2011 WL 5288945 (Ga.) (Appellate Brief)
Supreme Court of Georgia.

Rita L. JAMES, Appellant,
v.
INTOWN VENTURES, LLC, Appellee.

No. S11A1705.
September 12, 2011.

Fulton County Superior Court Civil Action File No. 2008-Cv-157543

Appellant's Brief

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*1 INTRODUCTION [1]

This is another case where the privatized collectors of property taxes in Fulton County, Georgia have targeted and unconscionably **abused** an **elderly** lady, Rita L. James, by trying to collect from her property taxes allegedly owing by a total stranger for property having an address which does not exist. These collection efforts continued even after Ms. James filed bankruptcy, even after she paid 100% of her debts under a Chapter 13 plan, even after she received an order discharging her debts (and, with it, a supposed fresh start), and even though the Appellee and the trial court were fully aware of the bankruptcy case and the discharge order.

JUDGMENT APPEALED

Ms. James appeals the Order Granting Plaintiff's Motion for Partial Summary Judgment entered April 11, 2011 [R5] and the Order Lifting Bankruptcy Stay and Granting Plaintiffs Motion for Stay of Discovery entered November 19, 2010 [R286].

JURISDICTIONAL STATEMENT

This Court, rather than the Court of Appeals, has jurisdiction over this appeal because this case involves title to land. Ga. Const. 1983, Art. VI, § VI, ¶ III (1).

*2 STATEMENT OF THE CASE

Appellant Rita L. James is 76 years old and suffers from diabetes accompanied by loss of vision. James Affidavit [R293 et seq.], 113. Her sole source of income is the $733 a month she receives from Social Security. R358. In 1964, Ms. James husband, Willie James, bought “Lots 1 and 2, Block C, Arlington Park Place Subdivision”... “being improved property having a house thereon known as 539 Baker Circle” according to the present numbering of houses in the City of Atlanta, Georgia.” (the “James Home”). *Id.* ¶¶ &R314. After purchasing it in 1964, Ms. James and her family resided at the James Home. *Id.* 116. In or about 1978, Ms. James and her husband divorced. Id. ¶7. As part of the divorce, Mr. James conveyed the James Home to Ms. James by a promptly recorded Warranty Deed. *Id.* 118.

Since 1964, Ms. James has continuously resided at the James Home and it has been Ms. James' sole and exclusive home, place of residence, and domicile. Id. ¶9. Throughout the time she has lived in the James Home, Ms. James was entitled to receive and received homestead exemptions from the Fulton County Board of Tax Assessors. Id. In 1994, the mortgage on the James Home was fully paid and thereafter Ms. James owned the home free and clear of any mortgage or security deed. Id. ¶11. The taxes on the James Home have been assessed based on a value which reflects the combination of both lots 1 &2 which, together, have always comprised 539 Baker Circle and these taxes have always been paid. Id. ¶¶11 & 40.

***3** In or about October 2002, Ms. James received a county notice that was not hers. Id. ¶17. She called the number provided in the notice. Id. In a letter dated October 7, 2002, the office of the Fulton County Manager, Customer Service Division, stated:

The Office of the Tax Assessor is responsible for address changes/corrections and I brought your problem to their attention. They told me that the company used for mailing notices picked up your address mistakenly for parcel *ID 14-0178-005-046-5*. This correction has been made and you should not receive further notices for the parcel in question.

(Emphasis added)

Id. & Exhibit D [R315]. Unbeknownst to Ms. James, on November 5,2002 (less than a month after being told that her address had been mistakenly associated with notices for parcel ID 14-0178-005-046-5), a tax sale was purportedly conducted based on eight fifas which: (a) named "Archie R. James, Jr." as the defendant-in-fifa; and (b) purported to be for alleged taxes for property with the address of "[No address] Baker Circle, NW" and parcel "ID 14-0178-005-046-5." R332-R333. The total amount of taxes alleged to be owing by the nonexistent "Archie R. James, Jr." for "[No street number] Baker Circle" was approximately $1,000.00. R316-R331.

Ms. James does not know anyone with the name "Archie R. James, Jr." or any similar name, nor has any person with that name ever resided at the James Home. James Affidavit, ¶¶ 13&14. Moreover, having lived on Baker Circle for more than 46 years, Ms. James had never heard of property having an address of either "0 Baker Circle" or simply "Baker Circle." Id. ¶10. Prior to the tax sale of "[No address] ***4** Baker Circle, NW," Ms. James never received: (1) notice of the assessment of the taxes for said property [Id. 15]; (2) any of the tax bills for said property [Id. 1116]; (3) notice of any delinquency or intent to issue fifas [Id. ¶ (4) notice of any intent to transfer the fifas to third parties [Id. 1119]; (5) twenty day notice of the tax sale [Id. 1120]; (6) ten day notice of the tax sale [Id. 1121]; or (7) notice of levy [Id. ¶¶ & 23].

