

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Honorable Diane S. Goodstein, First Judicial Circuit

Appellate Case No. 2018-000507

Molly M. Morpew

Appellant

v.

Stephen Dudek, and Doreen Cross

Respondents

APPELLANT'S FINAL BRIEF

Molly M. Morpew, pro se
786 E. Butternut Rd.
Summerville, SC 29483
(843) 514-7299

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In this action to establish a Constructive Trust, Appellant, Molly M. Morphew, pro
se ("Morphew"), appeals the Lower Court’s decision to grant the Respondents’
("Dudeks") Motion to Dismiss pursuant to Rules 12(b)(6), SCRCF, and its Motion to
Dismiss pursuant to 12(b)(8), SCRCF.

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ISSUES ON APPEAL

- 1) The lower court err in awarding Respondents Motion to Dismiss based on Rule 12(b)(6) and res judicata.
- 2) The lower court err in awarding Respondents Motion to Dismiss based on Rule 12(b)(8).

FACTS AND PROCEDURAL HISTORY

Appellant (“Morphew”), proceeding *pro se*, filed the above-captioned action against Stephen Dudek and Doreen Cross (collectively, "Dudeks") on or about June 12, 2017, seeking the remedy of Constructive Trust due to Respondents’ unlawful purchase of property located at 788 E. Butternut Rd., Summerville, SC 29483 (“property”). Morphew claims the Dudeks acquired or purchased said property by means of an unlawful ruling for Specific Performance, making the Order for Specific Performance, thus the Order for closing, void. Morphew further claims the Dudeks are not bona fide purchasers, they had intentionally stole the property from its rightful claimant, Morphew, and are required to transfer such property to Morphew who, with the Dudeks having complete knowledge of such, has had a claim on said property since December 16, 2012.

In 2012, the Dudeks had a contract to purchase said property from the owners/ sellers, Thomas and Lorraine Ferro (collectively, "Ferros") (R. pg. 376). On December 16, 2012, over 2 weeks after their sales contract expired, and after the Dudeks were issued a termination request for failure to close on or before said Contract expired (November 30, 2012), Morphew ratified a sales contract with the Ferros, allowing Morphew an ‘out’ contingency if the Dudeks failed to sign the termination request (R. pg. 385).

Almost a month later and upon knowledge the Sellers Ferro had a backup buyer, the Dudeks filed a *lis pendens* to prevent such sale (R. pg. 400)(R. pg. 399). Four days later they filed a complaint for specific performance (R. pg. 74). 2 weeks later, Morphew files its complaint for specific performance against the Ferros with a separate cause of action against the Dudeks for tortious interference with contractual relations. In Morphew’s complaint she claimed the Dudeks had failed to apply and secure lending per their sales contract (i.e., on or before November 30, 2012), therefore had breached their contract and were legally liable to sign the termination request.

(R. pg. 85). Through discovery, attorney meetings and numerous subpoenas and requests to the Dudeks and their lending bank for proof of financing per their Specific Performance claim, Morphew and the sellers were told/provided the “Dudeks had financing but could not close due to the sellers failure to obtain a CL-100 or cleared CL-100”, or “they have no information”.

Both the Dudeks’ case and Morphew case were combined into Case No. 2013-CP-18-00183 in September 2013. The two cases were heard separately in front of the Honorable James E. Chellis, Master- In-Equity for Dorchester County on June 11 and 12, 2014, at which the Respondents, their attorney and their witnesses (sales agent and loan officer) all testified or supported that the Dudeks, ultimately, were ‘ready, able and willing’ to close escrow but could not because of the Ferros.

In September 2014, the Ferros discovered evidence that completely contradicted the Respondents and its privies’ testimony or evidence at trial, and that the Respondents clearly had such evidence in their possession or had knowledge of before filing its complaint for Specific Performance. This evidence clearly proved beyond a reasonable doubt that the Dudeks, AT THEIR OWN HAND, were never ready or able to close escrow in order to lawfully compel such an extreme remedy of Specific Performance. Maybe more important, the new evidence specifically contradicts the lower Courts findings that the sellers Ferro were at fault for the Dudeks’ breach or failure to close escrow, and/or contradicts the Dudeks met the special rules and laws of equity in order to compel Specific Performance. The Ferros provided the discovered material and documented evidence to the Master by submitting a Petition to the lower court to review the documented material evidence and testimony discovered before making its ruling (R. pg. 115). Instead of taking notice, the Master informed the Ferros that he will not consider the new evidence [or facts], but only the attorney’s statements in its ruling (R. pg. 401). The Ferros were representing themselves, pro se.

The Master filed its Order two months later on November 6, 2014. No ruling was made on the petition or its evidence provided in its Order (R. pg. 1). In its Order of November 6, 2014, the Master stated it was guided by [specific] principals of law and equity, including good faith and fair dealings, excusing one breach due to another party's breach, and that the discretion of the court to grant specific performance is a judicial discretion to be exercised in accordance with special rules of equity AND with regard to the facts and circumstances of each case. It stated it found the Dudeks acted with good faith and fair dealing, and were at all times ready, able and willing to close escrow, but that the Ferros with unclean hands prevented the Dudeks from closing per their sales contract. The discovered evidence clearly reveals the Dudeks acted with bad faith and unfair dealings, had filed a frivolous and/or unlawful complaint for Specific Performance, could not be forgiven for their breach per the specific principals of law and equity, and that the lower court could not grant Specific Performance as a matter of justice or judicial discretion as the Dudeks neither met the special rules and laws of equity nor should have been granted on the facts and circumstances of the case. If the Master had considered the new evidence discovered in its ruling, the prior case would have had a completely different outcome.

