

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

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

RESPONDENTS' FINAL BRIEF

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SC Court of Appeals

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

The Appellant sought a default judgment against the Respondents for failure to timely answer or otherwise plead pursuant to Rule 55 S.C.R.C.P. to its second action filed September 20, 2011 against Respondents. (R. p. 60-62).

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

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

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

The Respondents also appeared by the filing of its Motion for Summary Judgment pursuant to SCRCP 12 (R. pp. 64-67, and other pleadings filed in the action including Defendant's Return and Memorandum to Plaintiff's Motion for Default Judgment (R. pp. 76-77), Answer of Defendants Tompkins and McMaster and John Gregg McMaster (R. pp. 78-82) Defendants' Supplemental Memorandum in Opposition to Plaintiff's Motion for Default (R. pp. 92-94):

An appearance may be expressly made by a party, such that the court acquires jurisdiction over the party, by formal written or oral declaration, or record entry, or it may be

implied from some act done with the intention of appearing and submitting to the court's jurisdiction.

Pursuant to Rule 12 S.C.R.C.P. (Definitions), an appearance is defined as follows.

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

Appellant's Motion for Default was properly denied as Respondent had undisputedly appeared in the action (R. pp. 76-77; 78-82; 92-94).

The Appellant does not discuss the full extent of the hearing, issues raised and resolved during the supplemental hearing before the Honorable Joseph Strickland on April 25, 2011 and as a result of Respondents' Confession of Judgment to the Appellant on August 10, 2010 (R. p. 146-148) which arose in Appellant's first action against Respondents filed November 24, 2009. (R. p. 14-56). Furthermore, the same issues were raised and discussed during a motion hearing before the Honorable Casey Manning on April 14, 2012 which arose in Appellant's second action filed against Respondents on September 20, 2011 (R. p. 60-62).

During the April 25, 2011 supplemental hearing before Judge Strickland, Appellant demanded possession of Respondents' art work, computers, chairs, tables, printers and typewriters. (R. p. 122, ll. 16-25; pp. 123-125).

After the April 25, 2011 supplemental hearing before Judge Strickland, the Respondent discovered it had inadvertently left the courtroom with a few of the original

exhibits. On April 27, 2011, Respondent wrote the Court, forwarded the exhibits and made clarifying comments on several issues raised during the supplemental hearing and confirmed he had contacted Appellant to take possession of some of the specific items Appellant had requested during the supplemental hearing (R. pp.153-154).

Pursuant to Appellant's demand, Respondents contacted the Appellant for delivery of conference room tables, chairs, art work, copier, computer terminals and volumes of the SE 2nd. Appellant responded that it did not want the items although Appellant specifically requested them during the supplemental hearing.

After Respondent demanded that Appellant take possession of the items it demanded in open court, Appellant did nothing and subsequently informed Respondent that it did not want possession of the items it so eagerly demand during the supplemental hearing before Judge Strickland. Appellant subsequently and reluctantly took possession of the items it so eagerly demanded in the supplemental hearing before Judge Strickland. On May 11, 2011, Respondent delivered additional art work and informed Appellant that it was securing additional items it had demanded during the supplemental hearing. (R. pp. 153-154). Appellant stated that no further item would be accepted.

The hearing before Judge Strickland included a full disclosure as to the structure of Tompkins and McMaster, LLP, including loans made by John Gregg McMaster to Tompkins and McMaster, LLP which loan balance and secured by a UCC filing filed in 2009 and promissory note. (R. p. 101, ll. 16-25; R. pp. 102-105; pp. 144-145).

The perfected U.C.C. filing was filed prior to Appellant's first action of 2009. The supplemental hearing of April 25, 2011, the Appellant had notice and the opportunity to request during the supplemental hearing that Judge Strickland to set aside the U.C.C. filing and/or amended its pleadings to include a cause of action for the same relief. The

Appellant failed to make any request as to the U.C.C. filing during any portion of the collection process which lasted approximately 1.5 years from the filing of the first action on November 24, 2009 and supplemental hearing on April 25, 2011. (R. pp. 14-56; 96).