Ms. James later came to learn that Intown had commenced a lawsuit (the "2004 Lawsuit") based on the fifas issued against "Archie R. James, Jr." for property described as "[No Address] Baker Circle" and with a parcel ID of "14-0178-005-046-5." Id. 11 41. Neither Ms. James nor any person residing in her home were ever served by any sheriffs deputy or marshal with any summons, complaint or other papers relating to the 2004 Lawsuit. Id. 1134. Having received the October 2002 letter from Fulton County and after reading the 2004 Lawsuit, Ms. James believed that it affected someone she did not know and had never heard of (i.e. Archie R. James, Jr.) and a property address that she had never heard of (i.e. "0 Baker Circle"). Id. ¶41. Moreover, the 2004 Lawsuit also referenced the very tax parcel ID 14-0178-005-046-5 that the County, in its earlier letter [R315], had described as having been sent to her in error - a mistake that had supposedly been fixed.

According to the documents relied upon by Intown, a special master was appointed in the 2004 Lawsuit and conducted a hearing at which only Intown's attorney, Allison C. Jett, was present. R56-R101. Notably, however, no witnesses ***5** were sworn or called: instead, "the Special Master heard from [Ms. Jett], received evidence via statements in counsel's place from [Ms. Jett], and received documents into evidence." R57. Based on a series of forms captioned "Process Serve's Entry of Service Notice" [R64-R74], the Special Master concluded that service had been perfected on Ms. James by "personal service." R58. Notably, however, the documents relied upon by the Special Master to prove service on Ms. James: (a) do not include the signature of a sheriff or marshal; (b) include no evidence that the "Bonita Marshall" who allegedly served Ms. James was duly or properly appointed; and (c) unlike other purported proofs of service, does not indicate that it was filed with the Court. Id. A copy of the Special Master's Report was not served on Ms. James [R101], nor is there any evidence whatsoever in the record

demonstrating that Ms. James ever received notice of that report or the Final Judgment and Order which followed [R52]. Indeed, Intown waited nearly three and a half years following the entry of that Judgment to file this action claiming to own a portion of 539 Baker Circle (the "2008 Ejectment Action").

In 2005, however, Ms. James had approximately $7,000 in credit card debt which she was unable to pay on her $733 per month social security income. James Affidavit, ¶43298]. On September 29, 2005, Ms. James filed for protection under Chapter 13 of the United States Bankruptcy Code which case became to be styled as *In re Rita L. James*, Chapter 13 Case No. 05-78523-MHM (the "James Bankruptcy ***6** Case"). R298 & R334. In her petition, Ms. James listed her home at 539 Baker Circle, N.W., Atlanta, Georgia as an asset having a value of $125,000 with no secured debt. R347. With respect to her home, she claimed her statutory exemptions under Georgia law (O.C.G.A. § 44-13-100) and under the Bankruptcy Code (11 U.S.C. §522(b)(2). R351. Consistent with her ignorance of the 2004 Lawsuit and her belief that it did not affect or involve 539 Baker Circle, Ms. James did not list or mention Intown in her bankruptcy schedules. Id. Ms. James proposed a 100 % repayment plan which was confirmed by bankruptcy court order. R362-R364 & R369.

After Ms. James had been performing her Chapter 13 payment plan for several years, the 2008 Ejectment Action caused her to hire the undersigned litigation counsel who was not aware of the bankruptcy filing until mid-February 2009. MT, 12/15/2010, p29. Prior to becoming aware of the bankruptcy filing, the undersigned counsel attempted to pursue discovery by serving notices of depositions [see, e.g. R112, R116, R120] and written discovery (interrogatories [R210], requests for production of documents [R217], and requests for admission [R226]). Discovery was opposed by third parties (e.g. Fulton County Tax Commissioner Arthur Ferdinand [R154]) and by Intown [RR140]. Once litigation counsel learned of the bankruptcy case, notice of that filing together with a copy of the Bankruptcy Court's order ***7** confirming Ms. James repayment plan was promptly given to Intown and the Court [2] . R253-R256. Initially, Intown claimed that the litigation should not be stayed based on its argument that the 2008 Ejectment Action did not involve property of Ms. James bankruptcy estate. R257. Intown, however, filed a supplement stating:

Upon further reflection, while Intown does not agree that this matter should be stayed by Ms. James' bankruptcy action, Intown, out of deference to the bankruptcy court and **in an effort to avoid unnecessary litigation, hereby consents to a stay of these proceedings pending the resolution of Ms. James bankruptcy.**

R260. After agreeing to defer to the bankruptcy proceeding, Intown failed to appear in any way in the James Bankruptcy Case and failed to either file a proof of claim or dispute Ms. James' sworn statement as to her complete and unquestioned ownership of 539 Baker Circle. James Affidavit, 1143 [R298]. On April 17, 2010, the bankruptcy Court entered an order of discharge which Intown itself acknowledged by filing a copy of that order in the record. R280-R282. On May 9, 2010, Intown requested the lifting of the stay imposed by bankruptcy but deny Ms. James the right to pursue discovery. R264. Ms. James' Chapter 13 Trustee filed his final report and accounting and an order was subsequently entered on July 20, 2010 approving the account, discharging the trustee and closing the estate. R336 & R370-372.

