STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2020-001258

TCJ Surfside, LLC and CDP Surfside, LLC . . . . . Respondents

v.

MB Pizza, LLC, d/b/a Hungry Howie's Pizza
and Brian Edelen . . . . . Appellants

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

A. THE PARTIES

Plaintiffs-Respondents, TCJ Surfside, LLC and CDP Surfside, LLC will collectively be referred to as "Landlord". The Defendants-Appellants, MB Pizza, LLC d/b/a Hungry Howie's Pizza and Brian Edelen, will be collectively referred to as "Tenant", unless the context indicates otherwise.

B. STATEMENT OF PROCEDURAL HISTORY

This matter began by the Landlord's filing of the Summons and Complaint on November 14, 2018 [R. ___] alleging that the Tenant had breached its contract with the Landlord, i.e., the lease agreement (hereinafter "Lease") [R. ___]. Although the Tenant was current in all its lease payments throughout the entire Lease term, the Landlord alleges that the Tenant breached the Lease by closing its business prior to the termination of the Lease. It seeks additional rent and damages from Tenant as a result of the alleged breach of contract. The Complaint also asserts a claim against Brian Edelen for an alleged breach of the personal guaranty agreement [R. ___].

Tenant did not timely answer the Complaint. Landlord filed a Motion for Entry of Default on December 21, 2018 [R. ____]. Tenant subsequently retained counsel, who filed a Motion to Set Aside Default on March 4, 2019 [R. ___], together with its Memorandum in Support of Motion to Set Aside Default with Exhibits [R. ___].

Tenant's Motion to Set Aside Default was heard on April 23, 2019, before the Honorable Benjamin H. Culbertson. The Motion was granted by Form 4 Order entered on April 23, 2019 [R. ____] and the Tenant filed its Answer on April 30, 2019 [R. _____]. A formal Order Granting Defendants' Motion to Set Aside Entry of Default and Allowing

the Filing of An Answer was electronically signed by Judge Culbertson on May 9, 2019, and filed on May 10, 2019 [R. ___]. In his Order, Judge Culbertson found, *inter alia*, that the Tenant had raised meritorious defenses to the Complaint. Discovery then ensued.

On October 11, 2019, Landlord filed its Motion for Partial Summary Judgment [R. ____] seeking summary judgment as to Tenant's breach of the Lease but reserving all issues relating to damages. Landlord's Motion for Partial Summary Judgment appeared on the Motions roster on October 29, 2019 for a hearing on December 3, 2019. The Landlord filed a Memorandum in Support of Motion for Partial Summary Judgment on November 27, 2019 [R. ___] ("Landlord's Memorandum"). In Landlord's Memorandum, the sole ground it asserted was that the Writ of Ejectment issued by the Surfside Beach Magistrate Court [R. ___] constituted *res judicata* precluding Tenant from challenging the right of Landlord to declare the Lease in default. Tenant filed its Outline of Argument in Opposition to Plaintiffs' Motion for Partial Summary Judgment ("Outline of Argument") on December 3, 2019 [R. ____] arguing that *res judicata* did not apply in this case.

The hearing on the Landlord's Motion for Partial Summary Judgment was held on December 3, 2019 before the Honorable Larry B. Hyman, who took the matter under advisement, as memorialized in his Form 4 Order filed on the date of the hearing [R. ___]. Judge Hyman told the parties that they could supplement their memoranda, and the Tenant did so on December 6, 2019 [R. ____].

Before issuing an Order in the matter, Judge Hyman retired from the bench. Subsequently, without a hearing, Judge Culbertson entered a Form 4 Order on May 13,

2020 granting Landlord's Motion for Partial Summary Judgment [R. __]. The Order does not explain the Court's reasoning as to why it granted partial summary judgment[1] but it is assumed that the Court ruled that the Writ of Ejectment constitutes a bar to the Tenant raising its defenses as to it not having breached the Lease.

On May 20, 2020, Tenant timely filed a Motion to Alter or Amend the Court's Order of May 13, 2020 [R. ____], which was denied by Judge Culbertson in his Form 4 Order filed on August 17, 2020 [R. ____].

This appeal timely followed.

