

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

Case No. 2019-001443

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

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SC Court of Appeals

Appellant,

V.

William L. Tuorto,

Respondent,

FINAL BRIEF OF APPELLANT

January 18, 2020

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I. STATEMENT OF THE ISSUES ON APPEAL

1. DID THE JUDGE ERR IN GRANTING SUMMARY JUDGMENT PREMATURELY THEREBY DENYING APPELLANT FULL AND FAIR DISCOVERY?
2. DID THE JUDGE HEARING THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ERR IN GRANTING SUMMARY JUDGMENT FOR RESPONDENT BASED ON THE DOCTRINE OF COLLATERAL ESTOPPEL?
3. DID THE JUDGE HEARING THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ERR IN GRANTING SUMMARY JUDGMENT FOR RESPONDENT ON APPELLANT'S CLAIM FOR UNJUST ENRICHMENT?
4. DID THE JUDGE HEARING THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ERR IN GRANTING SUMMARY JUDGMENT FOR RESPONDENT ON APPELLANT'S CLAIM FOR BREACH OF CONTRACT?
5. DID THE JUDGE HEARING THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ERR IN RELYING ON THE PAROL EVIDENCE RULE TO EXCLUDE APPELLANT'S PROFERRED EVIDENCE OF FRAUD AND MISREPRESENTATION?
6. DID THE JUDGE HEARING THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ERR IN GRANTING SUMMARY JUDGMENT FOR RESPONDENT ON APPELLANT'S CLAIM FOR CONVERSION?
7. DID THE JUDGE HEARING THE APPELLANT'S RECONSIDERATION MOTION ERR BY DENYING THE SAID MOTION?

II. STATEMENT OF THE CASE

On March 17, 2017, the Appellant filed, Pro Se, a complaint against the Respondent in the Court of Common Pleas for the County of Charleston, South Carolina (R12-R20). The Appellant, Thomas F. True, III, at all times relevant to this matter, was incarcerated in the federal prison system (R34-R43).

On May 1, 2017, the Respondent, by his attorney, filed a responsive pleading styled as "Answer and Counterclaim" (R21-R23).

On May 10, 2018, Respondent filed a Motion for Default and Default Judgment with an Affidavit of Default alleging that Appellant failed to reply to the alleged Counterclaim (R24-R25).

On June 19, 2018 the court entered an Order of Default against the Appellant for failing to timely answer the Counterclaim of the Respondent further ordering that a hearing be scheduled for entry of judgment (R3).

On July 2, 2018, Appellant, by their attorney filed a Motion to Set Aside Entry of Default (R26-R27), supported by a Memorandum (R26-R33) and Affidavit (R34-R43).

On September 24, 2018, the court heard Appellant Motion to Set Aside Entry of Default which was taken under advisement by the motion judge (R93-R105).

On October 1, 2018, prior to the motion judge issuing a decision on setting aside default, the Respondent filed a Motion for Summary Judgment. This motion was filed without any supporting documents (R44).

On October 30, 2018, the motion judge granted Appellant Motion to Set Aside Entry of Default and further ordered Appellant to file an Answer to Respondent Counterclaim within 30 days (R4).

On November 16, 2018 Appellant's Answer to Counterclaim is filed (R45-R46).

On March 5, 2019, the Respondent filed a Motion to Dismiss. It should be noted that this motion was never acted on (R47).

On March 8, 2019, Appellant filed a Memorandum in Opposition to the Respondent's Motion for Summary Judgment (R48-R59) along with Supporting Affidavit of John True (R60-R64).

Appellant filed a further Affidavit pursuant to SCRCPC 56(f), by its attorney on March 11, 2019 that set out difficulties of the attorney to communicate with Thomas F. True III who was incarcerated throughout the relevant dates of the course of the litigation (R65-R66).

On March 12, 2019, one day prior to motion hearing, Respondent filed a Memorandum in Support of the Motion for Summary Judgment (R67-R74).

On March 13, 2019, the court heard Respondent Motion for Summary Judgment which was taken under advisement by the motion judge (R106-R128).

On March 14, 2019, with court permission, Appellant filed a Supplemental Memorandum opposing the Respondent Motion for Summary Judgment (R75-R76).