***8** On November 19, 2010, the trial court entered an order: (a) lifting "the previously imposed bankruptcy stay;" (b) staying all discovery until after Intown's summary judgment motion could be heard; and (c) setting a hearing on Intown's motion for summary judgment for December 7, 2010. R286. That hearing was subsequently postponed to December 15, 2010. R288. In anticipation of the hearing, Ms. James supplemented her previous opposition to Intown's motion for summary judgment to assert, among other grounds, the existence and discharge obtained in her bankruptcy case. [See, e.g. R389] After the hearing, the trial court granted Intown's motion for summary judgment after characterizing Ms. James' opposition as follows:

Ms. James requests that the Court overturn Judge Campbell's March 31, 2005 Order, claiming that Intown Ventures has no right to or interest in the Property and that the tax sale and subsequent deed were void and invalid due to circumstances which occurred prior to and following the tax sale.

R8. Also included in the trial court's order was the following:

At this point, the Court has no option but to rule on the Motion for Partial Summary Judgment. In so ruling, the Court notes that the Georgia law which permits Fulton County to sell tax liens to private companies for pennies on the dollar and then auction the property at a tax sale can have a disproportionate impact on the **elderly**, the poorly educated, and families which have struggles to maintain their homes in economically challenging times. The practice, though legal, at times breeds misfortune and injustice. The Court urges the Fulton County Commission and the State Legislature to examine the consequences of the law and Fulton County policy which permits this practice, especially since so many other counties in this State have discontinued the practice.

The Court finds that there are no genuine issues of material fact which would preclude the Court from granting summary judgment to Intown ***9** Ventures on County I (ejectment).

The Court GRANTS Intown Ventures' Motion for Summary Judgment as to Count 1.

Intown Ventures seeks all mesne profits it has lost in the form of lost rental income due to Defendant's unlawful possession of the property. The Court finds that Intown Ventures may be entitled to those damages, but the amount of damages must be submitted to a jury for determination in accordance with O.C.G.A. § 44-11-7(a).

As to Intown Ventures claims for trespass (Count II) and nuisance (Count III), Intown Ventures did not seek summary judgment on these claims, and thus, they must also be submitted to a jury for determination. O.C.G.A. § 51-9-1, et seq.

R5-R10. Nowhere in its order did the trial court address or consider the effect of Ms. James' bankruptcy on the issues. This appeal followed [3].

*10 ENUMERATION OF ERRORS

1. The trial court erred by not giving full effect to the bankruptcy proceedings and orders.

2. The trial court erred in giving effect to the order and judgment in the 2004 Lawsuit.

3. The trial court erred in failing to treat Ms. James' pleadings alternatively as a motion to set aside the order and judgment issued in the 2004 Lawsuit.

4. The trial court erred in not setting aside the judgment in the 2004 Lawsuit.

5. The trial court erred in denying Ms. James alternative theory of prescriptive title.

6. The trial court erred in ruling on summary judgment without allowing any discovery.

ARGUMENT AND CITATION OF AUTHORITY

A. The 2008 Ejectment Action was Barred by Ms. James Bankruptcy

1. *The 2008 Ejectment Action Was Void Ab Initio.* Ms. James filed bankruptcy on September 29, 2005. R334. According to the Bankruptcy Code, an estate was created upon the commencement of the James Bankruptcy Case comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The scope of this provision is broadly interpreted because "Congress intended a broad range of property... to be included in the estate." *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 (1983). Ms. James' ***11** bankruptcy petition operated to prohibit Intown from: (a) commencing or continuing the 2008 Ejectment Action; (b) any attempt to enforce the judgment issued in the 2004 Lawsuit;

(c) any attempt to obtain possession of all or any portion of 539 Baker Circle; and (d) any act to collect, assess or recover so-called rent, mesne profits or attorneys fees. 11 U.S.C. § 362(a)(1)-(6).

The 2008 Ejectment Action was filed on September 24, 2008 for the purposes of removing Ms. James from her property, forcing her to tear down portions alleged to be "encroaching," and to collect "rent" or "mesne profits." R12. Because it was filed in violation of the automatic stay, the 2008 Ejectment Action is void *ab initio. Vereen v. Deutsche Bank National Trust Company*, 282 Ga. 284, 285 (2007). See also, *In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984) ("acts taken in violation of the automatic stay are generally deemed void and without effect"); *Borg-Warner Acceptance Corporation v. Hall*, 685 F.2d 1306, 1308 (11th Cir. 1981)("Actions taken in violation of the automatic stay are void and without effect."). Because its filing was a violation of the automatic stay and was void, the trial court should have dismissed the 2008 Ejectment Action.

2. *By Deferring to the Bankruptcy Court, but Then Not Appearing, Intown Sat on its Rights and Is Barred from Claiming in Interest in Ms. James Property*. Intown was fully aware of Ms. James' bankruptcy and even used that filing to prevent discovery in this case. Despite knowing about Ms. James' bankruptcy filing, ***12** however, Intown never filed a proof of claim or sought to have its claims in and to Ms. James' property preserved in the bankruptcy case. R334-R336. According to 11 U.S.C. § 501(a)("[a] creditor... may file a proof of claim."); 11 U.S.C. § 101(10)("The term 'creditor' means - (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor.") Upon first learning of the bankruptcy (and Ms. James has reason to believe Intown had actual knowledge very early in her bankruptcy case), Intown was obligated to present its claims in the bankruptcy court.

