ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Fifth Circuit Court Judge

Case No.: 2011-CP-40-6176

Vista Investments, LLC

..... Appellant,

v.

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

..... Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE & STATEMENT OF THE FACTS

While the order from which this appeal originates was entered in 2013, the history of this case dates back to 2009. In 2009, Tompkins & McMaster, LLP ("T&M"), a law firm, was leasing property located at 1333 Main Street in Columbia from Vista Investments, LLC ("Vista Investments"). (R. p. 014) Although the lease did not expire until April 30, 2011, T&M abandoned the property on July 31, 2009. (R. p. 015) At that time, T&M owed Vista Investments $25,295.47 in late rent and late charges. (R. p. 015) On November 30, 2009, Vista Investments filed a lawsuit in the Richland County Court of Common Pleas styled "*Vista Investments, LLC v. Tompkins & McMaster, LLP*," bearing Civil Action Number 2009-CP-40-8410 ("the Breach of Lease Lawsuit"). The Breach of Lease Lawsuit alleged that T&M was in default of the terms of the lease agreement by reason of its abandonment of the property before the expiration of the lease and its failure to pay rent. (R. pp. 014-016) Vista Investments sought back rent as well as rent for the remaining term of the lease. (R. p. 016) On February 1, 2010, T&M filed an answer, admitting that Vista Investments was entitled to a judgment. On August 10, 2010, T&M confessed judgment in favor of Vista Investments in the amount of $201,125.24. (R. p. 146) The Confession of Judgment referenced the lease agreement, which was attached to the 2009 Complaint, and described the extent of T&M's breach. (R. p. 146) It stated, in pertinent part:

> WHEREAS, on July 31, 2009, Tompkins & McMaster, LLP vacated the Leased Property, and at that time, Tompkins & McMaster, LLP owed Vista Investments, LLC back rent and

continued to remain responsible for rent through the remainder of the lease term.

WHEREAS, Tompkins & McMaster, LLP has defaulted on the terms of the Lease Agreements by virtue of its failure to pay rent and abandoning the Leased Property prior to the expiration of the Lease.

WHEREAS, despite efforts to lease the Leased Property, the Leased Property remains vacant.

WHEREAS, there is presently due and owing to Vista Investments, LLC by Tompkins & McMaster, LLP the sum of $201,125.24, said amount representing the entire amount due to Vista Investments, LLC.

(R. pp. 146-147) The Confession of Judgment was recorded in the Richland County Clerk of Court's Office on August 10, 2010. (R. p. 146)

Thereafter, Vista Investments started the process to collect the judgment. In December 2010, Vista Investments forwarded Executions Against Property to Richland County and Pickens County, asking the Sheriffs in those counties to seize any available assets to satisfy Vista Investments' judgment. (R. p. 149) Frank McMaster responded with a letter to the Richland County Sheriff's Department stating "John Gregg McMaster has a perfected security interest as to all assets of Tompkins & McMaster which has priority over the Judgment held by Vista." (R. p. 152) On January 28, 2011, the Richland County Sheriff issued a *nulla bona* return on the Execution Against Property. (R. p. 151)[1] Shortly thereafter, Vista Investments petitioned the Master in Equity for Richland County for a supplemental proceeding in an attempt to discover assets to execute its

[1] The Pickens County Sheriff was able to locate two pieces of real property, which T&M deeded to Vista Investments. Accordingly, on February 16, 2011, a Partial Satisfaction of Judgment in the amount of $30,000 was filed.

judgment. (R. pp. 57-59) The Court issued a Rule to Show Cause and Order for Supplemental Proceedings on March 1, 2011, ordering a representative of T&M to appear on April 25, 2011 to answer questions under oath concerning its assets and to show cause why its assets should not be applied toward the satisfaction of Vista Investments' judgment. (R. pp. 003-005)

On April 25, 2011, the Honorable Joseph M. Strickland, Master-in-Equity for Richland County, held a hearing at which Frank McMaster appeared and answered questions concerning T&M's assets. (R. p. 096) Frank McMaster testified that about three days before T&M walked out on its lease, T&M filed a UCC-1 financing statement, purporting to perfect for John Gregg McMaster, Jr. ("McMaster") a security interest in most of T&M's collateral.[2] (R. pp. 115-116, pp. 144-145) Frank McMaster explained that the security interest, which was reflected by the filing of the UCC-1 (hereinafter collectively referred to as "UCC-1"), was given to McMaster to secure old debt — loans totaling more than $240,000 that McMaster had made to T&M between 2004 and 2009 so T&M could make payroll and pay its employee's health insurance premiums. (R. pp. 109-110)

