

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Phillip DeClemente, a/k/a)
Phillip Goodpaster,)

Plaintiff,)

v.)

Assistive Technology Medical Equipment)
Services, LLC (ATMES), and Jeffery)
Reed; Murrell G. Smith,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Docket No. 2017-CP-10-05055

ORDER

RECEIVED

JUL 30 2018

SC Court of Appeals

FILED
2018 JUL -2 PM 2:30
JULIE K. OF COURT

This case is before the Court on Defendants' Motion to Dismiss filed on November 8, 2017. For the reasons state below, this Court grants Defendants' motion. This lawsuit seeks a declaratory judgment on the validity of a written agreement that was the subject of a counterclaim the Plaintiff attempted to bring in a 2011 case. The counterclaim was barred from consideration because the Plaintiff defaulted. That also bars this litigation.

gcM

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Phillip DeClemente brought this lawsuit in October of 2017. His complaint seeks a declaration on the effect of an agreement the parties entered in 2009. He alleges the agreement is a promise between the parties to never file a lawsuit against each other and that the Defendants breached this agreement by suing him in October of 2011.

DeClemente filed a supporting memorandum the same day he filed this complaint for a declaratory judgment. The memorandum acknowledges DeClemente was held in default in the 2011 case. He claims a declaratory judgment will end the controversy that started when the Defendants sued him in 2011. The memo also asserts DeClemente may pursue this declaratory judgment even though he was held in default in the 2011 case. The Defendants responded by filing

the instant motion seeking a speedy hearing, dismissal, and sanctions.

The Court conducted a hearing on December 11, 2017. Attorney James Smith attended for the Defendants. Attorney Cameron Marshall appeared for DeClemente.

At the hearing, the Defendants withdrew their request for sanctions, indicating they would be satisfied if the case was dismissed. They argued this lawsuit was barred because DeClemente asserted this same cause of action as a counterclaim in the 2011 case, where it was not reached on the grounds of DeClemente's default. They also argued DeClemente asserted this same cause of action in a separate case Plaintiff filed in 2015, where it was dismissed based on the statute of limitations. Defendants further contended these decisions barred DeClemente from filing *this* case, which raises the same issue. In response, DeClemente contended the Declaratory Judgment Act allowed him to file this case to obtain a ruling on the effect of the parties' 2009 agreement.

However, he acknowledged the agreement was asserted as a defense to the 2011 case and that his claim was dismissed because he was in default. He also acknowledged the order of default has never been set aside.

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The Court grants the motion to dismiss because a party may not use a subsequent lawsuit to litigate claims after the party has lost the ability to pursue those claims by virtue of defaulting in a prior case.

DeClemente's complaint is based on his contention that the written agreement the parties executed in 2009 precluded the Defendants from suing him in 2011. This would be a complete defense to the 2011 case and, under the logical relationship test for compulsory counterclaims, it would constitute a compulsory counterclaim to that case. *See N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). The rules require a party to state any

compulsory counterclaims in the party's responsive pleading. Rule 13(a), SCRPC. Although DeClemente attempted to assert counterclaims in the 2011 case, he was precluded from doing so as he was in default.

This case is similar to the situation the Court of Appeals addressed in *Stark Truss Co. v. Superior Construction Corp.*, 360 S.C. 503, 512, 602 S.E.2d 99, 104 (Ct. App. 2004). There, as here, a defaulted party attempted to assert counterclaims despite the entry of default and the court's refusal to set default aside. The Court of Appeals noted the counterclaims had been compulsory and that Rule 13(a) requires a party to include such counterclaims in a party's responsive pleading. *Id.* at 512, 602 S.E.2d at 104. The defaulting party's pleading had not been timely; thus, the counterclaims were properly dismissed.

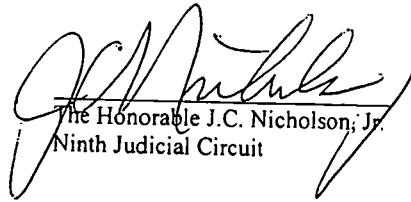
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The Court is not able to discern a meaningful way to distinguish *Stark Truss* from the present case. If a party could use a subsequent lawsuit to resurrect counterclaims that were lost by a prior order of default, there would be little purpose or consequence in the prior order of default. Parties could ignore the default and freely bring compulsory counterclaims in a separate lawsuit.