Once a creditor has notice of the bankruptcy case, the creditor has the "responsibility to refrain from violating the stay." *In re Baird*, 319 B.R. 686, 689 (Bankr.M.D.Ala.2004) (citing *Mitchell Const. Co., Inc. v. Smith (In re Smith)*, 180 B.R. 311,319 (Bankr.N.D.Ga.1995)). Many courts put a higher burden on a creditor than merely refraining from violating the stay, they "have emphasized the obligation of creditors to take affirmative action to terminate or undo any action that violates the automatic stay." Johnston, 321 B.R. at 283 (citations omitted). This view is due to the control the creditor has in a situation where it has initiated a process. The creditor should not be allowed to then sit back and "choose to do nothing and pass the buck to the debtor" to stop the process. *Id.* at 284 (quoting ***Elder*** *v. City of Thomasville (In re* ***Elder****)*, 12 B.R. 491 (Bankr.M.D.Ga.1981)). This is particularly true when a debtor has tried to stop the inappropriate action.

In re Caffey, 384 B.R. 297, 307 (Bankr. S.D.Ala. 2008). In a decision authored by the same Bankruptcy Judge who presided over Ms. James's case, the charge upon the creditor was equally clear:

> A bankruptcy debtor does not have the burden to personally contact its creditors to assure they take action to protect their interests. When notice of a bankruptcy filing is received, the burden is on the creditor to take ***13** appropriate action, including filing a proof of claim, discontinuing any efforts to collect a claim, and taking affirmative action to undo any action which may have been taken without notice of the bankruptcy in violation of the automatic stay or the discharge injunction. See *Jove Engineering, Inc. v. Internal Revenue Service*, 92 F.3d 1539, 1557 (11th Cir.1996).

In re Poole, 242 B.R. 104, 111 (Bankr. N.D.Ga., J. Murphy, 1999). Indeed, in construing the statute governing exceptions to discharge, the Eleventh Circuit has stated:

> The statutory language clearly contemplates that mere knowledge of a pending bankruptcy proceeding is sufficient to bar the claim of a creditor who took no action, whether or not that creditor received official notice from the court of various pertinent dates. This furthers the bankruptcy policy of affording a "fresh start" to the debtor by preventing a creditor, who knew of a proceeding but who did not receive formal notification, from standing back, allowing the bankruptcy action to proceed without adjudication of his claim, and then asserting that the debt owed him is undischargeable.

In re Alton, 837 F.2d 457, 460 (11th Cir. 1988).

Ms. James' bankruptcy case remained open for over 90 days after the entry of the discharge order while the Chapter 13 trustee filed: (1) that certain "Chapter 13 Trustee's Notice of Completed Plan and Request for Order Granting the Debtor's Discharge" [James Bankruptcy Docket #15]; and (2) that certain Chapter 13 Standing Trustee's Final Report and Account" [Id. Docket #18]. Following these filings, the Bankruptcy Court entered its final order concluding that Ms. James' "estate has been fully administered" and that "[t]he estate is closed." [Id. Docket # 20]. According to Bankruptcy Rule 5009 (emphasis added):

> ***14** If in a chapter 7, chapter 12, or chapter 13 case the trustee has filed a final report and final account and has certified that the estate has been fully administered, and if within 30 days no objection has been filed by the United States trustee or a party in interest, **there shall be a presumption that the estate has been fully administered.**

Significantly, after initially objecting to staying the case in February 2009, Intown filed a pleading the following day stating:

> Upon further reflection, while Intown does not agree that this matter should be stayed by Ms. James' bankruptcy action, Intown, out of deference to the bankruptcy court and **in an effort to avoid unnecessary litigation, hereby consents to a stay of these proceedings pending the resolution of Ms. James bankruptcy.**

R260. It is entirely reasonable to construe this statement as an admission that Intown was going to assert its claim or interest in the bankruptcy case, both to reach the merits and to mitigate its prior violations of the bankruptcy stay. That it would have slept on its rights or claims while Ms. James was under the protection of the bankruptcy court and the bankruptcy laws [4] would be an affront to the public policy underpinning the federal bankruptcy laws. It is also reasonable for Ms. James to have construed Intown's pleading as an affirmative election to take its claims to bankruptcy court, and that its failure to either move in that Court for relief from stay or for adequate protection, file a proof of claim, object to discharge, or object to the closing of the estate constituted an abandonment of its baseless claims to own any ***15** part of her property. There is absolutely no doubt what would have happened if Intown had come into the bankruptcy Court claiming a half interest in a $125,000 home based on the allegedly unpaid taxes of $1,000 owing by some stranger. Intown had a duty to appear, and its acquiescence is fatal to its attempt to have Ms. James tear down a portion of her home. By failing to appear or assert any claim in the bankruptcy case, Intown is estopped, judicially, collaterally, or otherwise, from either: (a) pursuing any claims against Ms. James; or (b) asserting any claim or right in or to the James Home.

