

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

RECEIVED
JAN 22 2020
SC Court of Appeals

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

Appellant,

V.

William L. Tuorto,

Respondent,

RECORD ON APPEAL

January 2, 2020

Peter H. Rosenthal
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Weymouth, MA. 02189
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Attorney for Appellant

Other Council of Record:
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THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
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V.

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January 2, 2020

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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

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

CASE NO.: 2017-CP-10-1395

Plaintiff,)

Vs.)

ORDER OF DEFAULT

William L. Tuorto,)

Defendant.)
_____)

FILED
CLERK OF COURT
JUL 19 AM 9:39

It appears from Affidavit of Default of Robert J. Wyndham, Esq., attorney for Defendant, and Motion for Default filed herein that an Answer and Counterclaim was filed on May 1, 2017 and the Plaintiff, Thomas F. True, III, Individually and as Trustee of Jate IV Trust, was served a copy on August 24, 2017.

And it further appears that Plaintiff, Thomas F. True, III, Individually and as Trustee of Jate IV Trust has failed to answer said Counterclaim within the time prescribed by South Carolina law. Accordingly,

I HEREBY DECLARE that the Plaintiff, Thomas F. True, III, Individually and as Trustee of Jate IV Trust be and is hereby in default and a hearing shall be set to enable the Court to enter judgment.



Judge, Ninth Judicial Circuit

June 19, 2018.

R003

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2017-CP-10-01395

Thomas F. True III
PLAINTIFF(S)

William L. Tuorto
DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Plaintiff/Counter-Defendant Thomas F. True III's Motion to Set Aside Entry of Default is GRANTED. Plaintiff/Counter-Defendant has 30 days from the date of filing of this order to file an answer to Defendant/Counter-Plaintiff's Answer and Counterclaim.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

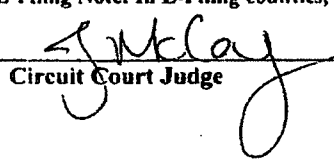
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		

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

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

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


Circuit Court Judge

2764

Judge Code

10/29/18

Date

R004

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

Thomas F. True, III, Individually and as)
Trustee of Jate IV Trust,)
)
Plaintiff,)
Vs.)
)
William L. Tuorto,)
)
Defendant.)
)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2017-CP-10-1395

ORDER GRANTING DEFENDANT
SUMMARY JUDGMENT

2019 APR 26 PM 2:55
FILED
CLERK OF COURT

This matter came before me upon motion of the Defendant for Summary Judgment. After careful and considerate deliberation, including counsel for Plaintiff's memorandum, counsel for Defendant's memorandum, oral arguments on March 13, 2019, and a review of the entire record, I hereby grant Defendant's motion for summary judgment.

Plaintiff filed his complaint on March 17, 2017. The Plaintiff alleges that an original lease agreement was entered into on August 28, 2011 and thereafter Plaintiff and Defendant renegotiated the original lease agreement which was memorialized in writing. The complaint alleges that the Defendant failed to live up to his end of the bargain and failed to abide by the terms of the transaction. The complaint further alleges that in a prior court action the Plaintiff sought to eject the tenant Tuorto based on Defendant's breach of the aforementioned agreement. The complaint further provides that Tuorto defended his interest but the Magistrate Court found in Plaintiff's favor. The complaint alleges Tuorto appealed that decision of the court to the Court of Common Pleas, County of Charleston, South Carolina and on March 14, 2014 the court reversed the decision of the Magistrate invalidating the revised lease. The complaint further alleges that the Circuit Court ruled in Tuorto's favor despite the fact that Tuorto failed to meet his obligations under the revised lease, since the reduction in the rent was conditioned on a loan from the Defendant Tuorto.

R005

The order referred to in Plaintiff's complaint was signed by the Honorable J. C. Nicholson, Jr. on or about March 31, 2014 and filed with this court on April 3, 2014.

It is clear that the Plaintiff seeks to relitigate the same and identical issues regarding Defendant's alleged breach of the second lease agreement and seeks to enforce and collect damages as a result of the alleged breach. Judge Nicholson's order clearly finds that the revised lease is a valid and enforceable contract. This finding was not appealed and is the law of the case. 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 and 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 or on the same or different claim. *McNaughton-McKay Elect. Co. of N.C. v. Andrich*, 324 S.C. 275, 482 S.E.2d 564 (Ct. App. 1996).

Based on the foregoing, I hereby grant Defendant's motion for summary judgment.

AND IT IS SO ORDERED.



Honorable William Seals

April 22, 2019

JULIE J. ARMSTRONG
CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2258
RETURN SERVICE REQUESTED



clerkofcourt.charlestoncounty.org

62



PETER H. ROSENTHAL
647 PLEASANT ST
WEYMOUTH MA 02189-3202

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

Order Denying Pltffs Motion for Reconsideration

CASE NO: 2017CP1001395

Thomas F True III , plaintiff, et al VS William L Tuorto

This judgment was entered on the 29th day of July, 2019, and notice mailed first class on Thursday, August 01, 2019, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at <http://clerkofcourt.charlestoncounty.org> or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.

R007

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

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

CASE NO.: 2017-CP-10-1395

Plaintiff,)

Vs.)

ORDER DENYING PLAINTIFF'S
MOTION FOR RECONSIDERATION

William L. Tuorto,)

Defendant.)

FILED
2019 JUL 29 PM 3:15
JULIE J. ARISTON
CLERK OF COURT

This matter came before me upon Plaintiff's Motion for Reconsideration. After considering Plaintiff's motion, Plaintiff's memorandum in support of motion for reconsideration and Defendant's memorandum in opposition to Plaintiff's motion for reconsideration, this court hereby denies Plaintiff's motion to reconsider for the following reasons.

This matter initially came before me on March 13, 2019 to consider Plaintiff's motion for summary judgment. After the hearing, and with careful and considerate deliberation, including Plaintiff's memorandum, counsel for Defendant's memorandum, oral arguments on March 13, 2019, and a review of the entire record, this Court granted Defendant's motion for summary judgment. That order was signed on April 22, 2019 and filed with the Charleston County Clerk of Court on April 26, 2019.

Subsequent to the order, the Plaintiff filed a motion for reconsideration and a memorandum in support of the motion on May 9, 2019. The Defendant filed a memorandum in opposition of Plaintiff's motion for reconsideration on May 29, 2019.

Under Rule 56(c), SCRPC, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Regions Bank v. Schmauch*, 582 S.E.2d 432 (Ct. App. 2003). Once a party moving for summary judgment meets the initial burden

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*, 582 S.E.2d 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*, 392 S.E.2d 789 (1990).

I find that Plaintiff has failed to come forward with specific facts showing there is a genuine issue for trial. Rather, Plaintiff recites allegations of his complaint which are allegations of the complaint and not specific facts showing there is a genuine issue for trial. Rule 56(e), SCRPC, requires that supporting and opposing affidavits 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 therein. Although Plaintiff submitted the affidavit of John True, who was not a party to the contract at issue, his affidavit fails to set forth facts as would be admissible in evidence. The Parol Evidence Rule provides that where the terms of a written instrument are unambiguous, clear and explicit, extrinsic evidence of statements made contemporaneously with or prior to its execution are inadmissible to contradict, vary or explain its terms. *Ray v. S.C. Nat'l Bank*, 314 S.E.2d 359 (1984). The facts relied upon by Plaintiff in the affidavit are clearly inadmissible and do not comply with the requirements of Rule 56(e), SCRPC.

§32-3-10(4) of the S.C. Code of Laws provides that any contract for an interest in land must be in writing and signed by the party against whom it is seeking to be enforced. §27-35-20 of the S.C. Code of Laws provides that failure to put such a contract in writing renders it void. A contract required to be in writing by the Statute of Frauds cannot be orally modified. *Windham v. Honeycutt*, 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 relied upon by Plaintiff in the affidavit

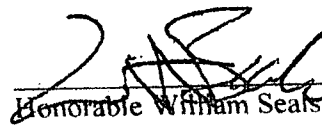
are inadmissible pursuant to the Parol Evidence Rule and the Statute of Frauds and thus cannot support Plaintiff's claim.

Plaintiff argues that the allegations regarding the bronze lions and furnishings is a separate claim from the contract at issue. Rule 56(e), SCRCP, clearly provides that opposing affidavits 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 therein. The affidavit submitted by Plaintiff clearly does not comply with the requirements of Rule 56(e) SCRCP. The affidavit states "upon information and belief, upon the foreclosure sale, the said bronze lions and the furnishings belonging to the Plaintiff remain in the possession of Defendant and have not been returned to Plaintiff." The affidavit clearly fails to provide that the affiant had personal knowledge of facts that would be admissible in evidence to support the claim. The affidavit and the Plaintiff have failed to come forward with any admissible evidence to support this claim. As provided in my prior order granting summary judgment, it is clear that the Plaintiff seeks to relitigate the same and identical issues regarding Defendant's alleged breach of the lease agreement which was litigated and determined by order of the Honorable J.C. Nicholson, Jr. on March 31, 2014 and filed with this court on April 3, 2014. That order was not appealed by Plaintiff and is the law of the case. When an issue of fact or law is actually litigated and determined by valid and final judgment, and the determination is essential to the judgment, the determination is conclusive and a subsequent action between the parties. *McNaughton-McKay Elect. Co. of N.C. v. Andrich*, 324 S.C. 275, 482 S.E2d 264 (Cl. App. 1996).

Based on the foregoing, I hereby deny Plaintiff's motion to reconsider.

AND IT IS SO ORDERED.

July 22, 2019


Honorable William Seals

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF
COMMON PLEAS FOR THE
COUNTY OF CHARLESTON

2017-CP-10-1395

THOMAS F. TRUE, III, INDIVIDUALLY,
AND AS TRUSTEE OF
JATE IV TRUST,

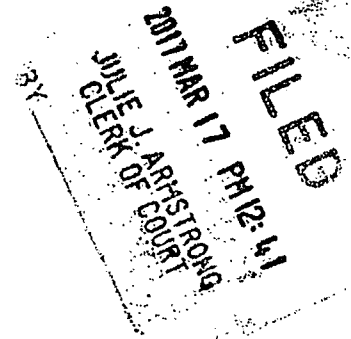
Plaintiff,

v.

WILLIAM L. TUORTO,

Defendant.

Complaint



NOW COMES Thomas F. True, III, individually and as
Trustee of the JATE IV Trust, and as and for this Complaint
against this Defendant William Tuorto states as follows:

1. Thomas F. True, III ("True") is a resident of the
State of South Carolina, presently residing at FCI Fort Dix, P.O.
Box 2000, Joint Base MDL, NJ 08640.

2. True is a trustee of the Jate IV Trust ("JATE IV").
JATE IV is a written trust agreement dated July 7, 2000, which
currently is the owner of certain assets including without
limitation 1180 Chersonese Round, Mt. Pleasant, South Carolina
29464.

3. Defendant, William L. Tuorto ("Tuorto"), is an
individual who resides in Charleston, South Carolina whose

address was at all relevant times stated herein, 1180 Chersonese Round, Mount Pleasant, South Carolina 29464.

4. Tuorto is also, upon information and belief an attorney licensed to practice law within the State of South Carolina.

SUMMARY OF CLAIM

5. Defendant engaged Plaintiffs in negotiations and/or in connection with a certain proposed lease agreement for the subject premises known as 1180 Chersonese Round, Mt. Pleasant, South Carolina.

6. The lease agreement was originally dated August 28, 2011 (the "Original Lease").

7. Thereafter, the Plaintiff sought to renegotiate the Original Lease with the tenant, one William Tuorto ("Tuorto").

8. The Original Lease was for a single family residence located at 1180 Cheronese Round, Mt. Pleasant, South Carolina.

9. The Original Lease provided that the monthly rental amount would be \$4,250.00.

10. The parties, the Plaintiffs herein and Tuorto, then renegotiated the lease wherein in exchange for Tuorto's agreement to loan \$75,000 to the Plaintiff True, Plaintiffs would reduce the rent for the subject premises to \$2,000.00 per month.

11. The Plaintiffs and Defendant herein memorialized the terms of said agreement, in writing.

12. The Defendant failed to live up to his end of the bargain and thus failed to abide by the terms of the transaction.

13. By Court action including an Order to Show Cause, Plaintiffs sought the ejectment of tenant Tuorto from the demised premises, based on Defendants breach of the aforementioned agreement.

14. Tuorto defended his interest against said claim by claiming that the Trustee, True, had exceeded his authority as Trustee of the Jate IV Trust and thus unilaterally declared the revised lease unenforceable.

15. Despite Tuorto's unilateral declaration and defense the Court found in favor of Plaintiff Jate IV. Thereafter, Tuorto appealed that decision of this 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, invalidating the Revised Lease.

16. This was despite the fact that Tuorto failed to meet his obligation under the revised lease agreement, since the reduction in the rent was conditioned upon a loan from the tenant Tuorto.

17. Defendant also took away and/or stole from the premises two (2) bronze lion statues that were located outside the front entrance of the subject premises.

18. Defendant also took away and/or stole other items from the premises, including but not limited to furnishings and other items.

19. By virtue of the foregoing, Defendant is liable to Plaintiffs for the following cause of action.

AS AND FOR A
FIRST COUNT FOR
UNJUST ENRICHMENT

20. Plaintiffs repeats and reallege each and every

allegation contained in paragraphs "1" through "19" as if fully set forth herein.

21. The Defendant was and is unjustly enriched by virtue of the fact that Defendants received the benefit of at least a \$2,250 dollar reduction in rental payments owed Plaintiffs for at least the past 63 months, based on a deal that Defendant never performed on (the loan of \$75,000 to Plaintiff).

22. The Defendant has been enriched in excess of \$110,000 by getting to keep said money instead of having to pay same to Plaintiffs in the form of rental payments, which would have been the fair market value of said rental payments, while at the same time not having to pay for said reduction in rental payments by loaning Plaintiffs \$75,000.

23. The Defendant has been further enriched by not having paid, loaned and/or departed the \$75,000 that was agreed upon.

24. The Defendant was even further enriched by receiving the personal property, including but not limited to furnishings and the bronze lion statues (or the monetary equivalent value of same) that belong to Plaintiffs.

25. The Defendant was enriched by the total value of the aforementioned, unjustly, since Defendant did not pay for and/or bargain for same, and since Plaintiffs received absolutely no value and/or considerations and/or quid pro quo for the enrichment and/or benefit that Defendant received from Plaintiffs and/or Plaintiff's property and/or money, including use and occupancy of the subject premises for under market rent for over 63 months.

26. As a result of the aforementioned, the Plaintiffs has been damaged, to wit: the lease rental amount has been reduced from \$4,250.00 per month to \$2,000.00 per month, since at least November 15, 2011 through to current day. The loss in rental income to the Plaintiffs as a result of the Defendant being unjustly enriched is in excess of \$110,000.00. In addition, Plaintiff Jate IV was forced to declare Chapter 11 Bankruptcy, costing Plaintiffs in excess of \$20,000.00.

27. The damage calculation reflects a loss of \$2,250 per month through to current day, a period of at least 63 months, plus Bankruptcy costs and fees as well as other actual, punitive, and compensatory damages.

28. The damage calculation for the lions and the other property taken by Defendant is in excess of \$170,000.00.

29. As a result of the Defendant's wrongful conduct, Defendant is liable to Plaintiffs in a cause of action for unjust enrichment, and as such Plaintiff has been damaged to the sum of at least \$300,000.00 plus interest through to collection of the total judgment at the maximum rate of interest permitted by statute to be assessed.

WHEREFORE, the Plaintiffs demand judgment against the Defendant as follows:

1. On the first count, money damages in an amount of not less than \$300,000.00.

2. On all counts, actual and punitive damages.

3. On all counts, an award of the Plaintiffs' costs, expenses, attorney's fees, and interest calculated through the date of the judgment and beyond to the date of collection of same at the maximum rate of statutory interest permitted under statute.

4. On all counts, the referral of the within action to the South Carolina Board of Bar Overseers, of similar entity charged with policing the conduct of Attorneys practicing within

the State of South Carolina, for disciplinary action.

Dated: 1/30/17



THOMAS F. TRUE, III
INDIVIDUALLY AND AS
TRUSTEE OF JATE IV TRUST
164 Market St.
Suite 177
Charleston, SC 29401

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF
COMMON PLEAS FOR THE
COUNTY OF CHARLESTON

THOMAS F. TRUE, III, INDIVIDUALLY,
AND AS TRUSTEE OF
JATE IV TRUST,

2017-CP-10-1395

FILED
2017 MAR 17 PM 12:40
JULIE J. ARMSTRONG
CLERK OF COURT

Plaintiff,

v.

SUMMONS

WILLIAM L. TUORTO,

Defendant.

YOU ARE HEREBY SUMMONED and required to answer the
Complaint, a copy of which is herewith served upon you, and to
serve said Answer upon the subscriber at this office at:

164 Market Street
Suite 177
Charleston, SC 29401

within thirty (30) days of service; and if you fail to serve an
Answer to the Complaint within the time aforesaid, the Plaintiff
shall apply to the Court for the relief demanded in the Complaint
and judgement by default will be rendered against you for the
relief demanded in the Complaint.



THOMAS F. TRUE, III
INDIVIDUALLY, AND
AS TRUSTEE OF
JATE IV TRUST
164 Market St.
Suite 177
Charleston, SC 29401

843-406-1567

R020

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

Plaintiff,

vs.

William L. Tuorto,

Defendant.