On April 26, 2019, the motion judge issued an Order Granting Summary Judgment on Respondent motion (R5-R6).

On May 9, 2019, Appellant filed a Motion for Reconsideration of the grant of summary judgment (R77-R78) with a supporting Memorandum (R79-R89).

Respondent Opposition to Appellant Reconsideration was filed on May 29, 2019 (R90-R92).

On July 29, 2019, the motion judge entered an Order Denying Appellant Motion for Reconsideration (R7-R11).

Appellant filed Notice of Appeal on August 29, 2019 (R129).

III. STANDARD OF REVIEW

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), SCRPC. Doe v. Wal-Mart Stores, Inc., 393 S.C. 240, 244, 711 S.E.2d 908, 910 (2011). When reviewing an order that grants a party summary judgment, the appellate court employs the same standard as applied in the trial court under SCRPC 56. Wachovia Bank, N.A. v. Coffey, 404 S.C. 421, 425, 746 S.E. 2nd 35, 37 (2013) (citations omitted).

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that

a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004).

Summary judgment is ripe only if there is no genuine issue as to any material fact. Rule 56(c), SCR. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Quail Hill, LLC v. City of Richland, 387 S.C. 223, 235, 692 S.E. 2nd 499, 505, (2010) (citations omitted).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000); Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct.App.2004). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000);

"In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Grimsley v. S.C. Law Enf't Div., 415 S.C. 33, 40, 780 S.E.2d 897, 900 (2015).

"The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." Bennett v. Inv'rs Title Ins. Co., 370 S.C. 578, 588–89, 635 S.E.2d 649, 654 (Ct. App. 2006).

All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct.App.2003).

“In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences [that] can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” Hancock v. Mid-S. Mgmt. Co , 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009).

Moreover, “in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” Hancock, 381 S.C. at 330, 673 S.E.2d at 803. “At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact.” S.C. Prop. & Cas. Guar. Ass'n v. Yensen , 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001).

“[B]ecause summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues.” Huffman v. Sunshine Recycling, LLC, 417 S.C. 514, 790 S.E.2d 401 (S.C. App., 2016).

IV. ARGUMENT

A. APPELLANT STATEMENT OF MATERIAL FACT

Reading the complaint and affidavits presented by Appellant in the light most favorable to the Appellant, with all reasonable inferences drawn therefrom, the following

facts, express and inferred, present genuine issues of fact. These facts and favorable inferences are as follows:

1. Respondent entered a lease (original lease) with Appellant on August 28, 2011 for the premises at 1180 Chersonese Round, Mount Pleasant, South Carolina, owned by Appellant Jate IV Trust; (R13, Complaint 5, 6 and 8)
2. John W. True, son of Appellant Thomas F. True III, provided an Affidavit dated March 7, 2019 that from his personal knowledge provided many of the facts supporting the opposition to summary judgment. (R60-R64, J W True Affidavit)
3. John W. True was at all times relevant to the Complaint a beneficiary of Appellant Jate IV Trust. (R60, J W True Affidavit, paragraph 1)
4. The original lease was for several years and charged a monthly rent \$4250; (R13, Complaint 9 and R 61, J W True Affidavit 9)
5. Respondent had taken possession under the original lease sometime prior to October of 2011; (R60, J W True Affidavit 6)
6. Throughout the time period of negotiating the original lease and the revised lease, Appellant Thomas F. True III, who had been charged with a serious federal crime, was awaiting trial for the said federal charges. (R61, J W True Affidavit, 7)
7. Inference drawn from Complaint that Thomas F. True III is suing Respondent both in his individual capacity and as Trustee of Jate IV on all allegations; (R12-R20)
8. At all times relevant to the lease negotiations, Appellant Thomas F. True III was facing incarceration on the said federal charges and was concerned about the financial security of his children who were beneficiaries of Jate IV Trust; (R61, J W True Affidavit 8)
9. At all times relevant to the lease negotiations, Appellant Thomas F True III was a real estate developer and at the time of lease negotiations Appellant had made an agreement with a bank that had foreclosed on a parcel of property to purchase that foreclosed parcel from the bank but \$75,000 was needed as a deposit to bind the property purchase. (R61, J W True Affidavit 11-13)
10. At all times relevant to the lease negotiations, Respondent and Appellant True were social friends and Appellant had trust and confidence that in the lease negotiations, Respondent

would act in Appellant's best interests and as such, the lease negotiations to revise the lease were not "arm's length"; (R61, J W True Affidavit 10)

