IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
THIRD DISTRICT

CASE NO.: 3D13-31

MAURICE COHEN AND LEON COHEN, ET AL.,

Appellants,

v.

CDR CREANCES, S.A.S.,

Appellee.

ON APPEAL TO THE THIRD DISTRICT COURT OF APPEAL
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

APPELLANTS' INITIAL BRIEF

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PRELIMINARY STATEMENT

In this brief, Appellants Maurice and Leon Cohen will be referred to by individual name, or collectively as the "Cohens." The business entity Appellants will be referred to by individual name, or collectively as the "Corporate Appellants." The Appellee, CDR Creances, S.A.S., will be referred to as "CDR." The Honorable Beatrice A. Butchko authored the order and Final Judgment on appeal. Her tribunal will be referred to as the trial court. Citations to the twenty-four volume record on appeal will be made by the letter "R.," followed by the appropriate volume and page number(s).

Due to the size of the record, the Appellants filed a three-volume Appendix to this Initial Brief for the Court's convenience. All twelve exhibits in the Appendix are included in the record. Citations to the Appendix are made as follows: Appx. Vol. #, A-#.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the instant appeal pursuant to Florida Rule of Appellate Procedure 9.030(b)(1)(A). Venue is proper in this Court pursuant to Section 35.043, Florida Statutes. The Final Judgment at issue in this appeal was entered on November 28, 2012. (R. Vol. XXII at 3930). The Corporate Defendants filed their Notice of Appeal on December 26, 2012. The Cohens filed their Notice of Appeal on December 24, 2012. *Id*. at 3925. Both notices of appeal

were timely. Accordingly, jurisdiction lies in this Honorable Court. FLA. R. APP. P. 9.110(b).

INTRODUCTION

This is an appeal from the trial court's entry of summary judgment in favor of CDR in proceedings supplementary. CDR obtained four money judgments in New York against a set of companies CDR believed were the Cohens' alter egos. CDR domesticated each judgment in Florida separately, such that four different cases were opened in Miami-Dade County, with four different case numbers. After domesticating the judgments, CDR did not initiate proceedings supplementary in any of the four cases. Instead, CDR litigated a fifth action in a separate Miami-Dade case before Judge Manno Schurr (the "Manno Schurr" case) against the judgment-debtor companies, the Cohens, and numerous other corporate defendants.

In the Manno Schurr case, CDR alleged that the judgment-debtors and the other corporate defendants were alter egos of the Cohens, and each other. CDR claimed that the judgments had not been satisfied, and that other than six Florida properties, CDR was "unable to locate assets belonging to Defendants sufficient to satisfy Defendants' obligations" to CDR. (Appx. V. 2, A-4 at ¶ 68). Thus, CDR claimed it was entitled to equitable relief because it had "no adequate remedy at law" to have its judgments satisfied. *Id*. at ¶¶ 69, 79, 86. Ultimately, the trial court

entered a Final Judgment granting CDR's request for a permanent injunction and a constructive trust over the properties. The Final Judgment ordered the appointment of a receiver to transfer title to the properties to CDR, as requested by CDR in its complaint. (Appx. V. 2, A-6 at 8).

After entry of the Final Judgment in the Manno Schurr case, CDR initiated proceedings supplementary in the four domesticated judgment cases, which had been sitting dormant for roughly two and a half years. In the proceedings supplementary, CDR impleaded the same entities it alleged were alter egos of the Cohens in the Manno Schurr case. The defendants-in-execution and the impleaded corporate defendants argued that the proceedings supplementary were barred by res judicata. Specifically, they argued that CDR should have raised its claims during the Manno Schurr litigation, and its failure to do so violated the rule against claim splitting. The trial court rejected the claim splitting argument, ruling that res judicata and claim splitting are not viable defenses to proceedings supplementary.

The sole issue on appeal is one of first impression in Florida: can res judicata principles apply to proceedings supplementary in Florida?

STATEMENT OF THE CASE AND FACTS

A. The New York Actions: Suits over a Hotel Loan

In 2003, CDR asserted five causes of action in the New York state courts against Maurice Cohen and four entities: Summerson International Establishment

("Summerson"), Blue Ocean Finance, Ltd. ("Blue Ocean"), World Business Center, Inc. ("World Business"), and Iderval Holding, Ltd. ("Iderval"). (Appx. V. 1, A-1). These entities are the underlying defendants, and the judgment-debtors in the proceedings supplementary below. Three years later, in 2006, also in New York state court, CDR asserted thirty-eight causes of action against Leon Cohen, Maurice Cohen, Sonia Cohen, Iderval, Blue Ocean, World Business, and various other Defendants not relevant to these proceedings. (Appx. V. 1, A-2). (The 2003 and 2006 actions are referred to hereinafter, collectively, as the "New York Actions"). Because, as noted by the New York court, those two actions were "inextricably intertwined," the court ultimately consolidated dispositive motions for default filed in both actions, and resolved them in an order dated August 7, 2008. (Appx. V. 2, A-3). The New York court remarked that, though CDR sought different forms of relief in the two actions, "the facts giving rise to both are identical." *Id.* at 2-3.