FILED

2017 MAY -1 PM 12:06

JULIE J. ARMSTRONG
CLERK OF COURT

COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

Civil Action No. 2017-CP-10-1395

ANSWER AND COUNTERCLAIM

FILED
2017 APR 3 AM 11:35
JULIE J. ARMSTRONG
CLERK OF COURT
Clocked in-date Canceled

TO: Defendant, Thomas F. True, III, Individually, & as Trustee of Jate IV Trust

The Defendant, William L. Tuorto, answering the Complaint any by way of Counterclaim, would allege and show as follows:

FOR A FIRST DEFENSE

1. The Defendant denies each and every allegation of the Complaint, not hereinafter specifically admitted;
2. The Defendant denies the allegations contained in Paragraph 1 and Paragraph 2 of the Complaint.
3. The Defendant admits to the allegations in Paragraph 3 and Paragraph 4 of the Complaint.
4. The Defendant denies the allegations contained in Paragraph 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19 of the Complaint.
5. The Defendant denies the allegations contained in Paragraph 20 of the Complaint as set forth above.
6. The Defendant denies the allegations contained in Paragraph 21, 22, 23, 24, 25, 26, 27, 28, and 29 of the Complaint.
7. The Defendant denies all remaining allegations of the Complaint including the Paragraph beginning "WHEREFORE" and all remaining allegations are hereby denied.

R021

FOR A SECOND DEFENSE
(FAILURE TO STATE A CLAIM)

8. The Defendant, William Tuorto, reiterates all of the allegations contained in each and every foregoing Paragraph of this Answer, as fully as if repeated verbatim herein.

9. The Defendant, William Tuorto, would show the allegations of the Complaint failed to state facts sufficient to state a cause of action and/or causes of action against. Defendant, William Tuorto.

FOR A THIRD DEFENSE
(COLLATERAL ESTOPPEL)

10. The Defendant, William Tuorto, reiterates all of the allegations contained in each and every foregoing Paragraph of this Answer, as fully as if repeated verbatim herein.

11. The claims and allegations set forth in the Complaint, specifically in Paragraph 15 of the Complaint, are the identical claims that were litigated in this circuit court and ruled in Defendant's favor on the identical allegations and claims, that circuit court decision was not appealed and is the law of the case, and bars Plaintiff's Complaint pursuant to the Doctrine of Collateral Estoppel.

FURTHER ANSWERING ANY BY WAY OF COUNTERCLAIM

12. The Defendant, William Tuorto, reiterates all of the allegations contained in each and every foregoing Paragraph of this Answer, as fully as if repeated verbatim herein.

13. That the Plaintiff, Thomas F. True, III, Individually, & as Trustee of Jate IV Trust, brought this action individually as set forth in his Complaint filed herein; and that he does not have standing or any legal basis to bring a claim individually and therefore violates the South Carolina Frivolous Proceeding Act.

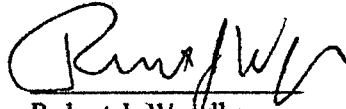
14. That neither the Plaintiff, Thomas F. True, III nor Trustee of Jate IV Trust owns the premises located 1180 Chersonese Round, Mount Pleasant, South Carolina 29464 including any real property or property attached thereto, and thus, the allegations of the Complaint violate the South Carolina Frivolous Proceeding Act; and therefore, the Defendant, William Tuorto, would respectfully requests that this Court dismiss this Complaint and award the Defendant attorney fees, expenses, punitive damages, and further relief as this court deems just and proper pursuant to the South Carolina Frivolous Proceeding Act.

FURTHER ANSWERING ANY BY WAY OF COUNTERCLAIM

15. The Defendant, William Tuorto, reiterates all of the allegations contained in each and every foregoing Paragraph of this Answer, as fully as if repeated verbatim herein.

16. That the Plaintiff, Thomas F. True, III, filed the complaint individually and allegedly as the Trustee of Jate IV Trust. The Trust is presumably a legal entity which must be represented by an attorney in accordance with South Carolina law; and therefore, all allegations and claims by the Defendant, Jate IV Trust, should be dismissed.

WHEREFORE, having fully answered the Complaint herein and by way of Counterclaim, the Defendant would respectfully request for this Court to issue an Order dismissing the Complaint of both Plaintiffs and awarding the Defendant with costs and expenses incurred in defending the Complaint, including attorney fees and an award of punitive damages, and for such other relief as the Court and jury deem just and proper.



Robert J. Wyndham
Wyndham Law Firm, LLC
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Post Office Box 598
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Attorney for the Defendant, William L. Tuorto

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Charleston, SC 29412
Telephone: (843) 724-7707
Facsimile: (843) 762-2333
justin@mcgee-lawfirm.com
Attorney for the Defendant, William L. Tuorto

MAY 1, 2017
DATE

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

Plaintiff,

Vs.

William L. Tuorto,

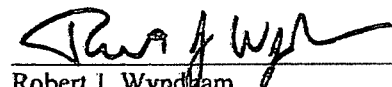
Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2017-CP-10-1395

MOTION FOR ENTRY OF DEFAULT
AND DEFAULT JUDGMENT AGAINST
THOMAS F. TRUE, III, INDIVIDUALLY
AND AS TRUSTEE OF JATE IV TRUST

PLEASE take notice that the Defendant moves that Plaintiff, Thomas F. True, III, Individually and as Trustee of Jate IV Trust be determined to be in default in the above captioned action and that a hearing be held for the purpose of enabling the court to enter judgment for the relief sought by Defendant. Said motion is made under South Carolina Rules of Civil Procedure, Rule 55, and is based upon the fact that, as appears by the Affidavit of Default filed herein, Plaintiff, Thomas F. True, III, Individually and as Trustee of Jate IV Trust, is in default herein.


Robert J. Wyndham
Law Offices of Gedney M. Howe, III, P.A.
P.O. Box 1034
Charleston, SC 29402
Telephone: (843) 722-8048
Attorney for Plaintiff

May 10, 2018

FILED
2018 MAY 10 PM 3:08
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

R024

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

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

CASE NO.: 2017-CP-10-1395

Plaintiff,)

Vs.)

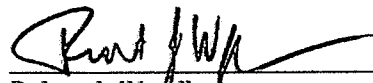
AFFIDAVIT OF DEFAULT

William L. Tuorto,)

Defendant.)

FILED
2018 MAY 10 PM 3:02
JULIE J. ARMSTRONG
CLERK OF COURT

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says that he is one of the attorneys for the Defendant in the above-captioned action and is authorized to make this affidavit on behalf of Defendant; that the Answer and Counterclaim in the above captioned action was filed in the Office of the Clerk of Court on May 1, 2017 and a copy of the said Answer and Counterclaim were served on the Plaintiff Thomas F. True, III, individually & as Trustee of Jate IV Trust on August 24, 2017, as appears by the file herein and the Affidavit of Service filed herein; that the Plaintiff did not serve any reply nor any other pleading or motion upon counsel for Defendant within the time allowed, and said Plaintiff is in default herein, further that the Plaintiff Thomas F. True, III, individually & as Trustee of Jate IV Trust, is not engaged in military service.


Robert J. Wyndham
Law Offices of Gedney M. Howe, III, P.A.
P.O. Box 1034
Charleston, SC 29402
Telephone: (843) 722-8048
Attorney for Plaintiff

May 10, 2018

SWORN to before me this 10th day
of May, 2018.


Notary Public for South Carolina
My Commission Expires: 26/2019

R025

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL DISTRICT

CASE NO. 2017-CP-10- 1395

MOTION TO SET ASIDE

ENTRY OF DEFAULT

Defendant.

2018 JUL -2 PM 2:50
JULIE A. PROSSER
CLERK OF COURT
BY 

The Plaintiff states further states that the court's Order of Default references Plaintiff's failure to answer the counterclaim of the Defendant, however, a reading of the alleged counterclaim reveals that the asserted counterclaims in paragraphs 13, 14 and 16 are not claims requiring a pleaded response from the Plaintiff but in fact call for sanctions against the Plaintiff. The South Carolina Code of Laws Title 15 Chapter 36, the Frivolous Civil Proceedings Act,

R026

states that any alleged violation of this Act are to be brought upon motion of the prevailing party at the conclusion of the litigation when the court can determine if the claim of Plaintiff was frivolous. Therefore, although the Defendant has styled the allegations of frivolous proceedings as a counterclaim, it is not a proper claim against the Plaintiff as contemplated by SCRCP 13 but a premature motion for sanctions that does not call for a required response.

Further, the pro se Plaintiff relied upon a series of correspondence between court personnel and Plaintiff to support his belief that he was in compliance with the court procedure and not in default.

In March of 2018, Plaintiff was notified that the instant case had been assigned to a jury trial roster and as set out in the accompanying affidavit of John True, Plaintiff was awaiting instruction from the court via the Chief Administrative Judge, Honorable Christi Harrington, as to what the court required of Plaintiff to proceed (as being incarcerated, a jury trial at this time would be inconvenient or impractical).

Further, the Plaintiff is filing a Memorandum of Law in support of this motion accompanied by the supporting affidavit of Plaintiff's son, John W. True.

Weymouth Massachusetts

June 29, 2018



Peter H. Rosenthal
647 Pleasant St.
Weymouth, MA 02189
617-571-9177 Tel.
781-335-2153 Fax
phr100@comcast.net
S.C. Bar Number 75645

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL DISTRICT

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

Plaintiff,)

Vs.)

William L. Tuorto,)

Defendant,)

CASE NO. 2017-CP-10- 1395

**MEMORANDUM IN SUPPORT OF
MOTION TO SET ASIDE
ENTRY OF DEFAULT**

2018 JUL -2 PM 2:50
JULIE J. HARRISON
CLERK OF COURT
BY _____

INTRODUCTION

This memorandum is filed in support of the accompanying motion of the Plaintiff to set aside the entry of default that was entered against the Plaintiff on June 19, 2018. At all times relevant to this matter, the Plaintiff, Thomas F. True III has been incarcerated either at the Federal Corrections Facility at Fort Dix, New Jersey or (as at present) at the Federal Medical Facility for federal prisoners at Lexington Kentucky.

This memorandum sets forth several reasons why the entry of default should be set aside, including lack of notice, that no counterclaim was made by the Defendant (although it was characterized as such) and that the default should be set aside for good cause shown under SCRCP 55.

CHRONOLOGY OF THE CASE

1. On March 17, 2017, the Plaintiff filed a Complaint against the Defendant in the Court of Common Pleas in Charleston South Carolina which Complaint was assigned Docket No. 2017-CP-10-1395;
2. On May 1, 2017, the Defendant filed a pleading entitled "Answer and Counterclaim;
3. According to the docket entries, the said Answer and Counterclaim was served on the Plaintiff on August 24, 2017 (assuming for purposes of this memorandum that service was by mailing);
4. In March of 2018, the Plaintiff received a communication/notification from the Court of Common Pleas that the instant matter had been assigned to a "jury roster";
5. Upon learning of this "jury roster " assignment, Plaintiff, by his son John (See affidavit of John W. True attached) sent an email to Don Michel, a Charleston Court of Common Pleas personnel whose name was on the notice referred to in the paragraph above, asking Mr. Michel to contact John True to discuss the issue of a jury trial while the Plaintiff was at the Lexington rehab facility;
6. Pursuant to a telephone conversation with Mr. Michel, he referred John's questions to Common Pleas Docket Manager Caroline C. Leonard who advised John to have the Plaintiff send a letter to Judge Christi Harrington, Chief Administrative Judge.
7. Plaintiff, through John True sent a letter on April 2, 2018 explaining Plaintiff's situation and requesting guidance as to how a jury trial could be conducted while Plaintiff was incarcerated; (See copy of letter attached to John W. True Affidavit)
8. Plaintiff, through John True, followed up with an email to Caroline C. Leonard on May 9, 2018 as there had been no reply to Plaintiff's letter of April 2, 2018 and John requested a status of the case; (See email attached to John W. True affidavit)
9. In response to the John W. True email referred to, above, on May 9, 2018, Caroline C. Leonard emailed a reply to John that Judge Harrington had been away from Charleston for several weeks in other circuits' courts and would be back the week of May 21 at

which time the judge would “hopefully” respond; (See email attached to John W. True affidavit)

10. On June 26, 2018, John True was notified that on June 19, 2018, a default was granted to the Defendant. Plaintiff had been waiting for a response from Judge Harrington so he was surprised and puzzled that a default would have been granted; (See email attached to affidavit of John W. True)
11. On June 29, 2018, John True received a number of returned letters from the Federal Medical Facility at Lexington Kentucky marked “refused-return to sender”. John immediately resent these items to Plaintiff without opening them; (See affidavit of John W. True attached)
12. To date there has not been a notice received by the Plaintiff concerning a hearing for a default judgment pursuant to Rule 55;

ARGUMENT

A. Good Cause Shown

The decision whether to set aside an entry of default lies with the sound discretion of the trial judge. See *Thompson v. Hammond*, 299 S.C. 116, 119, 382 S.E. 2d. 900, 902 (1989).

Under SCRCP 55(c) the trial court can grant relief from an entry of default for good cause. In deciding if good cause exists, the court considers several factors detailed below. See *Wham v. Shearson Lehman Bros.*, 298 S.C. 462, 465, 382 S.E. 2d 499, 502 (Ct App. 1989). Those factors relevant to this motion are:

1. The timing of the motion for relief. Here Plaintiff has filed his motion within days of being informed by the court of the entry of default. As set out in the

John True affidavit, the Plaintiff had been in communication with the court, and had no knowledge of the motion for default filed on May 19, 2018 by the Defendant;

2. Whether the Plaintiff has a meritorious claim. Here the Complaint of the Plaintiff sets out a course of conduct by the Defendant that alleges breach of contract and related claims. These claims set out a promise by the Defendant to loan to the Plaintiff \$75,000 in consideration for amending a lease that materially reduced the Defendant's rent by almost half. The Plaintiff alleges that the Defendant failed and refused to make the promised loan although he continued to pay the reduced rent. Plaintiff claim for money damages is based upon Defendant's breach by not lending the money to Plaintiff causing great harm and enriching the Defendant to the detriment of the Plaintiff;
3. The degree of prejudice to the Defendant if relief is granted. There is no prejudice shown here. The case had been assigned to a jury roster according to the court personnel and the incarceration status of the Plaintiff would create a need for the court to fashion a way for a jury trial to proceed without the personal attendance of the Plaintiff;

Further, in the instant matter there is an issue as to where service was mailed and based on the Plaintiff's relocation to a Medical Facility on Kentucky, whether he had ever received a copy of the Answer and Counterclaim of the Defendant. There are several issues related to timing here. First, the answer of the Defendant was filed on May 1, 2017, likely outside the thirty days for an Answer to be filed. Then, the said Answer and Counterclaim were alleged to have been served on the Plaintiff in August of 2017, several months after it was filed.

B. Lack of a Counterclaim Upon Which Plaintiff Can Be Defaulted

The allegation by the Defendant that his Answer contained a Counterclaim is contradicted by the contents of what was called a counterclaim. Under SCRCp 13, a counterclaim must obviously recite a claim against the Plaintiff that is either compulsory or

permissive. By calling a pleading a claim or a counterclaim does not make it one, it must contain a claim against the Plaintiff.

The contents of the alleged counterclaims of the Defendant are in paragraphs 13, 14 and 16 of the Defendant's responsive pleading. The allegations are solely based on the South Carolina Frivolous Civil Proceedings Sanctions Act. The Act contained in Title 15- Chapter 36 is not a claim as contemplated by SCRCP 13 but rather, as the Act's title declares is a sanction to be brought at the conclusion of a trial or related proceeding. This sanction procedure is carried out by motion and not by counterclaim. In fact, it does not, nor can it call for a responsive pleading by the Plaintiff. It merely alleges a frivolous action by the Plaintiff.

Under the Act, Section 15-36-10 (C)(1), in pertinent part, it states:

“At the conclusion of a trial and after a verdict...or a case has been dismissed.... Upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous.”

If the court *on motion* so finds, under certain conditions detailed in the Act, an attorney or pro se litigant can be sanctioned.

Such sanctions can be only imposed upon notice and an opportunity to respond by the party facing the sanctions all as set out in the said Act. Plaintiff therefore argues that the Answer contains two sections alleging counterclaims, however, these sections pertain to the Frivolous Civil Proceedings Act and as such cannot be construed as counterclaims contemplated under SCRCP 13 and therefore cannot serve as a basis for a default if not responded to as claims made under said Rule.

C. Reliance on the Court

Although a litigant, even pro se, should not rely upon the court personnel to avoid the fate of default under many circumstances, here the court, under SCRCP 55(c) has the discretion to give credence to the Plaintiff's reliance on the court's personnel. His actions are evidence that Plaintiff believed he was not in default. Obviously, Plaintiff was surprised by the entry of default and was expecting to be working out a procedure for trial where Plaintiff would be unable to attend because of his continuing incarceration in a federal prison.

The court can also consider that the judge entering the default was unaware of the communications between the court personnel and the Plaintiff as the judge who entered the default was not Judge Harrington (the judge to whom the letter was sent regarding the jury roster and referenced in the affidavit of John W. True).

Further, the court can consider the physical location of the Plaintiff and the difficulty in receiving communications from the court and presumably from the Defendant. Add to this situation, the moving of the Plaintiff to a Medical Facility out of the State where he was incarcerated and the recent information from John W. True that several communications from the Medical Facility had been returned to John True and marked "refused-return to sender".

The above facts can and should justify a finding by the court of good cause to set aside the default.

D. CONCLUSION

Based upon the uncommon physical situation of the Plaintiff, the related questions concerning the lack of notice and the anticipation of the Plaintiff that he was awaiting trial instructions, the court can find that any default in not answering a counterclaim was for good cause shown.

Further, merely labelling as a counterclaim the premature attempt to get sanctions under the Frivolous Civil Proceedings Sanctions Act does not establish a counterclaim. The Act requires a motion for sanctions following the conclusion of the litigation strengthens Plaintiff's motion to set aside the entry of default which the Plaintiffs asks this court to so do and proceed to completion of discovery and trial.

Respectfully submitted,
Plaintiff.

By his attorney,



Peter H. Rosenthal (S.C. Bar #75645)

647 Pleasant St.

Weymouth, MA 02189

617-571-9177 Tel.

781-335-2153 Fax

phr100@comcast.net

June 29, 2018

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL DISTRICT

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

Vs.)

