STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ABBEVILLE	)	EIGHTH JUDICIAL CIRCUIT
	)	
Pamela Richey,	)	
	)	**ORDER**
Plaintiff,	)	
v.	)	
	)	C.A. #2013-CP-01-284
Shirley W. Booth, Thomas J. Booth, Estate of Lee C. Williams,	)	
	)	
Defendants.	)	

This matter came before me upon separate motions of the Defendants Estate ("Lee") and Booth for summary judgment in the above-captioned action. I heard the motions on February 5, 2015, in Abbeville, South Carolina.

Based on the parties' arguments and the record before the Court, the Court grants summary judgment as to the Defendant Estate, with leave to file a claim against Lee's Estate, if available, and denies the motion for summary judgment as to the Defendants Booth, without prejudice and with leave to refile upon on-going discovery. RLG

FACTUAL AND PROCEDURAL HISTORY

Plaintiff Pamela Richey ("Penny") and Lee have a history of litigation regarding allegations Lee took an amount of cash money, up to $628,000, from Penny's father (also Lee's brother). This former litigation took place in the Probate Court for Abbeville County (2006-ES-01-169) and Common Pleas for Abbeville County (2007-CP-01-188[1]). In both sets of pleadings, Penny alleged

[1]Penny's allegations in probate court pleadings were consolidated into the 2007 common pleas case by way of counterclaim.

Lee took the cash from Penny's father and that Penny is the rightful owner of the cash money.

Penny and Lee actually litigated the 2007 Common Pleas case and participated in active discovery, including depositions of Lee and Defendant Shirley Booth, among others. Penny and Lee resolved the 2007 Common Pleas case by filing a stipulation of dismissal with prejudice, as well as, executing a mutual release and statement agreement. In exchange for Lee paying Penny $32,500, and other consideration, Penny and Lee signed a:

> "Mutual Release in settlement of all claims, disputes and differences from the beginning of time to the present relating to or arising out of the allegations and causes of action more specifically described in the pleadings [2007-CP-01-188]. Accordingly, [Lee] and [Penny], for themselves, and their heirs, legal representatives, successors, and assigns, expressly releases, acquits and forever discharges the other party and their heirs, legal representatives, successors, and assigns from all liability for claims, demands and causes of action, known or unknown, heretofore existing, relating to or arising out of the allegations and causes of action more specifically described in the pleadings [2007-CP-01-188]."

The case currently before the Court ("2013 Common Pleas case") concerns the same money in controversy as was litigated in the 2007 Common Pleas case. This 2013 Common Pleas case adds Defendants Booth (Lee's daughter and son-in-law) alleging that they took the same cash money from Lee that Lee allegedly took from Penny's father.

In response to Defendants' motions, Penny responded with an affidavit of Billy Garrett, Esq. (Penny's counsel in the 2007 Common Pleas case) outlining what Lee said to him after the resolution of the 2007 Common Pleas case and Mr. Garrett's opinion on the matter; as well as, two affidavits from Lee alleging that Lee did take the money and that the Defendants Booth then took the money from Lee.

ISSUES

1) Does the filed Stipulation of Dismissal with prejudice, and the Mutual Release and Settlement Agreement[2] in the 2007 Common Pleas case bar Plaintiff's 2013 Common Pleas case as to all Defendants?

2) Is Plaintiff's 2013 Common Pleas case barred under collateral estoppel as to all Defendants because the issues are the same as in the 2007 Common Pleas case?

3) Is Plaintiff's 2013 Common Pleas case barred under res judicata as to all Defendants because the claims are the same as in the 2007 Common Pleas case?

4) Is Plaintiff's 2013 Common Pleas case barred under Rule 60(b), SCRCP, as to all Defendants because the motion was not made within a reasonable period of time not to exceeding a year?

SUMMARY JUDGMENT STANDARD

Summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. E.g., Shelton v. LS&K, Inc., 374 S.C. 294, 297, 648 S.E.2d 307 (Ct. App. 2007). In reviewing the record, the Court views all the properly cognizable evidence in the light most favorable to the nonmoving party. Dawkins v. Fields, 354 S.C. 58, 67-68, 580 S.E.2d 433 (2003); Shelton, 374 S.C. at 297.

