VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 5th day of April, 2018.

D&MRE, LLC, et al., Appellants,

against Record No. 170248
Circuit Court Nos. CL08-137 and CL09-101

Kyus Enterprises, Inc., Appellee.

Upon an appeal from judgments rendered by the Circuit Court of King William County.

D&MRE, LLC ("D&MRE") and Donald Rennie ("Rennie") (collectively, "D&MRE defendants") appeal from the circuit court's granting of motions for nonsuit filed by Kyus Enterprises, Inc. ("Kyus") in two companion cases, CL08-137 (the "first case") and CL09-101 (the "second case"), which were consolidated for trial. Upon consideration of the record, briefs, and argument of counsel, we conclude (i) the appeal from the first case was improvidently granted, and (ii) there is no error in the judgment of the circuit court in the appeal of the second case.[1]

I.

On December 10, 2008, Kyus instituted the first case by filing a complaint against the D&MRE defendants in the Circuit Court of King William County. Kyus alleged that the D&MRE defendants improperly evicted Kyus from a gas station it operated pursuant to a sub-lease with a third company ("the gas station"). The first sentence of the complaint stated that it was filed pursuant to "Code Section 8.01-620 et al.," and the prayer for relief sought money

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[1] In the first case, Kyus sued only the D&MRE defendants. In the second case, Kyus sued a number of others, in addition to the D&MRE defendants. As Kyus' claims against those other defendants and their defenses against those claims are not relevant to the disposition of this appeal, we will recite only the facts and proceedings pertinent to the dispute between Kyus and the D&MRE defendants.

damages and to permanently enjoin the D&MRE defendants from interfering with the gas station.

According to an order dated December 11, 2008 ("12/11/08 order"), the parties appeared that day for a hearing on Kyus' motion for an "emergency injunction." The circuit court stated therein that "[e]vidence was presented and argued to the [c]ourt," after which it determined that Kyus "failed to present sufficient evidence that [Kyus] will likely succeed at a full trial on the merits of the case." The court then denied Kyus' "motion for an injunction" and directed in the order that the case be "removed from the docket." No transcript of the December 11, 2008 hearing ("12/11/08 hearing") appears in the record.

Kyus moved for reconsideration of the 12/11/08 order and, in the alternative, requested a nonsuit. In a "FINAL ORDER" dated December 23, 2008 ("12/23/08 order"), the circuit court denied reconsideration and a nonsuit. The court stated in this order that "the motion does not state any new material evidence to justify a modification of the previous decision" and "a nonsuit may not be taken after the case has been submitted to the [c]ourt for decision." The court then concluded, "[t]his is a final order, and the case is removed from the docket."

Kyus did not appeal the 12/23/08 order[2] and the circuit court, after entering that order, took no further action in this first case until February 2012 while presiding over the second case.

In January 2009, Kyus instituted the second case by filing a complaint ("second complaint") in the Circuit Court of Chesterfield County against the D&MRE defendants, among others. As with the complaint in the first case, the central focus of this second complaint was the D&MRE defendants' alleged wrongful eviction of Kyus from the gas station.

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[2] We note, however, that on January 5, 2009, the D&MRE defendants answered Kyus' complaint, demurred to Kyus' claim against Rennie, and counter-claimed that Kyus breached the controlling lease. In response, on January 21, 2009, Kyus filed an answer and moved to dismiss the counterclaim. Kyus stated in this pleading that it had requested a temporary restraining order on December 10, 2008, the circuit court denied that request, and then the court entered the 12/23/08 order as a final order. Kyus argued that the counterclaim was thus untimely. These pleadings of both parties following entry of the 12/23/08 order and taking opposite views as to its nature and effect are not dispositive under principles of judicial estoppel of whether or not the order was actually a final order on the merits of Kyus' action against the D&MRE defendants in the first case.

In response, the D&MRE defendants moved to dismiss Kyus' second complaint on the grounds it was barred by res judicata or collateral estoppel. They contended that, at the hearing precipitating the 12/11/08 order in the first case, the circuit court determined that the D&MRE defendants had lawfully reentered the gas station. Furthermore, they contended, the 12/23/08 order in the first case was actually a final order on the merits, thus triggering the protection of res judicata or alternatively collateral estoppel as a bar to the suit against them in this second case. Then, on the D&MRE defendants' motion, the second case was transferred to the Circuit Court of King William County and consolidated with the first case for trial.

On February 9, 2012, the circuit court held a hearing on, among other things, the D&MRE defendants' plea of res judicata or collateral estoppel. The same day, the circuit court entered a "CORRECTED FINAL ORDER" in the first case nunc pro tunc to December 23, 2008 ("nunc pro tunc order"). The nunc pro tunc order purportedly augmented the 12/23/08 order to clarify that it had denied Kyus' "motion to nonsuit as to the emergency injunction" and that it was only "a final order as to the emergency injunction." Also, in the nunc pro tunc order, the court noted the D&MRE defendants' objection to its entry "for the reasons stated in the record at hearing on February 9, 2012."[3] Although no order was entered at that time expressly ruling on the D&MRE defendants' plea of res judicata or collateral estoppel, the nunc pro tunc order was an implicit rejection of the plea. No transcript of the February 9, 2012 hearing ("2/9/12 hearing") appears in the record.

The D&MRE defendants subsequently filed a motion to reconsider the entry of the nunc pro tunc order and denial of the plea of res judicata. The circuit court denied the motion by an order entered on December 1, 2016. On the same day, the court entered orders granting Kyus' motions for nonsuit in both the first case and the second case.

II.