The New York court went on to describe the business transactions that gave rise to the New York actions. *Id.* at 3-6. In sum, CDR's claims arose out of a loan provided by CDR's predecessor to Euro-American Lodging Corporation ("EALC") and its shareholders – Summerson, and Summersun International et Cie ("Summersun" – with a "un"), each allegedly controlled by the Cohens – and two pledge agreements associated with the loan. The funds were loaned for the

purpose of acquiring a hotel property in Manhattan. *Id.* at 3. In the New York Actions, CDR alleged that the Cohens, together with the other defendants, failed to repay the loan and breached the pledge agreements by assigning rights and transferring funds, ownership and control of EALC, Summerson, and Summersun to other corporate entities. *Id.* at 4-6.

The New York Court subsequently entered final judgments in the fall of 2008 against Defendants-in-Execution Blue Ocean, Summerson, World Business, and Iderval. These are the judgments that CDR later domesticated and on which the proceedings supplemental are based. (R. Vol. II at 243; R. Vol. V at 679; R. Vol. VI at 850).

B. The Manno Schurr Case: Same Defendants, Same Alter-Ego Allegations, and Same Wrongful Acts Alleged as the Proceedings Supplementary

On September 2, 2008, following the entry of judgment in the New York Actions against Defendants-in-Execution Blue Ocean and Summerson, CDR filed the Manno Schurr case, a four-count complaint in Miami-Dade County Circuit Court against the Cohens and the Corporate Appellants. (Appx. V. 2, A-4). The crux of CDR's allegations was that, as part of the same fraud alleged in the New York Actions, the defendants had fraudulently transferred assets to purchase several real properties in Miami-Dade County.[1] In the sworn Complaint, CDR

[1] The real properties at issue in the Florida Action were the same Florida Real

alleged that the Cohens and the Corporate Appellants were all alter egos of one another. (*Id.* at ¶¶ 13-17, 35, 64, 73, 82).

Among other relief, CDR sought temporary and permanent injunctions relating to the Cohens' alleged fraudulent transfers of assets to purchase the Florida Real Properties (Count II), and imposition of a constructive trust on, and appointment of a receiver over, those properties as a result of the fraudulent transfers (Count III). CDR also sought the imposition of an equitable lien (Count IV), and asked the Court to enter a judgment amount. (Appx. V. 3, A-12). Ultimately, CDR elected to withdraw its equitable lien claim, however.

Following an evidentiary hearing, Judge Manno Schurr entered default in favor of CDR against all the Defendants, finding that the Cohens and the Corporate Appellants had "engaged in a wide-ranging and orchestrated scheme to defraud this Court as well as the court presiding over the related case brought by CDR against the Cohens in the Supreme Court of New York, New York County." (Appx. V. 2, A-5). On January 13, 2011, Judge Manno Schurr entered Final Judgment in CDR's favor on the fraudulent transfer and constructive trust claims, and at CDR's urging, dismissed the equitable lien claim without prejudice. (Appx. V. 2, A-6). A receiver was appointed to transfer title on the properties to

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Properties CDR alleged are owned by the Corporate Appellants in these proceedings supplementary, and CDR's allegations of fraud were identical to those that were the subject of the New York Actions. (*Id.* ¶¶ 19-29).

CDR. *Id*. This Court affirmed the Judgment on appeal. *Empire World Towers, LLC v. CDR Creances, S.A.S.*, 89 So. 3d 1034 (Fla. 3d DCA 2012).

C. These Proceedings Supplementary are Based on the Same Alter Ego Claims CDR already Alleged in the Manno Schurr Case

On September 2, 2008, the same day it filed the Manno Schurr case, CDR domesticated the New York judgments entered against Blue Ocean and Summerson (Case Nos. 08-50775 and 08-50781). (R. Vol. II at 243). On November 14, 2008, CDR domesticated the New York judgments entered against Iderval and World Business (Case Nos. 08-70409 and 08-70413). (R. Vol. V at 679; R. Vol. VI at 850)[2].

Approximately two-and-half years later, after Final Judgment was entered in the Manno Schurr case, CDR initiated the proceedings supplementary in these consolidated cases, seeking to enforce judgments against the various Impleaded Defendants-in-Execution by asserting theories of alter ego to hold them liable for the judgments entered against the Defendants-in-Execution[3]. <u>These are the identical theories advanced by CDR in the Manno Schurr case</u>. (R. Vol. I at 26; R. Vol. II at 260; R. Vol. V at 687; R; Vol. VI. at 959). Indeed, CDR admitted that

[2] A fifth New York Judgment was entered in September of 2011 against the Cohens, which CDR domesticated and used to initiate proceedings supplementary under Case No. 11-30204. (R. Vol. VIII at 1181). That New York judgment, like the others, was issued in the same underlying New York Actions. *Id*.

