THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge

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SC Court of Appeals

Case No. 2019-001443

Thomas F. True, III
Individually and as Trustee of
Jate IV Trust,

Appellant,

V.

William L. Tuorto,

Respondent.

INITIAL BRIEF OF RESPONDENT

December 2, 2019

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I. STATEMENT OF THE CASE

On March 17, 2017, the Appellant filed a Pro Se Summons and Complaint against the Respondent in the Court of Common Pleas for the County of Charleston, South Carolina. On May 1, 2017, the Respondent filed an answer to the complaint and a counterclaim which was served on the Appellant at the address listed on the Summons.

On May 10, 2018, Respondent filed a Motion for Default on the basis that Appellant failed to reply to the counterclaim as required. On June 19, 2019 after a hearing, the Court entered a entry of default against the Appellant for failing to answer the counterclaim and set a hearing to determine damages. On July 2, 2018, Appellant, by his attorney filed a Motion to Set Aside Entry of Default, along with a Memorandum. On September 24, 2018, the Court heard Appellant's Motion to Set Aside Entry of Default on the basis that the counterclaim was a claim for Appellant filing a frivolous action and that since the initial action had not been determined, the claim for filing a frivolous lawsuit was not ripe. The trial court granted Appellant's motion to set aside the entry of default as to Respondent's counterclaim.

Respondent filed a motion for summary judgment which was granted by Order of the Court of Common Pleas for the County of Charleston, South Carolina on April 26, 2019.

Appellant filed a motion to reconsider which was denied by Order dated July 29, 2019.

Appellant filed Notice of Appeal, appealing the order denying his motion to reconsider.

II. STANDARD OF REVIEW

The granting of summary judgment is immediately appealable because it ends the case. *Osborne v. Allstate Ins. Co.*, 319 S.C. 479, 462 S.E.2d 291 (Ct. App. 1995). Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Café Assocs. Ltd. v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991). In reviewing a grant of summary judgment, this court should apply the same standard as that employed by the trial court under Rule 56(c). SCRCP. *Doe v. Walmart Stores, Inc.*, 393 S.C. 240, 244, 711 S.E.2d 908, 910 (2011). An Appellate Court reviews the granting of summary judgment under the same standard applied by the trial court. *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001).

III. ARGUMENT

A. THE TRIAL COURT CORRECTLY RULED THAT APPELLANT'S CLAIMS WERE BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL

The trial court correctly ruled that Appellant's claim for damages as a result of a breach of contract and unjust enrichment are barred by the Doctrine of Collateral Estoppel. The allegations of Appellant's complaint, and the undisputed facts show that Appellant's claims against Respondent were previously litigated, resulting in an order of the Court of Common Pleas, filed on April 3, 2014. The Order held, "**Ordered, adjudged and decreed** that the revised lease is a valid and enforceable contract, including the purchase option..." (Order of J.C. Nicholson, Jr. p. 5). Appellant's complaint alleges that Appellant and Respondent entered into an original lease dated August 28, 2011. (Complaint, p. 2, paragraph 6). Appellant further alleges in his complaint that after the original lease, Appellant renegotiated the original lease with Respondent and that the revised lease was memorialized in writing. (Complaint, p. 2 paragraph 7). Appellant further alleges in his complaint that the Respondent failed to live up to his end of the bargain and thus failed to abide by the terms of the transaction. (Complaint, p. 2, paragraph 12). Appellant brought an action against Respondent based on Respondent's breach of the agreement. (Complaint, p. 3, paragraph 13). Appellant alleges that Respondent defended, and that Respondent appealed the decision of the Magistrate's Court to the Court of Common Pleas, County of Charleston, South Carolina, and on March 14, 2014, said court reversed the decision of the Magistrate. (Complaint, p. 3-4 and Order of J.C. Nicholson, Jr.). That Order was not appealed and is the law of the case. The law of the case applies to these issued explicitly decided and to those issues which were necessarily decided in the former case. *Ross v. Medical University of S.C.*, 328 S.C. 51, 492 S.E.2d 62 (1997).