On September 19, 2011, Vista Investments initiated this underlying action with the filing of an Amended Complaint against McMaster and T&M to have the UCC-1 filed in favor of McMaster declared null, void, and of no effect under South Carolina § 27-2-30, dealing with fraudulent conveyances ("the Fraudulent

[2] The UCC-1 covered T&M's accounts receivables, its operating account at First Citizens Bank, six laptops, seven computers, seven monitors, ten printers, two typewriters, and certain courtroom, mediation presentation and deposition equipment. (R. pp. 144-145)

Conveyance Lawsuit"). (R. pp. 060-063) The Fraudulent Conveyance Lawsuit alleged that T&M gave McMaster a security interest in T&M's collateral in order to defeat and frustrate Vista Investments' efforts to collect the amounts T&M owed Vista Investments for breaching the lease agreement. (R. p. 062) Service of the Amended Complaint was accepted by Frank McMaster, as counsel for the Respondents, on September 29, 2011, who subsequently received an extension of time until November 28, 2011 to respond. (R. pp. 070-073) Rather than filing an answer or motion under Rule 12(b) of the South Carolina Rules of Civil Procedure, on November 28, 2011, the Respondents filed a Motion for Summary Judgment. (R. p. 064) In their Motion for Summary Judgment, the Respondents advanced the following arguments:

1. The Fraudulent Conveyance Action should be barred by the application of the principles of res judicata and/or collateral estoppel.

2. Vista Investments was raising an issue that could have been — but was not — raised in the first action filed on November 30, 2009 and followed by supplemental hearings on April 25, 2011. John G. McMaster is the sole equity partner in T&M, is 97 years of age and has been the sole equity partner in T&M for numerous years prior to the filing of the November 30, 2009 action.

3. The lease upon which Vista Investments filed the November 30, 2009 lawsuit excluded the individual partners of T&M to any liability associated with the lease agreement and/or collection process.

4. The following sequence of dates foreclosed the UCC Action:

    - July 28, 2009 – UCC filing
    - November 30, 2009 – Plaintiff filed breach of lease collection action
    - August 10, 2010 – Confession of Judgment entered

- April 25, 2011 – Supplemental hearing before the Honorable Joseph Strickland for the location and/or seizure of assets

(R. pp. 064-065) On December 7, 2011, Vista Investments filed a Motion for Entry of Default and Default Judgment based on the Respondents' failure to answer or otherwise respond to the Amended Complaint in accordance with the South Carolina Rules of Civil Procedure. (R. pp. 068) The Richland County Clerk of Court entered an Entry of Default against the Respondents on December 5, 2011. (R. p. 075) On December 29, 2011, the Respondents filed a Return and Memorandum to Plaintiff's Motion for Default Judgment in which they claimed that their "Motion for Summary Judgment" was based on Rules 12(b) and 8 of the South Carolina Rules of Civil Procedure. (R. p. 076) The Respondents also asserted that they had made an appearance and should not be held in default. (R. p. 076) On March 7, 2012, Vista Investments filed a Memorandum in Opposition to Respondents' Motion for Summary Judgment, which the Respondents followed with a Supplemental Memorandum in Opposition to Vista Investments' Motion for Default. (R. p. 092)

On March 14, 2012, the Respondents' Motion for Summary Judgment and Vista Investments' Motion for Default Judgment came before the Honorable L. Casey Manning for a hearing. (R. pp. 127-143) On April 5, 2012, the Respondents filed an Answer to the Amended Complaint and asserted that Vista Investments' action to have the UCC-1 set aside as a fraudulent conveyance should be barred by the principles of res judicata and collateral estoppel. (R. p. 078)