William L. Tuorto,)
Defendant,)

CASE NO. 2017-CP-10- 1395

**AFFIDAVIT OF JOHN TRUE
IN SUPPORT OF MOTION
TO SET ASIDE DEFAULT**

FILED
2018 JUL -2 PM 2:50
JUL 4 2018
CLERK OF COURT

Now comes THE AFFIANT, John W. True, who on oath deposes and states as follows:

1. My name is John W. True and I am the son of the plaintiff, Thomas F. True III, the plaintiff in the above entitled matter;
2. Thomas F. True III at all times relevant to this affidavit, was incarcerated either at the Federal Correction Facility, Fort Dix, New Jersey or the Federal Corrections Medical Facility in Lexington, Kentucky where he is at this time (and has been at Lexington for about one year for hip surgery and rehabilitation);
3. I am aware of the fact that in March of 2017, the Plaintiff filed the Complaint in the above entitled matter with the Court of Common Pleas in Charleston;

R034

4. Upon information and belief, the Plaintiff did not timely receive the Defendant's pleading of May 1, 2017 entitled "Answer and Counterclaim" that was allegedly served upon the Plaintiff on August 24, 2017;
5. It is difficult to regularly and reliably communicate with the Plaintiff and any notifications from the court or legal mail received at his 164 Market St., Charleston address (the address listed in the Complaint) is immediately forwarded by me to the Plaintiff;
6. It has been my experience that mailings to Plaintiff is often not received or received only after lengthy delays by the prison facility;
7. As an example of delay, I recently received a package containing several mailings that had been forwarded to the Plaintiff at Lexington. That package was marked "refused-return to sender";
8. On information and belief and based on my experience of forwarding mail to the Plaintiff, the marking "refused" meant the facility refused to deliver it to the Plaintiff;
9. I am in contact with the Plaintiff, however, there are times that due to prison regulations, I cannot contact the Plaintiff, such times being intermittent throughout the period relevant to this matter;
10. To my knowledge, there had been no notices received from the court by the Plaintiff regarding the instant matter until March of 2018 when the Plaintiff informed me on

March 30, 2018 that Plaintiff received a court notice that the instant case had been "transferred to the Jury Trial Roster";

11. On March 30, 2018, I sent an email to Don Michel, a Charleston Court of Common Pleas personnel whose name was on the notice referred to in the paragraph, above asking Mr. Michel to contact me to discuss the issue of a jury trial while the Plaintiff was at the Lexington rehab facility; (Copy of email attached)
12. Pursuant to a telephone conversation with Mr. Michel, he referred my questions to Common Pleas Docket Manager Caroline C. Leonard who advised me to have the Plaintiff send a letter to Judge Christi Harrington, Chief Administrative Judge. Plaintiff, through me, sent a letter on April 2, 2018 explaining Plaintiff's situation and requesting guidance as to how a jury trial could be conducted while Plaintiff was incarcerated; (See copy of letter attached)
13. I followed up with an email to Caroline C. Leonard on May 9, 2018 because there had been no reply to Plaintiff's letter of April 2, 2018 and I requested a status of the case; (See email attached)
14. In response to my email referred to, above, on May 9, 2018, Caroline C. Leonard emailed a reply to me that Judge Harrington had been away from Charleston for several weeks in other circuit's courts and would be back the week of May 21 at which time the judge would "hopefully" respond; (See email attached)
15. On June 26, 2018, I was notified that on June 19, 2018, a default was granted to the defendant. I had been waiting for a response from Judge Harrington so I was

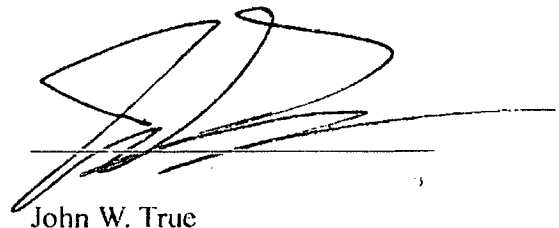
surprised and puzzled that a default would have been granted while Plaintiff was waiting for a response from the judge; (See email attached)

16. Caroline C. Leonard replied to my email of June 26 on the same day and stated that a Motion for Default was filed on May 10, 2018 and the matter was scheduled before Judge McCoy on June 19, 2018. Further, Ms. Leonard stated in her email that she had sent a letter to Plaintiff with a notice that she "needed a contact at the Federal Prison where he is housed to set up a telephone link for a hearing for this matter" and that she "received no response to this inquiry"; (See email attached)

17. To my knowledge and belief, Plaintiff never received any notice as referred to in the Caroline C. Leonard June 26 email. On June 29, I received a number of returned letters from the Federal Medical Facility at Lexington Kentucky marked "refused-return to sender". I immediately resent these items to Plaintiff without opening them;

18. Pursuant to Caroline C. Leonard's suggestion of June 26, 2018 that a motion for reconsideration be filed, the Plaintiff has retained an attorney to file appropriate motions to allow the Plaintiff relief from the default;

Signed on this 2nd day of July, 2018 under the pains and penalties of perjury by,



John W. True

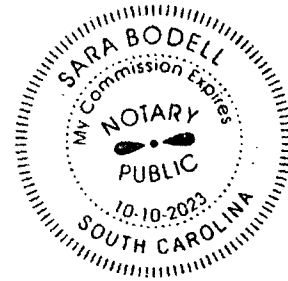
NOTARIZATION

R037

July 2, 2018

Sworn to before me this 2nd day of July 2018

S. Bodell



Notary Public for South Carolina My commission expires: 10-10-2023

R038

Ms. Christi Harrington
Chief Administrative Judge of The Common Pleas
Clerk of Court
100 Broad St
Charleston, SC 29401

RE: Thomas F True III v William Tuorto
2017 CP-10-1395

Your Honor:

After receiving notice that this case has been sent to the jury trial roster, I asked my son to reach out and speak to Caroline Leonard, Common Pleas docket manager explain my incarceration at FMC Lexington. My current situation will not allow me to attend a jury trial and I am seeking guidance from you and the courts on how I can proceed with this case. I was transferred from FCI Ft Dix in New Jersey to the Federal Medical Center due to health reasons and recently underwent surgery to replace my hip. I have been confined to a wheel chair for over a year and am in the process of rehabilitation post surgery. Please advise on options we may have to proceed with this case and any help will be greatly appreciated. Communication can be difficult at times, therefore to help expedite you may contact my son John True at the contact information below and he can pass the information along. Thank you in advance and look forward to hearing from you soon.

John True
164 Market St Ste 177
Charleston, SC 29401
843-568-3140
jwtrue@me.com

R039

From: Don Michel
Sent: Friday, March 30, 2018 3:51 PM
To: John True <jwtrue@icloud.com>
Cc: Caroline Crisler. Leonard <cclleonard@charlestoncounty.org>
Subject: RE: 2017CP1001395 Thomas F True v William Tuorto

Mr. True,

Please contact Caroline Leonard, who I have copied here. She is the CP Docket Manager and can assist you with any questions you may have.

Kind regards,

Don Michel
Support Management Supervisor
Charleston County Family Court
100 Broad St. Suite 143
Charleston, SC 29401
Direct: (843) 958-4422

From: John True [mailto:jwtrue@icloud.com]
Sent: Friday, March 30, 2018 3:33 PM
To: Don Michel <DMichel@charlestoncounty.org>
Subject: 2017CP1001395 Thomas F True v William Tuorto

Don

I just left a message at 843-958-5013. My father, Thomas True, just forwarded me the notice that the case has been transferred to the Jury Trial Roster. I have a few questions and when you have a chance could you please give me a call to discuss at 843-568-3140

Thanks in advance

JOHN W. TRUE
164 Market St. Ste. 177
Charleston, S.C. 29401
Tel. 843.568.3140
Fax.843.406.1567
jwtrue@me.com

Tel. 843.568.3140
Fax.843.406.1567
jwtrue@me.com

On May 09, 2018, at 03:15 PM, "Caroline Crisler. Leonard" <ccleonard@charlestoncounty.org> wrote:

Judge Harrington has been away from Charleston for the past several weeks, holding court in other circuits. She will be back the week of 5/21 and hopefully she can respond to you then.

Caroline C. Leonard
Common Pleas Docket Manager
Charleston, County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401
ccleonard@charlestoncounty.org
843-958-5013 (Office)
843-958-4440 (Fax)

Court *Pleas*

From: John True [mailto:jwtrue@icloud.com]
Sent: Wednesday, May 09, 2018 3:05 PM
To: Caroline Crisler. Leonard <ccleonard@charlestoncounty.org>
Subject: Re: 2017CP1001395 Thomas F True v William Tuorto

Caroline

As advised I wrote a letter to Cristi Harrington Chief Administrative Judge Common Pleas explaining my father's current incarceration and have not received a reply. Could you please help and see what the status is of his case ?

Thank you in advance

JOHN W. TRUE
164 Market St. Ste. 177
Charleston, S.C. 29401
Tel. 843.568.3140
Fax.843.406.1567
jwtrue@me.com

On Mar 30, 2018, at 04:43 PM, "Caroline Crisler. Leonard" <ccleonard@charlestoncounty.org> wrote:

I hope you do as well.

Caroline C. Leonard

Common Pleas Docket Manager
Charleston, County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401
ccleonard@charlestoncounty.org
843-958-5013 (Office)
843-958-4440 (Fax)

Court *Plus*

From: John True [mailto:jwtrue@icloud.com]
Sent: Friday, March 30, 2018 4:42 PM
To: Caroline Crisler. Leonard <ccleonard@charlestoncounty.org>
Subject: Re: 2017CP1001395 Thomas F True v William Tuorto

Caroline

Thank you for your help

Have a great weekend

JOHN W. TRUE
164 Market St. Ste. 177
Charleston, S.C. 29401
Tel. 843.568.3140
Fax. 843.406.1567
jwtrue@me.com

On Mar 30, 2018, at 03:59 PM, "Caroline Crisler. Leonard"
<ccleonard@charlestoncounty.org> wrote:

Don, Thanks so much for forwarding this. I have just spoken with Mr. True.

Caroline C. Leonard
Common Pleas Docket Manager
Charleston, County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401
ccleonard@charlestoncounty.org
843-958-5013 (Office)
843-958-4440 (Fax)

Court *Plus*

RE: 2017CP1001395 Thomas F True v William Tuorto

June 26, 2018 at 12:55 PM

From "Caroline Crisler, Leonard"

To John True

 image001.gif 0.49 KB

There was a Motion for Default that was filed in the case on May 10th. The matter was scheduled before Judge McCoy on 6/19. Notices were sent for this hearing on May 10th. I sent a letter to Thomas True with the notice advising that I needed a contact at the Federal Prison where he is housed to set up a telephone link for a hearing for this matter. I received no response to this inquiry.

A motion for reconsideration could be filed with a copy going to Judge McCoy for her consideration.

Caroline C. Leonard
Common Pleas Docket Manager
Charleston, County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401
ccleonard@charlestoncounty.org
843-958-5013 (Office)
843-958-4440 (Fax)

Court Pleas

From: John True [mailto:jwtrue@icloud.com]
Sent: Tuesday, June 26, 2018 12:50 PM
To: Caroline Crisler, Leonard <ccleonard@charlestoncounty.org>
Subject: Re: 2017CP1001395 Thomas F True v William Tuorto

Caroline

I was just notified that there was a notice of default granted in this case. I had been on standby waiting for Judge Harrington to return and provide some guidance on how to proceed. Could you please let me know what the situation is regarding this case and I have an attorney ready to make appearance in this case to continue to trial.

Any guidance is greatly appreciated .

Thanks in advance

JOHN W. TRUE
164 Market St. Ste. 177
Charleston, S.C. 29401

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

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

CASE NO.: 2017-CP-10-1395

Plaintiff,)

Vs.)

William L. Tuorto,)

Defendant.)

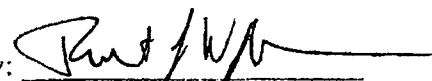
MOTION FOR SUMMARY JUDGMENT

FILED
2018 OCT -1 PM 3:16
CLERK OF COURT
J. ARISTON

Please take notice that Defendant hereby moves the court at such date, time and place as the court may set ten (10) days after the service hereof or as soon as the matter may be heard thereafter for an order granting Defendant's summary judgment adjudging Defendant is entitled to judgment as to a matter of law as to Plaintiff's cause of action and summary judgment as to Defendant's counter claim.

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 Defendant is entitled to judgment as a matter of law.

Robert J. Wyndham
Law Offices of Gedney M. Howe, III, P.A.
P.O. Box 1034
Charleston, SC 29402
Phone: (843) 722-8048
rwyndham@gedneyhowe.com

By: 
Attorney for Plaintiff

OCT. 1, 2018

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL DISTRICT

Thomas F. True, III. Individually and as)
Trustee of Jate IV Trust,)
Plaintiffs,)
Vs.)
William L. Tuorto,)
Defendant,)

CASE NO. 2017-CP-10- 1395

2018 NOV 16 PM 2:33
JULIE A. REYNOLDS
CLERK OF COURT
BY _____

PLAINTIFF/COUNTER-DEFENDANT ANSWER TO COUNTERCLAIM

Now come the Plaintiffs/Counter-Defendants and Answer the Counterclaim of the Defendant/Counter-Plaintiff as follows:

1. Responding to paragraphs 12 and 15 of Defendant/Counter-Plaintiff's Answer and Counterclaim the Plaintiffs/Counter-Defendants state that said paragraph 12 and 15 are a reiteration of its defenses and do not call for a reply;
2. Responding to paragraph 13 of Defendant/Counter-Plaintiff's Answer and Counterclaim, the Plaintiffs/Counter-Defendants deny that they do not have standing or legal basis for its claims and call upon Defendant/Counter-Plaintiff to prove same. Further answering, any action by this court regarding an alleged violation of the South Carolina Frivolous Proceeding Act is premature and is not a properly alleged counterclaim but rather a motion concealed as a counterclaim and should not be resolved at this stage of the said litigation;
3. Responding to paragraph 14 of Defendant/Counter-Plaintiff's Answer and Counterclaim, the Plaintiffs/Counter-Defendants state that current ownership of the subject real estate is not relevant to its complaint. Further that at all times relevant to the material facts of the complaint, the Plaintiff/Counter-Defendant the Jate IV Trust owned and or had legal interest in the said property. Further that at all times relevant to the material facts of the complaint, the Plaintiff/Counter-Defendant Thomas F. True III had a material interest in the lease that is the subject of the complaint and was the owner of certain personal property wrongfully taken by the Defendant/Counter-Plaintiff. Further answering, any action by this court regarding an alleged violation of the South Carolina Frivolous Proceeding Act is premature and is not a properly

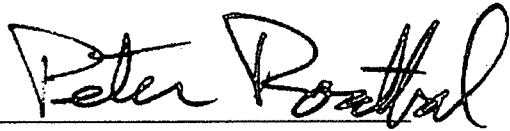
R045

alleged counterclaim but rather a motion concealed as a counterclaim and should not be resolved at this stage of the litigation;

4. Responding to paragraph 16 of Defendant/Counter-Plaintiff's Answer and Counterclaim, the Plaintiffs/Counter-Defendants state that both Plaintiffs/Counter-Defendants are represented by counsel signed below and that if at any time relevant to this complaint that if either Plaintiff/Counter-Defendant was not so represented that it was cured by the appearance of current counsel.

November 15, 2018

Signed,

A handwritten signature in black ink, appearing to read "Peter Rosenthal", written over a horizontal line.

Peter H. Rosenthal (SC Bar 75645)

647 Pleasant St.

Weymouth, MA. 02189

Tel. (617)571-9177

Fax (781)335-2153

phr100@comcast.net

Attorney for Plaintiffs

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Thomas F. True, III, Individually and as)
Trustee of Jate IV Trust,)
Plaintiff,)
Vs.)
William L. Tuorto,)
Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2017-CP-10-1395

MOTION TO DISMISS

FILED
2019 MAR -5 PM 3:52
JULIE A. ARISTARONG
CLERK OF COURT

The Defendant, William L. Tuorto, by and through his undersigned counsel, hereby moves this Court for an order dismissing Plaintiff's complaint. The allegations of the Plaintiff's complaint fails to state a cause of action and therefore should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

Robert J. Wyndham
Law Offices of Gedney M. Howe, III, P.A.
P.O. Box 1034
Charleston, SC 29402
Phone: (843) 722-8048
rwyndham@gedneyhowe.com

By: Robert J. Wyndham
Attorney for Defendant

March 5, 2019

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL DISTRICT

Thomas F. True, III. Individually and as)

CASE NO. 2017-CP-10- 1395

Trustee of Jate IV Trust,)

Plaintiff,)

Vs.)

William L. Tuorto,)

Defendant,)

FILED
2019 MAR -8 PM 1:02
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

**MEMORANDUM OF PLAINTIFF/DEFENDANT IN COUNTERCLAIM OPPOSING
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

This memorandum is filed in opposition to the Defendant's Motion for Summary Judgment filed on October 1, 2018. At all times relevant to this matter, the Plaintiff, Thomas F. True III has been incarcerated either at the Federal Corrections Facility at Fort Dix, New Jersey or (as at present) at the Federal Medical Facility for federal prisoners at Lexington Kentucky.

This memorandum sets forth several reasons why the summary judgment motion should be denied, including premature filing as the discovery is incomplete and triable issues of material facts as set out in the Complaint.

Further, Plaintiffs are filing two affidavits supporting this opposition. One affidavit is from Plaintiffs' attorney pursuant to SCRCP 56 (f) stating that he has been unable to procure an affidavit from Thomas True due to delays caused by communication due to his incarceration. The second affidavit is from John True, a beneficiary of the Jate IV Trust and son of Thomas True. John True's affidavit is made on personal knowledge and supporting the allegations of the Complaint that Defendant would loan \$75,000 to Thomas True, which loan was to serve as the sole consideration and without which a revision to the lease at issue would not take effect.