C. STATEMENT OF FACTS

Hungry Howie's Pizza & Subs, Inc. is a national pizza chain. The Tenant holds the franchise for the Hungry Howie's Surfside Beach location. Defendant, MB Pizza, LLC, d/b/a Hungry Howie's Pizza, entered into the Lease with the Landlord's predecessor in title on or about January 2, 2013 [R. ____]. The Lease had a 72-month term, which ended on January 4, 2019 [R. ____]. During the term of the Lease, the Tenant had paid its rent on time and had otherwise complied with all terms of the Lease.

Brian Edelen is the managing member of MB Pizza, LLC and personally guaranteed the Lease [R. __].

The Tenant was experiencing declining sales. On May 8, 2018, the Tenant gave notice to the Landlord it would not renew the Lease at the end of the Lease term.

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[1] The Tenant, for the purposes of this appeal, assumes that the trial court found and concluded that the doctrine of *res judicata* applied and that the basis for this conclusion is that the trial court considered the Writ of Ejectment a judgment which is a necessary element in order to apply the doctrine of *res judicata*. A formal order explaining the basis of the Judge's decision would have been helpful. *See Woodson v DLI Props., LLC*, 406 S.C. 517, 529, 753 S.E.2d 428, 430 (2014). The Order, by its terms, showed it had not considered Tenants' Outline of Argument filed on December 3, 2019 [R.].

[Affidavit of Brian Edelen, ¶4, R.___]. After the end of the tourist season, with only four months remaining on the Lease, the Tenant closed its Hungry Howie's Pizza location after Labor Day. The Tenant continued to pay its rent and utilities from September 2018 until the Lease expired on January 4, 2019 [Affidavit of Brian Edelen, ¶6-7, R. ___] and was not in default for non-payment of rent.

It is not unusual for restaurants along the Grand Strand to close at the end of the tourist season. [Affidavit of Brian Edelen, ¶5, R. _____]. Affidavit of Kenneth Wells [R. _____].

More importantly, the Lease is confusing on this point. Paragraph 6.1 of the Lease [R. ___] states, in part:

> . . . As such, Tenant agrees that, from and after the Commencement Date, Tenant will continuously and uninterruptedly keep open and operate its business in the entire Premises fully fixtured, stocked and staffed for the purpose specified in Section 1.1(j) and under the trade name specified in Section 1.1(a) with the public daily during such hours as are customary ~~in the Shopping Center~~ for tenant's Use. (strikeout in original.)

The Tenant believed and understood that closing the Hungry Howie's location after Labor Day would be customary for Tenant's Use. The Tenant did not understand that by closing its business operations in September, with only 4 months remaining before the 72-month Lease expired, could be considered a material event of default [Affidavit of Brian Edelen, R.___] and [Deposition of Brian Edelen, p. 58, R.__]. This lease provision is ambiguous on this point, especially with the words "in the Shopping Center" being struck from the Lease. Tenant closed its business reasonably believing that the Lease allowed it to do so.

Prior to the filing of its Complaint in this action, the Landlord filed an Application for Ejectment in the Surfside Beach Magistrate's Court, on or about October 4, 2018 [R. ___]. The Magistrate issued its Rule to Vacate or Show Cause (Eviction) (hereinafter abbreviated "Rule to Vacate") on the same date [R. ____]. The Rule to Vacate states, in part: **"FAILURE TO VACATE THE PREMISES OR RESPOND WITHIN TEN (10) DAYS MAY RESULT IN THE ISSUANCE OF A WRIT OF EJECTMENT."** (emphasis in original). The Tenant did not respond to the Rule to Vacate because it had already vacated the premises [Complaint ¶15, R. ____], and did not believe or understand why a response was necessary. Although the Magistrate did not enter a judgment, he did issue a Writ of Ejectment on or about October 21, 2018 [R. ___].[2] The only basis for issuing the Writ of Ejectment was the fact that the Tenant did not appear or file a return to the Rule to Vacate. No hearing was held on this matter. The Tenant did not object and does not object to the Landlord taking possession of the leased premises.[3]

As previously mentioned, the Landlord began this instant action by the filing of its Summons and Complaint on November 14, 2018. The Complaint states two causes of action: (1) Breach of Contract, and (2) Breach of the Guaranty Agreement. The Complaint alleges that Tenant defaulted on the Lease by closing for business prior to the end of the Lease term and, thereby, breaching the Lease. The Tenant denied the allegation in his Answer. The Complaint does not allege or reference any prior

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2. Although the preprinted Writ of Ejectment form has a space to fill in the date the Order of Judgment was entered, it was left blank, stating ". . . upon Judgment of this Court rendered on the , you are hereby Ordered . . ." [R. ____].