The Ferros and Morphew appealed, and within its appeal, again raised the issues stated in the Ferros' September 2014 Petition.

On August 24, 2016, Morphew filed an independent action against the Respondents, but also included its attorney, loan officer and sales agent, and several others for Fraud/Fraud on the Court and conspiracy to commit fraud/fraud on the court seeking the remedy of damages. This action is currently pending.

On January 11, 2017 this Court filed its Opinion affirming to the lower court's ruling on the overall authority, "As to whether the master properly ordered specific performance of the Contract: *Campbell v. Carr*, 361 S.C. 258, 262, 603 S.E.2d 625, 627 (Ct. App. 2004) ("An action

for specific performance is one in equity."); *Fesmire v. Digh*, 385 S.C. 296, 303, 683 S.E.2d 803, 807 (Ct. App. 2009) ("In an action in equity, the appellate court may resolve questions of fact in accordance with its own view of the preponderance of the evidence."); *id.* ("However, this broad scope of review does not require this [c]ourt to disregard the findings at trial or to ignore the fact that the master was in a better position to assess the credibility of the witnesses." It did not review or rule on the fraudulent issues or evidence presented, but instead chose to affirm the lower courts Order on the above authority (R. pg. 21). Morpew filed a motion for a rehearing but withdrew its motion. The Ferros were in dire economic distress; therefore Morpew withdrew its request to prevent any further injustice to the Ferros. Further, Morpew had an independent action for fraud/fraud on the court pending. On February 15, 2017, this Court remitted the matter back to the lower court, "The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed" (R. pg. 25).

On March 27, 2017 a hearing was held on the Respondents Motion for Closing and attorney's fees and costs against the Ferros. At said hearing, the Court was informed of the independent action for fraud/fraud on the Court against the Dudeks, with the Master stating that has no bearing on this case. Additionally, because the Ferros objected to the attorney fees and costs and that they were never presented with the fees and costs before the hearing, and that the Respondents were attempting to change the price of the house within its sales contract, the Master allowed an Answer to be filed to review before making his ruling.

Instead, on April 3, 2017 the Court prematurely filed its Order therefore had to convert the Ferro/Morpew Answer filed on April 6, 2017, to a Rule 59(e) Motion and scheduled a hearing for said Motion on May 12, 2017 (R. pg. 236). In its April 6th 59(e)Motion/Answer and at the May 12th hearing, the Ferros and/or Morpew once again objected to compelling specific performance and a closing, presented evidence that the Respondents failed to meet Specific Performance, at all

times material had no valid sales contract, had been denied lending by their own hand, were required to inform the court at any time of their inability to secure financing, were fraudulent [committed fraud on the court] and its award may be unlawful, Morphew and the Ferros' Constitutional right or due process was violated (were prevented from fully presenting their case(s))and that this case requires further review by the lower court to support or uphold the judicial machinery of the court, stating the court can only be effective, fair and 'just' if is allowed to function as the laws proscribe.

On May 17, 2017, the lower court issued its Order, stating all items [regarding the fraudulent or unlawful actions of the Respondents or their complete failure to meet Specific Performance requirements] have no merit (R. pg. 48) Morphew has appealed the Order of May 17, 2017.¹

On June 2, Respondents acquired/closed on the property. Upon the Dudeks closing on the property at issue, Morphew filed its Constructive Trust complaint on June 12, 2017, in which this appeal arises from. The Respondents filed a Motion to Dismiss pursuant Rule 12(b)(6) SCRCP based on the fact the Plaintiff has failed to state facts sufficient to constitute a cause of action against the Defendants on June 27, 2017 (R. pg. 286), and a separate Motion to Dismiss pursuant Rule 12(b)(8) SCRCP based on the fact that an action has been adjudicated between the same parties for the same claim (R. pg. 289), in which the Plaintiff recently filed an appeal on both Motions.

Based on the actions of the Dudeks, Morphew alleges in this instant complaint that she is the equitable owner of the Property and claims right to the property. Morphew seeks restitution to recover the property and obtain legal title by constructive trust, or as the alternate, damages equivalent to the loss of the property and any costs associated with this claim (R. pg. 260)

¹ The Order of May 17, 2017 and the Order of June 12th, 2017 have been combined into one appeal.