I. RELEVANT CHRONOLOGY OF THE CASE

1. On March 17, 2017, the Plaintiff filed a Complaint against the Defendant in the Court of Common Pleas in Charleston South Carolina which Complaint was assigned Docket No. 2017-CP-10-1395;
2. On May 1, 2017, the Defendant filed a pleading entitled "Answer and Counterclaim;
3. According to the docket entries, the said Answer and Counterclaim was served on the Plaintiff on August 24;
4. On June 19, 2018, a default was granted to the Defendant for failure of the Plaintiffs to Answer Defendant's Counterclaim;
5. On October 1, 2018, Defendant filed a Motion For Summary Judgment;
6. On October 29, 2018, the court granted Plaintiffs' Motion to Set Aside Entry of Default, and further ordered that the Plaintiffs file an Answer to Defendant's Counterclaim in or within 30 days (Plaintiffs filed said Answer on November 16, 2018);

II. FILING OF MOTION FOR SUMMARY JUDGMENT

The Defendant filed a Motion for Summary Judgment 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 Defendant 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." (See Court Docket Entry for 10/1/18)

The Defendant filed this motion prior to the completion of any discovery and without any supporting documents. The only fact document filed prior to this Opposition (which is accompanied by two affidavits) outside of the pleadings and default motion is an affidavit from the Plaintiffs 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.

Plaintiffs are filing a further affidavit from John True supporting this Opposition. There is nothing therein to support the Defendant's claim that there is no genuine issue of material fact. To the contrary, John True's affidavit supports the facts set forth in the Plaintiffs' complaint.

A motion for summary judgment at this early phase of the case, filed even before the court granted the Plaintiffs' 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 Plaintiffs' complaint based on the pleadings (one of the requirements in the set aside being a meritorious claim on its face).

Rule 8, SCRCP 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, 203 (Cl. App.2003).

III. INITIAL BURDEN NOT MET

Pursuant to SCRCP 56 (c) the initial burden is on the Defendant as the moving party to demonstrate the absence of a genuine material fact. See *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115 (1991).

The motion for summary judgment was filed on October 1, 2018, prior to this court allowing the set aside of default on October 29, 2018. Since that set aside was granted, Defendant, charged with the burden here, has not presented any further evidence. Thus, the court has no cause to reverse its decision issued on October 29, 2018, that sufficient material facts for a cause of action existed then and presumably still exists now.

A party seeking summary judgment has the burden of clearly establishing by the record properly before the Court the absence of a triable issue of fact. *Standard Fire Co. v. Marine Contracting and Towing*, 301 S.C. 418, 422 (1990). A party who fails to show the absence of a genuine issue of material fact is not entitled to summary judgment even though his adversary does not come forward with opposing materials. *Title Insurance Co. of Minnesota v. Christian*, 267 S.C. 71, 422 (19976).

To date, upon the filing of this Opposition, the Defendant has not produced any evidence or facts since the filing of their motion.

IV. STANDARD FOR DETERMINING SUMMARY JUDGMENT MOTION

Rule 56 (c) SCRCP states that a motion for summary judgment shall only be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

“In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing the summary judgment.” See *Palleres v. Seinar*, 407 S.C. 359, 365 (2014).

“Because summary judgment is a drastic remedy, it should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial”. *Spence v. Wingate*, 395 S.C. 148, 156 (2001).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Gadson v. Hembre*, 364 S.C. 316, 320 (2005). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Nelson v. Charleston County Parks*, 362 S.C. 1, 5 (Ct. App. 2004).

V. PROCEDURE WHEN AFFIDAVIT OF PLAINTIFF UNAVAILABLE

SCRCP 56 (f) states that if it appears from an affidavit of a party opposing summary judgment, that for reasons stated, said party cannot present an affidavit essential to justify party's opposition, the court may refuse the application for judgment or order a continuance to permit affidavits to be obtained or such other discovery to be had.

An affidavit from the Plaintiffs' attorney accompanies this Opposition stating that due to the situation with Thomas True's incarceration, the attorney has been unable to present an affidavit from Thomas True. Said essential facts justifying the opposition to granting summary judgment include actions of the Defendant supporting evidence of fraud and would be expected from an affidavit from Thomas F. True III.

VI. SUMMARY JUDGMENT PREMATURE WHEN DISCOVERY INCOMPLETE

In the instant case, the summary judgment motion has been filed at the inception of the period available for discovery including interrogatories, depositions and production of documents.

One of the major factual issues cited in the complaint concerns the lack of consideration for reducing the rent of the Defendant by half. Directly related to this is the allegation of the Plaintiffs that Defendant fraudulently promised to loan Plaintiffs \$75,000 and the reduction of rent in the lease was only to become effective upon Plaintiff's receipt of the loan promised. Through discovery, the Plaintiffs intend to procure further proof of this fraud and lack of consideration.

The instant motion for summary judgment is presented prematurely and if allowed would unfairly deprive the Plaintiffs of the opportunity to pursue discovery.

"Since it is a drastic remedy, summary judgment 'should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.'" See *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112 (1991). "This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Id.*

In *Baughman*, the court ruled summary judgment premature because (1) plaintiffs demonstrated 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.

VII. ISSUES OF MATERIAL FACT PRESENTED BY PLAINTIFFS

Reading the complaint and affidavit of John W. True in the light most favorable to the Plaintiffs, with all reasonable inferences drawn therefrom, the following facts, express and inferred, present genuine issues of fact. These facts and favorable inferences are followed by the

several causes of action and case theories that said facts would reasonably entitle the Plaintiffs to relief.

A. Facts and Inferences

The following facts and inferences can be drawn from the Complaint and John W. True affidavit seen in the light most favorable to the Plaintiffs.

1. Defendant enters a lease with Plaintiffs on August 28, 2011 for the premises at 1180 Chersonese Round owned by Plaintiff Jate IV Trust; (Complaint 5, 6 and 8)
2. Original lease monthly rent \$4250; (Complaint 9)
3. Defendant had taken possession under the Original Lease prior to October of 2011; (J W True Affidavit 6)
4. Inference drawn from complaint that Thomas F. True III is suing Defendant both in his individual capacity and as Trustee of Jate IV on all allegations;
5. Parties sought to renegotiate the Original lease via a telephone conference in November of 2011; (Complaint 7 and J W True Affidavit 5)
6. A revised lease was conditioned upon the Defendant arranging and making a \$75,000 loan to the Plaintiffs in consideration of Plaintiffs reducing the monthly rental (prior to the revised lease taking effect); (Complaint 10 and J W True Affidavit 15)
7. Unless and until Defendant loaned the \$75,000 to Plaintiffs, the rent would not be reduced and the lease was to be held in escrow by Defendant;

8. In contravention of the Defendant's representation that he must and would hold the revised lease in escrow until the loan was made, Defendant recorded the revised lease in the Registry of Deeds and began (and continued) paying the revised lease rental amount of \$2000 per month; (Complaint 12 and 15 and J W True Affidavit 20 and 21)
9. The circumstances that led Plaintiffs to seek the loan from Tuorto were Plaintiffs need for \$75,000 to place a deposit on a land parcel for development by Plaintiffs; (J W True Affidavit 11, 12, 13, 21, and 22)
10. Without Defendant making the promised loan, Plaintiffs were unable to place the said deposit and never consummated the contract to purchase the said parcel; (J W True Affidavit 22)
11. The reduction in rent was conditioned upon the loan being made; (Complaint 16)
12. The revised lease was signed and was to be held in escrow by the Defendant and not become effective unless the 75K loan was made and not otherwise; (J W True Affidavit 20 to 22)
13. Defendant 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; (J W True Affidavit 20)
14. Defendant never arranged nor made the \$75,000 loan to Plaintiffs but Defendant unilaterally, without permission or agreement of Plaintiffs began paying the reduced monthly rental of \$2000 all to the detriment of Plaintiffs; (JW True Affidavit 21 and 22)

15. Plaintiffs owned certain furnishings and other personal property (including the bronze statues) that Defendant retained and converted to his own use; (Complaint 17, 18 and 24 and J W True Affidavit 23 to 26)

16. Defendant Tuorto at the times relevant was an attorney licensed to practice in South Carolina; (Complaint 4)

B. Causes of Action and Case Theories

The following sets out several causes of action and case theories that said facts would reasonably entitle the Plaintiffs to relief.

1. Unjust Enrichment.

As emphasized by the Plaintiffs in the complaint, the Defendant has been unjustly enriched by unilaterally reducing the monthly rental from \$4,250 to \$2000 without loaning the Plaintiffs the promised \$75,000. The courts have recognized this equitable doctrine based on quantum meruit should the plaintiff be unable to prove breach of contract (here possibly because of the parol evidence rule, but see argument below).

“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 (Ct. App. 2011)

In the instant case, all these elements are met: the benefit conferred on the Defendant is the severe reduction in rent; the Defendant has realized the benefit, i.e. \$2,250 per month over at least 6 years; and the Defendant has retained this benefit without paying for its value, i.e. Defendant paid the reduced rental (a benefit) but failed to make the \$75,000 loan (failure to pay value) but retained the rent reduction.

2. Breach of Contract

“The necessary elements of a contract are an offer, acceptance and valuable consideration.” *Roberts v. Gaskins*, 327 S.C. 478, 483 (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, Defendant’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 (Ct. App. 1998).

Without the loan, there is no valuable consideration supporting the revised lease, the only difference between the Original lease and the revised lease being the seriously reduced rent. So, 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.

3. Parol Evidence and Fraudulent Intent

The Defendant may raise the issue of the parol evidence rule. That rule, under some circumstances (not present here), excludes extrinsic evidence of agreements contemporaneous with or prior to the execution of fully integrated written instruments.

In the light most favorable to the Plaintiffs, there is no material evidence that the parol evidence rule should apply here. The revised lease has not been introduced into evidence and the rule does not apply due to ambiguities present in the instant matter. See *Kluttz 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 Plaintiffs’ complaint, paragraph 11, refers to a writing memorializing the promise to loan \$75,000. Further, 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 (Ct. App. 1988).

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 (1971).

Arguably, fraud is present here. The Defendant induced Plaintiffs to revise the Original lease with the false promise of a loan for which the Plaintiffs were desperate. Thomas F. True III wanted to secure a real estate development deal before his impending incarceration (for an unrelated incident). True trusted the Defendant to make the loan before putting the revised lease into effect thus evidence that Defendant fraudulently induced the Plaintiffs into the revised lease is admissible.

"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 (t. App. 2005). "Similarly, the intent to deceive is an essential element of an action for fraud." *Id.*

4. Conversion

The Plaintiffs have alleged conversion of personal property in the complaint. In the light most favorable to the Plaintiffs, the Defendant has without the Plaintiffs' permission retained title to personal property that was present at the leased premises prior to the rental. Further, the Defendant has retained that personal property without the permission and to the exclusion of the Plaintiffs.

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 (1993). "Conversion may arise by...illegal detention of another's personal property." See *Regions Bank v. Schmauch*, 354 S. C. 648, 667 (Ct. App. 2003).

There are certainly ample allegations in the Complaint and Affidavit of John W. True to sustain a cause of action for conversion of the Plaintiffs' personal property.

VIII. CONCLUSION

Viewing the allegations of the Complaint and the Affidavits submitted in the light most favorable to the Plaintiffs the motion for summary judgment should be denied.

Further, should the court question the viability of any of the Plaintiffs claims, the motion should be considered premature as it has been made at such an early stage of the proceedings, no discovery has been completed. As the *Baughman* case cited by Plaintiffs in Section VI, above: "summary judgment must not be granted until the opposing party has had the full and fair opportunity to complete discovery."

Respectfully submitted,
Plaintiff.

By his attorney,



Peter H. Rosenthal (S.C. Bar #75645)
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Weymouth, MA 02189
617-571-9177 Tel.
781-335-2153 Fax
phr100@comcast.net

March 7, 2019

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL DISTRICT

Thomas F. True, III. Individually and as)
Trustec of Jate IV Trust,)
Plaintiff,)
Vs.)
William L. Tuorto,)
Defendant,)

CASE NO. 2017-CP-10- 1395

FILED
2019 MAR -8 PM 1:02
JULIE J. ANTONIANG
CLERK OF COURT
BY 

**AFFIDAVIT BY JOHN TRUE IN SUPPORT OF PLAINTIFFS OPPOSITION TO
SUMMARY JUDGMENT**

Now comes THE AFFIANT, John W. True, and on oath deposes and states as follows:

1. My name is John W. True and I am the son of Plaintiff Thomas F. True III and a beneficiary of the Jate IV Trust;
2. At all times relevant to this matter, the Plaintiff, Thomas F. True III has been incarcerated either at the Federal Corrections Facility at Fort Dix, New Jersey or (as at present) at the Federal Medical Facility for federal prisoners at Lexington Kentucky;
3. I have personal knowledge of the certain material facts that support the claims of the Plaintiff in the instant matter;
4. I am familiar with the locus property, 1180 Chersonese Round, that is the subject of this matter and have visited this premises on numerous occasions since 2005;

5. On or about early November of 2011 (precise date not known but prior to November 15, 2011 when the lease at issue was signed and recorded), I was present in the conference room of a law office used by the Plaintiffs' attorney when a lengthy telephone conference took place among the Plaintiff's attorney, Plaintiff Thomas F. True III and the Defendant that utilized a speaker phone so that I could hear the conversation;
6. To my personal knowledge, the Defendant had taken possession under a lease (the Original Lease) prior to October of 2011;
7. During the time period relevant to the said conference call, Plaintiff True had earlier in that year been charged with a serious federal crime and was awaiting a trial;
8. Because of the impending said criminal trial and probability that the Plaintiff would face incarceration, Plaintiff was worried about his future and the security for Jate IV Trust, the beneficiaries of which were his four children;
9. Further, prior to the date of the telephone conference referred to above, the Defendant signed a lease (Original Lease) and became the tenant of Jate IV Trust at 1180 Chersonese Round, Mount Pleasant for a period of years and at a monthly rent amount of \$4250;
10. Further, in that time frame (Fall of 2011) Plaintiff and Defendant were social friends and Plaintiff had trust in the Defendant and believed the Defendant would act in Plaintiff's best interests. In other words, any negotiations between the Plaintiff and Defendant would not be "arm's length";
11. To my personal knowledge, around the date of the above referenced conference call, Plaintiff True, who was at that time a real estate developer (and had been for about 40 years), had negotiated with a bank an agreement to purchase a parcel repossessed by the bank. Parcel is in North Charleston and known as "The Park";
12. Further, to my personal knowledge, Plaintiff True needed \$75,000 for an initial deposit with the said bank to contractually secure the right to purchase that property;

13. Further to my personal knowledge, around the date of the above referenced conference call, the Defendant had expressed to Plaintiff True that Defendant had access to funds (perhaps from a client of Defendant) to loan \$75,000 to Plaintiff to enable True to bind a contract to purchase The Park parcel from the said bank;
14. Although I did not participate in the conference call, I was present and heard the conversation and state below the agreement reached during that call;
15. The negotiations on the conference call led to an oral agreement that Defendant would loan Plaintiff True \$75,000 (possibly from funds Defendant was holding in his escrow account for a client) in consideration of Plaintiff True reducing the monthly rent at 1180 Chersonese Round to \$2000 per month. The parties would enter into a revised lease drafted by Defendant, however, Defendant was to hold the revised lease "in escrow" until the loan was funded and the funds were in the possession of the Plaintiff. Then and only then was the lease to come into effect and Defendant was to remove the escrow requirement and record the lease at the registry of deeds;
16. I do not know the particulars of how the loan would be repaid but on information and belief, the revised lease was to be used as a vehicle to deter a foreclosing bank (see below) from dispossessing the Defendant from the property;
17. On my personal knowledge, at and around the time of negotiating the revised lease, the subject property at 1180 Chersonese Round was in foreclosure because of a default on a mortgage for which the property provided security;
18. Upon information and belief, based upon what I was told at that time by the Plaintiff True and Plaintiff's attorney, once the \$75,000 loan was completed and the revised lease was to come into effect, the major reason for recording the lease was to attempt to foil any attempt by the foreclosing bank from removing the Defendant from possession of the property and if the bank did foreclose then the rental amount due from Tuorto would be below market value. This would not adversely affect the Plaintiff because the bank would then be receiving the rents;

19. Plaintiff True upon completion of the telephone conference was convinced that Defendant would make the loan as promised but if not the proposed lease would remain in escrow until the said loan payment was completed and if the loan was not made, the Original lease would remain in full force and effect;
20. Upon information and belief, Plaintiff and Defendant signed the revised that they agreed would be held in escrow. However, the Defendant, without the knowledge or permission of the Plaintiff True immediately took and recorded the revised lease on the same day it was signed;
21. Upon information and belief, Defendant never loaned the \$75,000 to Plaintiff True and the property was eventually foreclosed and the foreclosing bank sold the said premises to the Defendant;
22. On my personal knowledge, Plaintiff True was unable to raise the \$75,000 needed to bind the contract to purchase The Park parcel. Despite this, the Defendant began paying the reduced rent of \$2000 in contravention of the parties agreement and Defendant continued to pay said amount until the bank held a foreclosure sale and the Jate IV Trust lost the property to the bank;
23. On my personal knowledge, when the Defendant leased the 1180 Chersonese Round property, 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;
24. In addition to the above, I personally know of a family heirloom grandfather clock that has been in our family for over 100 years and this personal property is in the possession of the Defendant at the said 1180 Chersonese Round against the rights of possession of the Plaintiffs;

25. On my personal knowledge, Plaintiffs never intended to abandon or give the said personal property to the Defendant but only intended to allow Defendant to use the personal property;
26. Upon information and belief, upon the foreclosure sale, the said bronze lions and the furnishings belonging to the Plaintiffs remained in the possession of the Defendant and have not been returned to the Plaintiffs;

Signed and sworn to on this 7th day of March, 2019 by:

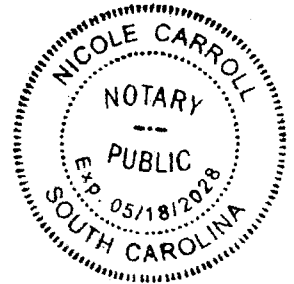


John W. True

NOTARIZATION

March 7, 2019

Sworn to and attested before me on this 7th day of March, 2019



Notary Public for South Carolina. My commission expires 5/18/2028

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL DISTRICT

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

Plaintiff,)

Vs.)