3. The Writ of Ejectment shows that the leased premises had been vacated. Deputy Sheriff Scotty E. Jordan noted that "the rental unit appeared unoccupied . . . " [R. ____].

judgment or that the doctrine of *res judicata* applies in this case, but does reference that a Writ of Ejectment did issue.

The issue of *res judicata* was first raised in Landlord's Memorandum [R. ___]. The trial court granted the Motion for Partial Summary Judgment presumably on the ground that the Tenant's defenses were barred by *res judicata* and that the basis for finding that *res judicata* applied was that a Writ of Ejectment had issued. The Form 4 Order [R. ____] did not address any other issues.

STANDARD OF REVIEW

Summary judgment is a drastic remedy to be invoked cautiously and must be denied if Tenant demonstrates a scintilla of evidence in support of its claims. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). The moving party is entitled to summary judgment only if "there is no genuine issue as to any material fact". Rule 56(c), SCRCP. This Court reviews grants of summary judgment using the same yardstick as the trial court. *Woodson v. DLI Props., LLC*, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). The facts should be viewed in the light most favorable to appellant, the non-moving party, and all reasonable inferences should be drawn in its favor. *NationsBank v. Scott Farm*, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995). "[T]hus, the appellate court reviews all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009).

"Reasonable doubt as to what was decided by a prior judgment should be resolved against using it as estoppel." *United States v. Ruhbayan,* 325 F.3d 197, 203 (4th Cir. 2003).

ARGUMENT AND CITATION OF AUTHORITIES

This appeal raises novel issues of law. In its Complaint, the Landlord alleges breach of contract (the Lease). In its Answer, the Tenant denies that it breached the contract [R. ___]. In granting partial summary judgment, the trial court struck the Tenant's defenses relating to its denials and affirmative defenses that it had not breached the contract.[4] The trial court applied *res judicata* solely on the fact that a Writ of Ejectment had issued. No decisional law in South Carolina supports this holding that a Writ of Ejectment is the equivalent of a judgment for purposes of *res judicata*.

Additionally, the South Carolina appellate courts have ruled that *res judicata* does not apply in certain proceedings. *See*, for instance, *Shelton v. Oscar Mayer Foods Corp.*, 325 S.C. 248, 251, 481 S.E.2d 706, 707 (1997) (issue of whether collateral estoppel applies to rulings of the Employment Security Commission had not been directly addressed by the appellate courts previously). This appeal presents the issues of whether the doctrine of *res judicata* should apply in a summary ejectment proceeding and whether a writ of ejectment alone can provide the basis for applying the doctrine of *res judicata*.

[4] The Tenant, in its affirmative defenses, alleges that any alleged breach of the Lease was not a material breach. It is argued in Landlord's Memorandum that the alleged breach was a material breach. This issue was not pled and there is no evidence that the issue of materiality of the breach was raised with the magistrate.

I. THERE IS NO FINAL JUDGMENT IN THE RECORD ON WHICH TO BASE *RES JUDICATA*

A. The Summary Eviction Process

"All proceedings before magistrates shall be **summary** or only with such delay as a fair and just examination of the case requires." (emphasis added.) S.C. Code Ann. § 22-3-730. Ejectment proceedings, as set out in S.C. Code Ann. § 27-37-10, *et seq.*, are "exceedingly" summary proceedings. *Wimberly v. Shorter*, 204 S.C. 558, 562, 30 S.E.2d 593, 595 (1944). The purpose of the ejectment proceedings is to determine who has the right to the immediate possession of leased property.

The commencement of an ejectment proceeding does not require the service of a summons, which would allow a defendant thirty (30) days to respond (Rule 12(a), SCRCP). Rather, it provides the tenant ten (10) days to voluntarily vacate the premises or to show cause why it does not have to vacate. S.C. Code Ann. § 27-37-20. The tenant is given the option to vacate, for whatever reason, or to challenge the eviction proceedings against it. If the tenant does not appear to show cause, a writ of ejectment summarily issues. S.C. Code Ann. § 27-37-40.