[2]Admitted by Plaintiff as a genuine document under SCRCP 36, dated August 19, 2014.

When a summary judgment motion is made and supported by factual material, the opposing party may not rest upon the allegations of his pleading but must put forth specific facts demonstrating a genuine factual issue for trial. Rule 56(e), SCRCP. Where the nonmoving party bears the burden of proof on a claim in the case, it must provide the Court with evidence showing that there is a genuine issue of material fact with regard to each of the elements of its claim. Hansson v. Scalise Builders of S.C., 374 S.C. 352, 358, 650 S.E.2d 68 (2007). Rule 56, SCRCP, "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof." Id. at 357 (internal quotation marks omitted, ellipsis in original). It is not enough for the party with the burden of proof to make a factual showing as to some, but not all, of the elements of its claims; rather, to deny summary judgment, "the court must determine that a genuine issue of material fact exists for each essential element[.]" Id. at 358. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Baughman v. AT&T, 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991). "Summary judgment speaks in terms of "genuine issue of fact" [. . .]." Saluda Motor Lines, Inc. v. Crouch, 300 S.C. 43, 45, 386 S.E.2d 290, 291-292 (Ct. App. 1989). "It is not sufficient that a mere inference be created as relates to [the summary judgment] motion." Id. "The issue as relates to a summary judgment must be genuine [. . .]. Id. "It is not sufficient that evidence create a far fetched inference." Id.

RULES OF APPLICABLE LAW AND APPLICATIONT TO THE FACTS

1. Rule 41 (SCRCP) and the Principle of Contract

The Court dismissed the 2007 Common Pleas case upon agreement of the parties, with prejudice. A dismissal with prejudice is a final adjudication of the case. Freeman v. McBee, 280 S.C. 490, 493, 313 S.E.2d 325, 327 (Ct. App. 1984) ("Here, the complaint was dismissed *with* prejudice. In that situation, the dismissal operates as an adjudication on the merits terminating the action and concluding the rights of the parties." (Citation omitted)).

The document entitled "Mutual Release and Settlement Agreement" is a release. See Bowers v. Dep't of Transp., 360 S.C. 149, 153-54, 600 S.E.2d 543, 545 (Ct. App. 2004) ("The Release is a contract. See Hyman v. Ford Motor Co., 142 F.Supp.2d 735 (D.S.C.2001) (applying South Carolina law, contract principles invoked to determine validity of a release); Lowery v. Callahan, 210 S.C. 300, 300, 42 S.E.2d 457, 458 (1947) (noting that the "same principles of adequacy of consideration which apply to other contracts, govern as to releases"); 18 S.C. Jur. Release § 2 (2003) ("Because a release is a contract, principles of law applicable to contracts generally are also applicable to releases."). "In construing terms in contracts, this Court must first look at the language of the contract to determine the intentions of the parties." C.A.N. Enterprises, Inc. v. South Carolina Health & Human Services Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988).

Penny was a party to previous actions seeking to recover the same money from Lee she seeks to recover in the 2013 Common Pleas case. Penny authorized the filing of a stipulation of dismissal with prejudice of the 2007 Common Pleas case, voluntarily settled the 2007 Common Pleas case releasing Lee, and accepted $32,500 from Lee, as well as other consideration, in exchange for the release of all claims, known and unknown arising out of the same facts and

circumstances alleged in the 2013 Common Pleas case. I find the filing of the stipulation of dismissal pursuant to Rule 41, SCRCP, is a final adjudication.

I find the terms of the release are clear and unambiguous. Since the Release unambiguously sets forth the contracting parties' intent, this Court is bound by that clearly expressed intent without resort to extrinsic evidence. "Extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible." C.A.N. Enterprises, Inc. v. South Carolina Health & Human Services Fin. Comm'n 373 S.E.2d at 586. Plaintiff admitted in her requests to admit that the release was genuine. She alleged no ambiguity in any pleading or affidavit. Accordingly, summary judgment is appropriate in favor of Defendant Estate of Lee Williams.