STANDARD OF REVIEW

1. An action for specific performance is one in equity. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 170 n. 2, 568 S.E.2d 361, 362 n. 2 (2002); *Wright v. Trask*, 329 S.C. 170, 176, 495 S.E.2d 222, 225 (Ct.App.1997). In an action in equity, tried by the judge alone, without a reference, on appeal the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).
2. "It is now well settled that this court has jurisdiction in appeals in equity cases to find the facts in accord with our view of the preponderance or greater weight of the evidence, in the absence of a verdict by a jury; and may reverse a factual finding by the lower court in such cases when the appellant satisfies this court that the finding is against the preponderance of the evidence." *Crowder v. Crowder*, 246 S.C. 299, 301, 143 S.E.2d 580, 581 (1965).
3. An action to declare a constructive trust is in equity, *Bank of Williston v. Alderman*, 91 S.E.2d 296 (1917), and this Court finds facts in accordance with its own view of the evidence. *Gray v. South Carolina Pub. Serv. Auth.*, 284 S.C. 397, 325 S.E. (2d) 547 (1985); *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E. (2d) 773 (1976). In order to establish a constructive trust, the evidence must be clear, definite, and unequivocal. *Whitmire v. Adams*, 273 S.C. 453, 257 S.E.2d 160 (1979); *Ramantanin v. Poulos*, 240 S.C. 13, 124 S.E. (2d) 611 (1962).
4. While the Appellate Court utilizes the same standard of review as the circuit court in scrutinizing the application of Rule 12(b)(8), each of the components of the rule are determined as a matter of law and thus it applies a de novo standard of review to the grant or denial of this motion. See *Miami Sand & Gravel, LLC v. Nance*, 849 N.E.2d 671, 676 (Ind.Ct.App.2006). In other words, the Appellate Court may determine whether there is another action involving the same parties, claims (or subject matter), and remedies as a matter of law.
5. "The question of subject matter jurisdiction is a question of law." *Porter v. Labor Depot*, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct.App.2007) (citations omitted). "The issue of interpretation of a statute is a question of law for the court." *Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 438, 633 S.E.2d 143, 146 (2006) (citation omitted). An appellate court may decide questions of law with no particular deference to the trial court. In re *Campbell*, 379 S.C. 593, 599, 666 S.E.2d 908, 911

(2008) (citation omitted).

ARGUMENTS

I. The Lower Court erred in dismissing the Appellant's pursuant to Rule 12(b)(6) and the doctrine of res judicata."

It appears the sole question to be decided here is whether the prior unsuccessful action of appellant for specific performance now precludes, on the ground of res judicata or estoppel, the maintenance of the present action to declare the Respondents a Constructive Trust to Appellant.

First, the lower court ruled at the hearing and in its Order, pursuant 12(b)(6) that Morphew' s constructive trust claim is fundamentally flawed, and she cannot plead a set of facts, against the Dudeks that would entitle her to relief on her constructive trust cause of action, specifically that Morphew cannot bring its constructive trust claim against the Dudeks because at no point did the Dudeks have a contract or relationship, fiduciary or otherwise, with Morphew (R. pg. 464, lines 16-18) (R. pg. 36). Morphew disagrees and argues this action is for a 'constructive trust' not an 'express' trust and that a relationship or contract is not a requirement in an action for a 'constructive trust', fiduciary or otherwise with the Dudeks; therefore the lower court erred in its dismissal of the Appellants complaint pursuant Rule 12(b)(6).

Constructive trust "results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution." *Carolina Park Associates, LLC v. Marino*, 732 S.E.2d 876, 879 (2012). (quoting, *Lollis v. Lollis*, 291 S.C. 525, 529, 354 S.E.2d 559, 560 (1987)); *Searson v. Webb*, 208 S.C. 453, 38 S.E. (2d) 654 (1946).

A constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by the one holding the legal title. *Wolfe v. Wolfe*, 215 S.C. 530, 56 S.E. (2d) 343 (1949); *Dominick v. Rhodes*, 202 S.C. 139, 24 S.E. (2d) 168 (1943); *Bank of Williston v. Alderman*, 106 S.C. 386, 91 S.E. 296 (1917). Fraud is an

essential element, although it need not be actual fraud. *Wolfe, supra; Dominick, supra.*

A constructive trust is distinguished from an express trust in that the former arises entirely by operation of law without reference to any actual or supposed intention of creating a trust. It is resorted to by equity to vindicate right and justice or frustrate fraud. *All v. Prillaman*, 200 S.C. 279, 20 S.E. (2d) 741 (1942). Generally, fraud is an essential element, but it need not be actual fraud. The case of *Bank of Williston v. Alderman*, 106 S.C. 386, 91 S.E. 296, 298 (1917) states: "Actual fraud is not necessary, but such trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by him who holds the legal title." See also *Dominick v. Rhodes*, 202 S.C. 139, 24 S.E. (2d) 168 (1943).

The application of the equitable remedy of constructive trust is far reaching. Its limits are circumscribed only by "the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them." *Latham v. Father Divine*, 299 N.Y. 22, 85 N.E.2d 168, 170 (1949). It "is the formula through which the conscience of equity finds expression." *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 122 N.E. 378, 380 (1919) (Cardozo, J.). "[T]he forms and varieties of constructive trusts are practically without limit, such trusts being raised, broadly speaking, whenever necessary to prevent injustice. *Dominick v. Rhodes*, 202 S.C. 139, 24 S.E. (2d) 168 (1943)

McNair v. Rainsford, II 330, S.C. 332, 499 S.E.2d 488(Ct.App. 1998)

As to *res judicata*, Morphew contends the Respondents have waived their right to apply the doctrine of *Res Judicata* in this action or to Morphew's complaint as they have not asserted or properly asserted *res judicata* in its Motion and/or pleaded said affirmative defense in an Answer. South Carolina and Federal case law *res judicata* is an affirmative defense that must be pleaded in the Answer. Even if the South Carolina courts allow *res judicata* to be asserted in a motion to dismiss instead of in the answer, the requirement is still to be pleaded in the Answer. Meaning,

asserting res judicata in a Motion to Dismiss only postpones the pleading of res judicata in the Answer until after the court rules on a motion to dismiss, if that motion is based on res judicata.