11. Early in November of 2011, John True was present at the law office of Appellant attorney and John True listened in to a telephone conference between Appellant and Respondent regarding renegotiating the original lease, contingent on Respondent loaning to Appellant the \$75,000 that Appellant needed to bind the purchase of the foreclosed property from the bank; (R60-R62, J W True Affidavit 5, 15)
12. Appellant and Respondent orally agreed during the said telephone conference that Respondent would loan to Appellant the \$75,000 needed to place the deposit for the foreclosed parcel owned by the bank in consideration for which the Appellant would reduce the monthly rental amount in the original lease from \$4250 to \$2000; (R62, J W True Affidavit 15 and R14, Complaint 10, 15)
13. A further element and condition of the oral agreement was that Respondent would hold the revised lease "in escrow: and it would not come into effect unless and until Respondent funded the \$75,000 loan and Appellant received the funds; (R62, J W True Affidavit, 15)
14. Unless and until Respondent loaned the \$75,000 to Appellant, the rent would not be reduced and the lease was to be held in escrow by Respondent and would not come into effect; (R14, Complaint 12 and 16 and R63, J W True Affidavit 20 and 21).
15. In contravention of the Respondent's representation that he must and would hold the revised lease in escrow until the loan was made, Respondent recorded the revised lease in the Registry of Deeds and began (and continued) paying the revised lease rental amount of \$2000 per month; (R14, Complaint 12 and 15 and R63, J W True Affidavit 20 and 21)
16. The circumstances that led Appellant to seek the loan from Respondent was Appellant's need for \$75,000 to place a deposit on a land parcel for development by Appellant; (R61-R63, J W True Affidavit 11, 12, 13, 21, and 22)
17. Without Respondent making the promised loan, Appellant was unable to place the said deposit and never consummated the contract to purchase the said parcel; (R63, J W True Affidavit 22)
18. The reduction in rent was conditioned upon the loan being made; (R14, Complaint 16)

19. The revised lease was signed and was to be held in escrow by the Respondent and not become effective unless the \$75000 loan was made and not otherwise; (R63, J W True Affidavit 20 to 22)
20. Respondent without right or permission or payment of consideration removed the revised lease from escrow and recorded it at the registry of deeds on Nov 15, 2011; (R63, J W True Affidavit 20)
21. Respondent never arranged nor made the \$75,000 loan to Appellant but unilaterally, without permission or agreement of Appellant began paying the reduced monthly rental of \$2000 all to the detriment of Appellant; (R63, JW True Affidavit 21and 22)
22. Appellant owned certain furnishings and other personal property (including the bronze statues) that Respondent retained and converted to his own use; (R15-R16, Complaint 17, 18 and 24 and R63, J W True Affidavit 23 to 26)
23. Respondent at the times relevant was an attorney licensed to practice in South Carolina; (R13, Complaint 4)

**B. MOTION JUDGE ERRED IN GRANTING SUMMARY JUDGMENT
PREMATURELY THEREBY DENYING APPELLANT RIGHT TO
FULL AND FAIR DISCOVERY**

The Respondent filed a Motion for Summary Judgment (R44) on October 1, 2018, shortly after the court's hearing on the motion to Set Aside Default and prior to the court granting that motion.

The Appellant stated the following as support for this motion:

“Said motion is made upon the ground that the record in the case shows there is no genuine issue as to any material fact and that the Defendant is entitled to judgment as a matter of law.”

The Respondent filed this motion prior to the completion of any discovery and without any supporting documents. The only fact document filed prior to the motion outside of the

pleadings and default motion is an affidavit from the Appellant submitted by John True that related only to the set aside of the default and contained no facts relating to the substance of the Complaint.