In this case, the Tenant had already vacated the leased premises prior to the filing of the Writ of Ejectment. The Tenant did not have a reason to respond to the Rule to Vacate, as it had already complied with the Rule to Vacate, even before it issued. The Tenant complied with the Rule to Vacate and no further response was necessary.

B. A Rule to Vacate Does Not Provide for a Default Judgment

Generally, in litigation, a summons is required to initiate a lawsuit. The summons describes what happens if a complaint is not timely answered. Rule 4(b), SCRCP

requires that the form of the summons contain sufficient information ". . . to notify him [the defendant] that in case of his failure to do so [appear and defend] judgment by default will be rendered against him for the relief demanded in the complaint". The summons has to inform the defendant of the consequences of what happens if he does not answer the complaint; namely, that a default judgment will be entered against him.

In contradistinction, in an ejectment proceeding, a rule to vacate notifies a tenant of the institution of the eviction proceeding and that the tenant must either vacate the premises or show cause why he does not have to vacate. The only consequence of not responding to the rule to vacate is that a writ of ejectment will issue. S.C. Code Ann. § 27-37-40. The rule to vacate does not inform the tenant that a default judgment will be entered against it if it does not appear and defend. The rule to vacate does not warn the tenant that its failure to appear and defend will result in a default judgment.

The writ of ejectment, itself, is not a judgment. It is an order from the magistrate to the sheriff of the county where the property is located authorizing the sheriff to remove the tenant from the premises. The preprinted rule to vacate form anticipates that a judgment had been issued by the magistrate as the form requires that the entry of judgment information be filled in on the writ of ejectment.

In this case, the Writ of Ejectment does not show that a judgment had been entered by the Magistrate. The Writ of Ejectment leaves blank any reference to any prior judgment or order. Moreover, the Landlord has not presented any judgment or order of the Magistrate relating to this ejectment, except for the Writ of Ejectment itself.

II. THE TENANT'S DEFENSES ARE NOT BARRED BY THE DOCTRINE OF *RES JUDICATA* (CLAIM PRECLUSION OR ISSUE PRECLUSION)

A party is generally allowed the right to only bring one action on a claim. If that action results in a final judgment, then the litigant cannot bring the same claim that had previously been adjudicated in the former suit. *Plum Creek Dev. Co. v. City of Conway*, 135 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). This bar on relitigating a previously litigated matter is known as the doctrine of *res judicata*.

"*Res judicata*" is a broad term. It encompasses two distinct concepts: claim preclusion and issue preclusion. When the term "*res judicata*" is used without explanation, it commonly refers to claim preclusion. *Garris v. Governing Bd. of S. Carolina Reinsurance Facility*, 333 S.C. 432, 449, 511 S.E.2d 48, 57 (1998). The Supreme Court has explained:

> The term *res judicata* encompasses two types of preclusion: claim preclusion and issue preclusion. *See Pedrina v. Chun*, 906 F.Supp. 1337 (D. Hawai'i 1995). "Issue preclusion and claim preclusion have historically been called collateral estoppel and bar or merger respectively." *Id.* at 1399. For the sake of simplicity, this Court will use the terms issue preclusion and claim preclusion. "Issue preclusion only bars relitigation of particular issues actually litigated and decided in the prior suit." "Claim preclusion . . . bars plaintiffs from pursuing successive suits where the claim was litigated or could have been litigated." *Id.*

Crestwood Golf Club v. Potter, et al., 328 S.C. 201, 215, 826 S.E.2d, 834-835. The trial court's Form 4 Order [R. ___] does not address the type of "*res judicata*" it applied in ruling in the Landlord's favor. A determination of whether the trial court granted the Landlord's Motion for Partial Summary Judgment based on a claim preclusion or issue preclusion analysis is fundamental in resolving this appeal.

A. Claims Preclusion Does Not Bar Tenant from Asserting Its Defenses

To establish claim preclusion, a party generally must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. *Plum Creek*, 334 S.C. at 34, 512 S.E.2d at 109 (1999). If these three elements are established, then a party may be precluded from bringing the same claim in a subsequent action.

