

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

L. Casey Manning, Fifth Circuit Court Judge

Civil Action No.: 2011-CP-40-6176

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Tompkins & McMaster, LLP and John Gregg McMaster, Jr.,..... Respondents

v.

Vista Investments, LLC, ..... Appellant

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**RESPONDENTS' INITIAL BRIEF**

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**RECEIVED**

JAN 06 2014

**SC Court of Appeals**

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**ISSUE 1.**  
**DID COURT ERR IN DETERMINING THAT THE RESPONDENTS WERE NOT  
IN DEFAULT WHEN THEY FILED A MOTION FOR SUMMARY JUDGMENT  
AS OPPOSED TO AN ANSWER OR MOTION TO DISMISS?**  
**ANSWER: NO.**

The Appellant sought a default judgment against the Respondents for failure to timely answer or otherwise plead pursuant to Rule 55 S.C.R.C.P.

It is undisputable that the Respondents have appeared in the present action by the filing of a Motion for Summary Judgment and/or Motion to Dismiss based upon Rules 12 and 8 S.C.R.C.P.

Pursuant to Rule 4 S.C.R.C.P.:

The Summons shall be signed by the Appellant or his attorney, contain the name of the State and county, the name of the court, the file number of the action, and the names of the parties; be directed to the defendant, state the name and address of the Appellant's attorney, if any, otherwise the Appellants address and the time within which these rules require the Respondents to APPEAR and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint.

The Defendant's appeared pursuant to the Note 8 of Rule 4 S.C.R.C.P. annotated as follows:

An appearance may be expressly made by a party, such that the court acquires jurisdiction over the party, by formal written or oral declaration, or record entry, or it may be implied from some act done with the intention of appearing and submitting to the court's jurisdiction.

The Respondents also appeared by filing of its Motion pursuant to Rule 12 S.C.R.C.P. (Definitions), an appearance is defined as follows:

As a general rule, an "appearance" in an action involves some presentation or submission to the court. However, it

has been stated that a defendant does not have to respond directly to a compliant in order for his actions to constitute an appearance. In fact, an appearance may arise by implications when a defendant takes, seeks or agrees to some step in the proceedings that is beneficial to himself or detrimental to the Appellant, *Roland v. W&L Motor Lines, Inc.*, 231 SE2d 685 (NC App 1977).

Appellant's Motion for Default was properly denied as Respondent had undisputedly appeared in the action.

The Appellant does not discuss the full extent of the hearing, issues raised and resolved during the hearing before the Honorable Joseph Strickland on April 25, 2011 and or the hearing before the Honorable Casey Manning on April March 14, 2012.

During the supplemental hearing before Judge Strickland, Appellant demanded art work, computers, chairs, tables, printers and typewriters. (Transcript of Supplemental Hearing P. 43, LL 16-25; P. 44, LL 1-25; P. 45, LL 1-25; P. 46, LL 1-25).

Pursuant to Appellant's demand, Respondents contacted the Appellant for delivery of conference tables, chairs, art work, copier, computer terminal, S.E. 2<sup>nd</sup>. The Appellant responded that it did not want the items although Appellant specifically requested them during the hearing.

After respondent demanded that Appellant take possession of the items which Appellant demanded in open court. Appellant did nothing and informed Respondent that Appellant did not want the items it demanded possession thereof. Subsequently, the Appellant reluctantly took possession of the items after several days.

The Respondents fully explained the nature of the structure of Tompkins and McMaster, LLP, including loans made by John Gregg McMaster to Tompkins and McMaster, LLP which loan balance was secured by a U.C.C. filing and promissory note

(P. 5, LL 16-25; P. 6, LL 1-25; P. 7, LL 1-25; P. 18, LL 1-25; P. 19, LL 1-25).

Prior to the Supplemental hearing of April 25, 2011, the Appellant had notice and the opportunity to request Judge Strickland to set aside the U.C.C. filing, but failed to make the request during any portion of the collection process which lasted approximately 1.5 years.