First, the Respondents Motion 12(b)(6) is not based on or properly based on res judicata, therefore fails to meet the requirement to bring res judicata in a motion to dismiss. The Respondents attempted to bring Res Judicata under Rule 12(b)(6) (R. pg. 436 lines 17-20; R. pg. 437 lines 1-9; R. pg. 456 line 23 thru pg. 457 line 1; R. pg. 457 lines 10-12), but nowhere in its Motion 12(b)(6) is res judicata asserted. (R. pg. 286).

Additionally, Morpew presented that when a Motion to Dismiss is filed, information supporting the grounds for dismissal must be included in the motion (R. pg. 372). There are different reasons for filing a Motion to Dismiss, many of which revolve around the following legal deficiencies, including failure to state a claim. No information supporting the grounds for dismissal pursuant Rule 12(b)(6) was included in Dudek motion (R. pg. 286-288) Instead, its Motion states only, “Plaintiff has failed to state facts sufficient to constitute a cause of action against the Defendants,” and contained not affidavit or memorandum.

Even if res judicata was asserted properly under the Dudeks Motion to Dismiss pursuant Rule 12(b)(6), Morpew argues the Dudeks have failed to file an Answer or plead res judicata in an Answer as required by Rule 8 and Rule 12(b), SCRCF, therefore waives its right to plead or apply the doctrine of res judicata.

Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (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, (8) another action is pending between the same parties for the same claim. (Rule 12(b), SCRCP)

For the reasons stated above, the Dudeks' 12(b)(6) Motion to Dismiss failed, was not based or properly based on res judicata, and/or they have waived their right to plead or apply res judicata, therefore Morphew asks this Court to dismiss the Respondents Motion 12(b)(6) with prejudice.

Even if res judicata was properly asserted in its Motion and an Answer was filed that specifically plead the affirmative defense of res judicata, or if res judicata was found properly asserted and pleaded, Morphew contends res judicata should not have been awarded. The lower court Order on this appeal ruled res judicata also bars this instant action for Constructive Trust because "*In the original action between these parties, Case No. 2013-CP-18-00183, Morphew could have brought her constructive trust or equitable ownership claim against the Dudeks*" and that "*Morphew has more than had her day in court on the issue of ownership of the Property*" (R. pg. 36, para. 2).

In order for res judicata to operate as a bar to a lawsuit, the following elements need to be proven: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. *Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 419 S.E.2d 217 (1992). "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.*

Morphew disagrees that 'a claim for Constructive Trust against the Dudeks could have been brought in the original action therefore bars her complaint for Constructive Trust' for the reason the Dudeks were not the legal title holders or owners in the original action. A constructive trust only applies when the defendant owns the property at issue.

Constructive Trust: A relationship by which a person who has obtained title to

property has an equitable duty to transfer it to another, to whom it rightfully belongs, on the basis that the acquisition or retention of it is wrongful and would unjustly enrich the person if he or she were allowed to retain it.²

Equitable Owner: Beneficiary of a property being held in a trust;

Equitable ownership: where the relevant interest arises under a trust.

A Constructive Trust action can only be claimed against a party who holds title, and only a title holder can hold property in a trust for an Equitable Owner, which the relevant interest arises under a trust (in this case, Constructive Trust). Moreover, only a legal title holder has the ability to transfer said property to another, therefore Morphew could not have brought this Constructive Trust action/remedy or its claim as equitable owner against the Dudeks in the original action as they did not hold legal title until June 2017.

Additionally, the lower court ruled in the original action that Morphew had equitable interest in the said property, as she had a valid pending sales contract. Nowhere or at any time was ownership an issue, litigated or ruled on. In this instant action, Morphew is claiming she was the only party that, at all times material, had a legal claim to the property, and that the Dudeks had knowingly and unlawfully purchased said property with notice of an adverse claim [outstanding fraud claim] or interest in the property by Morphew. Hence, were not bona fide purchasers.³ This was not an issue or claim that could have been raised in the original action or in the second action as the Dudeks did not purchase the property until June 2017, therefore Morphew's complaint should not have been dismissed.

² <https://legal-dictionary.thefreedictionary.com/constructive+trust>

³ One who acts without covin, fraud, or collusion; one who, in the commission of or connivance at no fraud, pays full price for the property, and in good faith, honestly, and in fair dealing buys and goes into possession. *Sanders v. McAfee*, 42 Ga. 250. A bona fide purchaser is one who buys property of another without notice that some third person has a right to, or interest in, such property, and pays a full and fair price for the same, at the time of such purchase, or before he has notice of the claim or interest of such other in the property. *Spicer v. Waters*, 05 Barb. (N. Y.) 231. Black's Law Dictionary 2nd Ed.

Also, in the Order on this appeal, the lower court stated, “*After losing at the trial court level, Morphew appealed, and the Court of Appeals affirmed the order awarding the Dudeks specific performance,*” that “*Not happy with the Court of Appeals decision, Morphew filed her second action, Case No. 2016-CP-18-1706, as well as this action.*” Morphew agrees the Court of Appeals affirmed the lower court’s decision, but only affirmed it based on ‘faith in the lower courts better ability to evaluate the testimony at trial’, not on the newly discovered evidence presented by Morphew and the Ferros on appeal; otherwise it would have surely found the lower court findings of fact were not or could not be supported by any evidence or that specific performance was not a remedy available to the Dudeks.