Claims preclusion involves the totality of the parties' claims. In other words, claim preclusion encompasses all aspects of the claim; those issues which were litigated and those issues which could have been litigated. *Id.*

The Landlord's reliance on claim preclusion in this case fails because it cannot establish the three necessary elements. The facts of this case show the following as to the three elements.

(1) Identity of the Parties. The parties are not identical. The ejectment proceeding was brought against MB Pizza, LLC. Although Brian Edelen had knowledge of the initiation of the ejectment action, he was not a party to it. Nothing notified or informed Mr. Edelen that by not responding to the ejectment proceeding that he would be barred from raising his defenses in the breach of guaranty cause of action brought against him.

(2) Identity of the Subject Matter. The Landlord cannot establish the same subject matter in both actions. The eviction proceeding was simply about possession of the leased property, which the Tenant had already vacated. The Complaint in circuit court is not about possession of the property; it is about whether the Tenant breached the Lease, whether the Landlord is entitled to additional rent and whether the Landlord

is entitled to claim any money relating to any alleged damage to the leased property. Additionally, the Landlord brought a claim on a personal guaranty against Brian Edelen which was not part of the ejectment proceeding. The subject matter is different in the ejectment proceeding and in the Common Pleas action.

(3) Prior Adjudication of the Issues. As demonstrated by the facts, there was no prior adjudication in the magistrate's court. The Landlord has not provided any final judgment or order arising from the ejectment proceedings. The Writ of Ejectment clearly indicates there was not a judgment prior to the issuance of the Writ of Ejectment. There is not a prior adjudication that supports the application of *res judicata.*

The fact that the Landlord is now bringing the second lawsuit is the clearest evidence that claims preclusion does not apply in this case. If the doctrine of claims preclusion applied, there would be no need to bring a second lawsuit. All issues would have been resolved in the first action. The Landlord could have brought all of its claims in the Court of Common Pleas, but chose not to do so.[5] The reason the Landlord is bringing the second lawsuit is that the ejectment proceeding did not resolve all of the Landlord's claims.

Landlord's Memorandum [R. ___] cites *Baty v. Stanley*, 291 S.C. 546, 548, 354 S.E.2d 571, 572 (Ct. App. 1987) as authority to support its claim that *res judicata* bars the Tenant's defenses as to the breach of the Lease. Reliance on *Baty* is misplaced in this case.

[5] Circuit Court and Magistrate Court have concurrent jurisdiction, although Magistrate Court jurisdiction in awarding damages is limited to $7,500.00 (S.C. Code Ann. § 22-4-40).

In *Baty*, the landlord obtained a judgment by default in magistrate court against its tenant for subleasing a portion of the leased property in violation of the lease. The magistrate's order explicitly found that the tenant had breached the lease. *Baty*, at 572 S.C. and 548 at S.E.2d. The subtenant (Baty) sued the tenant in circuit court for fraudulent inducement causing him to enter into the lease. In turn, the tenant then sued the landlord, by way of a third party complaint, alleging that it had not breached the lease. The landlord counterclaimed against the tenant and the tenant did not timely answer the third-party complaint, resulting in the tenant being in default on the counterclaim. The tenant moved to vacate the default judgment entered against it. The trial judge did not vacate the default finding that the tenant did not have a meritorious defense as a result of its default in magistrate's court. The trial court judge held that all matters had been fully litigated before the magistrate and that the tenant's claims were therefore barred by *res judicata*. *Id*.

In contrast, the following shows why *Baty* is not determinative authority in this appeal.

1. In *Baty*, there was an order that found the tenant had violated the lease. In this appeal, there is no such order.
2. In *Baty*, the circuit court judge found that the tenant did not have meritorious defenses. In this appeal, the trial judge found the Tenant did have meritorious defenses.
3. In *Baty*, the trial judge found that all matters raised in the tenant's reply and third-party complaint had been "fully litigated before the magistrate". The opposite applies in this case; nothing was litigated before the

magistrate and the magistrate made no finding or conclusion relating to a breach of the lease.

4. Reliance on a default judgment for issue preclusion is not the law of this state. *Kunst v. Lorree*, 404 S.C. 649, 746 S.E.2d 360 (Ct. App. 2013) expressly holds that a default judgment cannot be the basis for barring the tenant from raising its defenses.