3. *Intown's Current Efforts Also Violate the Discharge Injunction.* In addition to violating the automatic stay, Intown's attempt to revive its void action after Ms. James had fully performed her 100% payment plan and obtained a discharge violated the discharge injunction. The 2009 Discharge Order specifically states, "[a]11 creditors are prohibited from attempting to collect any debt that has been discharged in this case." R282 Intown never objected to or appealed that order and it became final, thereby providing Ms. James the protections of 11 U.S.C. § 524. Pursuant to 11 U.S.C.§ 524, the discharge operates as an injunction against Intown' action and claims in this case. See, e.g. 11 U.S.C. § 524(a). While Intown could have appeared and attempted to object to Ms. James' discharge, it did not do so. There is no exemption or exception to discharge available under 11 U.S.C. § 523 because Intown knew about the bankruptcy and did nothing.

***16** The trial court simply misconstrued the effect of the Ms. James' bankruptcy discharge order as matter of law. *See In re Meadows*, 428 B.R. 894, 907-910 (Bankr. NDGa. (J. Bonaphel) 2010). While a state court has concurrent jurisdiction with a bankruptcy court to determine the dischargeability of a debt, that jurisdiction does not extend to jurisdiction to modify the discharge. *In re Meadows*, 428 B.R. at 910. A state court's order which modifies a bankruptcy discharge order is void. Id. The 2008 Ejectment Action was commenced and has been prosecuted in bad faith and in blatant defiance of federal law and the jurisdiction of the federal courts over Ms. James and her property. Intown's continuation of these proceedings is an **abuse** of

process and harassment which deprives Ms. James of a "fresh start" and constitutes an unauthorized and unlawful assertion of an interest in or to Mr. James property or property interests in contempt of the federal bankruptcy court orders.

B. Summary Judgment based on 2004 Lawsuit Was Error

1. *The Trial Court in 2004 Lawsuit Lacked Jurisdiction Over Ms. James.* According to her unrebutted testimony, neither Ms. James nor any person of suitable age or discretion residing in her home were ever served by any sheriff's deputy or marshal with any summons, complaint or other papers relating to the 2004 Lawsuit. R34. While the Special Master in the 2004 Lawsuit determined that Ms. James had, indeed, been served with the 2004 Lawsuit, the special master based that conclusion solely on "statements in counsel's place" given by Intown's attorney Allison C. Jett, ***17** Esq. [R57] and on what appear to be official Sheriffs entry forms purportedly signed by a lady with the deceptive name of "Bonita *Marshall*" [R68]. Notably, there is no indication on the official looking "Process Server's Entry of Service Notice" that Ms. Marshall was a deputy sheriff, nor was any evidence attached proving that Ms. Marshall had been appointed as a process server.

> Process **shall be served by** the **sheriff** of the county where the action is brought or where the defendant is found, or by such **sheriff's deputy,** or by the **marshal or sheriff of the court,** or by such **official's deputy,** or by **any citizen of the United States specially appointed** by the court for that purpose, or by someone who is not a party and is not younger than 18 years of age and has been **appointed as a permanent process server by the court in which the action is brought.**

O.C.G.A. § 9-11-4(c) (emphasis added). The Civil Practice Act requires that a defendant be personally served with both the summons and the complaint by delivering a summons and a copy of the complaint:

> to the defendant personally, or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

O.C.G.A. § 9-11-4(e)(7). The manner and *timing* of the filing of evidence of such service is also specifically prescribed in O.C.G.A. § 9-11-4(h) which requires that "[t]he person serving the process shall make proof of service thereof to the court promptly and, in any event, *within the time during which the person served must respond to the process.*" (Emphasis added) Unlike other purported affidavits of ***18** service attached to the Special Master's Report in the 2004 Lawsuit, the one purporting to establish service on Ms. James was not stamped filed by the clerk. R68 Intown cannot demonstrate that it properly served Ms. James with in the prior action, nor can it demonstrate that it complied with the requirements of proving service and timely filing same. *Cf. French v. Edwards,* 80 U.S. 506, 511(1871) ("when the requisitions prescribed [for the sheriff] are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory.) *See also, Thatcher v. Powell,* 19 U.S. 119, 127 (1821). Summary judgment should have been denied because, at the very least, questions of fact existed as to whether: (a) Ms. James was properly served with a summons and complaint in the 2004 Lawsuit; and (b) proof of such service was timely filed with the clerk.

2. *Issues of Fact Preclude Summary Judgment Based on 2004 Lawsuit.* The party asserting *res judicata* bears the burden of proving it. See *Waggaman v. Franklin Life Ins. Co.,* 265 Ga. 565 (1995), *Sanders v. Trinity Universal Ins. Co.,* 647 S.E.2d 388 (Ga. Ct. App. 2007); *Rafizadeh v. KR Snellville LLC,* 634 S.E.2d 406 (Ga. Ct. App. 2006). "The doctrine of res judicata prevents the re-litigation of all claims which have already been adjudicated, or which could have been adjudicated, between identical parties or their privies in identical causes of action." *See Karan, Inc. v. Auto-Owners Ins. Co.,* 2006 WL 1069127 (Ga. April 25, 2006). Three prerequisites ***19** must be satisfied before *res judicata* applies: (1) identity of the cause of action, (2) identity of the parties or their privies, and (3) previous adjudication on the merits by a court of competent jurisdiction. *Id.* Collateral estoppel, like res judicata, requires the identity of the parties or the privies but unlike res judicata, does not require

identity of the claim. “Collateral estoppel only precludes those issues that were litigated and decided in the previous action, or that necessarily had to be decided in order for the previous judgment to have been rendered. Therefore, collateral estoppel does not necessarily bar an action merely because the judgment in the prior action was on the merits. Before collateral estoppel will bar consideration of an issue that issue must have actually been decided.” *Id.*

Applying these standards, the prior action involved property allegedly owned by “Archie R. James, Jr.” with an address of “Baker Circle, NW” on which Archie R. James, Jr. had apparently not paid taxes. Thus, the order which Intown obtained in the prior action was not in relation to Ms. James' property which has, for at least the last 46 years, been known as “539 Baker Circle, NW” and on which Ms. James had paid all taxes.

