northern R.R. v. Hyundai Merchant Marine Co.* (3rd Cir.1995), 63 F.3d 1227, 1233 n. 8 (applying collateral estoppel to issues decided by partial summary judgment based on consideration of “whether the parties were fully heard, whether a reasoned opinion was filed, and whether that decision could have been, or actually was, appealed”) (citation and quotations omitted); *Metromedia Co. v. Fugazy* (2nd Cir.1992), 983 F.2d 350, 366–67, *abrogated on other grounds as recognized by Yung v. Lee* (2nd Cir.2005), 432 F.3d 142, 147–48 (applying collateral estoppel despite the fact that the ruling is not yet appealable); *Christo*, 223 F.3d at 1339 (applying collateral estoppel based on a “substantial order in which [the court] explained its findings” after considering the evidence despite a subsequent settlement hindering entry of final judgment); *Williams v. Commissioner of Internal Revenue* (7th Cir.1993), 1 F.3d 502, 504 (“a judgment final in the trial court may have collateral estoppel effect even though the loser has not exhausted his appellate remedies”); 18A Wright et al., § 4434 at 110 (“[r]ecent decisions

have relaxed traditional views of the finality requirement by applying issue preclusion to matters resolved by preliminary rulings or to determinations of liability that have not yet been completed by an award of damages or other relief”).

Baltrusch, supra, at 1274-1275.

Recitation of federal circuit law demonstrates that the finality requirement does not require exhaustion of all appeal rights. As such, the Amended Final Judgment entered in FCDC DV-16-389B satisfies the second element of the test. The District Court’s Order should be affirmed.

3. RUSSELL WAS AFFORDED A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS ALLEGED RIGHT TO POSSESSION OF THE SCRAP YARD.

The District Court properly found that Russell was afforded a full and fair opportunity to litigate his alleged right to possession of Parcel 4 stating:

The burden of showing an absence of a full and fair opportunity to litigate rests on the party attempting to defeat the collateral estoppel claim. *Baltrusch, supra.* at 1274. Here, while Russell disputes that he was afforded a full and fair opportunity to litigate the issue of possession for Parcel 4 during the action in DV-16-389(B), he acknowledges that he “is appealing the matter currently.” [citation omitted]. Russell’s appeal to the Supreme Court is the appropriate venue to address his dissatisfaction with his opportunity to litigate this issue in the original proceeding. During the pendency of his appeal, Russell cannot satisfy the burden of showing that he has been denied the opportunity to fully and fairly litigate this issue. Russell is now bound to litigating his right to possession through his appeal and cannot concurrently litigate the identical issue in district court. The Court finds all four factors for collateral estoppel are satisfied and this matter is

hereby DISMISSED.

Russell has conceded he was a party to the underlying prior action and adjudication as evidenced by the caption in that case. (FCDC DV-18-733A, R@10, p. 5)

Despite this, Russell argues that he was not afforded the opportunity to litigate his alleged right to possession of the scrap yard because he “did not recognize the need to raise issue with or challenge the right to possession prior to the sale of the property...” (FCDC DV-18-733A, R@10, p. 11). In Montana, ignorance of the law is neither justification nor a viable argument for lack of an opportunity to defend. *Northwest Farm Credit Services v. Lund*, 255 Mont. 114, 841 P.2d 490, 493 (1992). In *Northwest Farm Credit Services*, landowners failed to defend the case, blaming the clerk for their inaction to defend along with a lack of legal knowledge. The Court stated:

Not only is ignorance of the law not an argument for lack of opportunity to defend, but it was the Lunds’ own inaction that caused them to lose their chance to defend. “Every person is bound to take care of his own rights, and to vindicate them in due season, and in proper order. This is a sound and salutary principle of law.” *Federal Land Bank*, 84 Mont. at 111, 274 P. at 291 (quoting *Dunne v. Yund* (1916), 52 Mont. 24, 33–34, 155 P. 273, 276). We also have a maxim of equity that “the law helps the vigilant before those who sleep on their rights.” Section 1–3–218, MCA. A review of the facts indicates that, aside from ignorance of the law, it was the Lunds’ own inaction that caused them to lose their chance to defend in this action.

Id.

Russell has been on notice since filing of the original complaint in FC-DV-16-389B (May, 2016) that KSV has repeatedly requested the successful purchaser at the Sheriff's Sale be entitled to possession of the property purchased during the redemption period. (FCDC DV-18-733A, R@8) (App. 1, Exs. 2, 3, 4) The Court entered its Amended Final Judgment on March 12, 2018, establishing that the purchaser at the Sheriff's sale would be entitled to possession of the property during the redemption period. (FCDC DV-18-733A, R@8) (App. 1, Ex. 1) KSV mailed Russell a Notice of Entry of Judgment on April 13, 2018. (FCDC DV-16-389B, R@124.) Russell filed his Notice of Appeal on May 4, 2018. (MTSC DA 18-0238, R@Notice of Appeal dated 5/4/2018.) Up to that point Russell had never claimed the scrap yard as his homestead. The properties were noticed for a Sheriff's Sale which ultimately occurred on June 1, 2018. Russell was fully afforded the opportunity to challenge the right to possession during the redemption period in the both the prior adjudication and the subsequent appeal. And he did so to the extent of filing emergency motions before both courts.