All claims for damages resulting from the alleged breach of contract and unjust enrichment are barred by the Doctrine of Collateral Estoppel and the Doctrine of Res Judicata. 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 the parties and their privies in any subsequent action based upon a different claim. *Richburg v. Baughman*, 290 S.C. 431, 351 S.E.2d 164 (1986). When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive and a subsequent action between the parties, whether on the same claim or different claim. *McNaughton – McKay Elect. Co. of N.C. v. Andrich*, 324 S.C. 275, 482 S.E.2d 564 (Ct. App. 1996). It is clear that Plaintiff seeks to re-litigate the same and identical issues regarding Respondent's alleged breach of the revised lease agreement and seeks to enforce and collect damages as a result of the alleged breach. All of Appellant's claims for damages are on the basis that the revised lease is invalid, and the original lease should be enforced allowing Appellant to collect additional rent money under a breach of contract and/or unjust enrichment. This is the exact issue determined by Judge Nicholson whose order clearly finds that the revised lease is valid and an enforceable contract.

B. THE TRIAL COURT CORRECTLY RULED THAT DEFENDANT WAS ENTITLED TO SUMMARY JUDGMENT ON THE BASIS THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT

Pursuant to Rule 56(c), SCRCP, the parties seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E. 2d 432 (Ct. App. 2003). Once a moving party for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case,

the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Regions Bank* at 438. Rather, the non-moving party must come forward with specific facts showing there is a genuine issue for trial. *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990). The Appellant failed to provide the lower court with any admissible fact to support any allegation of his complaint. In addition, the underlying complaint herein, seeks to relitigate identical issues previously brought by Appellant and ruled upon by Order of the Honorable J. C. Nicholson, Jr. which was filed on April 3, 2014 and that order was not appealed by Appellant and is the law of the case. The Court explicitly held, "**Order, judged and decreed** that the revised lease is a valid and enforceable contract, including the purchase option provision given the Appellant (Respondent herein) the right to purchase the property for $675,000 at any time during the lease term." (Order, p. 6). The allegations of the underlying complaint herein, are that Appellant is due additional rent because, the revised lease is invalid. The court explicitly ruled on this issue back on April 3, 2014.

All claims made by Appellant involve two written lease agreements relating to real property. The Order of J. C. Nicholson, Jr. clearly provides that the revised lease is a valid and enforceable contract and thus, all claims relating to the first lease and the revised lease have been ruled upon and that order is the law of the case. (Order of J. C. Nicholson, Jr., p. 6). Appellant's additional claims in the underlying complaint, made several years after the Order of J. C. Nicholson back in 2014, relates to alleged oral agreements outside of the lease agreement. Parol Evidence Rule prohibits the admission of any factual agreement inconsistent with the written document. Parol Evidence Rule states that "where the terms of a written instrument are unambiguous, clear and explicit, extrinsic evidence of statements made contemporaneously with or prior to the execution are inadmissible to contradict, vary or explain its terms." *Ray v S.C. Nat'l Bank*, 281 S.C. 170,

314 S.E.2d 359 (1984). Any and all alleged "facts" relied upon by Plaintiff are inadmissible and do not comply with the requirements of Rule 56(e) SCRCP.

Any contract for an interest in land must be in writing and signed by the party against whom it is seeking to be enforced., §32-3-10(4) S.C. Code of Laws. Failure to put such a contract in writing renders it void, §27-35-20 S.C. Code of Laws. Moreover, a contract required to be in writing by the Statute of Frauds cannot be orally modified. *Windham v. Hunnicutt*, 279 S.C. 111, 302 S.E. 2d 856 (1983). In *Windham*, the court held evidence of oral modification of the real estate contract violates Statute of Frauds. The facts alleged in Appellant's complaint and the affidavits are inadmissible pursuant to the Parol Evidence Rule and the Statute of Frauds and thus cannot support Appellant's claim.

C. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT BECAUSE APPELLANT FAILED TO PROVIDE ANY ADMISSIBLE EVIDENCE TO SUPPORT APPELLANT'S CLAIMS

Appellant argues that the claim that Respondent took personal property would not be covered by Judge Nicholson's Order. Appellant alleges that the allegations relating to the bronze lions and furnishings, referenced in paragraph 26 of the underlying complaint somehow are unrelated to the written lease agreement. (Complaint, p. 6, paragraph 26).