“While this court in equity matters has jurisdiction to find facts based on its own view of the preponderance of the evidence, we are not required to disregard the findings of the trial judge who saw and heard the witnesses and who is in a better position to evaluate the testimony.” *Hartley v. Hartley*, 292 S.C. 245, 355 S.E. (2d) 869 (Ct. App. 1987).

As to all other issues: *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

(R. pg. 21-24)

In its Order, the lower court stated that ‘Morphew filed its second action for Fraud on the Court and this instant action for Constructive Trust against Dudek and Cross because she was “not happy with the Court of Appeals decision”’ (R. pg. 36, para. 2). Morphew objects to these allegations asserted by the Defendants or this Court as it is speculative or subjective, and without evidentiary support. In fact such an assumption would be technically impossible since Morphew filed her second action for Fraud/Fraud on the Court months before the Appellate Court had even

placed the original action on their calendar for review or made their decision. Further, Morpew filed this instant action for Constructive Trust against the Dudeks only after they had filed and were awarded a motion for closing and after they had purchased the property, even though they and the lower court had full knowledge of the Respondents' fraud and/or complete and utter failure to meet the specific performance rules, laws or statues required in order for the remedy of specific performance to be available and/or for the lower court to lawfully compel such an extreme remedy (R. pg. 236-259; R. 115-131). Instead, the Lower Court stated it was not going to review the evidence (when submitted months before his ruling for Specific Performance) or that the fraud case against Dudeks was not relevant to the case or that the fraudulent evidence was irrelevant or moot (R. pg. 57, para. 12). Filing the second action and this action was not because the Appellant was unhappy with the Appellate Court's decision, but instead it was because the Dudeks and its privies committed fraud/fraud on the court, has cost her undue stress, time and money, fraudulently took or stole property they had no legal claim to, especially with notice of her claim to the property and/or pending fraud complaint against them, and unlawfully ejected her and her family from their home. Morpew has only filed its additional two complaints in order to protect her rights against fraud and/or due process, the first for the fraud on the court and the second for having her home unlawfully or fraudulently taken away, all accomplished by the Respondents and their privies' unlawful or fraudulent behavior and the lower courts abuse of discretion.

Morpew contends this court should also be alarmed at the prior and/or continuing fraud/fraud on the court or unlawful acts of the Respondents and the Lower Court's alleged abuse of discretion in its failure to review the evidence presented, and that the Respondents had come to court with unclean hands and unlawfully sought Specific Performance. The court had a duty to consider the Respondents unclean hands and fraudulent actions or non-actions. The South Carolina courts rely on the equity maxim: "He who seeks equity must do equity." *Norton v.*

Matthews, 249 S.C. 71, 152 S.E.2d 680 (1967). S Schwartz, 'The Case for Specific Performance' (1979) 89 Yale Law Journal 271. In the original specific performance case, equity did not favor the granting of specific performance as a matter of sound judicial discretion. First, the power to set aside a judgment exists in every court. (CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, supra note 151). Second, in whichever court the fraud was committed, that court should consider the matter. (Id.) (citing *Universal Oil Prods. Co. v. Root Refining Co.*, 328 U.S. 575 (1946) (other citations omitted). Third, while parties have the right to file a motion requesting the court to set aside a judgment procured by fraud, the court may also proceed on its own motion. (*Universal Oil Prods. Co. v. Root Refining Co.*, 328 U.S. 575 (1946). Indeed, one court stated that the facts that had come to its attention "not only justify the inquiry but impose upon us the duty to make it, even if no party to the original cause should be willing to cooperate, to the end that the records of the court might be purged of fraud, if any should be found to exist."(*Root Refining Co. v. Universal Oil Prods. Co.*, 169 F.2d 514, 521–23 (3d Cir. 1948) (emphasis added). Fourth, unlike just about every other remedy or claim existing under the rules of civil procedure or common law, there is no time limit on setting aside a judgment obtained by fraud, nor can laches bar consideration of the matter.(See CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, supra note 151). The logic is clear: "[T]he law favors discovery and correction of corruption of the judicial process even more than it requires an end to lawsuits."(*Lockwood v. Bowles*, 46 F.R.D. 625, 634 (D.D.C. 1969). "There is no time limitation which would bar a civil court from granting relief from a final judgment upon ground of fraud upon the court under rule providing for relief from judgment and court could, at any time, set aside judgment for after-discovered fraud upon the court." Federal Rules Civil Procedure Rule 60(b). 28 U.S.C.A. Therefore, the lower court should have considered the fraud and facts presented before issuing the Order of November 6, 2014 or awarding a closing on said property or attempting

to 'close' or 'end' this case.

Maybe even more critical, the Master had stressed—"in the name of justice"-- the importance of parties to follow court orders and the affects when not strictly followed, particularly on the administration of justice.