No discovery had proceeded on behalf of either party from the filing date of the summary judgment motion on October 1, 2018 when the hearing was held on March 13, 2019.

A motion for summary judgment at this early phase of the case, filed even before the court granted the Appellant motion to Set Aside the Default, is akin to a 12(b)(6) motion for judgment on the pleadings. The court, by allowing the set aside of the default, is also acknowledging that there is merit to the Appellant complaint based on the pleadings (one of the requirements in the set aside being a meritorious claim on its face).

By the court allowing the motion setting aside the default, the court is acknowledging that the Appellant claim had merit. Rule 8, SCRPC requires that a complaint contain “a short and plain statement of the facts showing that the pleader is entitled to relief”. A motion to dismiss must be denied “if facts alleged and inferences reasonably deductible therefrom would entitle the plaintiff to relief on any theory of the case.” See Flateau vs. Harrelson, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App.2003).

Therefore, after the October 1, 2018 filing of the motion for summary judgment the court recognized that the complaint was meritorious when on October 30, 2018 it allowed the Appellant motion to set aside default.

In the instant matter, it cannot be claimed that Appellant was dilatory in pursuing discovery as the summary judgment motion was filed and a hearing scheduled less than five months after the filing.

Further, from the facts recited in the Argument section A, above, there are facts and inferences that favor the Appellant's theory of unjust enrichment, breach of contract and conversion.

The Supreme Court of South Carolina in Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E. 2nd 537 (1991) held that summary judgment is "a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery. In Baughman, the court ruled summary judgment premature because (1) plaintiffs demonstrated a likelihood that further discovery would uncover additional relevant evidence, and (2) plaintiffs were not dilatory in seeking discovery. Although three years had elapsed between filing the action and summary judgment, the delay could not fairly be attributed solely to plaintiffs' inaction, and the delay was tempered by the complexity of the case. Id. at 112-114, 410 S.E.2d at 544.

Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Doe v. Batson, 345 S.C. 316, 548 S.E.2d 854 (2001); see also Schmidt v. Courtney, 357 S.C. 310, 319, 592 S.E.2d 326, 331 (Ct.App.2003) ("Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a full and fair opportunity to complete discovery."). BPS, INC. v. Worthy, 362 S.C. 319, 608 S.E.2d 155 (S.C. App., 2005)

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Vermeer Carolina's, Inc. v. Wood/ Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). Redwend Ltd. Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (S.C. App., 2003).

C. MOTION JUDGE ERRED IN GRANTING SUMMARY JUDGMENT BASED ON COLLATERAL ESTOPPEL

As set out above in the Statement of the Case, at the summary judgment hearing held on March 13, 2019, the motion judge on April 26, 2019 granted Respondent summary judgment motion. (R5-R6)

A reading of the order makes clear that motion judge was relying on the decision of the Court of Common Pleas judge reversing a Magistrates Court in the matter styled: *Jate IV Trust v. William Tuorto, Court of Common Pleas Case No. 2013-CP-10-2307* and captioned: "Order Granting Defendant's Appeal And Reversing Magistrate Court, In Part". (R67-R74)

The motion judge ruled in the instant matter that the Judge Nicholson Jr. decision estops the Appellant from litigating the issues in the instant lawsuit because the issues are the same. The interpretation by the motion judge that the doctrine of collateral estoppel applies here is misplaced. This is because the sole issue decided by Judge Nicholson Jr. in the 2013 case was as follows:

"Whether the Magistrate Court erred in determining that a revised lease between the parties was void or voidable as a result of the trustee exceeding his authority when entering into the same." (See the Order attached to Respondent Memorandum). (R67-R74)

Thus, the issue addressed by Judge Nicholson Jr. was a technical one: the power of the trustee to void the revised lease. That judge went into great detail in the “Legal Analysis” section as to why the trust could not void the lease based on the trust language as they are applicable to the South Carolina Probate Code concluding: “As such, because more than one year has passed, the beneficiaries in the present case are now barred from seeking relief under Section 62-7-802, specifically including the right to render the Revised Lease voidable.” (Order attached to Respondent Memorandum at R70-R74)

It is important to note that the decision by Judge Nicholson Jr. *reversed* a decision by the Magistrate that was *favorable* to the Appellant that voided the revised lease at issue in the instant case. The only issue decided on the appeal of the Magistrate Court was if the court erred as a result of the trustee exceeding his authority. The issue of the trustee exceeding his authority is unrelated and is separate from the instant issues.