Efforts by Intown to rely on the tax parcel identification number as a sufficient identifier of the property that was the subject of the prior action has been specifically rejected by the Georgia Supreme Court in a case in which Intown' prior counsel participated. *The Harpagon Company, LLC v. Gelfond*, 279 Ga. 59, 61 (2005) ***20** (concluding that conflicts between the owner, legal description, address and tax identification number renders the deed internally inconsistent, thereby creating a question as to the identity of the property purportedly being conveyed). Construing the subject matter of the lawsuit predicated on the “Archie R. James, Jr.” fifas against “0 Baker Circle,” is analogous to interpreting the identity of property in a deed. A deed with a vague or indefinite land description is void for uncertainty and does not convey title or color of title. *Conyers v. West*, 210 Ga. 190, 191-92 (1953) (invalidating deed as too vague and indefinite when the land description was minimal); *Mull v. Allen*, 202 Ga. 176, 178 (1947) (holding deed void for indefiniteness when land tract was unknown and no shape, metes, bounds, or adjoining landowner information was given); *Donaldson v. Nichols*, 223 Ga. 206,208 (1976); *Leathers v. Garrett*, 179 Ga. 619, 620 (1934) (declaring deed void for insufficient levy when the entry was not only vague and uncertain, but named the wrong lot number). In order to be valid, a land description in a deed must sufficiently identify the particular tract of land, or “must contain a key by the use of which the description may be applied by extrinsic evidence.” Conyers, 210 Ga. at 192. A key that does not definitely lead to or readily identify the land conveyed will not suffice to convey title. *See Blumberg v. Nathan*, 190 Ga. 64, 65 (1940) (stating that a key must lead “unerringly to the land in question”). Because the property described in the judgment in the 2004 Lawsuit is vague and ambiguous, it is void and could not be ***21** relied upon by Intown. Moreover, having received the October 2002 letter from the County explaining the mistake in addressing notices for Archie James (R315), there are genuine issues of fact as to whether Ms. James could have believed that the 2004 Lawsuit did not involve her property at 539 Baker Circle.

C. The Trial Court Erred by Not Construing Ms. James' Defenses as Motion to Set Aside Prior Judgment

As demonstrated above, the decision in the 2004 Lawsuit was binding on neither Ms. James nor her property at 539 Baker Circle. Even if it was, Ms. James presented more than ample grounds for the judgment in the 2004 Lawsuit to be set aside under O.C.G.A. § 9-11-60 or O.C.G.A. § 9-13-172. The Civil Practice Act “shall be construed to secure the just, speedy, and inexpensive determination of every action.” O.C.G.A. § 9-11-1. Moreover, the substance of a pleading determines its effect, not the form. *Cf. Truckstops of America, Inc. v. Engram*, 220 Ga.App. 289 (1996). Pretermitting the effect of Ms. James' bankruptcy filing, a motion to set aside the prior judgment was a compulsory counterclaim to the complaint filed by Intown in its 2008 Ejectment Action. Ms. James' affirmative defenses, counterclaim and opposition to Intown's motion for summary judgment all raised and asserted arguments supporting, in the alternative, the setting aside of the judgment in the 2004 Lawsuit. That these pleadings were not captioned as a “motion” under O.C.G.A. § 9-11-60 is of no moment. In substance, Ms. James presented and was entitled to have ***22** the Court construe her pleadings in a manner designed to secure the speedy and inexpensive setting aside of the earlier void or otherwise invalid judgment.

D. Any Purported Tax Sale of any Portion of 539 Baker Circle Must be Set Aside

Even if there was a valid tax sale, because of all of the fatal defects and misleading conduct involving the purported Archie James fifas and resultant tax sale, the Court is required to set aside that tax sale. O.C.G.A. § 9-13-172 (“Courts shall have full

power over their officers making execution sales. Whenever the court is satisfied that a sale made under process is infected with fraud, irregularity, or error to the injury of either party, the court shall set aside the sale.").

