

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Vista Investments, LLC,)
)
 Plaintiff,)
)
 vs.)
)
 Tompkins & McMaster, LLP and John)
 Gregg McMaster, Jr. ,)
)
 Defendants.)
)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2011-CP-40-6176

RECEIVED

JUN 12 2013

SC Court of Appeals

**ORDER DENYING PLAINTIFF'S MOTION
 FOR DEFAULT JUDGMENT AND
 GRANTING DEFENDANTS MOTION FOR
 SUMMARY JUDGMENT**

2013 MAY 16 AM 9:12
 JEANETTE M. McBRIDE
 CLERK OF COURT
 RICHLAND COUNTY

This matter comes before the Court pursuant to two motions: Plaintiff's Motion for Default Judgment and Defendants' Motion for Summary Judgment (collectively "the Motions"). A hearing on the Motions was held before me on March 12, 2012. Plaintiff and Defendants, by and through their attorneys, appeared and participated in the hearing. After carefully considering the pleadings, the legal memoranda submitted, the arguments of counsel, and the applicable law, for reasons more fully set forth below the Court hereby **DENIES** Plaintiff's Motion for Default Judgment and **GRANTS** Defendants' Motion for Summary Judgment.

BACKGROUND

Plaintiff, Vista Investments ("Vista Investments" or "Plaintiff"), is a judgment creditor of the Defendant, Tompkins & McMaster, LLP ("T&M"). On August 10, 2010, T&M confessed judgment in favor of Vista Investments in the amount of \$201,125.24.¹ The confession resulted from a 2009 lawsuit filed in the Richland County Court of Common Pleas, styled *Vista Investments, LLC v. Tompkins & McMaster, LLP*, Civil

¹ T&M has satisfied \$36,000 of the judgment as Vista Investments has accepted conveyance of certain real property.

Action Number 2009-CP-40-8410, which was filed after T&M vacated the property it was leasing from Vista Investments, where it operated its law practice. When T&M vacated, its lease had not yet expired, and it owed back rent.

Upon obtaining the judgment against T&M, Vista Investments started the process to collect its judgment. Supplemental proceedings were held before the Honorable Joseph M. Strickland, Master-in-Equity for Richland County, on April 25, 2011, at which a representative of T&M appeared and answered questions concerning T&M's assets. At the hearing, there was testimony that on or about July 28, 2010, T&M filed a UCC financing statement, purporting to give John Gregg McMaster, Jr. ("McMaster") a security interest in certain collateral ("the UCC").² The UCC covers most of T&M's assets, including its accounts receivables and its operating account at First Citizens Bank.

On September 19, 2011, Vista Investments filed this lawsuit against the Defendants to have the UCC declared null, void, and of no effect under the Statute of Elizabeth. As the Court understands it, the crux of the lawsuit is that T&M gave McMaster a security interest in T&M's property in order to defeat T&M's creditors, including Vista Investments.³ The Amended Complaint was served upon Frank McMaster, as counsel for the Defendants, on September 29, 2011. The Defendants were granted an extension of time until November 28, 2011 to respond. On November 28, 2011, the Defendants filed a Motion for Summary Judgment, asserting that the present action to set aside the UCC was barred by the principles of res judicata and/or collateral estoppel. On December 1, 2011, Vista Investments filed a Motion for Entry of

² A copy of the transcript was submitted to the Court.

³ The UCC stands in Plaintiff's way of collecting its judgment.

Default and Default Judgment, based on the Defendants failure to answer or otherwise respond to the Amended Complaint. On December 5, 2011, Entry of Default was entered against the Defendants. On December 28, 2011, the Defendants filed a Return and Memorandum to Plaintiffs' Motion for Default Judgment.

CONCLUSIONS OF LAW

I. Motion for Default Judgment

Plaintiff argues that Defendants have failed to answer or otherwise defend this lawsuit. The Court disagrees.

Under Rule 55(a) of the South Carolina Rules of Civil Procedure, if a party "has failed to plead or otherwise defend as provided as provided by these rules, . . . the clerk shall enter his default." Rule 55(a), SCRPC. Rule 12(a) of the South Carolina Rules of Civil Procedure states, "A defendant shall serve his answer within 30 days after the service of the complaint upon him." Rule 12(a), SCRPC. Plaintiff maintains that Defendants' motion for summary judgment is not a responsive pleading to the complaint, and therefore, the Defendants have been in default since November 28, 2011. Whereas, the Defendants argue their motion for summary judgment is based upon Rule 12(b) and Rule 8(e). In response, Plaintiff claims that Defendants' motion for summary judgment does not even reference Rule 12 and is not grounded in any of the eight defenses listed in Rule 12(b). More specifically, Plaintiff argues that the affirmative defenses of res judicata and collateral estoppel, which form the basis for Defendants' motion for summary judgment, are not Rule 12(b) defenses that can be made by motion, and thus the motion is truly a motion for summary judgment, and a motion for summary judgment is not an answer, nor is it a valid pleading or defense for

purposes of Rule 55(a). Plaintiff cites a Fourth Circuit case, *Educational Servs., Inc. v. Maryland State Bd. of Higher Education*, 710 F.2d 170, 176 (4th Cir. 1983), for the proposition that a motion, other than a Rule 12(b) motion, is not deemed a responsive pleading for purposes of altering the time limits for filing an answer. While the Court has considered Plaintiff's arguments, I find them to be without merit and conclude that Defendants' Motion for Summary Judgment, which includes the affirmative defenses of res judicata and collateral estoppel, is sufficient under the South Carolina Rules of Civil Procedure to withstand the entry of default. Therefore, the Defendants cannot be held to be in default, and the Motion for Default Judgment is denied.