South Carolina case law states that collateral estoppel “occurs when a party in a second action seeks to preclude a party from relitigating an issue which was decided in a previous action, Catawba Indian Nation v. State, 407 S.C. 526, 536, 756 S.E. 2d 900, 906 (2014). The party asserting collateral estoppel must demonstrate that: “the issue in the present lawsuit was (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment, Id. at 536-537, 756 S.E. 2d at 906.

In the matter before the trial court, none of these issues were previously litigated: 1) unjust enrichment; 2) conversion of property; 3) breach of contract; 4) parol evidence and fraud. None of the three prongs necessary for collateral estoppel are present here. As stated in Aaron v. Mahl, 381 S.C. 585, 592 674 S.E. 2d 482, 486 (2009): “Collateral estoppel prevents

a party from re-litigating an issue in a subsequent suit which was actually necessarily litigated and determined in a prior action.”

In its order granting summary judgment, the trial court relied on Richburg v. Baughman, 290 S.C. 431, 351 S. E. 2d 164 (1986) that states “once a final judgment on the merits has been reached in a prior action, 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.” As no final judgment on any of the issues in the instant matter have been reached, summary judgment on any of these issues is wrong. The sole issue litigated was whether the trustee exceeded his authority and that issue is not on trial here.

Appellant further argues that the eleventh hour submission of Respondent’s Memorandum in Support of their summary judgment motion should not have been considered as it was filed in violation of SCRCP 56 (c) requiring motions to be served at least 10 days before the time fixed for hearing and supporting affidavits at least two days prior..

Here, the Defendant’s submission of its Memorandum was on March 12, 2019 when the hearing was scheduled and held one day later on March 13, 2019. The memorandum had as an exhibit the Order of Judge Nicholson Jr. upon which the court’s grant of summary judgment relied. (R67-R74)

The Appellant’s attorney objected to the filing and the court did not sustain or deny the objection. This court should not have allowed the said memorandum to be filed or at minimum allowed sufficient time for the Appellant to respond and file opposition. Instead, the court only allowed the Appellant two days to submit a supplement to their memorandum and

the court never commented or addressed the issues addressed in its grant of summary judgment. (R106-R128)

D. MOTION JUDGE ERRED IN GRANTING SUMMARY JUDGMENT FOR RESPONDENT ON APPELLANT'S CLAIM FOR UNJUST ENRICHMENT

As emphasized by the Appellant in the complaint, the Respondent has been unjustly enriched by unilaterally removing the revised lease from escrow without making the promised loan of \$75000. The result, viewed in light most favorable to Appellant, is to reduce the monthly rental from \$4,250 to \$2000 without consideration.

The Respondent, quite literally, was unjustly enriched by removing the lease from escrow thereby reducing the rent paid by more than half. John True, a fact witness, was present when the parties agreed to the preconditions to remove the lease from escrow. (See John True Affidavit 14, R60-R64). The courts have recognized the equitable doctrine of unjust enrichment based on quantum meruit where a party may be unable to prove breach of contract (here possibly because of the parol evidence rule, but see argument below).

The South Carolina Supreme Court set out the standard for this principle in Columbia Wholesale Co. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994) where the court recognizes quantum meruit "as an equitable doctrine to allow recovery for unjust enrichment."

"A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another." Dema v. Tenet Physician Servs.-Hilton Head, Inc., 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009).

“Unjust enrichment is an equitable doctrine, which permits recovery of the amount that the defendant has been unjustly enriched at the expense of the plaintiff. The elements to recover for unjust enrichment based on quantum meruit, quasi-contract, or implied by law contract which are equivalent terms for equitable relief, are: (1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value.” See Regions Bank v. Wingard Props. Inc., 394 S.C. 241, 256-257 715 S.E. 2d 348, 356 (Ct. App. 2011).