William L. Tuorto,)

Defendant,)

CASE NO. 2017-CP-10- 1395

FILED
2019 MAR 11 PM 12:46
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

AFFIDAVIT BY ATTORNEY FOR PLAINTIFFS PURSUANT TO SCRPC 56 (f)

Now comes the attorney for the Plaintiffs and on oath deposes and states as follows:

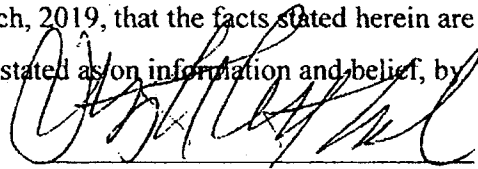
1. I am the attorney of record for the Plaintiffs and submit this affidavit pursuant to SCRPC 56 (f);
2. At all times relevant to this matter, the Plaintiff, Thomas F. True III has been incarcerated either at the Federal Corrections Facility at Fort Dix, New Jersey or (as at present) at the Federal Medical Facility for federal prisoners at Lexington Kentucky;
3. Upon information and belief, Plaintiff True has personal knowledge to support his contentions in the instant complaint;
4. Upon information and belief, True's supporting facts include his personal knowledge that the Defendant represented and agreed to loan Plaintiffs \$75,000 as consideration for the revision of the subject lease by reducing the monthly rental to \$2000 from \$4250;
5. Upon information and belief, True's supporting facts include his personal knowledge that Defendant agreed to hold the revised lease in escrow until the said \$75,000 loan was funded and paid over to the Plaintiffs and instead, on the same day the revised lease was signed rather than hold the lease in escrow as promised, the Defendant, without funding

R065

the loan immediately recorded the lease in the Registry of Deeds and since that date paid the Plaintiffs a monthly rental amount of \$2000 and not \$4,250 per month;

6. Upon information and belief, True's supporting facts include his personal knowledge that the sole reason for revising the subject lease to reduce the rental by \$2250 per month was the method by which the said loan would be repaid and without the loan being made, any reduction in the rental amount would enrich the Defendant unjustly and without consideration as the revised lease was not to come into effect without the loan being made to Plaintiffs;
7. Because of the incarceration of the Thomas True, affiant has had difficulty in getting an affidavit into and out of the prison where Thomas True is held and more time is needed to accomplish this task;

Sworn to by the affiant on this 8th day of March, 2019, that the facts stated herein are true of the affiant's knowledge, except for those matters stated as on information and belief, by

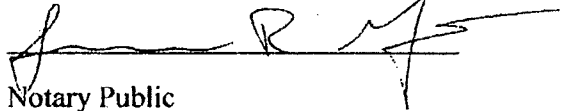


Peter H. Rosenthal

Commonwealth of Massachusetts

County of Norfolk

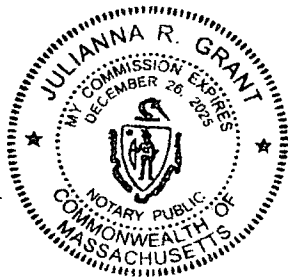
On this 8th day of March, 2019, before me, the undersigned notary public, personally appeared Peter H. Rosenthal, proven to me through satisfactory evidence of identification (which identification was MA Drivers license) to be the person whose name is signed on the above instrument, and that the facts therein are true to the affiant's knowledge and acknowledged to me that they signed it voluntarily and for its stated purpose.



Notary Public

My Commission Expires 12/26/25

(SEAL)



R066

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

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

CASE NO.: 2017-CP-10-1395

Plaintiff,)

Vs.)

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

William L. Tuorto,)

Defendant.)

FILED
2019 MAR 12 PM 3:35
CLERK OF COURT
JULIE A. ARMSTRONG

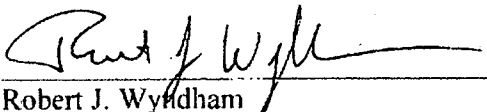
The Defendant, William L. Tuorto, respectfully submits this memorandum in support of his motion for summary judgment. On March 17, 2017 the Plaintiff filed suit individually and as Trustee of Jate IV Trust. The property known as 1180 Chersonese Round, Mount Pleasant, SC was previously owned and titled in the name of Jate IV Trust. Thomas F. True, III was not the owner of the property and has no legal basis to assert a claim individually. The property was foreclosed on by the mortgage lender in 2017 and subsequently sold.

Plaintiff alleges in his complaint that there was an original lease dated August 28, 2011. The Plaintiff also alleges that the lease agreement was renegotiated, and the terms were memorialized in writing. Although Plaintiff alleges that the Defendant failed to live up to his end of the bargain, paragraph 15 of the complaint provides that this court issued an order dated March 31, 2014 and filed April 3, 2014 finding in Defendant's favor regarding the revised lease. A filed copy of that court order is attached as Exhibit A.

In essence, Plaintiff alleges and concedes in his complaint that the allegations of this complaint were previously litigated, and the same allegations were ruled on by order of this court dated March 31, 2014 and filed April 3, 2014 ruling in Defendant's favor. That order has not been appealed and is the law of the case.

Defendant would respectfully request that this court grant summary judgment on the basis that there is no genuine issue of material fact and that Plaintiff is collaterally estopped from asserting the claims which are the identical claims that were litigated in this court resulting in the order dated March 31, 2014 and filed on April 3, 2014.

For the reasons set forth herein and those that may be advanced at oral arguments, Defendant would respectfully request that this court grant Defendant's motion and issue an order granting summary judgment on behalf of Defendant on all causes of action by Plaintiff.


Robert J. Wyndham
Law Offices of Gedney M. Howe, III, P.A.
P.O. Box 1034
Charleston, SC 29402
Telephone: (843) 722-8048

Attorney for Defendant

MARCH 12, 2019

Exhibit A

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

JATE IV TRUST,

Plaintiff,

v.

WILLIAM TUORTO,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE COUNTY OF CHARLESTON
CASE NO.: 2013-CP-10-2307

MAGISTRATE CASE NO. 2012CV1011100602

ORDER GRANTING DEFENDANT'S
APPEAL AND REVERSING
MAGISTRATE COURT, IN PART

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2014 APR -3 PM 4:05
JULIE J. ARSTRONG
CLERK OF COURT

This matter came before the Court on March 3, 2014 on the appeal of Defendant William Tuorto (the "Appellant") of an order of the Honorable Judge Thomas E. Lynn of the Charleston County Magistrate Court. The Plaintiff, Jate IV Trust (the "Trust"), did not appear. Appellant was represented by Justin M. McGee.

ISSUE

1. 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.

FINDINGS OF FACT

The parties entered into a lease under which Appellant leased the house and premises at 1180 Chersonese Round, Mount Pleasant, South Carolina (the "Property") on August 28, 2011 (the "Original Lease"). The Property is owned by the Trust. Tom True is, or was at all times relevant hereto, the trustee of the Trust. The Original Lease included both rental provisions and an option to purchase the Property for \$950,000.00. Due to the deferred maintenance costs existing in the Property, the parties renegotiated and entered a second lease agreement on

R070

November 15, 2011 (the "Revised Lease"), which reduced both the monthly rental amount to \$2,000.00 per month and the option purchase price to \$675,000.00 and extended the lease term to ten years. The parties operated under the terms of the Revised Lease for one year until the Trust, by and through Tom True as trustee, filed an Application for Ejectment and Rule to Vacate or Show Cause against Appellant in the Magistrate Court on November 13, 2012.

Appellant successfully defended the Trust's claims that Appellant failed to pay the required amount of rent during the Rule to Vacate or Show Cause hearing before the Magistrate Court and that finding is not contested.

During this hearing, however, the Trust, by and through the testimony of Tom True as trustee, claimed the Revised Lease was unenforceable as to the Trust because Tom True exceeded his authority as trustee under the declaration of trust document. Specifically, Mr. True claimed he was prohibited by the Trust from leasing the Property for a period in excess of five years without written approval from the beneficiaries. *See* Trust, Art. VIII, § C (2).

The Magistrate Court incorporated the position asserted by the Trust – that the Revised Lease was void or voidable – in its order regarding the Rule to Vacate or Show Cause dated December 28, 2012 (the "Order"). Appellant appealed that portion of the Magistrate Court's ruling, which forms the basis for the issue before the Court today.

LEGAL ANALYSIS

First, the Order contradicts the terms of the declaration of trust, which states that "no person dealing with the Trustee in the capacity of purchaser . . . tenant, lessee or party to any other contract shall be bound to inquire into the capacity to act on the part of the Trustee or into the authority for . . . any act." Trust, Art. VIII, § C (18). As such, Appellant had no duty to explore the parameters of the trustee's authority and was entitled to rely upon the trustee's assertion of authority under the

declaration of trust.

Second, the Order contradicts statutory authority. Specifically, the Order states, "The [Trust] alleges that the Trustee entered in to the agreement, in part, to secure a loan from the Defendant and that makes the second lease voidable by the beneficiaries pursuant to Section 62-7-802(b) of South Carolina Probate Code. Order, pg. 1. Further, "this court finds that the second lease is void, *ab initio*, or at the least, voidable by the beneficiaries." Order, pg. 2.

However, Section 62-7-802(b), which carries "Duty of Loyalty" as its title, states:



"Subject to the rights of persons dealing with or assisting the trustee as provided in Section 62-7-1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless: . . . (3) the beneficiary did not commence a judicial proceeding within the time allowed by Section 62-7-1005. . . ."

SCPC § 62-7-802(b) (*emphasis added*).

Therefore, Section 62-7-802(b) is limited by Section 62-7-1012 (titled "Protection of person dealing with trustee."), which states:

(a) A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power.

(b) A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.

SCPC § 62-7-1012 (*emphasis added*).

Appellant is not a beneficiary of the Trust and acted in good faith and for value when negotiating and executing the Revised Lease.

Appellant also had no knowledge that Tom True was exceeding his authority as trustee and

was not required to inquire into the extent of a trustee's authority in these circumstances. Trustees in South Carolina have statutory authority to "enter into a lease for any purpose as lessor or lessee . . . with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust." S.C. CODE ANN. 62-7-816(9). More decisively, Section 62-7-1012(b) expressly declares that a person meeting the aforementioned criteria "is not required to inquire into the extent of the trustee's powers or the propriety of their exercise." As such, Appellant had no duty to explore the parameters of Mr. True's authority and was statutorily entitled to rely upon Mr. True's assertion of commensurate authority when entering into the Revised Lease.

Thus, any right belonging to a beneficiary of the Trust to render the Revised Lease voidable under Section 62-7-802(b) is subject to Mr. Tuorto's rights under Section 62-7-1012, including the protection afforded to Mr. Tuorto from liability to the Trust in subsection (a). Indeed, Section 62-7-1012(a) mandates that Mr. Tuorto be protected under these circumstances as if Mr. True's exercise of power in the Revised Lease was proper.

Furthermore, Section 62-7-802(b) sets forth additional requirements that a beneficiary must meet in order to render the action of its trustee voidable where the trustee breached the duty of loyalty. Specifically, in order to render such a transaction voidable, a beneficiary must "commence a judicial proceeding within the time allowed by Section 62-7-1005." SCPC § 62-7-802(b).

Section 62-7-1005 is titled "Limitation of action against trustee" and states:

- (a) Unless previously barred by adjudication, consent, or limitation, a beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust.

SCPC § 62-7-1005 (*emphasis added*).

At this point, no beneficiary of the Trust has commenced any judicial proceeding against the Trustee or any other person or entity to void the Revised Lease.

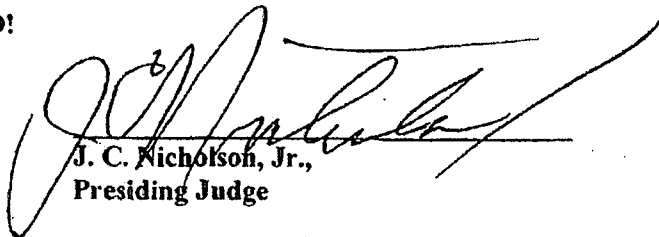
As such, because more than one year has passed, the beneficiaries in the present case are now barred from seeking any relief under Section 62-7-802, specifically including the right to render the Revised Lease voidable. Therefore, even in the event Appellant did not meet the criteria under Section 62-7-1012(a), which he does, the beneficiaries have not pursued and cannot now pursue the remedy of voiding the Revised Lease under Section 62-7-802.

Accordingly, for the reasons set forth herein, it is

ORDERED, ADJUDGED AND DECREED that the determination by the Magistrate Court rendering the Revised Lease void or voidable is **REVERSED**; and it is further

ORDERED, ADJUDGED AND DECREED that the Revised Lease is a valid and enforceable contract, including the purchase option provision giving Appellant the right to purchase the Property for \$675,000.00 at any time during the lease term.

THEREFORE IT IS SO ORDERED!


J. C. Nicholson, Jr.,
Presiding Judge

Charleston, South Carolina
This 31 day of March, 2014

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL DISTRICT

Thomas F. True, III. Individually and as)
Trustee of Jate IV Trust,)
Plaintiff,)
Vs.)
William L. Tuorto,)
Defendant.)

CASE NO. 2017-CP-10- 1395

FILED
2019 MAR 14 AM 11:21
JULIE J. ARSTRONG
CLERK OF COURT

SUPPLEMENTAL MEMORANDUM

Now comes the Plaintiff and submits the following supplements the Opposition to address the Defendant's late filed Memorandum concerning collateral estoppel.

First, the issues in the instant case are not identical. The only issue presented in the ejectment matter was that of the Trustee exceeding his authority, not the issue of unjust enrichment or breach of contract litigated in the instant matter.

"Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). "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.* "While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issue." *Id.* (quoting *Snively v. AMISUB of S.C., Inc.*, 379 S.C. 386, 398, 665 S.E.2d 222, 228 (Ct. App. 2008)).

In the instant matter, the issue litigated in the present lawsuit is unjust enrichment. The only issue in question in the ejectment matter was trustee exceeding authority.

Further, the court is not to be rigid in employing collateral estoppel and can when circumstances require because of unfair or unjust results. See *Carigg v. Cannon*, 347 S.C. 75, 81 (Ct. App. 2001).

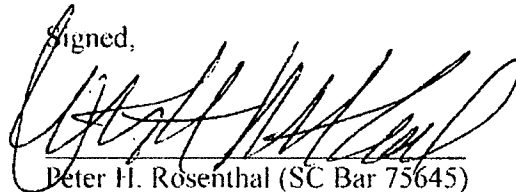
R075

Further, the court should note that the damages caused caused to the Plaintiff by the Defendant's actions in reducing the rent without performing on the loan continued long after the Court's action on the reversal of the ejectment matter in March of 2014.

Finally, the Plaintiff has also alleged a cause of action under conversion that has nothing to do with the issues visited in the ejectment matter.

March 14, 2019

Signed,

A handwritten signature in black ink, appearing to read 'Peter H. Rosenthal', written over a horizontal line.

Peter H. Rosenthal (SC Bar 75645)

647 Pleasant St.

Weymouth, MA. 02189

Tel. (617)571-9177

Fax (781)335-2153

phr100@comcast.net

Attorney for Plaintiffs

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL DISTRICT

Thomas F. True, III. Individually and as)
Trustee of Jate IV Trust,)
Plaintiff,)
Vs.)
William L. Tuorto,)
Defendant,)

CASE NO. 2017-CP-10- 1395

FILED
2019 MAY -9 PM 3:44
JULIE J. ARMSTRONG
CLERK OF COURT
BY

**MOTION OF PLAINTIFFS/DEFENDANTS IN COUNTERCLAIM FOR
RECONSIDERATION OF ENTRY OF SUMMARY JUDGMENT PURSUANT TO
SCRCP 59(e)**

Now come the Plaintiffs/Defendants in Counterclaim and move for the court to reconsider its summary judgment in favor of the defendant in the above entitled action.

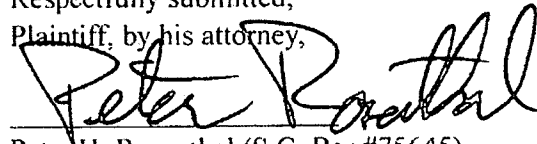
In support hereof the Plaintiffs state that the allowance by the court of Defendant's motion for summary judgment wrongfully relied on the doctrine of collateral estoppel and did not consider the facts in the light most favorable to the Plaintiffs.

Further, the court did not consider the facts presented by the Plaintiffs in support of their claims for unjust enrichment, breach of contract, parol evidence, fraudulent intent and conversion.

R077

Plaintiffs support this motion with the accompanying Memorandum of Law.

Respectfully submitted,
Plaintiff, by his attorney,

A handwritten signature in black ink, appearing to read "Peter Rosenthal", written over a horizontal line.

Peter H. Rosenthal (S.C. Bar #75645)

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May 9, 2019

R078

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL DISTRICT

Thomas F. Truc, III. Individually and as)
Trustee of Jate IV Trust,)
Plaintiff,)
Vs.)
William L. Tuorto,)
Defendant,)

CASE NO. 2017-CP-10- 1395

FILED
2019 MAY -9 PM 3:44
JULIE J. ARMSTRONG
CLERK OF COURT

**MEMORANDUM OF PLAINTIFFS/DEFENDANTS IN COUNTERCLAIM IN
SUPPORT OF MOTION FOR RECONSIDERATION**

INTRODUCTION

This memorandum is filed in support of Plaintiffs/Defendant in Counterclaim motion for reconsideration of the court's Order Granting Defendant Summary Judgment entered on April 29, 2019 with notice sent on May 3, 2019.