II. Motion for Summary Judgment

Defendants argue that the present case is barred by the affirmatives of res judicata and collateral estoppel. As explained below, the Court agrees.

a. Res Judicata

Res judicata "bars a litigant from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former lawsuit." *Pye v. Aycock*, 325 S.C. 426, 432, 480 S.E.2d 455, 458 (Ct. App. 1997). To establish res judicata, three elements must be proven: "(1) identity of the parties, (2) identity of the subject matter, and (3) adjudication of the issue in the former suit." *Judy v. Judy*, 393 S.C. 160, 168, 712 S.E.2d 408, 412 (2011).⁴ The purpose of *res judicata* is to ensure

⁴ South Carolina our courts have utilized at least four tests in determining whether a claim should have been raised in a prior suit:

(1) when there is identity of the subject matter in both cases; (2) when the first and second cases involve the same primary right held by the plaintiff and one primary wrong committed by the defendant; (3) when there is the same evidence in both cases; and recently, (4) when the claims arise out of the same transaction or occurrence that is the subject of the prior action.

Judy, 393 S.C. at 172, 712 S.E.2d at 414 (citing James F. Flanagan, South Carolina Civil Procedure 649-50 (2d ed. 1996)).

that “no one should be twice sued for the same cause of action.” *Id.* (quoting *First Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co.*, 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945)).

Plaintiff claims the aforementioned elements are not satisfied and therefore res judicata does not apply. Plaintiff argues that McMaster, who is named in this action to set aside the UCC, was not a party in the other action and could not have been because he was not a party to T&M's lease. Plaintiff also disputes that the facts, claims, and damages are the same in both actions. Plaintiff maintains the first action focused on the terms of the lease and T&M's breach and establishing a judgment against T&M; whereas, the present case centers on T&M's grant of a security interest to McMaster and having that set aside as a fraudulent conveyance. Plaintiff argued that the evidence for the two actions is different, with the evidence for the first action consisting of the lease, T&M's payment history, and the date T&M vacated contrasted to the evidence for this action, focusing on the circumstances surrounding the UCC. Plaintiff also contends that, while it sought to establish a money judgment against T&M for walking out on its lease, that is not the purpose of the present action, which instead seeks to have the UCC T&M gave McMaster set aside. Further, Plaintiff claims the narrow issue in this case—whether T&M gave McMaster a security interest to defraud T&M—has not previously been adjudicated.

The Court understands Plaintiff's arguments but finds them to be without merit. This is Plaintiff's third legal action. The first action was to recover for T&M's breach of the lease agreement, and the second was Plaintiff's attempt to collect through supplemental proceedings the judgment it obtained as a result of T&M's breach. Now, the Plaintiff has brought this action to try to set aside the UCC that T&M gave to

McMaster. The Court agrees with Defendant that this is an impermissible second bite of the apple. Plaintiff should have tried to have the UCC set aside in either of the two previous legal actions — the action to obtain a judgment against T&M for its breach or the supplemental proceedings to collect the judgment. While John G. McMaster was not a party in either of the two previous actions, the Court nonetheless finds the same parties were involved in all of the actions since McMaster is one of the three partners of T&M and the sole equity partner. The Court also thinks the evidence is the same for both actions and there is nothing to differentiate what Plaintiff hopes to accomplish in this action, setting aside the UCC, from the judgment it obtained in the previous action. The Court is mindful of the purpose of *res judicata*— to ensure that “no one should be twice sued for the same cause of action.” *First Nat’l Bank of Greenville*, 207 S.C. at 24, 35 S.E.2d at 56. Plaintiff could have and should have raised the issue of setting aside the UCC given to McMaster earlier. Because Plaintiff did not, the doctrine *res judicata* now precludes Plaintiff from doing so.

b. Collateral Estoppel

Collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding. *Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997). “Under the doctrine of collateral estoppel, when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.” *Id.*

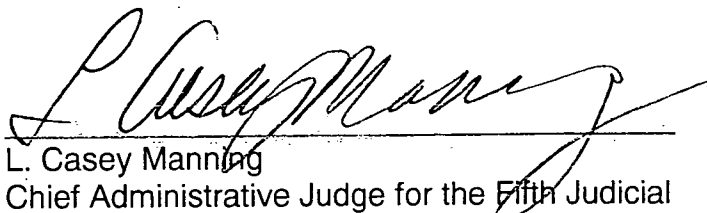
Plaintiff argues that whether T&M gave McMaster a security interest for the purpose of hindering or defrauding T&M was not actually litigated in the lease dispute

action (or the supplemental proceedings), nor was that issue necessary to the resolution of either, but it is to this lawsuit. Plaintiff maintains that the UCC was simply of no consequence until now. In the absence of such litigation and a consequent determination of the merits of whether T&M gave McMaster a security interest to put its assets beyond Plaintiff's reach, Plaintiff claims there is no collateral effect in this action. The Court disagrees. First, the Court finds that the confession of judgment and the supplemental hearings constitute final judgments. The Court also concludes that the issue of whether T&M gave McMaster a security interest in its collateral was finally determined by the confession of judgment and during the supplemental proceedings. Therefore, collateral estoppel bars Plaintiff from relitigating this issue.

NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion for Default Judgment is denied, and Defendants' Motion for Summary Judgment is granted.

AND IT IS SO ORDERED.



L. Casey Manning
Chief Administrative Judge for the Fifth Judicial
Circuit

Columbia, South Carolina

May 15, 2013