Conversely, I do not find summary judgment is appropriate in favor of the Defendants Booth. Despite the explicit language that the release applies to Lee and Penny and "their heirs, legal representatives, successors and assigns," the Defendants Booth were not parties to the 2007 Common Pleas case, nor to the Release. I deny the motion for summary judgment as to the Defendants Booth on this ground, without prejudice with leave to refile. based upon ongoing discovery. RLM

2. Collateral Estoppel and Res Judicata

Collateral estoppel, also known as issue preclusion, prevents a party from re-litigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct.App.2009). The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was:

(1) actually litigated in the prior action;
(2) directly determined in the prior action; and
(3) necessary to support the prior judgment.
Beall v. Doe, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189–90 n. 1 (Ct.App.1984).

However, the doctrine of collateral estoppel should not be rigidly or mechanically applied. Carrigg v. Cannon, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct.App.2001). Thus, even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it. State v. Bacote, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998).

"The doctrine of collateral estoppel [. . .] rests generally on equitable principles." S. Carolina Pub. Interest Found. v. Greenville Cnty., 401 S.C. 377, 386©87, 737 S.E.2d 502, 507 (Ct. App. 2013), reh'g denied (Jan. 23, 2013), cert. denied (May 7, 2014) (citations omitted). In Watson v. Goldsmith, 205 S.C. 215, 31 S.E.2d 317 (1944), our supreme court contrasted the origin of the doctrine of collateral estoppel with the origin of res judicata:

> Estoppel rests generally on equitable principles, which res judicata does not, but upon the two maxims which were its foundation in the Roman law, *nemo debet bis vexari pro eadem causa* (no one ought to be twice sued for the same cause of action) and *interest reipublicae ut sit finis litium* (it is the interest of the state that there should be an end of litigation [ ])[.] ... Res judicata is rather a principle of public policy than the result of equitable considerations, which [the] latter estoppel is.

"Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." Judy v. Judy, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011) (citation omitted). "Under the doctrine of res judicata, a litigant 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." Id. (citation and quotation marks omitted).

"Res judicata bars re-litigation of the same cause of action while collateral estoppel bars

re-litigation 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). In Beall v. Doe, this court distinguished the two concepts as follows:

> "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. 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 190 n. 1 (Ct.App.1984) (citations and quotation marks omitted)."

Penny and Lee litigated the identical issues in the 2007 Common Pleas case as are set forth in the 2013 Common Pleas case. Essentially, Penny sued Lee again over the same money in the case at bar. Penny's counsel conceded to the Court at oral argument both cases involved the same money.

I find the issues and claims, as to Lee, between the two cases are identical. The 2013 Common Pleas case is barred under both collateral estoppel and res judicata. Accordingly, summary judgment is appropriate in favor of Defendant Estate of Lee Williams.

As I found collateral estoppel and res judicata properly applied to Lee, I do not find these doctrines apply to bar the 2013 Common Pleas case against the Defendants Booth. I find this an appropriate circumstance not to apply collateral estoppel. Collateral estoppel is an equitable doctrine, and since information about the Booths alleged activity was not known by Penny until March 6, 2012, an injustice may occur if the allegations are not further reinvestigated. The

doctrine of collateral estoppel should not be rigidly or mechanically applied. Carrigg v. Cannon, 552 S.E.2d at 770. Thus, even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it. State v. Bacote, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998). I chose not to apply collateral estoppel under these circumstances.

I further conclude the doctrine of res judicata does not apply here because the Booths were not parties to the 2007 Common Pleas case. See Judy v. Judy, 712 S.E.2d at 414 ("Res judicata bars subsequent actions **by the same parties** when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties.") (Emphasis added.) Accordingly, I deny the motion for summary judgment as to the Defendants Booth on these grounds, without prejudice with leave to refile.

3. Rule 60(b), SCRCP

Rule 60, SCRCP is as follows:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud, misrepresentation, or other misconduct of an adverse party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.
> The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality

> of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. During the pendency of an appeal, leave to make the motion must be obtained from the appellate court. [. . .]"

The burden of proof under Rule 60(b), SCRCP, is clear and convincing evidence. Gainey v. Gainey, 382 S.C. 414, 427, 675 S.E.2d 792, 799 (Ct. App. 2009) (When a party asserts grounds for relief because of fraud, misrepresentation, or other misconduct of an adverse party under Rule 60(b)(3), SCRCP, the movant must prove her entitlement by clear and convincing evidence.") (citation omitted).