On February 7, 2013, Judge Manning entered a Form 4 Order granting the Respondents' Motion for Summary Judgment. (R. p. 006) On February 22, 2013, Vista Investments filed a Motion to Alter or Amend, requesting that Judge Manning reconsider or amplify the Form 4 Order since it gave no reasons or justification for the decision. (R. p. 095) Vista Investments also argued that Judge Manning did not specify that he had given any consideration to Vista Investments' arguments, including the fact that T&M and McMaster never answered the Complaint and were in default. (R. p. 095) Judge Manning reconsidered the Form 4 Order and on May 16, 2013 entered an Order Denying Vista Investments' Motion for Default Judgment and Granting the Respondents' Motion for Summary Judgment. (R. p. 007-013) In denying Vista Investments' Motion for Default Judgment, Judge Manning concluded that "the 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." (R. p. 010) Judge Manning further held that the Fraudulent Conveyance Lawsuit was barred by the principles of res judicata and collateral estoppel. (R. p. 010) On the res judicata issue, he reasoned that Vista Investments was taking an "impermissible second bite of the apple" and that "Vista Investments should have tried to have the UCC-1 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." (R. pp. 011-012) As for collateral estoppel, Judge Manning concluded that the issue in the Fraudulent Conveyance Lawsuit — whether T&M gave McMaster a security

interest in the collateral to hinder Vista Investments' collection efforts—"was finally determined by the [C]onfession of [J]udgment and the supplemental proceedings." (R. pp. 012-013)

This appeal followed.

ARGUMENT

I.

THE COURT ERRED IN DETERMINING THAT THE RESPONDENTS WERE NOT IN DEFAULT.

The Court below erred in refusing to find that the Respondents were in default by filing a motion for summary judgment rather than filing an answer or motion under Rule 12(b) of the South Carolina Rules of Civil Procedure. Although the Respondents' Motion for Summary Judgment was within the deadline, a default judgment was appropriate in this case because a motion for summary judgment is not a responsive pleading to a complaint as contemplated under the South Carolina Rules of Civil Procedure.

The procedure for responding to a complaint is set forth in Rule 12 of the South Carolina Rules of Civil Procedure. Rule 12(a) states that unless an extension is granted, "[a] defendant shall serve his answer within 30 days." Rule 12(a), SCRCP. However, the service of a motion under Rule 12(b) alters the 30 day requirement for an answer. Rule 12(b), SCRCP ("The service of a motion permitted under **this rule** alters these periods of time . . . ")(emphasis added). In turn, Rule 55 (a) describes the consequences if a party does not respond to a complaint. It provides that if a party fails to "plead or **otherwise defend as provided by these rules** and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default." Rule 55(a), SCRCP. (emphasis added). The phrase "or otherwise defend as provided by these rules" is not insignificant. In *Stark Truss Co. v. Superior Construction Corp.*, this Court

explained that the phrase refers to the "interposition of various challenges to such matters as service, venue, and the sufficiency of the prior pleading, any of which might prevent a default if pursued in the absence of a responsive pleading." 360 S.C. 503, 509 n1, 602 S.E.2d 99, 102 n1 (Ct. App. 2004) (quoting 10A Charles Allen Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2682, at 16-17 (3rd ed. 1989)). This Court was, of course, referring to those defenses listed in Rule 12(b), which tolls the time period for an answer.

In *Stark Truss Co.*, this Court addressed whether the defendant was in default despite filing a late answer. 360 S.C. at 509, 602 S.E.2d at 102. This Court answered in the affirmative, reasoning that although a late answer amounted to a pleading, it was not a valid pleading or defense as provided by the South Carolina Rules of Civil Procedure since it did not comply with the time requirement. *Id.* This Court explained:

> Appellants clearly failed to file an answer within 30 days of service of the summons and complaint upon them and they were technically in default. Thus, Appellants' answer was not a valid pleading or defense 'as provided' by the Rules of Civil Procedure. **A plain reading of Rule 55(a) allows entry of default when a pleading or defense is asserted in a manner noncompliant with the Rules of Civil Procedure. To hold otherwise would render the requirements of Rule 12(a) SCRCP, meaningless.** We find the court's entry of default was proper.

Id. (emphasis added). This Court's decision in *Stark Truss Co.* is significant insomuch as it makes clear that default is appropriate when a pleading or defense is asserted in a manner noncompliant with the Rules of Civil Procedure.