In his appeal, Russell wrongfully attempts to argue his alleged right to possession under Mont. Code Ann., § 25-13-821 and § 71-1-229. (MTSC DA 18-0677, R@Opening Brief dated 02/20/2019 and 03/04/2019, pp. 26-28.) He further argues that no one has ever disputed that he resided on the property. He is wrong. (MTSC DA 18-0238, R@Response to Motion-Stay dated 06/15/2018, p. 22) In the

event this Court determines that the right to possession was not determined in MTSC DA 18-0238, the proper remedy is to remand the matter back to the District Court for a further determination on the merits.

Finally, Appellant further appears to argue that because he was denied the right to oral argument in FCDC DV-16-389B, he was not afforded the opportunity to fully litigate the alleged right to possession. However, Russell admittedly appealed the summary judgment ruling in FCDC DV-16-389B and the denial of oral argument. Ultimately, this Court denied his appeal of those issues in MTSC DA 18-0238. The Court should affirm the District Court's Order dismissing the action.

III. RUSSELL'S ATTEMPT TO ARGUE THE MERITS OF HIS CLAIM TO POSSESSION OF THE SCRAP YARD DURING THE REDEMPTION PERIOD IS IMPROPER AND IS NOT PROPERLY BEFORE THIS COURT ON APPEAL.

The District Court properly dismissed FCDC DV-18-733A with prejudice under Mont.R.Civ.P. 12(b)(6) finding that Russell was collaterally estopped from bringing the action. Specifically stating:

On March 9, 2018, a final judgment was issued in DV-16-389(B) granting a decree of foreclosure, order of sale, and deciding the issue of possession for Parcel 4. Despite Russell's current appeal, this judgment was final for the purposes of collateral estoppel.

3) Russell concedes that he was a party or in privity with a party to the prior adjudication.

The Court finds this element is satisfied.

(4) Russell was afforded a full and fair opportunity to litigate his alleged right to possession of Parcel 4.

The burden of showing an absence of a full and fair opportunity to litigate rests on the party attempting to defeat the collateral estoppel claim. [citation omitted]. Here, while Russell disputes that he was afforded a full and fair opportunity to litigate the issue of possession for Parcel 4 during the action in DV-16-389(B), he acknowledges that he “is appealing the matter currently.” [citation omitted]. Russell’s appeal to the Supreme Court is the appropriate venue to address his dissatisfaction with his opportunity to litigate this issue in the original proceeding. During the pendency of his appeal, Russell cannot satisfy the burden of showing that he has been denied the opportunity to fully and fairly litigate this issue. Russell is now bound to litigating his right to possession through his appeal and cannot concurrently litigate the identical issue in district court. The Court finds all four factors for collateral estoppel are satisfied and this matter is hereby DISMISSED. (FCDC DV-18-733A, R@14, p. 4)

As the District Court noted, “the doctrine of collateral estoppel is designed to prevent a litigant from filing ‘dubious post-trial motions and appeals and drag[ging] them out as long as possible, with the hope of delaying the preclusive effects of an earlier ruling until he obtains a settlement or inconsistent judgment in the later case.’” [citation omitted]. (FCDC DV-18-733A, R@14, p. 4)

The issue before this Court is whether or not Russell is collaterally estopped from bringing this action, not whether he has a right to possess the Property during the redemption period. Despite this, Russell wrongfully attempts to argue on appeal an issue that is not properly before this Court; more specifically that he is

entitled to possession during the redemption period. This Court does not review issues raised on appeal for the first time. *Jones v. Montana University System*, 2007 Mont. 82, ¶ 23, 337 Mont. 1, 155 P.3d 1247. He further argues that no one has ever disputed that he resided on the property. (MTSC DA 18-0677, R@Opening Brief dated 02/20/2019 and 03/04/2019) He is wrong. (MTSC DA 18-0238, R@Response to Motion-Stay dated 06/15/2018, p. 22) In the event this Court determines that the right to possession was not determined in MTSC DA 18-0238, the proper remedy is to remand the matter back to the District Court for a further determination on the merits.

CONCLUSION

The District Court properly dismissed FCDC DV-18-733A, with prejudice, pursuant to Mont.R.Civ.P. 12(b)(6) finding that Russell was collaterally estopped from bringing the action yet again. As such, the Court should affirm the District Court's Order of Dismissal.

DATED this 16th day of April, 2019.

ROCKY MOUNTAIN LAW PARTNERS, P.C.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced (except that footnotes and quoted and indented material are single spaced); with left, right, top and bottom margins of one inch; and the word count calculated by Microsoft Word is 6,719 words, excluding the Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance.

DATED this 16th day of April, 2019.

ROCKY MOUNTAIN LAW PARTNERS, P.C.

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CERTIFICATE OF SERVICE

I, Bruce Allen Fredrickson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-16-2019:

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