The facts of this case are fundamentally different than those found in *Baty*. Most importantly, there is no formal order in this case as there was in *Baty*. For these reasons, *Baty* does not preclude the Tenant from asserting its defenses.

B. Issue Preclusion Does Not Bar Tenant from Asserting Its Defenses

Since the Landlord has brought a second, separate action, the Landlord is actually asserting that the doctrine of issue preclusion applies to bar the Tenant's defenses relating to the issue of whether there was a material breach of the Lease. However, issue preclusion does not apply in this case. In order for issue preclusion to apply, Landlord must establish that the matter to be precluded was actually litigated. Issue preclusion does not apply to default judgments because in cases resulting in a default judgment, no issue or fact was actually litigated. *Beall v. Doe*, 281 S.C. 363, 371, 315 S.E.2d 186, 191 (Ct. App. 1984). *Kunst v. Loree*, 404 S.C. 649, 654, 746 S.E.2d 360, 362 (Ct. App. 2013). It is understood that the Tenant did not appear in the ejectment proceedings. The Writ of Ejectment was entered on the basis on the basis of a "default" and this alone prevents the application of issue preclusion.

III. SUMMARY EJECTMENT PROCEEDINGS ARE EXEMPT FROM THE DOCTRINE OF CLAIMS PRECLUSION EXCEPT AS TO ISSUES OF POSSESSION

Assuming that *res judicata* as claim preclusion may apply, this Court would still have to determine if an exception to the application of *res judicata* applies. The doctrine of *res judicata* is not an iron-clad bar to a later lawsuit, or, as in this case, defenses. *Judy v. Judy*, 383 S.C. 160, 167, 712 S.E.2d 408, 412 (2011). South Carolina recognizes the exceptions to the application of the doctrine of *res judicata*. As set out in *Judy*, S.C. at 168, S.E.2d at 412:

> Significantly, the *Restatement (Second) of Judgments* has recognized exceptions to the application of this doctrine. *See Restatement (Second) of Judgments* § 26 (1982 & Supp.2011); *id.* (noting in commentary that section 26 "presents a set of exceptional cases in which, after judgment that would otherwise extinguish the claim under the rules of merger or bar ..., the plaintiff is nevertheless free to maintain a second action on the same claim or part of it.").

The exceptions contained in the *Restatement (Second) of Judgments* applies to the facts of this case.

Specifically, *Restatement (Second) of Judgments* § 26 states:

> (I) When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claims subsist as a possible basis for a second action by the plaintiff against the defendant:
>
> . . .
>
> (d) The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim; or . . .

Proceedings for summary eviction fall under this exception.

As discussed above, ejectment proceedings are for the purpose of arriving at a speedy and summary resolution of who has the right to possession of the leased property; it does not provide the basis for dealing with any other issue. As compared with a summons which requires an answer within thirty (30) days, summary ejectment proceedings give a tenant only ten (10) days to respond. The rule to vacate does not inform the tenant of any consequence in not responding to the rule to vacate, other than a writ of ejectment may issue. The rule to vacate also allows the tenant to voluntarily vacate the property. The entire statutory scheme is for the quick resolution on the issue of possession of the property.

This Tenant acknowledges that the issue of possession is resolved by the ejectment proceedings, but nothing else. The tenant would be estopped from challenging possession, in a later action, whether the Tenant voluntarily vacates the property or engages in a full hearing on the issue. However, the Landlord's Complaint and the Tenant's Answer in this case do not raise any issue concerning possession of the property. All other issues relating to the Lease, rent or damages are not precluded from subsequent litigation.

A case which demonstrates this point is *G.C. Wallace v. The Eighth Judicial Dist. Court*, 127 Nev. 701, 262 P.3d 1135 (2011) out of Nevada. In this case, the tenant was ejected from the leased premises in a summary proceeding. Thereafter, the landlord brought a claim against tenant for unpaid rent and damages in a subsequent action in its court of general jurisdiction. The tenant then filed a motion for summary judgment arguing that the landlord's claims for damages were barred by the doctrine of claim

preclusion. The tenant specifically argued that the landlord should have sued for both eviction and damages in one action, as the Nevada District Court had the jurisdiction to hear both claims. Since the landlord had moved in its summary court for just repossession of the property, the tenant claimed that it was now barred by the theory doctrine of claims preclusion because it could have brought one action in Nevada's court of general jurisdiction.