Under no theory can the Respondents' Motion for Summary Judgment be viewed as compliant with the South Carolina Rules of Civil Procedure. In

responding to Vista Investments' Amended Complaint, the Respondents had two options— to either file an answer or to file a motion asserting one or more of the defenses enumerated in Rule 12(b). The Respondents' Motion for Summary Judgment is unmistakably not an answer. Rule 8(b) describes the responses to be made in the answer. The plain language of Rule 8(b) explains that the pleader is to meet fairly the substance of the allegations, and that the averments in the complaint should elicit one of three responses: (1) an admission, (2) a denial, or (3) a denial on lack of information and belief. Rule 8(b), SCRCP. The Respondents' Motion for Summary Judgment does not admit or deny the allegations of the Amended Complaint. While the Respondents include a recitation of facts in their Motion for Summary Judgment, they do not even address the allegations at the heart of the dispute. Rather, they left uncontroverted the following allegations:

> 13. The Plaintiff is informed and believes that T&M gave McMaster a security interest in the collateral for the purpose of hindering, delaying, and/or defrauding the Plaintiff of the sums to which it is entitled and in an effort to protect the listed collateral from levy and execution, and such intent is imputable to McMaster.
>
> 14. Said UCC financing statement purportedly gave Defendant McMaster an interest in property, which has been owned by T&M.
>
> 15. Upon information and belief, the transfer was made for no or inadequate or nominal consideration and thus was voluntary.
>
> 16. Upon information and belief, T&M failed to retain sufficient property to pay its debts at all times relevant hereto.
>
> 17. The transfer was made with T&M's and McMaster's knowledge of the amounts due to the Plaintiff, Plaintiff's claim, and with the actual intention to defraud the Plaintiff.

> 18. The Plaintiff is informed and believes that T&M gave McMaster a security interest in the property in order to defeat T&M's creditors, including the Plaintiff, in violation of the Statute of Elizabeth, as codified at South Carolina Code § 27-23-10.
>
> 19. The Plaintiff is informed and believes that, pursuant to South Carolina Code § 27-23-10, the transfer described herein should be declared null, void, and of no effect and the property referenced herein be released from the UCC financing statement filed on July 28, 2009.

(R. pp. 062-063). Since the Respondents' Motion for Summary Judgment does not meet the substance of the allegations, it cannot be an answer for purposes of Rules 8 and 12 of the South Carolina Rules of Civil Procedure.[3] The Respondents virtually concede this, in that they essentially argued below that the Motion for Summary Judgment was akin to an answer because it raised affirmative defenses. (R. p. 093). However, the Fourth Circuit Court of Appeals in *Educational Services, Inc. v. Maryland State Board for Higher Education*, 710 F.2d 170 (4th Cir. 1983) rejected a similar argument. In that case, the defendant board argued that its response to the plaintiff's motion for preliminary injunction, which accompanied the complaint, was "tantamount to the answer required by the Rules." *Id.* at 176. Although the Fourth Circuit found that a default judgment was not warranted on the facts of that case, it cited the "general rule that a motion or a response to one is not deemed a 'responsive pleading' for the purpose of the time limits set out in the Rules." *Id.* That general rule applies with equal force to this case, and unless the Respondents' Motion for Summary

[3] Additionally, since the Respondents failed to deny the averments in paragraphs 13 through 19, they are deemed admitted. *See* Rule 8(d), SCRCP.

Judgment is pursuant to Rule 12(b), as they claim, they have not answered or other responded to the Amended Complaint.

Rule 12(b) governs the presentation of defenses and directs whether certain defenses can be made by motion or in the answer. The first sentence of Rule 12(b) lists eight defenses and gives the pleader the option to raise the defenses before the answer or in the answer. The eight defenses include (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state facts sufficient to constitute a cause of action, (7) failure to join a party under Rule 19, and (8) another action is pending between the same parties for the same claim. Rule 12(b), SCRCP. A motion making any of these defenses must be made before pleading if a further pleading is permitted. Rule 12(b), SCRCP. If a motion is made asserting one or more of the eight defenses, then the time for the filing of the answer is altered. Rule 12(a), SCRCP.