[3] Although no transcript of the 2/9/12 hearing is in the record, the circuit court entered an order on that date in the second case memorializing the results of the hearing. While the order did not explicitly deny the D&MRE defendants' claim of res judicata, the D&MRE defendants endorsed the order with an objection claiming (1) they were entitled to res judicata based on the first case and (2) the court did not have jurisdiction to enter the nunc pro tunc order because the 12/23/08 final order in the first case was indeed final.

A.

Under their first assignment of error, the D&MRE defendants argue the circuit court lacked jurisdiction to enter the nunc pro tunc order because the first case ended three years earlier with a final decision on the merits with the entry of the 12/23/08 order.

We conclude the D&MRE defendants' first assignment of error was improvidently granted as the record is insufficient to allow us to determine whether the circuit court abused its discretion in entering the nunc pro tunc order. *See Morgan v. Russrand Triangle Assocs., Inc.*, 270 Va. 21, 25, 613 S.E. 2d 589, 591 (2005) (correcting the record nunc pro tunc is limited to situations where the record clearly supports the correction). The D&MRE defendants have not provided a transcript from the hearings that precipitated (i) the 12/11/08 order, which was the basis for the 12/23/08 order, and (ii) the nunc pro tunc order. *See Haugen v. Shenandoah Valley Dep't of Soc. Servs.*, 274 Va. 27, 41, 645 S.E.2d 261, 269 (2007) ("[T]he onus is upon the appellant to provide the reviewing court with a sufficient record from which it can be determined whether the trial court erred as the appellant alleges." (quoting *White v. Morano*, 249 Va. 27, 30, 452 S.E.2d 856, 858 (1995))). Absent a transcript from the 12/11/08 hearing, it is impossible to reliably discern whether the circuit court finally resolved any issues related to Kyus' claims or, relatedly, whether the 12/23/08 order might have been final. Similarly, without a transcript from the 2/9/12 hearing, it is impossible to reliably discern whether the circuit court identified sufficient support in the record for the nunc pro tunc order.

B.

The D&MRE defendants assert under their second assignment of error that the circuit court erred in overruling their plea of res judicata filed in the second case. They argue that, as to them, the second case involved the same parties and the same conduct, transaction or occurrence at issue in the first case. Furthermore, according to them, they have established that the first case ended in a final judgment on the merits, thus precluding Kyus' action against them in the second case. We disagree.

A prerequisite for claim preclusion under the doctrine of res judicata is a final judgment on the merits of a claim. Rule 1:6(a); *see Chilton-Belloni v. Angle ex rel. City of Staunton*, 294 Va. 328, 335, 806 S.E.2d 129, 132 (2017); *Funny Guy, LLC v. Lecego, LLC*, 293 Va. 135, 149-52, 795 S.E.2d 887, 894-95 (2017); *Lee v. Spoden*, 290 Va. 235, 246-48, 776 S.E.2d 798, 804-05 (2015). Under this doctrine, the burden is on the party asserting the preclusion to "show by a

preponderance of the evidence that litigation of the claim . . . should be precluded by the prior judgment." *Chilton-Belloni*, 294 Va. at 335, 806 S.E.2d at 132 (citing *Bates v. Devers*, 214 Va. 667, 671, 202 S.E.2d 917, 921 (1974)). Whether an action is precluded by res judicata is an issue of law subject to de novo review. *Id.*

As the record stands, there is nothing in the first case that persuasively indicates that the circuit court had any valid opportunity to, and did in fact, make a final determination on the merits of Kyus' claim of wrongful eviction for which it sought a permanent injunction and money damages. *See Super Fresh Food Mkts. of Va. v. Ruffin*, 263 Va. 555, 560, 561 S.E.2d 734, 737 (2002) ("In general terms, a final judgment is one which disposes of the entire action and leaves nothing to be done except the ministerial superintendence of execution of the judgment."). Rather, the record indicates just the opposite based on the circuit court's 12/11/08 and 12/23/08 orders—even without consideration of the nunc pro tunc order. *See Lopez-Rosario v. Habib*, 291 Va. 293, 299, 785 S.E.2d 214, 216 (2016) (explaining that "trial courts speak only through their written orders" (quoting *Temple v. Mary Washington Hospital*, 288 Va. 134, 141, 762 S.E.2d 751, 754 (2014))).

According to the 12/11/08 order (entered the day after Kyus filed its complaint in the first case), the parties only appeared that day for an ore tenus hearing on Kyus' motion for an emergency injunction; the court denied the motion upon finding that Kyus failed to present sufficient evidence to establish that it was likely to "succeed at a full trial on the merits of the case."

After Kyus then moved for reconsideration of the 12/11/08 order, the circuit court denied that motion in the 12/23/08 order. In doing so, the court therein explained that "the motion does not state any new material evidence to justify a modification of the previous decision"—obviously referring to its decision in the 12/11/08 order to deny an emergency injunction. Furthermore, neither the 12/23/08 order nor any other order in the record indicates that the court received and considered a full presentation of evidence on the actual merits of the complaint in the first case, or otherwise considered a dispositive pre-trial motion, before entering the 12/23/08 order. To be sure, the court proceeded in that order to deny Kyus' motion for a nonsuit, referred to the order as a "final order," and directed that the case be removed from the docket. But that alone does not provide us with a sufficient basis to conclude that the court had an opportunity to, and did in fact, make a final ruling on the merits of the claim set forth in Kyus' complaint in the

first case. The record indicates instead that the court merely rendered an interlocutory ruling on a motion for an emergency injunction, given the limited evidence before it according to the substance of the 12/11/08 and 12/23/08 orders.

III.

For the above reasons, we dismiss the appeal as improvidently granted in the first case (CL08-137), and affirm the judgment of the circuit court in the second case (CL09-101).

This order shall be certified to the Circuit Court of King William County.

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Teste:

Clerk