In Chewning v. Ford Motor Company, 354 S.C. 72, 80, 579 S.E.2d 605, 610 (2003), the South Carolina Supreme Court discussed the rule that extrinsic fraud is necessary to set aside a judgment based on fraud under Rule 60(b), SCRCP. The court explained the difference between intrinsic and extrinsic fraud:

> "Extrinsic fraud is 'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action.'
>
> Intrinsic fraud, on the other hand, is fraud which was presented and considered in the trial. It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud."

Id. at 81, 579 S.E.2d 605, 579 S.E.2d at 610 (quoting Hilton Head Ctr. of S.C. v. Pub. Serv. Comm'n, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). Perjury by a party or a witness, use of forged documents, or failure to disclose documents by a party or witness are examples of intrinsic fraud.

Id.; Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 21 n. 5, 594 S.E.2d 478, 483 n. 5 (2004). However, the subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud amounting to fraud on the court. Chewning, 354 S.C. at 82–84, 579 S.E.2d at 610–11. Any claim of fraud on the court must be accompanied by particularized allegations. Id. at 86, 579 S.E.2d 605, 579 S.E.2d at 613.

Penny filed the 2013 Common Pleas case after a year of "newly discovered evidence" and alleged no fraud upon the court. Actual discovery occurred and depositions were taken of Lee and Defendant Shirley Booth. Penny did not make her motion in a reasonable amount of time as to Lee. Rule 60(b), SCRCP. Therefore, Penny may not pursue the 2013 Common Pleas Case as her 60(b) motion should have been brought to relieve her form 2007 Common Pleas case adjudication. Accordingly, summary judgment is appropriate in favor of Defendant Estate of Lee Williams.

As I found Rule 60(b) properly applied to Lee as an additional sustaining ground to prevent Penny's case against him, I do not find this rule limits Penny's case against the Defendants Booth at this time. Rule 60(b) is a permissive rule. See Rule 60(b), SCRCP ("On motion and upon such terms as are just, the court **may** [. . .]) (emphasis added). Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the trial court. Se. Hous. Found. v. Smith, 380 S.C. 621, 636, 670 S.E.2d 680, 688 (Ct. App. 2008) (citation omitted). There is simply no previous judgment or adjudication involving the Defendants Booth that this Court can grant relief from. I deny the motion for summary judgment as to the Defendants Booth on this ground, without prejudice with leave to refile.

CONCLUSION

Because of Penny's stipulation of dismissal with prejudice, an enforceable release signed by her, the doctrine of collateral estoppel and res judicata, as well as Rule 60(b), SCRCP, the motion for summary judgment of Defendant Estate of Lee Williams must be granted. The Defendants Booth are in a slightly different position. At this time, I find the current state of the issues warrant that I deny the motion for summary judgment of the Defendants Booth.

It is therefore hereby ORDERED that the Defendant Estate of Lee Williams motion for summary judgment is granted, with leave to file a claim against Lee's Estate, if available, and the motion for summary judgment of the Defendants Booth is denied, without prejudice with leave to refile.

And IT IS SO ORDERED.

R. Lawton McIntosh
Circuit Judge for Abbeville County

Anderson, South Carolina
February 20, 2015.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2013-CP-01-00284

Pamela Richey,
PLAINTIFF(S)

Shirley W. Booth, Thomas J. Booth, et al
DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

RECEIVED
MAY 14 2015
SC Court of Appeals

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

Plaintiff's Motion to Alter or Amend is denied without formal argument. No formal order is requested.

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2015 APR 2 AM 8
EMILY Y MCMAHAN
CLERK OF COURT

ORDER INFORMATION
ABBEVILLE COUNTY CLERK OF COURT

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

2155
Judge Code

3-31-15
Date

For Clerk of Court Office Use Only

This judgment was entered on the 8 day of APRIL 2015 and a copy mailed first class or placed in the appropriate attorney's box on this 6 day of APRIL, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

R. JAMISON TINSLEY, JR.

ATTORNEY(S) FOR THE PLAINTIFF(S)

JANE H. MERRILL
TRIPP HADGETT

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.