Appellant's second action filed on September 19, 2011, captioned Vista Investments, LLC vs. Tompkins & McMaster, LLP and John Gregg McMaster, Jr. is virtually a repeat of Appellant's 2009 first action for breach of lease. Respondent confessed judgment to Appellant and underwent full examination as to the U.C.C filing, assets of Tompkins and McMaster, partnership structure and lack of liability of any partner of Tompkins and McMaster, including but not limited to John Gregg McMaster pursuant to the lease upon which the 2009 action was based. The lease included a specific limitation of liability as to the partners of Tompkins & McMaster pursuant to paragraph 28. Further, the 2009 Confession of Judgment makes specific reference in the first paragraph that the Confession was made with specific reference to paragraph 28 of the lease which limited the liable of any partner of Tompkins & McMaster individually, including, but not limited to John Gregg McMaster. (R. pp. 14-56, 146-145, 96-128, 43).

After the Appellant commenced the second action 2011, the Respondents filed for summary judgment as to any and all issues which were raised and/or could have been raised during Appellant's first action for breach of lease. Furthermore, the 2011 supplemental hearing before Judge Strickland which was a part of the Appellant's 2009 first action breach of lease and was the final stage of the collection process between the parties including John Gregg McMaster. (R. pp. 64-67, 96-128).

Appellant's second action filed in 2011 involves the same parties and/or issues which should have been raised or could have been raised in the first action of 2009. The Respondents Motion for Summary Judgment filed in the second action of 2011 raised the

affirmative defenses of Res Judicata and Collateral Estoppel and was filed prior to Appellant's request for default judgment. Respondents also filed a Return and Memorandum to Appellant's Motion for Default Judgment, Answer of Defendants Tompkins & McMaster and John Gregg McMaster, supplemental memorandum in opposition to Plaintiff's Motion for Default (R. pp. 64-67; 76-77; 78-82; 92-94).

During a motion hearing in Appellant's second action of 2011, Judge Manning utilized Rules 56, 12, and 8 SCRPC in his order granting Summary Judgment to the Respondents, including the applications of res judicata and collateral estoppel. The hearing on the Respondents' Motion for Summary Judgment included Appellant's request for a default judgment and all issues raised by Appellant and Respondent in the second 2011 action filed by the Appellant. The hearing also covered issues raised and/or which could have been raised during the 1.5 year collection process of the Appellant's 2009 breach of lease action. Judge Manning made specific reference to the fact that the Respondents Motion for Summary Judgment and affirmative defense were raised prior to Appellant's request for a default judgment. A default judgment was never entered against the Respondents, merely a clerk's entry of default had been made in the matter. (R. pp. 127-143).

During an in-chambers hearing, which occurred approximately a month after the motion hearing, Judge Manning raised the issue as to what more was there to collect from Respondents as Appellant had been offered every item it requested in the supplemental hearing before Judge Strickland, but refused to take possession of the items although Appellant demanded the items in open court.

ISSUE 2:
DID THE COURT ERR IN APPLYING COLLATERAL ESTOPPEL AND RES JUDICATA TO PRECLUDE VISTA INVESTMENTS ACTION UNDER THE STATUTE OF ELIZABETH TO SET ASIDE THE SECURITY INTEREST T&M GRANTED TO MCMASTER AS A FRAUDULENT?
ANSWER: NO.

COLLATERAL ESTOPPEL

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

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

RES JUDICATA

The doctrine of res judicata is applicable to the facts of this case, and therefore, the Court was correct in finding that Appellant was precluded from maintaining the Fraudulent Conveyance Lawsuit to set aside the 2009 U.C.C. filing by John Gregg McMaster. The issue was covered at length by Judge Strickland during the supplemental hearing associated with Appellant’s first action 2009 breach of lease. Furthermore, the

same issues were heard during the motion hearing before Judge Manning on March 14, 2012 arising from Appellant's second action of 2011.

"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 (2000). "Under res judicata, a party is "barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Plott v. Justin Enter.*, 374 S.C. 504, 511, 649 S.E.2d 92, 95 (Ct. Appl. 2007). The doctrine operates where there is: (1) identity of the parties, (2) identity of the subject matter, and (3) adjudication of the issue in the former lawsuit. *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408, (2011); see also *Sub-Zero Freezer Co. vs. R.J. Clarkson Co.*, 308 S.C. 188, 417 S.E.2d 569 (1992) (res judicata bars subsequent suit by same party on same issues and claims between same parties arising out of same transaction or occurrence that is the subject of the prior suit). Where these requirements are met, the judgment is an absolute bar not only of what was decided but what might have been decided. *Mackey v. Frazier*, 234 S.C. 81, 106 S.E.2d 895 (1959).