In the instant case, all these elements are met: the benefit conferred on the Respondent is the severe reduction in rent; the Respondent has realized the benefit, i.e. \$2,250 per month over at least 6 years; and the Respondent has retained this benefit without paying for its value, i.e. Respondent paid the reduced rental (a benefit) but failed to make the \$75,000 loan (failure to pay value) but retained the rent reduction. The remedy for unjust enrichment is restitution. See Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 409, 581 S.E.2d 161, 167 (2003).

A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another. Unjust enrichment is an equitable doctrine which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff. Ellis v. Smith Grading and Paving, Inc., 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct.App.1988).

E. MOTION JUDGE ERRED IN GRANTING SUMMARY JUDGMENT FOR RESPONDENT ON APPELLANT’S CLAIM FOR BREACH OF CONTRACT

“The necessary elements of a contract are an offer, acceptance and valuable consideration.” Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E. 2d 771, 773 (Ct. App. 1997).

In the instant matter, these elements are present in the original lease. However, when looking at the terms of the revised lease, Respondent's failure to make the loan places into question whether there was valuable consideration for that revised contract.

Although valuable consideration takes many forms, here the consideration would have been the loan. "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other," Prestwick Golf Club Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 389, 503 S.E, 2d 184, 186 (Ct. App. 1998).

Without the loan, there was no valuable consideration supporting the revised lease. For a finding at the summary judgment stage, the facts in the record, viewed in the light most favorable to the Appellant, the difference between the original lease and the revised lease is the seriously reduced rent. This rent reduction is based on the condition that Respondent make the proffered loan. The instant matter raises the material issue of fact as to consideration for the revised lease and an arguable cause of action for breach of contract.

Although the said facts align closely with the Appellant's argument for unjust enrichment, breach of contract here is supported by parol evidence that is not excluded as set out in the section below.

F. EXCEPTION TO THE PAROL EVIDENCE RULE WHERE FRAUD AND MISREPRESENTATION ARE PRESENT

Viewed in the light most favorable to the Appellant, the parol evidence rule should not be invoked here. The revised lease has not been introduced into evidence and the parol

evidence rule does not apply due to ambiguities present in the instant matter. See Klutts Resort Realty Inc. v. Down'Round Dev. Corp., 268 S.C. at 89, 232 S.E.2d at 25 (1977).

Further, parol evidence can be admitted to show a separate and independent agreement not inconsistent with the revised lease as long as it does not contradict the lease. In the instant case Appellant's complaint, paragraph 11, refers to a writing memorializing the promise to loan \$75,000. (R14)

Even if not in writing, an independent oral agreement may be introduced to explain the reason for a rent reduction and would not violate the parol evidence rule as long as it is not inconsistent with the revised lease. See Beckham v. Short, 294 S. C. 415, 418, 365 S.E. 2d 42, 43 (Ct. App. 1988). Here, the oral agreement to hold the lease in escrow, subject to the funding of the loan, provides the obvious explanation for the revised lease.

Further, parol evidence is admissible to prove fraud: "if a writing was procured by words and with a fraudulent intent of the party claiming under it, then parol evidence is competent to prove the facts which constitute the fraud." See Allen-Parker Co. v. Lollis, 257 S. C. 266, 272, 185 S.E.2d 739, 742 (1971). "To recover on a claim for fraud in the inducement, the plaintiff must show the defendant made a false representation relating to a present or preexisting fact, the defendant intended to deceive the plaintiff, and the plaintiff had a right to rely on the false representation." See Smith v. Hastie, 367 S. C. 410, 416, 626 S.E. 2d 13, 16 (Ct. App. 2005). "Similarly, the intent to deceive is an essential element of an action for fraud." *Id.*

Arguably, fraud is present here. The Respondent induced Appellant to revise the original lease with the false promise of a loan which Appellant needed to secure a real estate

development deal before his impending incarceration. Appellant trusted the Respondent who was an attorney and social friend of Appellant as stated by John True in his supporting affidavit (R60-R64).