COURT: *The jail sentence will be for purposes of my -- the inherent power that I have and must exercise when parties fail to obey the Court's orders. It's imperative that our -- that parties to lawsuits abide by orders of the Court. And the failure to do so affects the administration of justice in ways that you cannot imagine right now, Ms. Morpew. But if I make an order and a party doesn't abide by it, then what's the next party going to do if not abide by the next order?* (R. pg. 426 lines 8-19)

But what about a party's effect on the administration of justice when they fail to abide by the rules and laws in its filings or actions in the litigation in the first place? There are laws and rules against acting in bad faith and unfair dealings, knowingly filing frivolous claims, failing or intentionally failing to provide initial discovery, providing false answers or documents in discovery, unlawfully continuing to litigate a frivolous claim, an attorney knowingly making false statements at hearings or trials, an attorney suborning its clients or witnesses to falsely testify or misrepresent pertinent material facts to the case, forged material evidence, and extensive misrepresentation/false testimony from the parties and all their witness about the very core of its and Morpew's case or issues – which also directly violates the oath taken in court "to tell the truth, the whole truth and nothing but the truth". All this was alleged and presented to the lower court in the original action, but did not seem to be a relevant issue. The only issue imperative to the Master was closing its case. Should a party's unlawful behavior be continuously overlooked at the prejudice of another party? Should a case be dismissed or closed just "to be done with it"?

A shallow view of the original case would thus suggest that another review of the evidence

or fraudulent evidence by the Master of Equity had looked like too much work for too little gain, and allowing the Respondents to close was much easier. Morphew contends there is much more at stake in this case than just the personal claims raised by Morphew. This case calls into question the role of a court in our system of justice. And it concerns the responsibility of a court to ensure that parties who are properly before the court are heard and afforded a just and coherent answer to their claims. The lower court's action previously ignores that our system of justice is founded on a "starting presumption that when jurisdiction is conferred, a court may not decline to exercise it." *Union Pacific R.R. Co. v. Bhd. Of Locomotive Eng'rs and Trainmen*, 130 S. Ct. 584, 590 (2009).

The original case raises an extraordinarily important question, the constitutionality of ignoring evidence, especially documented material evidence that substantially contradicts or contradicts all the testimony of the Dudeks and its privies at trial and beyond, or the lower court's findings of fact in its Order. The Lower Court in this instant action acknowledged Morphew and the Sellers Ferro had discovered the evidence after the trial and presented the evidence to the Master in Equity before his ruling, which he refused to consider. Instead, in its ruling the lower court found, by the laws and statutes of equity, that granting specific performance to the Dudeks was proper. Even though she and the sellers appealed the Order and presented the same evidence to this court, it was again not considered. Morphew had, in several subsequent actions, presented the allegations and evidence to the lower court, but it was ruled moot or with no significance to the case. Morphew claims she was unfairly and severely prejudiced in the original action because the evidence does not substantially support the lower court's ruling, instead the Dudeks were awarded for their bad faith/unfair dealings, or unlawful or fraudulent behavior.

The lower court in this instant action stated, "*Morphew has more than had her day in court on the issue of ownership of the Property.*" Morphew disagrees. There was never any issue of ownership in the prior case(s), only now in this instant action. A Specific Performance case in real

property decides if a party to a contract has a right to compel the performance of that contract not ownership.

Further, the lower court in his action stated Morphew had legal mechanisms to bring the alleged fraud and abuse of process to the court's attention. It specifically suggested Rule 60, SCRCF, stating neither Morphew nor the Ferros, despite knowing of the alleged fraud by the Dudeks, filed a motion pursuant to Rule 60, SCRCF. Morphew argues nowhere during the hearing for Constructive Trust did the lower court determine Morphew was required to file a Rule 60(b) in the prior case in order to bring the fraud or abuse of process to the court's attention. Moreover, the lower court stated that if any fraud was committed on the court that it doesn't mean it cannot be brought in the other cases rather some sort of collateral attack, or the fraud claim should be brought in the case where the fraud on the court occurred (R. pg. 464 lines 3-11). Morphew argues neither she nor the Ferros were required to file a Rule 60(b) Motion, as the rule clearly states, *"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."* Rule 60(b) SCRCF

Further, as argued above, the court of equity had and/or has the duty to consider the fraud presented by a party, especially a pro se party -- and just as critical-- before its ruling was made.

Morphew contends fraud was properly presented to the Court of Equity and this Court in the original action but was neither heard nor ruled on but should have been, particularly in the court in which the fraud was committed (R. pg. 401; pg. 1; pg. 115) (R. 24). Res judicata can only bar an action that was litigated and adjudicated. Even though the issued was presented to the Court(s), it was not ruled on, therefore fraud cannot be barred by res judicata in this action.

Additionally, the lower court stated Morphew brought the same claims in the second action she filed against the Dudeks, Case No. 2016-CP- 18-1706, and that by way of an order issued on

January 31, 2017, the court dismissed Morphew's fraud-based claims against the Dudeks. For these reasons, her fraud and abuse of process causes of action are dismissed and barred by res judicata. Morphew disagrees. Again, as argued above and repeated herein, Morphew contends the Respondents have waived their right to apply the doctrine of Res Judicata in this action or to Morphew's complaint as they have not asserted or properly asserted it in its Motion(s) and/or pleaded said affirmative defense in an Answer, or properly asserted and pleaded res judicata. Therefore any claim within Morphew's Complaint, but specifically here for fraud and abuse of process, cannot be barred by res judicata.

Even if res judicata could be applied, the cause of action "Abuse of Process" against the Dudeks in this instant action was neither brought in the original action nor the second action, therefore the application of res judicata cannot bar Morphew's cause of action for abuse of process in this action, and its case should not have been dismissed.