The Respondents' Motion for Summary Judgment does not even reference Rule 12 nor is it grounded in any of the eight defenses identified by Rule 12(b). Rather, the Respondents are very clear in their Motion for Summary Judgment (as well as their subsequent filings) that they rely upon the doctrines of collateral estoppel and res judicata. (R. pp. 064, 076, 093) Collateral estoppel and res judicata are not any of the defenses that can be made by a Rule 12(b) motion. *See* Rule 12(b), SCRCP. As the Respondents recognize, they are affirmative defenses. *See* Rule 8(b). Under Rule 8(c), affirmative defenses must

be set forth in a "pleading." Rule 8(c), SCRCP ("In a pleading to a preceding pleading, a party shall set forth affirmatively the defenses: . . . res judicata, . . and any other matter constituting an . . . affirmative defense."). A "pleading" is "[a] formal document in which a party to a legal proceeding . . . sets forth or responds to allegations, claims, denials, or defenses." Black's Law Dictionary 531 (2nd ed. 2001). Whereas, a "motion" is "[a] written or oral application requesting a court to make a specified ruling or order." Black's Law Dictionary 458 (2nd ed. 2001). As explained above, the Respondents' Motion for Summary Judgment does not respond to the allegations of the Amended Complaint, and as a result, the Respondents have failed to set forth the affirmative defenses in a pleading compliant with the South Carolina Rules of Civil Procedure (i.e. an answer).[4] Therefore, the Respondents' Motion for Summary Judgment can only be recognized for it is— a motion for summary judgment and not a motion under Rule 12(b)[5].

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[4] This Court in *Wagner v. Wagner*, 286 S.C. 489, 491, 335 S.E.2d 246, 247 (Ct. App. 1985) did permit the pleading of an affirmative defense by way of summary judgment; however, this case is distinguishable on its facts. In *Wagner*, the defendant did not plead in her answer the defense of preclusion by a former judgment. *Id.* Rejecting the plaintiff's argument that the defense was not properly presented, the Court explained that although the better practice would have been to amend the answer to raise the defense, the judgment did not exist when the defendant was required to answer the complaint. *Id.* Unlike in *Wagner*, the judgment that the Respondents contend precludes this action existed at the time that the Respondents' answer was due. Therefore, in accord with *Wagner*, the Respondents should have filed an answer, asserting the affirmative defenses of res judicata and collateral estoppel.

[5] Since the Respondents failed to plead the affirmative defenses in compliance with South Carolina Rules of Civil Procedure, they have waived the right to assert those defenses. *Whitehead v. State*, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002).

The Respondents also contended below that because they made an appearance in the action, an entry of default judgment would be improper. (R. p. 094) Vista Investments does not dispute that the Respondents appeared. However, the significance the Respondents assign to their appearance is misplaced. Their appearance entitled them only to a notice and hearing before having a default judgment entered against them. *See* Rule 55(b)(2)("If the party against whom judgment by default is sought has appeared in the action, the party . . . shall be served with written notice of the motion . . . at least 3 days prior to the hearing."); *see also Stark Truss Co.*, 360 S.C. at 511, 602 S.E.2d at 103 (a late answer was an appearance that only entitled the defendants to notice and a hearing before judgment by default was entered"). Thus, contrary to Respondents' belief, their appearance does nothing to save them from their failure to answer or otherwise respond to the Amended Complaint.

While no technical form of pleadings is required under the South Carolina Rules of Civil Procedure, that does not give the Respondents carte blanche to ignore the rules entirely or apply them only as they see fit. Otherwise, as this Court aptly noted in *Stark Truss Co.* the rules would be rendered meaningless. This is not a situation involving a pro se litigant where compliance with the rules might be relaxed. The Respondents are a law firm and a lawyer, both of whom are represented by able counsel. T&M clearly knew how to admit and deny allegations within the appropriate timeframe since it filed an answer in the Breach of Lease Lawsuit. The Respondents even filed an answer in this action albeit it

was almost five months late. The rules exist for a reason, and the Respondents have failed to follow the rules.

Since the Respondents' Motion for Summary Judgment was neither an answer nor a motion under Rule 12(b), the Respondents were in default, and Vista Investments' Motion for Default Judgment should have been granted.

II.

THE COURT ERRED IN FINDING THAT VISTA INVESTMENTS' LAWSUIT TO SET ASIDE THE UCC-1 AS A FRAUDULENT CONVEYANCE WAS BARRED BY COLLATERAL ESTOPPEL AND RES JUDICATA.

The Court below found that Vista Investments' lawsuit to set aside the UCC-1 as a fraudulent conveyance under the Status of Elizabeth was barred by the doctrines of res judicata and collateral estoppel This was error.

A. 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.

Id. This Court emphasized:

> [T]o assert collateral estoppel successfully, **the party seeking issue preclusion still must show that the issue was actually**

> **litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment.**

Id. (emphasis added); *see also Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997)("collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding).