Appellant has failed to come forward with any admissible fact to support the allegations of the complaint. In an effort to support the allegations, Appellant submitted an affidavit of the Plaintiff's adult son in an effort to survive summary judgment since no other evidence or fact had been presented. Rule 56(e), SCRCP provides that "supporting an opposing affidavit shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated herein." The

affidavit provides "Upon information and belief, upon the foreclosure sale, the said bronze lions and the furnishings belonging to Plaintiff remained in the possession of the Defendant and have not been returned to Plaintiffs." (Affidavit of John True). The mortgage lender of Appellant foreclosed on the home and became the owner of the home. Rule 56(e) SCRCP requires that an affidavit be made on personal knowledge and set forth facts that would be admissible into evidence. The True affidavit fails to comply with those requirements.

D. THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO RECONSIDER

The trial court correctly denied Appellant's motion to reconsider based on the Doctrine of Collateral Estoppel and on the basis that there was no genuine issue of material fact to support Appellant's claims. Appellant failed to provide any admissible fact.

Once a party moving for summary judgment meets the initial burden showing an absence of evidentiary support for the opponent's case, the opponent simply cannot rest on mere allegations or denials contained in the pleadings. *Regions Bank*, 582 S.E.2d at 438. The non-moving party must come forward with specific facts showing there is a genuine issue for trial. *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990).

The court, in denying Appellant's motion for reconsideration, correctly found that Appellant failed to come forward with specific facts showing a genuine issue for trial. Rule 56(e) SCRCP requires that supporting an opposing affidavit shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall affirmatively that the affiant is confident to testify to the matters stated therein. Appellant attempted to create a factual issue by submitting the Affidavit of John True however, the affidavit failed to set forth facts as would be

admissible in evidence. The Parol Evidence provides that where the terms of a written instrument are unambiguous, clear and explicit, extrinsic evidence of statements made contemporaneously with or prior to the execution are inadmissible to contradict, vary or explain its terms. *Ray v. S.C. Nat'l Bank*, 281 S.C. 170, 314 S.E.2d 359 (1984).

In addition, the affidavit of John True provided "Upon information and belief, upon the foreclosure sale, the said bronze lions and furnishings belonging to the Plaintiff remained in the possession of the Defendant and have not been returned to Plaintiff." The affidavit clearly fails because Rule 56e) of the SCRCP clearly provides that the affidavit must be made on personal knowledge and state facts that would be admissible.

For these reasons and those set forth above, the court correctly denied Appellant's motion for reconsideration.

IV. CONCLUSION

The Doctrine of Collateral Estoppel and Res Judicata precludes and bars Appellant's claim for damages as a result of an alleged breach of contract and unjust enrichment. Appellant filed his first lawsuit against Respondent alleging a breach of contract and damages as a result of the revised lease being unenforceable. Judge Nicholson's order clearly and unequivocally rules that the revised lease was valid and enforceable. The order was not appealed and is the law of the case.

In addition, Appellant has failed to provide any issue of material fact and therefore the court properly granted summary judgment as to all claims.

Respectfully submitted,

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December 2, 2019

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CERTIFICATE OF SERVICE

I, Robert J. Wyndham, hereby certify that I have, on the date indicated below, served counsel named below with the Initial Brief of Resondent by mailing a copy of same via U.S. Mail, first class, postage prepaid with return address clearly indicated on the envelope, to the following address:

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December 2, 2019

The Honorable Jenny Abbott Kitchins
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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Re: Thomas True III v. William Tuorto; Appellate Case No. 2019-001443

Dear Madam Clerk:

Enclosed for filing please find the following documents:

1. Initial Brief of Respondent;
2. Certificate of Service.

Thank you for your assistance in this matter.

With kindest personal regards, I am

Sincerely,

Robert J. Wyndham

RJW:ks
Enclosure: as stated

Cc: Peter H. Rosenthal, Esq.

First Class Mail

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