1. *There Was No Levy.* In Georgia, the creation and filing of a fifa creates a lien against or interest in the real and personal property *of the defendant-in-fifa.* See, e.g. O.C.G.A. §§ 48-2-55; 48-2-56. Here, the defendant-in-fifa was "Archie R. James, Jr." and, thus, it was impossible for the Sheriff to levy on the James Home based on such fifas. If there was no levy, there was no valid sale. *See Isam v. Hooks,* 46 Ga. 309 (1872) (stating that a valid levy is "a necessary part of the authority to sell"); *Ansley v. Wilson,* 50 Ga. 418 (1873) (same); *Morris v. Tinker,* 60 Ga. 466 (1878) (holding that a purported levy by a sheriff without authority was no levy; thus, the tax sale was void). Indeed, a levy is a muniment of title. *Collins & Son v. Hudson,* 69 Ga. 684 (1882) ("The title of a purchaser at a tax sale should show a good levy, ***23** because it is a muniment of title.") Where no levy occurred, there is a break in the chain of title and a void sale, thereby vesting no property interest to the defendant in fifa's property. *Collins & Son v. Hudson,* 69 Ga. 684 (1882) (holding that a levy by one without authority is no levy; and that a purported sale without such a valid levy, is no sale and is void on its face). When a tax sale is challenged on the grounds that there was no levy, the remedy is to void the sale. *Id.* The purported tax sale of Ms. James' property was void.

2. *Collection Activity Should Have Ceased per O.C.G.A. § 48-3-19(c)(2)(C).* Ms. James demanded that Intown cease and desist from further asserting claims to ownership of an interest in or to the subject property based on violations of O.C.G.A. § 48-3-19(c)(2)(C)) on the grounds that the tax executions were transferred in violation of that statute. R124 At the time of the alleged transfer of the fifas, the property owner was entitled to 90 day notice of the Tax Commissioner's intent to transfer the fifas. The Archie James Fifas, however, were transferred within less than 90 days of their issuance. R316-R331 The tax execution was not validly issued, was not validly transferred and was not transferred in accordance with the requirements of O.C.G.A. § 48-3-19 which, among other things, provides in O.C.G.A. § 48-3-19(c)(2)(C) that:

> In the event any execution transferred is later determined to have been issued in error, the transferee will cease and desist from all collection efforts, remove the associated entries from any execution ***24** dockets on which it has been entered, remove any negative reports that may have been submitted to credit reporting agencies regarding the erroneous execution, and return the execution to the transferor.

The tax executions or fifas upon which Plaintiff bases its claims to ownership of a portion of the subject property were issued and transferred in violation of the law and in error. Because of the failure of compliance with the provisions set forth in O.C.G.A. § 48-3-19(c)(2), the Court must dismiss any and all of Intown's claims to ownership of all or any portion of the James Home.

3. *The FiFas and Tax Deed Violate the Electronic Signatures Act.* Had Ms. James been allowed discovery, she would have been able to demonstrate that Sondra Burnett was not in office as Tax Commissioner when several of the fifas were created electronically and signed with a bitmapped or electronic signature that purported to be hers. Likewise, the signatures of Ms. Burnett's successor, Arthur Ferdinand were electronically affixed. Discovery would have also demonstrated that Tax Commissioner Ferdinand also took it upon himself to create and enter on the "fifas" a bitmapped signature of the Clerk of the Superior Court of Fulton County and other recording information (including the book and page of a General Execution Docket book reserved for his use).

Because they were not properly signed, however, the fifas issued against Archie R. James, Jr. and the tax deed are inadmissible and ineffective. *Cf.* ***25** *Turner v. Neisler,* 141 Ga. 27 (1913)("If a deed is not probated or attested as to authorize its record, though it may be physically recorded, a certified copy thereof is not admissible in evidence.").

On April 22, 1997, before the electronic creation of certain of the subject fifas, the Georgia Electronic Records and Signatures Act (O.C.G.A. § 10-12-1 et seq.) was enacted. 1997 Ga. Laws. pp. 1052. While this Act contemplated the limited use of electronic signatures, it specifically provided that it "shall not apply to any rule of law governing the creation or execution of... any record that serves as a unique and transferable physical token of rights and obligations, including, without limitation, negotiable instruments and instruments of title wherein possession of the instruments is deemed to confer title." O.C.G.A. §

10-21-4(i)(3). Thus, after the enactment of the Electronic Signature Act unsigned electronic files cannot be used to create or provide evidence of an interest in real property. Because certain of the later fifas upon which any purported tax sale of Ms. James property was based were void, illegal or simply non-existent, any proceedings taken as a result thereof are similarly void and ineffective.

E. By Virtue of Prescription, Ms. James Regained Any Title Purportedly Lost

A party holding a tax deed executed on or later July 1, 1996 can obtain title to the property by prescription after a period of four years. O.C.G.A. § 48-4-48(b) (1999). "Under this statute, the purchaser at the tax sale can acquire prescriptive title ***26** unless those who claim a right of redemption redeem the property before the expiration of the four-year period." *Machen v. Wolande Mgmt. Group, Inc.*, 271 Ga. 163, 164, 517 S.E.2d 58 (1999). Title by prescription requires continued possession for a period of time, in this case four years. O.C.G.A. § 44-5-160 (1991). "In order for possession to be the foundation of prescriptive title, the possession must be in the right of the possessor, be under claim of right, and be public, continuous, exclusive, uninterrupted, and peaceable, and not have originated in fraud." *Williamson v. Fain*, 274 Ga. 413, 415-16, 554 S.E.2d 175 (2001); O.C.G.A. § 44-5-161 (1991). Here, Ms. James has remained in open, hostile, notorious, and exclusive possession of the entirety of 539 Baker Circle, NW. If four years is long enough for a tax sale purchaser to obtain prescriptive title, then Ms. James' rights under both the Georgia and United States Constitutions to equal protection under the law [5] require that she, ***27** too, be able to obtain prescriptive title after a tax sale provided she remains in possession for at least four years