The parol evidence rule allows extrinsic evidence by the party attacking an instrument on the ground of fraud. Bradley v. Hullander, 272 S.C. 6, 249 S.E.2d 486 (1978); Allen-Parker Co. v. Lollis, 257 S.C. 266, 185 S.E.2d 739 (1971); see also Restatement (Second) of Agency § 257 cmt. c (1958) ("Although parol evidence cannot be introduced to vary or contradict the terms of a written contract, it can be introduced for the purpose of proving that the contract was obtained by means of untrue statements.").

The fraud exception to the parol evidence rule refers to "fraud either in the execution or in the inducement of a contract." 37 Am.Jur.2d Fraud and Deceit § 542 at 622 (1968); see Bradley v. Hullander, 272 S.C. 6, 249 S.E.2d 486 (1978), appeal after remand, 277 S.C. 327, 287 S.E.2d 140 (1982) (holding that parol evidence is generally admissible to show fraud in the inducement of a writing).

"[I]f [a] writing was procured by words and with fraudulent intent of [the] party claiming under it, then parol evidence is competent to prove facts which constitute fraud." Allen-Parker Co. v. Lollis, 257 S.C. at 272, 185 S.E.2d at 742. "Whether reliance is justified in a given situation requires an evaluation of the circumstances involved, including the positions and relations of the parties." Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 474, 581 S.E.2d 496, 504 (Ct.App.2003) (internal quotation marks omitted).

G. MOTION JUDGE ERRED IN GRANTING SUMMARY JUDGMENT FOR RESPONDENT ON APPELLANT'S CLAIM FOR CONVERSION

The Appellant has alleged conversion of personal property in the complaint (R12-R20)). On the record, there are ample facts in support of Appellant's conversion claim. Viewed in the light most favorable to the Appellant, the Respondent has without the Appellant's permission retained title to personal property that was present at the leased premises prior to the rental. Further, the Respondent has retained that personal property without the permission and to the exclusion of the Appellant.

Appellant makes the conversion allegation in the complaint at paragraphs 17 and 18 that Respondent "took away and stole from the premises two bronze lion statues...located outside the premises" and that Respondent "also took away and stole other items from the premises" (R15). John True in his affidavit factually and with personal knowledge supports these claims stating in part: "... there were several items of property belonging to Plaintiffs that were left at the property and used by the Defendant including but not limited to two bronze lions in the front of the property and several items of valuable furnishings inside the property". (R64). John True further refers to a family heirloom grandfather clock held by Respondent "against the rights of possession of the Plaintiffs". (Affidavit 24, R63)).

John True further avers in his affidavit that on his personal knowledge, the Appellant did not intend to abandon these items of personal property but Respondent was only allowed to use them adding that those items remained in the possession of Appellant. (Affidavit 25, R64).

Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights. See Crane v. Citicorp Nat'l Servs. Inc., 313 S. C. 70, 73, 437 S.E. 2d 50, 52 (1993). "Conversion may arise by...illegal detention of another's personal property." See Regions Bank v. Schmauch, 354 S. C. 648, 667, 582 S.E. 2d 432, 440 (Ct. App. 2003).

There are no facts or other evidence on the record that contradict the Appellant assertion of this claim of conversion except in Respondent Answer as a denial only without more.

H. THE JUDGE HEARING THE APPELLANT'S RECONSIDERATION MOTION ERRED BY DENYING THE SAID MOTION

The motion judge's April 22, 2019 summary judgment order recites *only one* basis for allowing summary judgment: the doctrine of collateral estoppel. The judge states therein that: "it is clear that the Plaintiff seeks to relitigate the same and identical issues regarding the Defendant's alleged breach of the second lease agreement..." (R5-R6).. Appellant has argued to the contrary in the argument section C, above, and relies on that argument

The motion judge ruling on the reconsideration motion referred to collateral estoppel briefly at the close of his order repeating that it was a clear situation of relitigating the same and identical issues that Judge Nicholson Jr. had resolved. (R7-R11).

In addition, the motion judge did address, in the reconsideration order, some of the arguments Appellant had made in its opposition to summary judgment and in its reconsideration memorandum.