DeClemente's memorandum cited *Loadholt v. South Carolina State Budget & Control Board*, 339 S.C. 165, 528 S.E.2d 670 (Ct. App. 2000) as supporting the right to bring this declaratory judgment even though he was held in default. *Loadholt* was a declaratory judgment to determine the Insurance Reserve Fund's obligation to provide coverage for underlying tort litigation. The fact that a local sheriff (the defendant in the underlying tort suit) defaulted in the tort suit did not affect his ability to sue the IRF to determine the IRF's obligation to satisfy the tort suit's judgment.

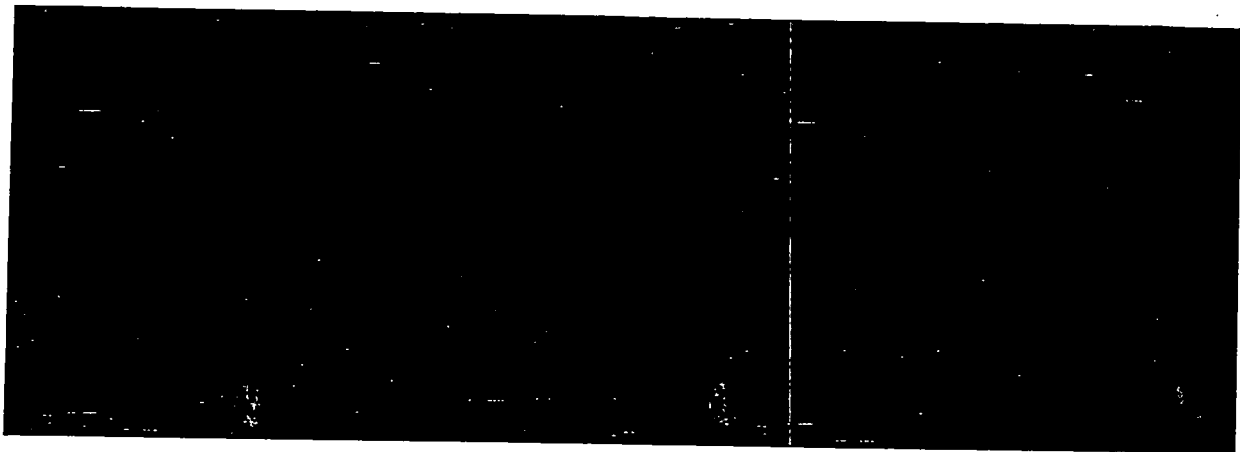
DeClemente's declaratory judgment, by contrast, is a collateral attack on his liability in the 2011 case. The sheriff in *Loadholt* did not bring a declaratory judgment against the same parties

who had sued him in tort. Nothing in that opinion suggests he could have done so. Accordingly,
Defendants' Motion to Dismiss is Granted.

AND IT IS SO ORDERED.


The Honorable J.C. Nicholson, Jr.
Ninth Judicial Circuit

July 2, 2018
Charleston, South Carolina



Phillip DeClemente a/k/a Phillip Goodpaster

Assistive Technology Medical Equipment,
 et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

- 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), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
 - ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
 - STAYED DUE TO BANKRUPTCY**
 - DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**
 Affirmed; Reversed; Remanded; Other

FILED
 2018 JUL 2 PM 2:30
 CLERK OF COURT

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:

ORDER INFORMATION

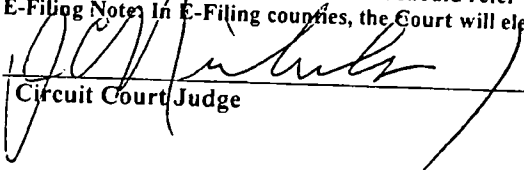
This order ends does not end the case.

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

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.
 E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


 Circuit Court Judge

2117

Judge Code

7/2/18
 Date

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SC Court of Appeals