F. The Trial Court Erred in Denying Discovery to Ms. James

On January 5, 2009, Ms. James's counsel, being unaware of the bankruptcy filing several years earlier, promptly commenced discovery (having served subpoenas and notices to take depositions), but already those efforts are being thwarted. Instead of allowing Ms. James any meaningful discovery (indeed, in what looks like a plan intentionally designed to deprive Ms. James of discovery), on or about December 9, 2008, Plaintiff filed its motion for summary judgment and subsequently moved to quash or stay any and all discovery served by Ms. James. While Ms. James contends that her bankruptcy prohibited the filing of the 2008 Ejectment Action, the trial court treated the bankruptcy case as simply requiring a stay until the bankruptcy case was over. If the trial court was correct in its construction, then when the stay lifted, Ms. James should have been allowed to take the noticed depositions and obtain responses to her written discovery.

Ruling on a motion for summary judgment is inappropriate where the party opposing that motion is unable to complete discovery prior to the deadline to respond ***28** to a motion for summary judgment. *See J.A.T.T.Title Holding Corp. v. Roberts*, 173 Ga. App. 902, 903, (1985)(Trial court's grant of summary judgment was error where it was made inconsistently with a pending order compelling discovery); *Cowan v. J.C. Penney & Co., Inc.*, 790 F.2d 1529, 1532 (11th Cir. 1986)(A summary judgment is generally premature when the moving party has not answered the opponents interrogatories, especially where the information request is critical to the dispute). *See, Erickson v. Hodges*, 257 Ga. App. 144, 146 (2002) (Ruling on motion for summary judgment premature given pending discovery); *McCall v. Henry Medical Center, Inc.*, 250 Ga. App. 679, 683 (2002) (Error to grant summary judgment prior to ruling on motion to compel).

CONCLUSION

For the foregoing reasons, Ms. James respectfully requests that the Court reverse the trial court's grant of summary judgment, void the purported tax sale, dismiss Intown's claims with prejudice, and permanently enjoin Intown from commencing or continuing any claim to ownership of all or any part of 539 Baker Circle, N.W., Atlanta, Georgia.

***29** Respectfully submitted, this 12th day of September, 2011.

Footnotes

1 This brief is timely based on the attached order entered on August 30, 2011, a copy of which is attached hereto as **Exhibit A.**

2 Ms. James has reason to believe that Intown had prior knowledge of her bankruptcy, but was prevented from any discovery on this or any other issue.

3 On Friday, August 26, 2011, Ms. James filed a Complaint in the United States District Court, Northern District of Georgia (Atlanta Division) (the "James Federal Complaint") in which she sought (a) damages for the violations of the automatic stay and of the discharge injunction; and (b) an injunction against any further attempts by Intown, its principals or attorneys from prosecuting any action designed to collect the debt evidenced by the Archie-James-Zero-Baker Circle Fifas or to assert any interest in the James Home based on such Fifas. A copy of the James Federal Complaint has previously been filed with this Court as an attachment to Ms. James' request that this action be stayed and enjoined. A hearing on said motion was held on September 2, 2011, and the matter is currently under advisement. Without waiving her right to obtain the relief in the Federal Court, Ms. James renews her motion to stay and dismiss this action based the series of federal court orders entered in the James Bankruptcy Case. To allow the 2008 Superior Court Action to proceed would deprive Ms. James of the benefits of having: (a) filed bankruptcy; (b) proposed and obtained an order approving her Chapter 13 Plan; (c) completed all of the payments under and pursuant to that Chapter 13 Plan; (d) obtained an order of discharge; and (e) revested all property of the estate in her.

4 For example, the availability, at no cost, of a trustee [11 U.S.C. § 1302] and the ability to void any transfer for less than equivalent value [11 U.S.C. § 502(d)].

5 According to Ga. Const. Art. I, § I, Para. II, "[p]rotection to person and property is the paramount duty of government and shall be impartial and complete. **No person shall be denied the equal protection of the laws.**" (Emphasis added) "All citizens of the United States, resident in this state, are hereby declared citizens of this state; and it shall be the duty of the General Assembly to enact such laws as will protect them in the full enjoyment of the rights, privileges, and immunities due to such citizenship." Ga. Const. Art. I, § I, Para. VII. Ms. James is also entitled to the protections of the Constitutions of the United States and Georgia which obligations include and are more particularly described in the following: (A) "No person shall be deprived of life, liberty, or property except by due process of law." Georgia Constitution, Art. 1, §1, ¶1. See also, U.S. Constitution, Amends. V & XIV, Section 1; (B) "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws." Georgia Constitution, Art. 1, §1, ¶2. **"Legislative acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them."** Georgia Constitution, Art. 1, §2, ¶5. With these general principles as a backdrop, the policy of the State of Georgia is to interpret tax sale statutes in favor or property owners. *Blizzard v. Moniz*, 271 Ga. 50 (1999).

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