In the reconsideration order the judge stated that the Appellant had failed to come forward with: "specific facts showing there is a genuine issue for trial". In response,

Appellant argues that as laid out in its Argument Section A, Facts Section, above, there are extensive facts and inferences to be taken from the averments in the complaint and the John True affidavit that support denial of summary judgment at this very early stage of the litigation. For example, the Fact section A, paragraphs 11 through 23, John True recites his personal observations of the telephone exchange between Appellant and Respondent laying out the substance of Appellant claims for unjust enrichment and breach of the oral contract preceding the execution of the revised lease. Certainly this is admissible evidence of the facts asserted to prove negotiations took place and the Respondent's failure to deliver the loan consideration.

Appellant challenges the motion judge statement that John True's affidavit would not lead to admissible evidence as it clearly would be based on his personal knowledge of the negotiations and the oral agreement and the failure of the Respondent to make the required \$75,000 loan.

Next, the motion judge states his reliance on the parol evidence rule. Again, in Section F of this Argument, above, the Appellant has expressed his contrary opinion on this issue. Of interest is the motion judge's reference to Ray v. S.C. National Bank, 281 S.C. 170, 314 S.C. 2d 359 (1984) as support for excluding Appellant's proffered facts with the parol evidence rule. The Ray case was dealing with promissory notes creating a high bar to avoiding liability by the promisor. At page 174 of Ray, the court specifically notes that "There is no evidence of fraud..." in that case. This lack of fraud is inopposite to the allegations of the instant matter (see Section F, Argument, *Supra*).

Appellant's final area of disagreement with the motion judge reconsideration order concerns the conversion claim. As with the contract and unfair enrichment matters, Appellant has presented facts and inferences from the complaint and the John True affidavit to support a denial of summary judgment. The judge states the John True affidavit "fails to provide personal knowledge". On the contrary, referring to Appellant's fact section A, paragraph 22 that refers to the Complaint paragraphs 17, 18 and 23 and John True Affidavit paragraph 23 to 26 there is, viewing these averments in the light most favorably to Appellant, ample facts based on personal knowledge set out.

For example, the John True affidavit at paragraph 23 to 26, John True states "On my personal knowledge" and goes on to directly describe personal property items retained by the Respondent belonging to Appellant. John True details the bronze lions and a family heirloom clock among other property that Appellant left with Respondent and that they were items the Appellant did not intend to abandon. (Affidavit 23 to 25, R60-R64).

Certainly, viewing these facts and inferences in the light most to the Appellant, there are ample admissible facts presented to deny summary judgment.

V. CONCLUSION

The standard of this court in reviewing this appeal is to apply should apply the same standard as that employed by the trial court under Rule 56(c), SCRPC. Doe v. Wal-Mart Stores, Inc., 393 S.C. 240, 244, 711 S.E.2d 908, 910 (2011). When reviewing an order that grants a party summary judgment, the appellate court employs the same standard as applied in the trial court

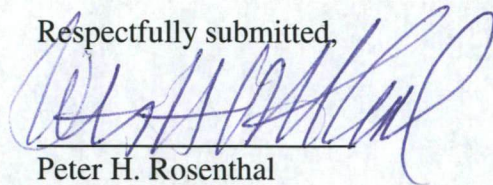
under SCRCP 56. Wachovia Bank, N.A. v. Coffey, 404 S.C. 421, 425, 746 S.E. 2nd 35, 37 (2013)
(citations omitted).

With this standard, Appellant prays the court will overrule the motion judge and return
the matter to the trial court for further discovery or to make such other decision as this court
deems just.

Weymouth Massachusetts

January 18, 2020

Respectfully submitted,



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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

Case No. 2019-001443

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

Appellant,

V.

William L. Tuorto,

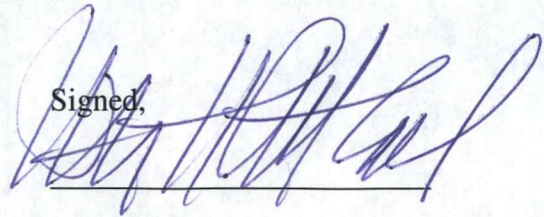
Respondent,

CERTIFICATE OF COUNSEL
FINAL BRIEF

The undersigned certifies that this Final Brief complied with Rule 211(b), SCACR.

January 18, 2020

Signed,



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