This memorandum sets forth several reasons why the summary judgment motion of Defendant should have been denied. The judge wrongly relied upon the doctrine of collateral estoppel as the basis for granting the motion.

Further, the court failed to recognize the premature filing of the motion as the discovery was incomplete and there are triable issues of material facts as set out in the Complaint. Those issues of material fact would support triable issues of unjust enrichment, breach of contract, parol evidence, fraudulent intent and conversion.

Further, the court wrongly relied upon a memorandum filed by the Defendant violating the filing deadline.

I. COURT RECITAL OF THE FACTS AND THE CONTRAST WITH FACTS MOST FAVORABLE TO PLAINTIFFS

The court's Order Granting Defendant Summary Judgment fails to recite all the facts in the light most favorable to the Plaintiffs. The following facts that are favorable to Plaintiffs are missing from the court's recitation:

1. In Plaintiffs' complaint at paragraphs 9 and 10, it avers that the renegotiated lease was in exchange for Defendant's agreement to loan Plaintiff \$75,000 in exchange for lowering the rent from \$4,250 per month to \$2,000;
2. In the affidavit of John True submitted with Plaintiffs' memorandum opposing summary judgment, at paragraph 15 of his affidavit, it states the renegotiated lease was to be held in escrow until the \$75,000 promised loan was funded and placed in the possession of Plaintiff and only then would the renegotiated lease come into effect;
3. In the affidavit of John True submitted with Plaintiffs' memorandum opposing summary judgment, at paragraph 20, states without funding the said loan, Defendant, without knowledge or permission of Plaintiff, removed the lease from escrow and recorded it on the same day the lease was signed despite the agreement to hold it in escrow;
4. In the affidavit of John True submitted with Plaintiffs' memorandum opposing summary judgment, at paragraphs 11 and 12, the reason Plaintiff renegotiated the lease to lower the

rent was because Plaintiff needed the \$75,000 loan to make a deposit on a parcel of land Plaintiff wanted to purchase;

5. In the affidavit of John True submitted with Plaintiffs' memorandum opposing summary judgment, at paragraph 19, if Defendant did not make the \$75,000 loan, the original lease would remain in full force;
6. In Plaintiffs' complaint at paragraph 14, Plaintiffs recite that Defendant defended his right to remain in the property under the renegotiated lease was because Plaintiff had "exceeded his authority as Trustee..."
7. In Plaintiffs' complaint paragraph 17 and 18, Plaintiff states the Defendant took away and/or stole from the premises two bronze lion statutes and other items including but not limited to furnishings and other items;
8. In Plaintiffs' complaint paragraphs 21 to 29 the Plaintiff makes claims for unjust enrichment;
9. In the affidavit of John True submitted with Plaintiffs' memorandum opposing summary judgment, at paragraphs 23 to 26, to his personal knowledge, the two bronze lions, a family heirloom grandfather clock and several items of valuable furnishings inside the property were left at the property for the use of the Defendant and were not abandoned or given by Plaintiffs to the Defendant;

II. RATIONALE OF COURT FOR GRANTING SUMMARY JUDGMENT

This court's order of summary judgment contained limited facts and instead relied on the legal analysis of collateral estoppel to support its decision. The Plaintiffs have extensively explained in their Memorandum Opposing Summary Judgment filed with the court in advance of

the summary judgment hearing held on March 13, 2019 why summary judgment should be denied.

However, it is appropriate to include here the requisite foundation in South Carolina for a Defendant to prevail at this early stage of this litigation where no discovery has been exchanged and the facts and law are resolved in the light most favorable to the Plaintiffs. (See Memorandum Opposing Summary Judgment Section VI).

In addition, the summary judgment motion followed a court decision that allowed the Plaintiffs' motion to set aside default which meant that the motion judge acknowledged that there is merit to the Plaintiffs' complaint based on the pleadings (one of the requirements in the set aside being a meritorious claim on its face).

"[A circuit] court's order on summary judgment must set out facts and accompanying legal analysis sufficient to permit meaningful appellate review". *Bowen v Lee Process Sys Co.*, 342 S.C. 232, 237, 536 S.E. 2d 86, 88 (Ct. App. 200). "Such an order must include those facts which the circuit court finds relevant, determinative of the issues and undisputed." *Id.* At 237-238, 536 S.E. 2d at 66-89. Said order should additionally "provide clear notice to all parties and the reviewing court as to the rationale applied in granting...summary judgment". *Id.* at 38, 536 S.E. 2d at 89.

III. MISPLACED RELIANCE OF THE COURT ON COLLATERAL ESTOPPEL

Collateral estoppel is the basis on which this court granted the Defendant summary judgment. This court was relying on the decision of the Court of Common Pleas judge reversing the 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”. The court in the instant matter found that said decision estops the Plaintiffs from litigating the issues in the instant lawsuit because the issues are the same.

The interpretation by the instant court that the doctrine of collateral estoppel applies here is misplaced. This is because the 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 filed by the Defendant with this Court on 3/12/19)

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.”

It is important to note that the decision by Judge Nicholson Jr. *reversed* a decision by the Magistrate that was *favorable* to the Plaintiffs voiding 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 this court, none of these issues were previously litigated: 1) unjust enrichment; 2) conversion of property; 3) breach of contract; 4) parol evidence and fraudulent intent; as Plaintiffs have extensively set out in their Memorandum in Opposition to Summary Judgment, Section VI. B. None of the three prongs necessary for collateral estoppel is present here. As stated in *Aaron v. Mahl*, 381 S.C. 585, 592 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.

This court, in its order granting summary judgment 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 these current issues have been reached, summary judgment on any of these issues in the instant matter is wrong. The sole issue litigated was whether the trustee exceeded his authority and that issue is not on trial here.

IV. COURT SHOULD NOT HAVE ALLOWED DEFENDANT TO FILE A MEMORANDUM THE DAY PRIOR TO THE HEARING

Plaintiffs further argue that the eleventh hour submission of their Memorandum in Support of their summary judgment motion should not be considered as it was filed in violation of SCRCP 56 (c) requires motions to be served at least 10 days before the time fixed for hearing.

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.

The Plaintiffs 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 Plaintiffs to respond and file opposition. Instead, the court only allowed the Plaintiffs 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.

V. PLAINTIFFS' ISSUES NOT LITIGATED

As stated above, there were several issues presented in the Plaintiffs' Memorandum in Opposition to Summary Judgment not subject to collateral estoppel. In brief, those issues include the following.

1. Unjust Enrichment.

As emphasized by the Plaintiffs in the complaint, the Defendant has been unjustly enriched by unilaterally reducing the monthly rental from \$4,250 to \$2000 without loaning the Plaintiffs the promised \$75,000.

"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 (Ct. App. 2011).

2. Breach of Contract

"The necessary elements of a contract are an offer, acceptance and valuable consideration." *Roberts v. Gaskins*, 327 S.C. 478, 483 (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, Defendant'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 (Ct. App. 1998).

Without the loan, there was no valuable consideration supporting the revised lease, the only difference between the Original lease and the revised lease being the seriously reduced rent. So, 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.

3. Parol Evidence and Fraudulent Intent

The Defendant may raise the issue of the parol evidence rule. In the light most favorable to the Plaintiffs, there is no material evidence that the parol evidence rule should apply here. The revised lease has not been introduced into evidence and the rule does not apply due to ambiguities present in the instant matter. See *Kluttz 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 Plaintiffs' complaint, paragraph 11, refers to a writing memorializing the promise to loan \$75,000. Further, 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 (Ct. App. 1988).

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 (1971).

Arguably, fraud is present here. The Defendant induced Plaintiffs to revise the Original lease with the false promise of a loan for which the Plaintiffs were desperate. Thomas F. True III wanted to secure a real estate development deal before his impending incarceration (for an unrelated incident). True trusted the Defendant to make the loan before putting the revised lease into effect thus evidence that Defendant fraudulently induced the Plaintiffs into the revised lease is admissible.

"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 (1. App. 2005). "Similarly, the intent to deceive is an essential element of an action for fraud." *Id.*

4. Conversion

The Plaintiffs have alleged conversion of personal property in the complaint. In the light most favorable to the Plaintiffs, the Defendant has without the Plaintiffs' permission retained title to personal property that was present at the leased premises prior to the rental. Further, the Defendant has retained that personal property without the permission and to the exclusion of the Plaintiffs.

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 (1993). "Conversion may arise by...illegal detention of another's personal property." See *Regions Bank v. Schmauch*, 354 S. C. 648, 667 (Ct. App. 2003).

There are certainly ample allegations in the Complaint and Affidavit of John W. True to sustain a cause of action for conversion of the Plaintiffs' personal property.

VI. SUMMARY JUDGMENT PREMATURE WHEN DISCOVERY INCOMPLETE

The summary judgment motion was filed at the inception of the period available for discovery including: interrogatories, depositions and production of documents. The court should have considered this when ruling on the motion and should reconsider it here.

"Since it is a drastic remedy, summary judgment 'should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.'" See *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112 (1991). "This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Id.* 112.

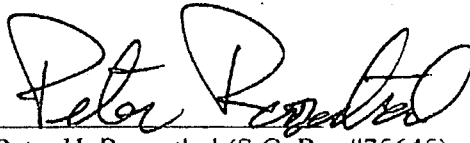
VII. CONCLUSION

As the court has relied on collateral estoppel for its grant of summary judgment, the court should review the issues listed above that have not been litigated. In fact, the conversion issue was never a part of the prior litigation.

The only issue previously litigated was the trust exceeding its authority in attempting to void the revised lease. Viewing the allegations of the Complaint and the Affidavits submitted in the light most favorable to the Plaintiffs the issue set out in Section V. above were never litigated.

Further, the motion should be considered premature as it has been made at such an early stage of the proceedings, no discovery has been completed. As the *Baughman* case cited by Plaintiffs in Section VI, above states: "summary judgment must not be granted until the opposing party has had the full and fair opportunity to complete discovery."

Respectfully submitted,
Plaintiff
By his attorney,



Peter H. Rosenthal (S.C. Bar #75645)

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Weymouth, MA 02189

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May 9, 2019

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Thomas F. True, III, Individually and as)
Trustee of Jate IV Trust,)
Plaintiff,)
Vs.)
William L. Tuorto,)
Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2017-CP-10-1395

MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION TO
RECONSIDER

FILED
2019 MAY 29 PM 3:40
JULIE J. ARMSTRONG
CLERK OF COURT

This memorandum is submitted in opposition to Plaintiff's motion to reconsider. Plaintiff's memorandum in support of the motion to reconsider provides no new or additional argument or evidence to support his motion and therefore the motion to reconsider should be denied for the following reasons.

Under Rule 56(c), SCRPC, the parties seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Regions Bank v. Schmauch*, 582 S.E.2d 432 (Cl. App. 2003). Once a party moving 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*, 582 S.E.2d 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*, 392 S.E.2d 789 (1990).

Plaintiff's memorandum provides that this court's order granting summary judgment fails to recite all of the facts in the light most favorable to the Plaintiffs. The memorandum then goes on to cite allegations of the complaint which are not facts and cannot be used to meet his burden as set forth in the *SSI Med. Servs., Inc.* case cited above. The additional "facts" relied upon by Plaintiff in his memorandum include the affidavit of John True who was not a party to the contract

nor a party to this action. The rule governing summary judgment provides that "supporting and opposing affidavits 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 therein." Rule 56(e), SCRPC. The affidavit fails to set forth facts as would be admissible in evidence. First, this case involves two written lease agreements relating to real property. The Parol Evidence Rule prohibits the admission of any factual agreement inconsistent with the written document. The 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 its execution are inadmissible to contradict, vary or explain its terms." *Ray v. S.C. Nat'l Bank*, 314 S.E.2d 359 (1984). The "facts" relied upon by Plaintiff are inadmissible and do not comply with the requirements of Rule 56(e) SCRPC.

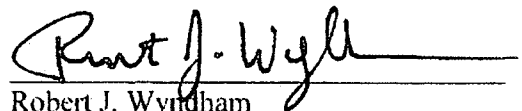
Any contract for an interest in land must be in writing and signed by the party against whom it is seeking to be enforced (§ 32-3-10(4) S.C. Code of Laws.) Failure to put such a contract in writing renders it void (§ 27-35-20 S.C. Code of Laws). Moreover, a contract required to be in writing by the Statute of Frauds cannot be orally modified. *Windham v. Honeycutt*, 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 the affidavit submitted by the Plaintiff are inadmissible pursuant to the Parol Evidence Rule and the Statute of Frauds and thus cannot support Plaintiff's claim.

In addition, as to the allegations regarding the bronze lions and furnishings, the affidavit under paragraph 26 provides "upon information and belief, upon the foreclosure sale, the said bronze lions and the furnishings belonging to Plaintiffs remain in the possession of the Defendant and have not been returned to Plaintiffs." The very terms used in the affidavit makes clear that the

affiant did not have personal knowledge or facts as would be admissible in evidence to support the claim.

It is clear from the Order of the Honorable J.C. Nicholson, Jr. filed on April 3, 2014 that Jate IV Trust, through Tom True as Trustee claimed the revised lease was unenforceable. The Court held "Ordered, Adjudged and Decreed that the revised lease is a valid and enforceable contract, including the purchase option provision given the appellant the right to purchase the property for \$675,000 at any time during the lease term." The factual findings and legal conclusions were not appealed by the Jate IV Trust and are the law of the case. The Jate IV Trust has now come forward with inconsistent and untrue allegations with no factual basis or support in violation of the South Carolina Frivolous Proceeding Act. In response to the complaint filed herein, the Defendant filed an answer and counterclaim denying all allegations and setting forth several affirmative defenses including the complaint failed to state a cause of action, collateral estoppel, and by way of counterclaim alleged that Thomas F. True did not have legal standing or any legal basis to bring the claim in violation of the South Carolina Frivolous Proceeding Act.

For the reasons set forth above, this Honorable Court should deny Plaintiff's motion to reconsider.



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Attorney for Defendant

MAY 29, 2019

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Thomas F. True, III, et al.,	)	CASE NO. 2017-CP-10-01395
	)	
PLAINTIFFS,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	ORIGINAL
	)	
William I. Tuorto,	)	
	)	
DEFENDANT.	)	
	)	

September 26, 2018

Charleston, South Carolina

B E F O R E:

The Honorable Jennifer McCoy

A P P E A R A N C E S:

Peter H. Rosenthal, Esquire
For the Plaintiff

Robert J. Wyndham, Esquire
For the Defense

Certified Transcript Provided For: Peter H. Rosenthal

Phyllis Norton, CVR-Master, Nationally Certified Verbatim Court Reporter
636 Long Point Road, Unit G, #74, Mt. Pleasant, South Carolina 29464
PNorton@sccourts.org

R093

I N D E XHEARING

-- 03

EXHIBITS - None ProfferedCERTIFICATION OF TRANSCRIPT

-- 13

If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

1 THE COURT: Thomas True versus William Tuorto.

2 MR. WYNDHAM: Good morning, Your Honor.

3 THE COURT: Good morning.

4 Good to see you, Mr. Wyndham. Are you doing all right?

5 MR. WYNDHAM: Yes, I am, Your Honor.

6 THE COURT: Good.

7 MR. WYNDHAM: I hope you are doing well.

8 THE COURT: Good. Good.

9 THE COURT: All right. And you are Mr. Rosenthal?

10 MR. ROSENTHAL: Yes, Your Honor.

11 THE COURT: Welcome. This is I know something we have
12 had scheduled for quite some time.

13 MR. ROSENTHAL: Correct.

14 THE COURT: Is your client, Mr. Rosenthal, going to be
15 present via speakerphone or how do we -- is he waiving
16 presence today?

17 MR. ROSENTHAL: No, he is waiving his presence today.

18 THE COURT: Okay.

19 MR. ROSENTHAL: It is a motion for we believe entry of
20 default, set aside the judgment. We got to this matter which
21 was -- my client is as you know presently incarcerated in
22 federal prison. My client filed the original complaint back
23 in 2017. There was an answer filed with what was purported to
24 be a counterclaim by the defendant in 2018. And as you can
25 see from the memorandum that has been filed with the court

1 that at the time that the -- my client never received the
2 notice -- never received the answer and the counterclaim or
3 the notice of default.

4 And as a result of the fact that he was moved from one
5 prison to another from Fort Dick in New Jersey to another -- a
6 hospital present in Lexington, Kentucky, oftentimes the mail
7 is sent to him as a return to sender. And there was an
8 affidavit that was filed with the memorandum that -- filed by
9 John True the son of the plaintiff that states that this often
10 happens where mail is returned to and never received by the
11 inmate.

12 Further, the -- one of the major arguments of the
13 plaintiff here is that the answer and counterclaim that was
14 filed by the defendant does contain what is labeled as a
15 counterclaim, but actually our argument is that it is not a
16 counterclaim at all but a claim under the South Carolina
17 Frivolous Proceedings Act which is something that is handled
18 by motion at the conclusion of the trial -- of the
19 proceedings, something that would fit as a counterclaim.

20 So based on the fact that my client never received or has
21 a good argument that he never received the answer and the
22 request for the counterclaim and the fact that the
23 counterclaim is not really a counterclaim but really a motion
24 for sanctions we would ask the court to reinstate the
25 complaint and allow the case to go forward.

1 Another issue that the court has to deal with is whether
2 or not there is a meritorious claim. In the plaintiff's claim
3 as it is set out certainly shows merit based on the fact that
4 the genesis of the complaint was that there was a house that
5 was rented by the defendant from the plaintiff and at the time
6 it was rented there was this -- there was a certain lease that
7 called for I think it was \$4,200 a month. That was reduced to
8 \$2,000 a month based on an agreement between the parties that
9 the defendant would pay the plaintiff -- would loan the
10 plaintiff \$75,000.

11 And the allegation is that that payment was never made,
12 so the difference between the \$4,200 lease and the revised
13 lease that was reduced to \$2,000 based on consideration of
14 having a loan made by the defendant to the plaintiff which was
15 never made that there is at least damages based on the
16 difference between the 4,200 and the 2,000 and also damages as
17 to the fact that the \$75,000 loan was never made by the
18 defendant to the plaintiff.