Appellant's second action filed on September 19, 2011, captioned Vista Investments, LLC vs. Tompkins & McMaster, LLP and John Gregg McMaster, Jr. is virtually the same action Appellant pursued in 2009 and which proceeded to a supplemental hearing (copy of full transcript attached as Exhibit A).

The Respondents filed for summary judgment based upon Rules 56, 12 and 8 S.C.R.C.P. and raised affirmative defenses in the summary judgment motion.

As to any and all issues, which were raised and/or could have been raised in the first action against Tompkins & McMaster. Furthermore, the supplemental proceeding was the final stage of the collection process between the parties.

Appellant's second action involves the same parties and/or issues which should have been raised or could have been raised in the first action. The Respondents raised the affirmative defenses of Res Judicata and Collateral Estoppel. The entire collection action was ended by the conclusion of the 2009 Breach of Lease action and Supplemental Hearing.

Judge Manning utilized Rules 56, 12, and 8 SCRCPP in his order granting Summary Judgment for the Respondents, including the applications of res judicata and collateral estoppel.

During an in-chambers hearing, which occurred not less than a month after the Respondents Motion for Summary Judgment, Judge Manning raised the issue as what

more was there to collect from Respondent. Appellant had been offered every item it requested in the supplemental hearing of, but refused to take possession of the items although Appellant demanded the items in open court.

**ISSUE 2:**

**DID THE COURT ERR IN APPLYING COLLATERAL ESTOPPEL AND RES JUDICATA TO PRECLUDE VISTA INVESTMENTS ACTION UNDER THE STATUTE OF ELIZABETH TO SET ASIDE THE SECURITY INTEREST T&M GRANTED TO MCMASTER AS A FRAUDULENT?**

**ANSWER: NO.**

**COLLATERAL ESTOPPEL**

“Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties and their privies in any subsequent action based upon a different claim.” *Anchor Point, Inc. v. the Shoals Sewer Co.*, 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992). In *Beall v. Does*, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189 n. 1 (Ct. App. 1984), this Court explained the distinctions between res judicata and collateral estoppel:

The doctrines of res judicata and collateral estoppel are, of course, two different concepts. A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of res judicata in a second action based on the same claim as to issues, actually litigated and as to issues which might have been litigated in the first action. Under the doctrine of collateral estoppel, on the other hand, the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues “actually and necessarily litigated and determined in the first suit.

**RES JUDICATA**

The doctrine of res judicata is applicable to the facts of this case, and therefore, the Court was correct in finding that Vista Investments was precluded from maintaining

the Fraudulent Conveyance Lawsuit to set aside the UCC-1.

“Res judicata bars subsequent actions by the same parties when the claims arise out of the same occurrence that was the subject of a prior action between those parties.” *Aaron v. Mahl*, 381 S.C. 585, 592, 674 S.E.2d 482, 486 (200). “Under res judicata, a party is “barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.” *Plott v. Justin Enter.*, 374 S.C. 504, 511, 649 S.E.2d 92, 95 (Ct. Appl. 2007). The doctrine operates where there is: (1) identity of the parties, (2) identity of the subject matter, and (3) adjudication of the issue in the former lawsuit. *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408, (2011); see also *Sub-Zero Freezer Co. vs. R.J. Clarkson Co.*, 308 S.C.188, 417 S.E.2d 569 (1992) (res judicata bars subsequent suit by same party on same issues and claims between same parties arising out of same transaction or occurrence that is the subject of the prior suit). Where these requirements are met, the judgment is an absolute bar not only of what was decided but what might have been decided. *Mackey v. Frazier*, 234 S.C. 81, 106 S.E.2d 895 (1959).

An examination of Appellant’s actions reveals it is frivolous, regardless of the UCC filing. In fact, the Respondents have not utilized the UCC-filing to hinder the Appellant from obtaining one single item it has requested and or listed in the UCC filing.