Relying on § 26 1(d) of the *Restatement (Second) of Judgments,* the Nevada Supreme Court ruled that the summary eviction proceedings came under the exception to the general rules of claim preclusion.

The Nevada Supreme Court stated:

> A special appreciation of the unique nature of summary eviction proceedings is vital to properly construing [the Nevada eviction statute]. In enacting [the Nevada eviction statute] the Legislature created a swift and straightforward procedure for determining who is entitled to immediate possession. (Citation omitted). If we construed [the Nevada eviction statute] to require simultaneous litigation of all claims arising from the tenant's default, we would eviscerate the utility and the very purpose of justice court summary eviction proceedings.
>
> . . .
>
> Additionally, commentators have specifically warned against applying preclusive effect to summary eviction proceedings. *See* Kimberly E. O'Leary, *The Inadvisibility of Applying Preclusive Doctrines to Summary Evictions*, 30 U. Tol. L.Rev. 49, 72 (1998) ("[T]he realities of landlord-tenant practice make the use of preclusive doctrines in these actions especially problematic."); Rosemary Smith, *Locked Out: The Hidden Threat of Claim Preclusion for Tenants in Summary Process*, 15 Suffolk J. Trial & App. Advoc. 125 (2010) ("[T]he very purpose of an expedited proceeding would be undermined if lawyers felt obliged to append a

> multitude of related claims, lest they be barred by claim preclusion from raising them in a separate action."

G.C. Wallace, 127 Nev. at 709-10 and 262 P.3d at 1140-1141.

It is ironic that in *G.C. Wallace*, the tenant moved for summary judgment based on claims preclusion, arguing that its landlord should have brought one action combining all of its claims together. However, even though it is the Landlord bringing two separate actions, the same principles apply to the Tenant raising defenses. Summary eviction proceedings are not subject to the same preclusive rules that would apply in a court of general jurisdiction other than to the issue of possession of the leased property.

Therefore, if the Landlord has the right to bring a separate action on the same facts raised in magistrate court, then the Tenant has the right to defend that action based on its defense that it had not breached the Lease.

IV. LANDLORD WAIVED ITS RIGHT TO ASSERT *RES JUDICATA* BECAUSE IT DID NOT PLEAD IT

In order to invoke *res judicata* as a bar to the Tenant's defenses, *res judicata* must be pled. ". . . [A]s a general rule, a former adjudication must be pled in order to make the doctrine of collateral estoppel operative in a particular case." *Beall, 315 S.E.2d at 188. See also Baty v. Stanley*, 291 S.C. 546, 548, 354 S.E.2d 571, 572 (Ct. App. 1987). Unless the Landlord can show an exception to this requirement (which it cannot), it has waived its right to base partial summary judgment on the doctrine of *res judicata.*

In its Complaint, the Landlord alleges that "on October 31 the Landlords obtained Writ of Ejectment against Tenant as a result of its breach of the Lease." [Complaint,

¶21, R.____]. Although it is accurate that the Landlord obtained the Writ of Ejectment, it did not plead that Tenant was, therefore, precluded from raising any defenses to the allegations in the Complaint. Furthermore, there is no order or judgment from the magistrate court as to the basis of why it issued the Writ of Ejectment. A writ of ejectment will issue if the tenant makes no appearance. S.C. Code Ann. § 27-37-40.

The Tenant timely objected to *res judicata* being raised for the first time in its Motion for Partial Summary Judgment [R. ___]. *Res Judicata* was first raised in the Landlord's Memorandum [R. ___]. At its first opportunity, the Tenant objected to the raising of *res judicata* in its Outline of Argument. In paragraph G, Tenant stated: " The Defendants object to res judicata being raised at this time as it was not pled." [Outline, p. 5, R.___]. For these reasons, the Landlord has waived its right to assert *res judicata* as a bar to the Tenant's defenses.

CONCLUSION

Based on the above and foregoing, the Appellant prays that this Court reverse the Order granting partial summary judgment to the Respondent and remand this matter to the trial court for further proceedings.

Respectfully submitted,

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