An examination of Appellant's second action of 2011 reveals it is frivolous, regardless of the UCC filing. In fact, the Respondents have not utilized the U.C.C. filing to hinder the Appellant from obtaining one single item it has requested and or listed in the U.C.C. filing. Respondents have offered Appellant that it take possession of the items it requested and Respondents provided a full financial disclosure during the supplemental hearing before Judge Strickland.

Certainly the Appellant is not entitled to the Trust Account of T&M as it is not the property of T&M. The Operating Account, Trust Account, debts of T&M were

completely and fully during the supplemental before Judge Strickland. (Tr. p. 9, ll.) (R. p. 104, ll. 10-12; p. 124, ll 4-25; p. 105, ll. 1-3).

Appellant's argument that res judicata and/or collateral estoppel is not applicable to Appellant's second 2011 action is nothing but a smoke screen to hide the true intent of Appellant's basis for appeal, commencement of the second collection action and total disregard for the lease which Appellant drafted, including paragraph 28 of the lease which specifically provides that no partner of Tompkins & McMaster shall be individually liable to the Appellant for any debt and/or cause of action arising from the lease. Appellant is attempting re-litigate issues which is lost at the circuit level involving the same parties and issues which were or should have been litigated.

The Appellant ignore and/or refuse to accept the 28 of the lease, which Appellant drafted. The lease is incredibly clear that no partner, assigns heir or future partners shall be liable for any amounts owed on the lease. (R. p. 43).

The Appellant also ignores that the U.C.C. was filed prior to the commencement of its circuit court actions and that the public filing provides notice to Appellant. The Appellant could have raised the Statute of Elizabeth by amending its pleadings during the 2009 collection action and the amendment could have taken place during and/or after the supplemental hearing before Judge Strickland in 2011.

The individual partners of Tompkins & McMaster are provided complete and total protection from any type of liability arising from the lease. The issue is so very simple that no case law is needed to support Respondents' position on this issue. A review by this honorable court of paragraph of the lease drafted by Appellant should weigh heavily in Respondents' favor.

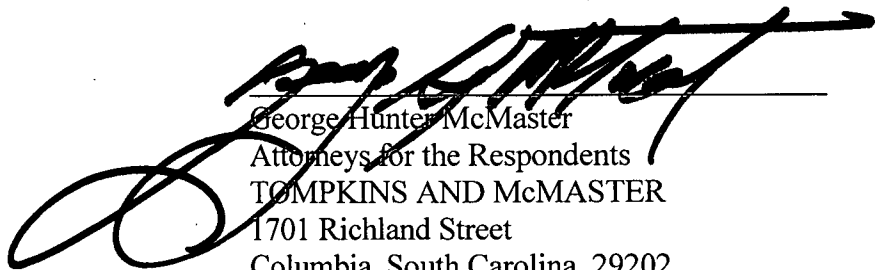
The application of the paragraph 28 of the lease results in Appellant's argument being frivolous and a waste of the Appellant Court's valuable time (R. p. 103, ll. 1-25).

The U.C.C. which Appellant argues should have been set aside in its second action of 2011 is another attempt to avoid the undisputed fact that the issue was exhaustively argued and considered by Judge Strickland during the 2011 supplemental hearing and Judge Manning in 2012 in Appellant's second action of 2011. The supplemental hearing testimony explains how John Gregg McMaster began loaning Tompkins & McMaster money for various expenses in 2004 the debt was paid down over the years and the debt also increased over the years as JGM was requested to make additional loans . The complete ledger, history of the debt and payments thereon was fully discussed at the supplemental hearing before Judge Strickland. (R. p. 109, ll. 9-25; pp. 110-119).

SUMMARY

Appellant's arguments are frivolous and a desperate attempt to re-litigate issues which have been, could have and/or should have raised during the first action captioned Vista Investments, LLC v. Tompkins & McMaster, LLP. Manning Properly granted Respondents Motion for Summary Judgment in the second action of 2011.

Respectfully Submitted:



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March 31 2014

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v.

Vista Investments, LLC, Appellant

PROOF OF SERVICE

I certify that I have served Respondents Final Brief on Vista Investments, LLC by depositing one copy of the same in the United States Mail, postage prepared, on April 1, 2014, addressed to counsel of record for Respondents, Duvall Spruill, Esq., Turner Padgett Graham & Laney PA, Post Office Box 1473; Columbia, SC 29202..

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