Further, Res judicata does not bar a separate suite based upon an existing final judgment rendered upon the merits with fraud or collusion. Res judicata is also defined as the principal that an existing final judgment rendered upon the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. *BALLENTINE'S LAW DICTIONARY* 1105 (3d ed. 1969). *Black's Law Dictionary* 1312 (7th ed. 1999). Even if the Dudeks were relieved of fraud in a motion to dismiss in the second action, it was relieved based on res judicata (the fraud was heard and adjudicated in the original action) and as argued herein is incorrect, as fraud on the court was not adjudicated in the prior action.

Further, the cause of action for fraud/fraud on the court in the second action was fraud which induced a ruling for Specific Performance. In this instant action, Morphew asserts the Dudeks

'stole' or prevented her from purchasing the property by unlawfully or fraudulently purchasing the property and knowing of Morphew's claim to said property, therefore are liable under a constructive trust to transfer said property to Morphew.

Material documented evidence is provided in this instant action to this Court proving the Dudeks had completed knowledge they critically failed to meet the strict requirements, rules and guidelines of Specific Performance even before they filed their action Specific Performance in 2013, and/or their Motion for Closing in 2017. Meaning, the Dudeks were denied lending because their sales contract was invalid at application. It was never remedied, therefore the lending bank denied them lending and closed their file in January 2013. As a whole, and at all times material, the Dudeks sales contract was void due to their own hand as of December 1, 2012. Morphew asserts in this action the Dudeks failed to have valid legal claim to the property as of December 1, 2012, knew of Morphew's claim by constructive notice or express notice, therefore unlawfully purchased or obtained said property.

Morphew argues as a matter of law or in an action to declare a constructive trust, the Court of Appeals can find facts in accordance with its view of the evidence. Therefore Morphew argues whether or not an issue for fraud against the Dudeks was dismissed, this Court can review the evidence presented in this case and find facts in accord with its view, therefore res judicata should not bar or completely bar this action for constructive trust:

"It is now well settled that this court has jurisdiction in appeals in equity cases to find the facts in accord with our view of the preponderance or greater weight of the evidence, in the absence of a verdict by a jury; and may reverse a factual finding by the lower court in such cases when the appellant satisfies this court that the finding is against the preponderance of the evidence." *Crowder v. Crowder*, 246 S.C. 299, 301, 143 S.E.2d 580, 581 (1965).

"An action to declare a constructive trust is in equity, *Bank of Williston v. Alderman*, 106 S.C. 386, 91 S.E. 296 (1917), and this Court finds facts in accordance with its own view of the

evidence.” *Gray v. South Carolina Pub. Serv. Auth.*, 284 S.C. 397, 325 S.E. (2d) 547 (1985); *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E. (2d) 773 (1976). In order to establish a constructive trust, the evidence must be clear, definite, and unequivocal. *Whitmire v. Adams*, 273 S.C. 453, 257 S.E. (2d) 160 (1979); *Ramantanin v. Poulos*, 240 S.C. 13, 124 S.E. (2d) 611 (1962).

Additionally, the judgment in the second action was not dispositive or did not bring about the settlement of the [fraud] CLAIM [i.e., the Dudeks unlawfully obtained a ruling in their favor for Specific Performance by fraud/frauding the court]; There are eight (8) other defendants in the second action, all of which were not relieved of the Fraud/Fraud and conspiracy to commit fraud (collusion) on the Court that brought about the unlawful ruling/judgment for SPECIFIC PERFORMANCE in favor of the DUDEKS, meaning the issue that the Dudek’s Order for Specific Performance was procured by fraud/fraud on the court has not been adjudicated., therefore should not be barred by res judicata.

The Dudeks have committed additional or continuing fraud/fraud on the court by filing a Motion for Closing with the knowledge they failed to meet the strict statutes, rules or guidelines of Specific Performance and acquired same unlawfully or fraudulently and/or closing on the property which they have full knowledge Morphew has a claim against. Moreover, the Master had knowledge of Morphew’s continuing claim to the property, that Morphew contends his Order for Specific Performance was unlawful or improper and therefore ordering a closing was against the judicial process, and that the Dudeks, its attorney and witnesses committed fraud/fraud on the court-- all before it issued its final ruling on the Dudeks’ Motion for Closing on May 17, 2017.

For the reasons stated above, the lower court should not have granted the Dudeks’ Motion to Dismiss based on Rule 12(b)(6) and/or res judicata, therefore Morphew respectfully asks this Court to reverse the lower court Order to dismiss the Dudeks’ Motion to Dismiss pursuant 12(b)(6)

with prejudice.

II. The lower court err in awarding Respondents Motion to Dismiss based on Rule 12(b)(8).

In its Order, the lower court dismissed Morpew's complaint because "*another action is pending between the same parties for the same or substantially the same claim. Specifically, the second action filed by Morpew, Case No.2016-CP-18-1706, is pending. It is between Morpew and the Dudeks. And it is for the same or substantially the same claim. For these reasons, Morpew's complaint is dismissed pursuant to Rule 12(b)(8)*". Morpew contends the lower court erred in ruling its complaint dismissed pursuant to Rule 12(b)(8). First, the Dudeks' Motion to Dismiss pursuant 12(b)(8) "*is based on the fact that an action has been adjudicated between the same parties for the same claim in which the Plaintiff recently filed an appeal (see Stephen Dudek...v... Thomas Ferro...and Molly Morpew v. Stephen Dudek....Case No. 2013-CP-074 consolidated with Case No. 2013-CP-183.*" The Dudeks Motion pursuant 12(b)(8) fails or is improper as it is not based on a pending case, therefore is improper and the lower court erred in awarding its Motion to Dismiss pursuant 12(b)(8).