19 So the defendant -- the plaintiff here argues that there
20 certainly is a meritorious claim. And the -- with these kind
21 of cases, as the Court knows, it is up to the discretion of
22 the judge, the sound discretion of the judge, to determine
23 whether or not the default can be removed.

24 Some of the issues in deciding whether or not the default
25 is going to be removed are based on how long it took the

1 defaulting party to try to remedy the situation. Here it was
2 remedied within one or two days of hearing that the default
3 was entered.

4 So the timing for the motion of relief is about as fast
5 as you can go to try to reinstate the claim, whether or not it
6 is a meritorious claim, which I have just argued to the court.
7 And the degree of prejudice to the defendant, and here we
8 argued that there was no prejudice because it was so quickly
9 after the -- after default took place that the motion was made
10 to remove the default.

11 Finally, there is some issue as to whether or not the
12 plaintiff here was confused or misled by the actions of court
13 personnel. And of course no one meant to hoodwink or make
14 this case so that the plaintiff couldn't go forward. But it
15 seems like based on the affidavits filed by John True that
16 there was some interaction between the court personnel and the
17 plaintiff here in that the plaintiff was waiting to hear back
18 from the court as to whether or not I guess the matter before
19 the default was -- before the motion for default was made that
20 the matter was moved to what the court calls a jury roster.
21 So at the time that the matter was removed from the jury
22 roster at that time the plaintiff was waiting to hear to try
23 to make some arrangements as to how he could continue with the
24 case based on the fact that he is incarcerated and trying to
25 make some arrangements with the court as to how that could go

1 forward.

2 So while he was waiting for all of this to take place
3 that is when the default motion was filed which my client
4 claims he never got notice of. And as a result of waiting for
5 the issue of the jury roster to be resolved the motion for
6 default was filed and allowed.

7 So my client was waiting to hear back from the court as
8 to how to try to resolve the issue of how to go forward on the
9 -- with the jury trial. And in that same period of time that
10 was when the motion for default was filed and that was when it
11 was allowed without obviously my client being present or
12 knowing about the fact that this was going on.

13 So based on the fact that there is a meritorious claim,
14 based on the fact that it was quickly -- the plaintiff quickly
15 filed to remove the default, and the physical situation of the
16 plaintiff not being able to -- not receiving the -- a lot of
17 the mailings that were sent to him.

18 And I know that the -- we don't have any kind of specific
19 proof that this certain motion that was made by the defendant
20 for the either the answer in the counterclaim or the motion
21 for default was received by the plaintiff.

22 I do have another letter that was more recently sent to
23 the plaintiff but -- by his son. It was sent to the mailing
24 address and then sent on to him. And you can see that --
25 hopefully see that it says return to sender. So many of the

1 things that were sent to him even though it is legal mail or
2 even though it is something from the court or something from
3 an attorney it is arbitrarily returned without him ever
4 receiving it.

5 So based on this argument along with the fact that even
6 if there is -- even if there is reason for a default we claim
7 that there is no counterclaim in any of the defendant's
8 defenses and counterclaims they are really not counterclaims
9 but they are actually it is a motion under the Frivolous
10 Proceedings Act which should be heard at the conclusion of the
11 matter.

12 Thank you, Judge.

13 THE COURT: All right. When you say your client was
14 served initially you mentioned that he switched prisons; is
15 that right?

16 MR. ROSENTHAL: He was moved from Fort Dix in New Jersey
17 to a medical facility in Kentucky.

18 THE COURT: Okay. Did he notify the court when he - his
19 change of address?

20 MR. ROSENTHAL: His - no, his mailing address was always
21 a P.O. Box in Charleston and then it is forwarded on to him by
22 his son.

23 THE COURT: Okay. So his mailing address never changed
24 then ---

25 MR. ROSENTHAL: Correct.

1 THE COURT: --- as far as the court knew; is that right?

2 MR. ROSENTHAL: Yes.

3 THE COURT: Okay.

4 MR. ROSENTHAL: But obviously he is not receiving the
5 mail at his mailing address. It is just the address the mail
6 is sent to and then it is forwarded on to him by his son and
7 his son ---

8 THE COURT: So then his son has to take his mail and
9 forward it on to him?

10 MR. ROSENTHAL: Correct, without opening it. He just
11 sends it on to him. And, like I said, it is either not
12 received or oftentimes returned and never received by the
13 plaintiff.

14 THE COURT: Okay. I am happy to hear from you, Mr.
15 Wyndam.

16 MR. WYNDHAM: Thank you, Your Honor. The plaintiff in
17 this case filed a summons and complaint. In the summons it
18 requires the defendant to serve the plaintiff at 164 Market
19 Street, Suite 177, Charleston, South Carolina 29401.

20 That is where the plaintiff was served the summons. We
21 filed a motion for entry of default. Not a default judgment
22 but an entry of default. We filed an affidavit. The process
23 servers had served the plaintiff at that address.

24 And because the plaintiff had sent a letter from prison
25 to Judge Scarborough it got its way to the Clerk of Court's

1 Office and when I asked them to sign an order on an entry of
2 default they said since we got this letter we can't do that,
3 you have got to have a hearing. And we have had that hearing.
4 And the plaintiff was provided with notice of that.

5 And so at this point the only thing that has been done is
6 an entry of default. And he is in default. He was in prison
7 at the time he filed his lawsuit. He had been there for many
8 years.

9 And so he is the one that brought the case. He is the
10 one that told us where to serve him. We served him. He is in
11 default. And we don't think Your Honor should let him out of
12 default.

13 In terms of the meritorious claim in the case if Your
14 Honor would look at the complaint he filed, this has to do
15 with a lease of a residential home located at 1180 Chersonese
16 Round in Mount Pleasant, South Carolina. The plaintiff is not
17 the owner of that home and has no legal rights.

18 He put in Paragraph 15, the plaintiff provides in there,
19 that: I brought a lawsuit over the lease agreement about the
20 money that he was talking about. The magistrate ruled in my
21 favor. Mr. Tuorto appealed to the circuit court, and the
22 circuit court ruled in Mr. Tuorto's favor.

23 He has lost that. And that is one of my affirmative
24 defenses. He has lost it. He has no legal claim. The home
25 had been in foreclosure forever. It was sold at a foreclosure

1 sale to the mortgage holder prior to this lawsuit being filed.
2 He has no legal interest in the home. He has no right to
3 pursue any claim.

4 In addition the home was in the trust name. And so
5 individually Mr. True has no right to pursue anything. A
6 legal representative of the trust could have brought a case.
7 But he can't. And so we haven't filed a motion to dismiss.
8 We simply filed a motion for an entry of default. We would
9 ask Your Honor to deny that motion and then later allow us to
10 have a damages hearing.

11 I sent discovery requests to counsel. He asked that I
12 give him an extension of time to answer until the court makes
13 a decision today. I agreed to do that. So I wanted to do a
14 little discovery before we have our damages hearing.

15 And, again, he was served. There is no excuse for not
16 answering. We served him where he asked to be served. So we
17 would ask that you deny their motion to be out of default.

18 THE COURT: Okay, so the damages hearing portion is on
19 the calendar. We are just going to have to mark it as
20 continued for purposes of today I assume.

21 All right. Anything else you want to tell me, Mr.
22 Rosenthal?

23 MR. ROSENTHAL: Just in response to what my brother said
24 about the claim. Anything that has to do with either a motion
25 to dismiss for failing for any claim or any other issues that

1 are involved with what my brother is arguing would be
2 something that would be subject to let's say a motion for
3 summary judgment or a motion to dismiss.

4 We are talking about just staying the lawsuit at this
5 point based on the fact that even though there is a default
6 here that it is up to the discretion of the court to allow the
7 default to be removed. And we would say that this is a
8 lawsuit that should be decided on its merits and not on a fact
9 that there was technically missing -- missing a response by my
10 client.

11 And more importantly even if -- the basis of the default
12 was failure to answer a counterclaim, so if the counterclaim
13 is not really a counterclaim but called a counterclaim then it
14 shouldn't be even a reason for the default and we should be
15 able to allow the merits of the case to go forward, Judge.

16 THE COURT: Okay. I am going to look at this a little
17 closer and get word to you within the week, all right. Thank
18 you.

19 MR. ROSENTHAL: Thank you

20 MR. WYNDHAM: Thank you.

21 THE COURT: If we need anything else we will contact your
22 office. Okay. I appreciate it.

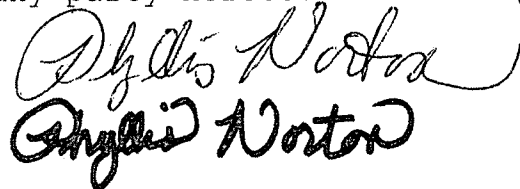
23 (WHEREUPON, the hearing adjourned.)

(NOTE: Please contact the court reporter for additional copies or certified transcripts.)

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South Carolina, on September 26, 2018.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

A handwritten signature in cursive script, reading "Phyllis Norton", enclosed within a large, loopy circular flourish.

PHYLLIS NORTON, CVR

Date: September 30, 2019

Certified Transcript Provided For: Peter H. Rosenthal
Certification Reference #2019-0930 ORIG

1 STATE OF SOUTH CAROLINA

2 COURT OF COMMON PLEAS

3 COUNTY OF CHARLESTON

4 -----x

5 THOMAS TRUE, individually,)

6 and as trustee of JATE IV,)

7 Trust,)

8 Plaintiffs,)

9 vs.)

10 WILLIAM TUORTO,)

11 Defendant.)

Transcript of Record
2017-CP-10-01395

12 -----x

13 March 13, 2019

14 DEFENDANT'S MOTION

15 B E F O R E:

16 The Honorable William H. Seals, Jr., Judge.

17
18 A P P E A R A N C E S:

19 Peter H. Rosenthal, Esq.
20 Attorney for the Plaintiff

21 Robert J. Wyndham, Esq.
22 Attorney for the Defendant

23
24 Court Reporter: Jowandaly Graham

25 Transcribed by: Bobbi Fisher, RPR, CET

R106

I N D E X

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Argument by Mr. Rosenthal	5
Response by Mr. Wyndham	20

E X H I B I T S

(None.)

1 P R O C E E D I N G S

2 (Whereupon, the proceedings commenced as follows:)

3 MR. WYNDHAM: Good morning, Your Honor.

4 THE COURT: Good morning.

5 MR. WYNDHAM: This is the defendant's motion, Your Honor.

6 Robert Wyndham on behalf of the defendant, William Tuorto.

7 THE COURT: All right. Ready whenever you are.

8 ARGUMENT ON BEHALF OF THE DEFENDANT

9 MR. WYNDHAM: Thank you, Your Honor. I filed a short
10 memorandum yesterday. I'm not sure if Your Honor has that in
11 the file; I can hand it to you.

12 THE COURT: Here it is.

13 MR. WYNDHAM: Your Honor, the case we're here on today
14 was filed by Thomas True individually and as trustee of Jate
15 IV Trust. And that complaint was filed on March 17th, 2017.
16 We filed an answer and counterclaim on May 1st, 2017, and in
17 our answer, we asserted the defense of collateral estoppel.
18 We now have filed a motion for summary judgment.

19 And as stated in our memorandum, when you look at
20 Plaintiff's complaint, his claim is based on an original
21 lease -- and this is paragraph 6. The lease agreement was
22 originally dated August 28, 2011. Thereafter, the plaintiff
23 sought to renegotiate the original lease with the tenant,
24 William Tuorto.

25 And the original lease provided for 4,250 bucks a month,

1 and the new lease provided for \$2,000 a month. He goes on in
2 his complaint to say that, one year after the renegotiated
3 lease, he filed a claim in magistrate's court alleging
4 Mr. Tuorto had not paid rent, should be ejected from the
5 property. He also alleged that the lease was invalid because
6 he didn't have the authority as a trustee to enter into the
7 new agreement. At the magistrate level, the Court denied his
8 motion to eject Mr. Tuorto but ruled that, under the trust
9 agreement, he exceeded his authority so the lease was no good.

10 Mr. Tuorto appealed that decision to this Court, and he
11 actually, in his complaint -- that's what the client says --
12 and says, back in 2014, I lost. I attached a copy of the 2014
13 order of this court, which was not appealed. And in that
14 order, Judge Nicholson makes factual findings, and the factual
15 findings were that the parties entered into a lease under
16 which appellate leased the house on the premises at 1180
17 Chersonese Round, Mount Pleasant, South Carolina. Same
18 property, same lease as we're here today about.

19 On August 28, 2011, the property is owned by the trust.
20 So it's not owned by Thomas F. True, so, individually, he has
21 no standing to be a plaintiff in this case. The only person
22 that would -- or the only entity that would have standing
23 would be the trust, and so he's an improper plaintiff.

24 But the order goes on to find -- and it talks about the
25 original lease -- and the finding is: Due to the deferred

1 maintenance cost existing in the property, the parties
2 renegotiated and entered into a second lease agreement on
3 November 15, 2011. Same as in this complaint. Same
4 obligations by the plaintiff. Same two leases.

5 And so the order talks about the legal issue involved in
6 the case. They rule in Mr. Tuorto's favor. And at the end of
7 the order, the judge says, "Ordered, adjudged, and decreed
8 that the determination by the magistrate court, rendering the
9 revised lease void or voidable is reversed. It is further
10 ordered, adjudged, and decreed that the revised lease is a
11 valid and enforceable contract, including the purchase option
12 provision given appellate."

13 So back in 2014, this Court ruled that the revised lease
14 was enforceable. The revised lease provided for 2,000 a
15 month. The original lease provided for about 4,000 a month
16 but really only for the first five months, but that's out.
17 All of the claims for damages, when you read the Plaintiff's
18 complaint, it is he paid 2,000; he should have been paying
19 4,000, so that's my damages.

20 So it's the identical case. They're barred by collateral
21 estoppel, res judicata. Identical parties, identical factual,
22 identical legal issues, and this Court has already made a
23 determination back in 2014.

24 THE COURT: All right. Be glad to hear from Plaintiffs.

25 ARGUMENT ON BEHALF OF THE PLAINTIFFS

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20 So it's the identical case. They're barred by collateral
21 estoppel, res judicata. Identical parties, identical factual,
22 identical legal issues, and this Court has already made a
23 determination back in 2014.

24 THE COURT: All right. Be glad to hear from Plaintiffs.

25 ARGUMENT ON BEHALF OF THE PLAINTIFFS

1 MR. ROSENTHAL: Good morning, Your Honor. My name is
2 Peter Rosenthal. I represent plaintiffs.

3 First of all, I would like the Court to know that there's
4 only, in the last 12 hours, I received my brother's memorandum
5 in support of this motion for summary judgment regarding this
6 collateral estoppel issue. So my first request would be to
7 strike the memorandum and the support for it based on the fact
8 that its response was late.

9 And if the Court does not want to accept it as a late
10 filing, I'd ask for time to be able to an order -- response
11 for better thought out and give me some time to file a
12 response.

13 But what I can say right now, based on what I have looked
14 at is, number one, that this collateral estoppel issue was
15 present at the beginning of the case. What had happened was,
16 the plaintiffs had not responded to a counterclaim that was
17 made by the defendants. As a result of that, there was a
18 default entered. That was back, I believe, in 2018.

19 What had happened was my client, Thomas True, is
20 currently incarcerated in the federal prison system and has
21 been throughout the timing of this case, and made some -- had
22 not received the counterclaim that was filed by the defendant.
23 So as a result of that, I became involved in the case and made
24 a motion to set aside the default. That was heard in October
25 of last year. And as a result of that motion, the Court set

1 aside the default and reinstituted the case.

2 Now, as part of that decision made by the judge to set
3 aside the default, the Court, obviously, reviewed the claim
4 and the answer, and as a result of -- in order to make the
5 determination to set aside the default, it had to be material
6 facts that the Court relied on in order to let the case go
7 forward. If this collateral estoppel issue, which was there
8 as amended to by my brother, was there in their answer, then
9 the Court would have said at that time, Okay, there's no case,
10 we're not going to set aside the default because there's no
11 material issue of fact to go forward with.

12 So the Court's already made a determination that that
13 collateral estoppel issue doesn't apply. But in addition to
14 that, just off the brief time that I have had to review my
15 brother's motion, there is case law throughout the cases in
16 South Carolina that deal with collateral estoppel and deal
17 with res judicata. And first they say that to darken
18 collateral estoppel should not be rigidly or mechanically
19 applied.

20 Secondly, they bring up the issues that are required for
21 a collateral estoppel, and one of the issues is there has to
22 be an actually litigated action. In other words, it has to be
23 a -- both parties have to appear and litigate the case in
24 front of a judge. In this case, there was no response. The
25 defendant -- or the plaintiff in that case went in for

1 ejectment. This case was not -- it has nothing to do with
2 ejectment, so first of all, it's not the same issue. But even
3 if you think that there are the same issues involved, there
4 was not a trial. There was not a hearing that fleshed out
5 whether or not the second lease was valid. The only decision
6 that the Court made was that the trustee, from a technical
7 point of view, tried to invalidate the lease too late.
8 Something had to occur within, I believe, a year's time, and
9 that didn't occur, so the judge said, on a technical issue,
10 you didn't come in soon enough, so I'm not going to say this
11 lease is void or voidable because you can't reach that issue
12 because, technically, you have come too late.

13 Secondly, if you look at the decision that was made by
14 the Court on the ejectment that allowed the second lease to
15 stand, one of the major issues that my client is -- has
16 alleged is that there is a breach of contract based on the
17 fraud in the inducement to enter into the contract by the
18 defendant, Tuorto.