Thus, for purposes of this appeal, the issue is whether there was an adjudication of the merits of Vista Investments' claim that T&M granted McMaster a security interest in its collateral for the purpose of defrauding Vista Investments. The Court below held that the issue was finally determined during the supplemental proceedings hearing and by the Confession of Judgment. However, neither South Carolina law nor the record below supports this conclusion.

At the beginning of the supplemental proceedings hearing on April 25, 2011, Judge Strickland described the purpose of the hearing. He stated:

> I know you know what this is all about, but I always make a little spiel for clarity of the record in case anybody has to read it. . . . In South Carolina, when somebody sues you or a business, and wins a money judgment, they can bring you back to court, put you under oath and ask you questions. The purpose is to see if there's money or property that can be used to pay the judgment. It's not an appeal, it's not a new trial, it's not a chance to fight the case again on the merits; it's just a remedy that creditors have. As you know, Ms. Clayton's going to ask you some questions, and when she finishes she's going to ask for some kind of relief. And, hopefully, that'll be the end of it after she finishes her questions and asks for relief.

(R. p. 098). As Judge Strickland explained, supplemental proceedings are nothing more than a remedy a creditor has to try to enforce or collect its judgment. *See* S.C. Code § 15-39-350 ("the judge may by an order require such

person or corporation, or any officer or member thereof, to appear at a specified time and place and answer concerning such property or indebtedness."). While Frank McMaster testified about the circumstances surrounding the UCC-1, Judge Strickland was not asked to rule on whether T&M gave McMaster a security interest in its collateral for the purpose of defrauding Vista Investments. The validity of the UCC-1 was in no way determined in the supplemental proceedings. Nor could it have been given the limited purpose for the proceedings. Thus, the supplemental proceedings do not avail the Respondents of a viable claim of collateral estoppel.

Turning to the Confession of Judgment, it also has no collateral effect in this case since it was not the result of actual litigation of the issue on the merits. This Court has recently held that the doctrine of collateral estoppel cannot be applied to default judgments because the essential element requiring the claim sought to be precluded actually have been litigated in the earlier action is not met. *See Kunst v. Loree*, 746 S.E.2d 360, 364 (Ct. App. 2013). In reaching this conclusion, this Court noted that "South Carolina courts have consistently followed the Restatement (Second) of Judgments ["the Restatement"] with regard to the issue of collateral estoppel." *Id.* at 363. Comment e of Restatement states:

> **In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated.** Therefore the rule of this Section does not apply with respect to any issue in a subsequent action.

Restatement (Second) Judgments § 27, comment e (1982)(emphasis added). According to the Restatement, confessions of judgments have not been "actually

litigated" and cannot be used as the basis for collateral estoppel in subsequent actions. This is certainly true in the context of this case. The Confession of Judgment established nothing more than the amount T&M owed Vista Investments for walking out on its lease. In fact, the Confession of Judgment is entirely silent on the issue of the UCC-1. It does not even mention John Gregg McMaster, the UCC-1, or the circumstances under which T&M granted McMaster a security interest in its collateral. The UCC-1 was simply of no consequence to the Confession of Judgment and did nothing to determine the merits of Vista Investments claim that T&M gave McMaster a security interest in its collateral for the purpose of defrauding Vista Investments.

Since the validity of the UCC-1 was never previously litigated, either by way of the supplemental proceedings or the Confession of Judgment, collateral estoppel does not apply. Neither Vista Investments nor McMaster has ever had its day in court before this lawsuit—they have not had a chance to present their evidence and arguments. Therefore, the Court was incorrect in granting Respondents' Motion for Summary Judgment based on collateral estoppel.

B. Res Judicata

The doctrine of res judicata is likewise inapplicable to the facts of this case, and therefore, the Court erred 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 (2009). "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. App. 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. v. 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). For the reasons explained above, the validity of the UCC-1 was not previously determined, either by way of the Confession of Judgment entered in the Breach of Lease Lawsuit or the subsequent supplemental proceedings. Therefore, res judicata has no application. However, for purposes of this appeal, Vista Investments will complete the analysis to show that the Respondents cannot satisfy the requirements for res judicata.