Even if its Motion was proper, and as stated above, during the hearing the lower court did not rule on the effect of the pending second action (Case No. 2016-CP-18-1706) for Fraud/Fraud on the Court, but instead made a ruling that it found that a cause of action for Constructive Trust cannot survive under the current circumstances, the matters of Constructive Trust have been litigated, and specifically, none of the elements of constructive trust can be met or are met in this instance (R. pg. 464, lines 1-21), making a ruling based on a 'pending action' improper.

Also, Morpew argues the matters or claims raised in this action to declare a constructive trust are that the Dudeks unlawfully acquired or purchased said property based on fraudulent acts or fraud on the court, are not bona fide purchasers, therefore stole the property from Morpew who

had a legal claim or the only legal claim to it, therefore the Dudeks are lawfully required to transfer the property [being held in trust]. While Morphew respectfully recognizes that the pending Fraud claim may have some relationship or impact upon this circuit court action, Morphew would also respectfully ask this court to also recognize that the pending Fraud/Fraud on the Court action and this Constructive Trust action are fundamentally and structurally different from each other, and/or each action's subject matter and remedies are not precisely the same, or are not substantially the same, therefore the drastic remedy of dismissal was inappropriate under Rule 12(b)(8). South Carolina Appellate Court:

“In South Carolina, dismissal under Rule 12(b)(8) may be proper when there is (1) another action pending, (2) between the same parties, (3) for the same claim. Rule 12(b)(8), SCRCP. The rule has historic ties to a former statute providing a defendant a similar opportunity to demur; our supreme court traditionally interpreted that statute narrowly, stating that it only applied when there was identity of parties, causes of action and relief. S.C. Public Serv. *Comm'n v. City of Rock Hill*, 268 S.C. 405, 408, 234 S.E.2d 228, 229 (1977); see also James F. Flanagan, South Carolina Civil Procedure 96-97 (2d ed.1996). We find this approach consistent with modern day practice under rules similar to our Rule 12(b)(8). See, e.g., *Beatty v. Liberty Mut. Ins. Group*, 893 N.E.2d 1079, 1084 (Ind .App.Ct.2008) (applying 12(b)(8) dismissal " where the parties, subject matter, and remedies are precisely the same, and it also applies when they are only substantially the same."). Accordingly, we interpret the rule narrowly such that the claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8).

While we utilize the same standard of review as the circuit court in scrutinizing the

application of Rule 12(b)(8), each of the components of the rule are determined as a matter of law and thus we apply a de novo standard of review to the grant or denial of this motion. See *Miami Sand & Gravel, LLC v. Nance*, 849 N.E.2d 671, 676 (Ind.Ct.App.2006).

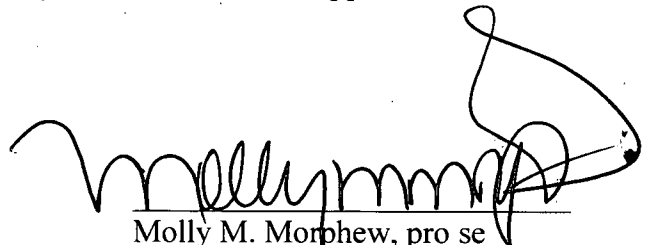
In other words, this Court may determine whether there is another action involving the same parties, claims (or subject matter), and remedies as a matter of law.

CONCLUSION

Morphew contends the Dudek's Motions pursuant Rule 12(b)(6) and/or 12(b)(8) ultimately fail or fail on its face, therefore Morphew's action for Constructive Trust should not have been dismissed. Even if their Motion(s) were proper, Morphew argues, based on the reasons stated herein, its complaint should not have been dismissed, and particularly the cause of action for "Abuse of Process" against the Dudeks as it was neither brought in the original action nor the second pending action, therefore the application of res judicata cannot bar Morphew's cause of action for abuse of process in this instant action. For this reason alone, Morphew's action for Constructive Trust should not have been dismissed.

Based on the reasons or defenses within this Brief, Morphew respectfully requests this Court to reverse the lower court's Order to dismiss Dudeks' Motions with prejudice, and remand this action back to the lower court for further proceedings as this Court finds applicable.

Respectfully submitted,



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September 4, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Honorable Diane S. Goodstein, First Judicial Circuit

Appellate Case No. 2018-000507

Molly M. Morpew

Appellant

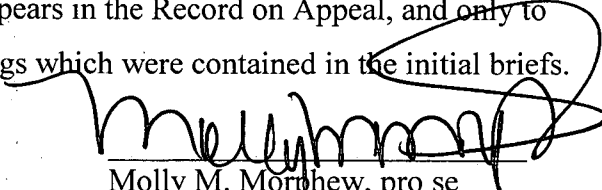
v.

Stephen Dudek and Doreen Cross

Respondents

CERTIFICATE

The undersigned hereby certifies that its Final Briefs comply with Rule 211(b) as to the Content are identical to its brief(s) previously served under Rule 208, except the initial briefs have been revised to indicate where the material appears in the Record on Appeal, and only to correct obvious typographical errors and misspellings which were contained in the initial briefs.



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September 4, 2018