Certainly the Appellant is not entitled to the Trust Account of T&M as it is not the property of T&M. The Operating Account of T&M was completely and fully discussed during the Respondents’ first collection action and before Judge Strickland during the supplemental hearings. (Tr. p. 9, ll. ).

Appellant’s argument that res judicata and/or collateral estoppel is not applicable to Appellant’s second action is nothing but a smoke screen to hide the true intent of



Appellant's basis for appeal, commencement of the second collection action and total disregard for the lease Appellant drafted. Appellant is attempting relegate issues which is lost at the circuit level involving the same parties and issues which were or should have been litigated.

The appellants ignore and or refuse to accept the lease which the appellants drafted. The lease is incredibly clear that no partner, assigns and or future parties shall be liable for any amounts owed on the lease. (See paragraph 28 of Lease, attached as Exhibit "B").

The appellant also ignores that the UCC was filed prior to the commencement of its circuit court actions and that the filing thereof provided notice to appellant thereof.

The individual partners of Tompkins & McMaster total and complete protection from individual liability. The issue is so very simple that no case law is needed to support respondents position on this issue as all that is needed it a review by this honorable court of the lease DRAFTED by the appellants.

The application of the lease results in appellant's argument being frivolous and a waste of the appellant court's voluble time.

The UCC which the respondent agues should have been set aside is another attempt to avoid the undisputed fact that the issue was exhaustively argued and considered by Judge Strickland on April 25 2011. supplemental hearings testimony explains how John Gregg McMaster began loaning Tompkins & McMaster money for various expenses in 2004 the debt was paid down over the years and the bet also increased over the years as JGM was requested to make additional loans . The complete ledger, history of the debt and payments thereon was fully discussed at the supplemental hearing. Transcript 18 6-25

19 202123 24 end line 12.

## SUMMARY

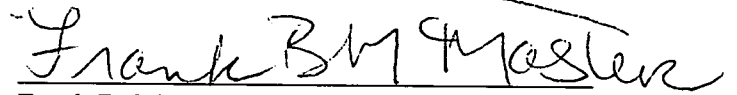
Appellant's arguments are frivolous and a desperate attempt to relegate issues which have been, could have and/or should have raised during the first captioned Vista Investments, LLC filed in

The Respondents clearly appeared and Judge Manning Properly granted Respondents Motion for Summary Judgment.

It should also be noted that appellant drafted the order for Judge Manning's Signature. The respondent specifically instructed the appellant that to purposely draft an appealable order would be improper.

On a very personal note, I must that the members of the appellate court and Ms. Michelle Clayton for the respect and consideration that has been shown my father John Gregg McMaster who is no longer a member of the firm of Tompkins & McMaster, LLP. Both the court and Ms. Clayton have provided me with three extensions to file this initial brief without question. These extensions have allowed me additional time to be with my father in his last days. He has bone cancer throughout his body which was supposed to end his life two years ago. He is presently bleeding internally and his six sons have decided not to provide him with any additional blood transfusions. He was supposed to pass within four days and that was two months ago. Should this appeal require oral argument, John Gregg McMaster may well appear and argue for the respondents.

Respectfully Submitted:

A handwritten signature in cursive script that reads "Frank B. McMaster". The signature is written in black ink and is positioned above a horizontal line.

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January 2, 2014

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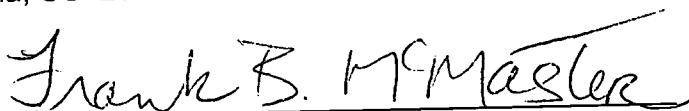
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**PROOF OF SERVICE**

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I certify that I have served Respondents Initial Brief and Designation of Matter to be Included in the Record on Appeal on Vista Investments, LLC by depositing one copy of the same in the United States Mail, postage prepared, on January 2, 2014, addressed to counsel of record for Respondents, Michelle P. Clayton, Esq., Turner Padgett Graham & Laney PA, Post Office Box 1473; Columbia, SC 29202..

January 2, 2014



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