South Carolina courts have utilized four factors to determine 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 (4) when the claims arise out of the same transaction or occurrence that is the subject of the prior action." *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408 (2011)(citing James F. Flanagan, South Carolina Civil Procedure 649-50 (2d ed. 1996)). Applying these factors here, the Breach of Lease Lawsuit and the Fraudulent Conveyance Lawsuit are different cases for res judicata purposes, and the Court below was wrong in holding otherwise.

The parties to the Fraudulent Conveyance Lawsuit were not parties to the Breach of Lease Lawsuit. Rather, Vista Investments named only T&M in the Breach of Lease Lawsuit, not John Gregg McMaster. If T&M had simply paid the judgment, the validity of McMaster's security interest would never have been raised. Below, the Court concluded that although McMaster was not named in the Breach of Lease Lawsuit or the supplemental proceedings, the identity of the parties was the same because McMaster was one of the three partners of T&M and the sole equity partner. (R. p. 012) This holding was erroneous. For the parties to have been the same as the Respondents contend and as the Court below agreed, McMaster would had to have been in privity with T&M. "[P]rivity," in the context of res judicata, "does not embrace relationships between persons or entities, but rather it deals with **a person's relationship to the subject matter of the litigation**." *Richburg v. Baughman*, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986)(emphasis added). The subject matter of the Breach of Lease Lawsuit was the lease itself and T&M's breach. McMaster was not a party to the lease and for that reason was not and could not have been a defendant to the

Breach of Lease Lawsuit.[6] McMaster simply does not have the requisite relationship with the subject matter of the Breach of Lease Lawsuit and therefore was not a party to that action.

Not only are the parties different, but the Breach of Lease Lawsuit and Fraudulent Conveyance Actions are based on different subjects, have different claims and evidence, and seek different remedies. The thing sued upon in the Breach of Lease Lawsuit was the lease agreement. While the Amended Complaint in the Fraudulent Conveyance Lawsuit references how Vista Investments obtained its judgment, the thing sued on in that action was T&M giving McMaster a security interest — the UCC-1 and how that was done for the purpose of placing T&M's assets beyond Vista Investments' reach. The causes of action are undeniably different — breach of contract versus fraud. Likewise, the elements of proof and damages for breaching the lease agreement are entirely distinct from that which is required to prove that a transfer is fraudulent. The latter is predicated upon acts set out in a particular statute, not a breach like the Breach of Lease Lawsuit. In the Breach of Lease Lawsuit, Vista Investments sought damages against T&M as a result of its default on the lease. Whereas, through the Fraudulent Conveyance Lawsuit Vista Investments sought to have the UCC-1 declared null and void.

Since the underlying factual allegations and claims are not the same, the evidence is also different. The evidence for the Breach of Lease Lawsuit

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[6] Additionally, the lease upon which the Breach of Lease Lawsuit was filed included a limitation of liability clause stating that Vista Investments could proceed only against T&M.

consisted of the lease, T&M's payment history, and the details concerning T&M's abandonment of the leased premises. Whereas, the evidence for the Fraudulent Conveyance Lawsuit would have necessarily focused on the security interest, the UCC-1, the relationship between T&M and John Gregg McMaster, the amount and timing of the loans to T&M, and John Gregg McMaster's knowledge of the amounts owed to Vista Investments.

Based on these many differences, the Breach of Lease Lawsuit does not have a res judicata preclusive effect on the claim by Vista Investments in the Fraudulent Conveyance Lawsuit. Therefore, the Court erred in finding that Vista Investments should have raised the issue of setting aside the UCC-1 previously.

CONCLUSION

For all of the reasons stated herein, Vista Investments respectfully submits that the Court's decision was in error and that the Respondents were in default and that Vista Investments' lawsuit to set aside the security interest T&M granted to McMaster as reflected in the UCC-1 filing was not barred by collateral estoppel or res judicata.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the foregoing Final Brief of Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Fifth Circuit Court Judge

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

Vista Investments, LLC

..... **Appellant**

v.

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

..... **Respondents**

PROOF OF SERVICE

I certify that I have served the **FINAL BRIEF OF APPELLANT** on Tompkins & McMaster, LLP and John Gregg McMaster, Jr. by having two copies of the same hand delivered on February 20, 2014, to counsel of record for Respondents, Frank B. McMaster, Esquire, Tompkins and McMaster, 1701 Richland Street, Columbia, SC 29201.

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