19 The second lease, obviously, if you look at it just from
20 a practical point of view, you ask yourself why does the
21 plaintiff drop the rental down from \$4,200 a month to \$2,000 a
22 month. There, logically, has to be reason for it. And the
23 reason for this alleged in the complaint of the plaintiff is
24 that the defendant had offered to make a loan of \$75,000 to
25 True and to Jate IV Trust because, at the time of this

1 renegotiation took place for the second lease, there was a --
2 pursuant to an affidavit that's been filed with the opposition
3 to the summary judgment motion, there was a -- my client,
4 Mr. True, was a developer, and at the time that the second
5 lease was negotiated, he was trying to secure a parcel of
6 property, and the parcel of property required a down payment
7 to the bank of \$75,000.

8 So the affidavit of my client's son, who was personally
9 present at a negotiation session during which the second lease
10 was discussed and agreed to, in order to enter into the second
11 lease, there had to be this \$75,000 loan made. The \$75,000
12 loan was never made.

13 In the best interest -- in the light most favorable to
14 the plaintiff here, the Court has to accept the fact that that
15 \$75,000 loan was never made. That \$75,000 loan provided the
16 inducement to enter into the second lease, and the second
17 lease was supposed to be held in escrow until the \$75,000 was
18 made. So if you read the affidavit, which is the only
19 evidence that's before the Court that's outside the pleadings,
20 is the affidavit of John True, who was present at the time
21 that the parties discussed it and agreed to enter into a
22 second lease contingent upon a loan being made of \$75,000
23 before the lease was taken into effect.

24 According to the affidavit, the lease was supposed to be
25 held in escrow until the loan was made, and only when the loan

1 was made was the lease to become effective. But, instead,
2 what happened was the defendant took the lease out of escrow
3 as soon as it was signed or the same day it was signed and
4 recorded it with the registry of deeds and began to pay the
5 lower rent, even though they never made the \$75,000 loan.

6 So if you read through the memorandum that I filed with
7 the Court in opposition to the summary judgment motion, the
8 Court will see that the lease should never have come into
9 effect. We're not saying that the lease itself -- we're not
10 trying to fight the fact that the lease itself was signed but
11 we're saying that the lease was not supposed to come into
12 existence without the payment of the loan. And, therefore,
13 the defendant committed fraud in the inducement, which allows
14 the Court to look at the whole picture as to what happened
15 prior to the lease being recorded. And, therefore, there is
16 material issues of fact, which the Court can review here.
17 It's not just collateral estoppel based on the narrow issue of
18 the trustee signing a lease -- trying to get out of a lease
19 that's beyond the one-year requirement for a trustee to remove
20 himself from a lease, which is the basis on which the Court
21 made the determination that the lease was good.

22 They have duty of loyalty issues of the trustee, to the
23 beneficiaries, dates by which something is void or voidability
24 of a lease has to take place. Those are the issues that the
25 Court made a determination that the lease was valid.

1 If you look at the decision that my brother has presented
2 today of the Court -- it's on the second or third page. The
3 top of the page starts with paragraph, "Second, the order,"
4 meaning the order that the judge has overturned, "contradicts
5 statutory authority." Specifically, the order states, and he
6 quotes, "The trust alleges that the trustee entered into the
7 agreement in part to secure a loan from the defendant, and
8 that makes the second lease voidable."

9 So the judge in the appeals court, the judge said --
10 overturned the decision of the magistrate is saying that there
11 is an issue there of the \$75,000 loan that was brought up
12 before the original magistrate, not in determining whether or
13 not -- and this is my words -- I'm not determining -- the
14 second judge is saying I'm not making a determination on
15 whether or not that happened or whether or not the loan didn't
16 take place. What he's saying is, based on the technicalities
17 of the law regarding what the ability of a trustee to void a
18 lease, he hasn't done that on time. So, technically, you
19 can't void a lease, and the magistrate didn't realize that or
20 didn't make the decision -- didn't make the proper decision on
21 the time period by which the trustee had to come in and voice
22 the lease. The defendant didn't know that the trustee didn't
23 have the power to void the lease.

24 So on that technical basis, I'm going to say that the
25 second lease was good, but he didn't make any decision based

1 on the decision of the magistrate, which said that the trustee
2 entered into the agreement and prior to securing a loan from
3 the defendant and that loan was never made. So that never has
4 never been litigated, and that's the issue in the complaint
5 that's before the Court today. The issue is the \$75,000 loan
6 was promised. The \$75,000 loan was never made.

7 So the issue of collateral estoppel, going to whether or
8 not the facts of whether or not that loan was made, one of the
9 issues before this Court is unjust enrichment. So Defendant
10 gets a reduction of more than half of a lease amount per
11 month. For what reason? There's no -- what consideration
12 went in to giving him the reduction? The consideration for
13 the \$75,000 loan that was never made.

14 So without making a loan, he still gets the benefit of
15 the \$2,250 reduction per month of the rent for several years
16 based on fraud, based on something that he was supposed to do
17 that he didn't do. So what did the defendant gain by that?
18 The defendant gained, under the theory of unjust enrichment,
19 which is an equitable principle, he gained -- he was enriched
20 by the fact that the lease was dropped by \$2,250 a month, but
21 he gave nothing in return for that. So as a result in
22 receiving that \$2,250 a month, he was unjustly enriched, which
23 is well-briefed in my memorandum to the Court.

24 So in addition to the late filing that my brother made on
25 this issue of collateral estoppel, which I would say should be

1 stricken, but even if it has not, the Court has already made a
2 decision on that when it decided to allow the plaintiff back
3 in the case in order to set aside the default back in October
4 of last year.

5 In addition to that, we had the summary judgment motion
6 that's filed at the very beginning of this case. This case
7 really got off the ground -- technically got off the ground
8 once the set-aside was presented in October. The judge made
9 the decision to set aside the default I believe October 29th.
10 My brother made the motion for summary judgment on October 1st
11 and it sat there with nothing happening to it until there was
12 a -- this Court scheduled a hearing for what we're before you
13 today, for January, as a result of being continued to today.
14 Today is the date that we're hearing the motion for summary
15 judgment.

16 At the beginning of the case, the case law says that
17 summary judgment is based on discovery, affidavits, everything
18 that's filed after the initial complaint and after the initial
19 pleadings are made. In this case, there's been no discovery.
20 There's been no chance for the plaintiff to investigate or get
21 into or ask questions about or get responses, interrogatories,
22 production of documents about what happened to this \$75,000
23 loan, why it was made, whether it was made, whether -- what
24 was he supposed to do with the lease? Was he supposed to hold
25 it in escrow?

1 These are all issues that the judge has to -- that the
2 Court has to find in favor of the plaintiff here at the
3 summary judgment because the Court, obviously, has to look at
4 these facts in the light most favorable to the plaintiff. In
5 the light most favorable to the plaintiff, there was an unjust
6 enrichment received by the defendant that has nothing to do
7 with the decision that was made by the Court on the ejectment
8 issue. We're not relitigating the ejectment. We're not
9 relitigating the fact that the trustee didn't have the right
10 to -- didn't have the right to contest the second lease
11 because it was too late. We're not here for that purpose.
12 We're here for the purpose of all the other issues that arise
13 as a result of the fact that the defendant never made the
14 loan, which was the consideration for the lease.

15 The next issue, Your Honor, is the fact that, also very
16 recently, my brother made another motion to this Court that I
17 received an email about and just received the actual hard copy
18 of the motion that was sent down on March 6th, which was a
19 motion to dismiss this case based on 12(b)(6), that there has
20 no cause of action, which essentially is the same basis on
21 which the motion for summary judgment is being made.

22 But when the Court -- when and if the Court considers a
23 motion on the 12(b)(6) and there's been additional paperwork
24 and additional filings, in this case, the affidavit of John
25 True regarding the -- what happened with the negotiation of

1 the second lease, once there's been additional filings that
2 are made to the Court beyond the initial pleadings, a motion
3 of a 12(b)(6) is automatically converted into a motion for
4 summary judgment. And that is also addressed in my --
5 coincidentally, I did address that in my opposition, even
6 though the opposition was filed before this 12(b)(6) motion
7 was made.

8 So if you're looking at a 12(b)(6) motion and looking
9 only at the pleadings, so the 12(b)(6) motion itself should be
10 denied based on the fact that the judge has already basically
11 said that there is a cause of action because, without a cause
12 of action, material facts been found or the judge had made a
13 determination on the motion to set aside the default, she
14 never really set aside the default. She would have said
15 there's nothing there. So even though you might have a good
16 reason for not answering the counterclaim -- you didn't answer
17 the counterclaim on time, you would have defaulted, even
18 though I could remove it because you have a valid excuse for
19 not responding, I'm not going to remove it because there's no
20 issue here. There's no issues of material fact. So that's
21 the second issue.

22 The third issue, Your Honor, is the fact, as I said,
23 summary judgment is premature, and I filed a motion myself --
24 not a motion -- I filed an affidavit myself as an attorney
25 under the rules that states that my client, being a federal

1 prisoner, was unable to file an affidavit himself, which would
2 be in support of our opposition to this motion. And even
3 though I tried to get an affidavit from him because of the
4 problems with the federal prison -- he's been moved from one
5 place to another; he was in Fort Dix and now he's in Kentucky
6 at a federal prison -- health facility -- I wasn't able to get
7 an affidavit -- I wasn't able to get an affidavit for this
8 Court at this time from my client.

9 So as a result of that, I'm asking for the Court, even if
10 they do think that there is enough to allow the motion for
11 summary judgment, that they delay any action on a motion for
12 summary judgment until we get further on the case, there's
13 further discovery, I'm able to get a proper affidavit from my
14 client to be able to support our opposition.

15 So that's the next issue, that I wasn't able to get an
16 affidavit from my client to support my opposition. And just
17 as an aside, I have been told that, at this time, my client,
18 in addition to the problems that he had when he was
19 hospitalized in the federal prison in Kentucky and probably
20 have an answer as to why I wasn't able to get the affidavit --
21 get an affidavit back from him is that he's now bed-ridden
22 with a heart problem and, apparently, is having a lot of
23 problems being able to make it through the day let alone, I
24 guess, be able to respond to the -- to be able to get the
25 affidavit. Plus I have had a lot of trouble just with the

1 administration of the prisons in order to get material to my
2 client and for my client to get material back out to me,
3 including, obviously, an affidavit has to be notarized. And
4 getting all that done, we haven't been able to accomplish
5 that.

6 The next issue is the summary judgment -- the relevant
7 material facts that create causes of action in this case --
8 several causes of action. Those include -- as I stated
9 already to the Court, those include the unjust enrichment.
10 Unjust enrichment is an equitable action, and what has to be
11 shown is that there was a -- the defendant was enriched
12 unjustly and permits recovery of the amount that the defendant
13 had been unjustly enriched at the expense of the plaintiff.

14 The elements to recover for unjust enrichment, based on
15 quantum meruit, quasi contract, and implied by law contract
16 are equivalent in terms for equitable relief and are as
17 follows:

18 Number one, a benefit conferred on the plaintiff, which,
19 obviously, there is a benefit here, which is the reduction of
20 rent;

21 Number two, a realization of the benefit by the
22 defendant, which also took place. He realized for a long
23 period of time a reduction in rent of \$2,250 a month;

24 And, three, retention of benefit by the defendant under
25 circumstances that make it inequitable for him to retain at

1 low-paying values for it.

2 So if the \$75,000 loan is a pre-condition to entering
3 into the second lease, and the second lease was supposed to be
4 held in escrow and wasn't held in escrow but, in fact, was
5 recorded and the defendant started paying the reduced amount
6 of money without making the loan, then, in the light most
7 favorable to my client, there was unjust enrichment.

8 There was also an issue of breach of contract. The
9 contract may be -- that may be breached. In addition to the
10 breach of contract of a lease, even if the Court says that the
11 lease is good, there was a contract -- in the light most
12 favorable to my client, there is a contract that was made
13 between the two parties, an oral contract that, okay, this
14 lease, you can go -- you can file this lease, record this
15 lease, and pay the 2,000 based on you're giving me the
16 \$75,000. You didn't loan the \$75,000 so that, in itself, is a
17 separate contract, then, that's made between the two parties
18 that was breached. So there is a breach of contract there.

19 Then, in my opposition, I go into the parol evidence rule
20 and fraudulent intent. In the light most favorable to my
21 client, the parol evidence rule doesn't come into evidence and
22 there's fraud in the inducement to induce the plaintiff to
23 enter into this reduced-rent situation. And that, again, is
24 briefed in my memorandum.

25 And then we have a separate issue of conversion, also in

1 my claimant's complaint. He said that the defendant took and
2 kept for himself personal property that belongs to the
3 plaintiffs. And that's an issue that hasn't even been
4 contested and that there's no affidavits. In the light most
5 favorable to my client, that there is a conversion that took
6 place here.

7 So based on the argument that I'm making this morning and
8 requesting the Court to -- if they decide that the collateral
9 estoppel issue should be, even though late-filed, considered
10 by the Court, to give my client and myself time to be able to
11 respond to that issue, which, like I said, I just received
12 yesterday after 4:00 in the afternoon.

13 So I don't think that that's proper for the Court to
14 consider something --

15 THE COURT: I tell you what: I'll give you until
16 Thursday. If you want to respond, email a response to me, and
17 I will rule by end of the week.

18 MR. ROSENTHAL: Thursday next week?

19 THE COURT: This week.

20 MR. ROSENTHAL: Thursday this week.

21 THE COURT: I will rule by 5:00 on Friday.

22 MR. ROSENTHAL: Okay. Thursday is --

23 THE COURT: Modified.

24 MR. ROSENTHAL: Modified.

25 THE COURT: The memorandum he filed is really small.

1 It's very short and very simple. If you want to respond to
2 it, feel free.

3 MR. ROSENTHAL: Okay. I would like to respond to it, but
4 it's also (indiscernible) because we're not going back to my
5 office until Thursday afternoon.

6 THE COURT: That's fine. You may have probably already
7 orally responded, which is fine as well. But, anyway, I will
8 rule by Friday at 5:00.

9 MR. ROSENTHAL: Okay.

10 THE COURT: Do you want to respond briefly?

11 RESPONSE ON BEHALF OF THE DEFENDANT

12 MR. WYNDHAM: Just very briefly, Your Honor. On the
13 default issue, we filed an answer and a counterclaim. He did
14 not file an answer to the counterclaim. He was in default.
15 He made a motion to let him out of default, and the basis had
16 nothing to do with the complaint. It was -- his counterclaim
17 is -- he's bringing a frivolous proceeding. He's got to win
18 on the first part before it would be proper to have the
19 frivolous proceeding, and the judge correctly ruled, that's
20 correct; I'm going to let him out of default.

21 Timing-wise on this discovery, our action was filed back
22 in May of 2017. We served interrogatories and requests for
23 production asking for the lease agreement and asking for
24 contracts. We agreed to hold off on that until the default
25 was decided.

1 November 7th, 2018, to Mr. Rosenthal: "I'm enclosing a
2 copy of the Court's order granting the motion to set aside
3 default. Since the default has been set aside, I look forward
4 to receiving responses to my discovery requests."

5 It is now March and we haven't gotten any lease
6 agreements, any contracts, any witness -- we got no response.
7 And so we have had plenty of time to do discovery. We have
8 done everything we could do to see what evidence they have,
9 but in his argument, he concedes that all of the issues in
10 this complaint were decided by this Court back in 2014, even
11 this \$75,000 loan was an issue back then.

12 I think the order speaks for itself. The factual
13 findings weren't appealed. The conclusions weren't appealed.
14 And it's the law of the case.

15 THE COURT: All right. I'll get you a ruling by 5:00 on
16 Friday.

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1 CERTIFICATE OF TRANSCRIBER

2 CASE/NO.: Thomas True, et al., vs William Tuorto

3 2017-CP-10-01395

4 DATE OF PROCEEDING: March 13, 2019

5 COURT REPORTER: Jowandaly Graham

6
7 I, Bobbi J. Fisher, do hereby certify that the
8 foregoing transcript is a true and correct record of the
9 recorded proceedings; that said proceedings were transcribed
10 to the best of my ability from the audio recording and
11 supporting information; and that I am neither counsel for,
12 related to, nor employed by any of the parties to this case,
13 and I have no interest, financial or otherwise, in its
14 outcome.

15
16 

17
18 _____
19 Bobbi J. Fisher, RPR, CET

20 NCRA Registered Professional Reporter (RPR)

21 AAERT Certified Electronic Transcriber No. CET-1148

22 Prepared: September 30, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

THE HONORABLE WILLIAM H. SEALS JR., Circuit Court Judge

Case No. 2017-CP-10-1395

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

Appellant,

v.

William L. Tuorto,

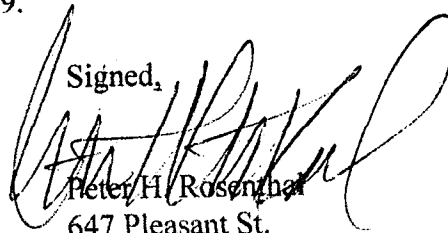
Respondent.

NOTICE OF APPEAL

Thomas F. True, III, Individually and as Trustee of Jate IV Trust, appeals the judgment of the Honorable William H. Seals, Jr. said judgment incorporating an order denying Plaintiff's motion for reconsideration of the allowance of the defendant's motion for summary judgment, said judgment entering on the docket on July 29, 2019. Appellant received written notice of entry of this judgment on August 5, 2019.

August 26, 2019

Signed,



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R129

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,

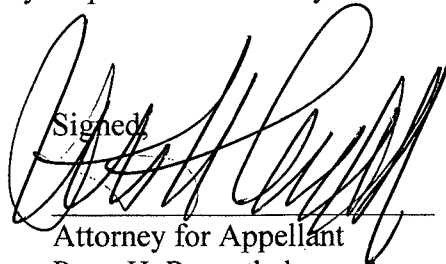
Respondent,

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SC Court of Appeals

CERTIFICATION OF COUNSEL
RECORD ON APPEAL

Pursuant to Rule 210(g), SCACR, the Appellant, by his attorney, hereby certifies that the Record on Appeal contains all material proposed to be included by all parties and not any other material.

January 2, 2020

Signed: 

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