[3] Ultimately, the separate proceedings supplementary cases were consolidated into one action. (R. Vol. VII at 1171).

the claims in these proceedings supplementary are identical to the claims it litigated in the Manno Schurr case. (Appx. V. 2, A-7 at 8).

In fact, CDR's designated representative at deposition, Douglas Kellner, testified that ***all*** of CDR's actions against the defendants are prosecutions of the same allegedly tortious conduct:

> Q: But they are all based on the same allegation, that the Cohens' use of a worldwide web of alter-ego entities to hide $33 million in cash received from the sale proceeds of the New York Flatotel and the fruits of their use of that unreported income, right?
>
> A: Yes.

(Appx. V. 2, A-9 at 293:1-7).

> Q: And it's the same allegations as well as were raised in the Manno Schurr case, right, same factual allegations?
>
> A: That's right.
>
> Q: Nothing new in these proceedings supplemental, is there?
>
> A: I have to think about that for a second, but –
>
> Q: Nothing you can think of as you sit here now; is that fair to say?
>
> A: That's right.

(Appx. V. 2, A-9 at 297:9-19). In sum, as Kellner admitted, all of these lawsuits involve "absolutely the same underlying tort." (Appx. V. 2, A-9 at 300:11-12).

D. Judgment for CDR

On October 11, 2012, the lower court granted CDR's motion for summary judgment. (R. Vol. XXI at 3898: A10). The lower court denied Appellants' Cross-Motion for Summary Judgment, which argued that the matters were barred on res judicata grounds. *Id.* Final Judgment was entered on November 28, 2012 (R. Vol. XXII at 3930), and this appeal follows.

SUMMARY OF ARGUMENT

The Appellants agree with CDR and the trial court that in the typical proceedings supplementary case, a judgment-debtor should not be able to avail itself of the defenses of res judicata and claim splitting. When a creditor obtains a money judgment, Section 56.29, Florida Statutes, provides a statutory mechanism for pursuing collection on that judgment. A debtor's use of res judicata as a shield against proceedings supplementary would obviate the purpose of the statute. It would preclude a creditor from recovering on a money judgment because a debtor could argue the attempt at collection was simply a rehashing of the issues that led to imposition of the judgment. This is not the Appellants' argument, however.

In this case, CDR had valid, outstanding judgments which were domesticated in Miami-Dade County. It elected not to pursue proceedings supplementary after obtaining those judgments. Instead, CDR elected to enforce the judgments by pursuing equitable relief in a wholly separate action in Miami-

Dade County. That equitable relief was granted because CDR claimed it had no other adequate remedy to have the judgments satisfied. CDR should not be permitted in proceedings supplementary to exercise the remedy it previously claimed it did not have, when the same parties, same nucleus of facts, and same dispute were at issue in both actions. To hold otherwise would undermine the long-standing and vital public interests served by application of res judicata principles. This Court should vacate the Final Judgment in CDR's favor, and direct the trial court to enter Final Judgment in favor of the defendants.

ARGUMENT

I. CDR'S PROCEEDINGS SUPPLEMENTARY ARE BARRED BY THE RULE AGAINST CLAIM SPLITTING BECAUSE THEY SHOULD HAVE BEEN RAISED IN THE MANNO SCHURR LITIGATION.

A. Standard of Review

The standard of appellate review applicable to a trial court's entry of summary judgment is *de novo*. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

B. Argument on the Merits

1. The General Rule that Res Judicata Principles do not Apply to Proceedings Supplementary does not Apply to this Case.

Res judicata and the rule against claim splitting should apply to the proceedings supplementary in this case. Appellants agree that res judicata and

claim splitting are not viable defenses in traditional proceedings supplementary. For instance, if a party obtains a judgment, and in a continuation of that proceeding, invokes § 56.29 to pursue collection, the party-turned-creditor is not splitting its claims. It is following the procedure specifically outlined in § 56.29.

Likewise, res judicata and claim splitting should not bar multiple proceedings supplementary initiated in different jurisdictions, where a creditor cannot feasibly pursue collection efforts in one action. For example, a creditor may need to execute on property located in different jurisdictions to satisfy an outstanding judgment. Necessarily, then, the creditor would need to initiate proceedings in separate jurisdictions.

For instance, in *The Nostalgia Network, Inc. v. Lockwood*, 315 F.3d 717 (7th Cir. 2002), Nostalgia obtained a default judgment against an attorney named Rayle in California for $3 million. Rayle and his girlfriend held an account as joint-tenants in Indiana. Rayle transferred his interest as a joint-tenant to his girlfriend, and she became the sole owner of the account. Later Rayle transferred $343,000 into what was now his girlfriend's account. The girlfriend took all but $36,000 out of the account. Nostalgia sued in Indiana, alleging that the transfer was fraudulent, and that it was entitled to the $343,000. The court agreed, and Nostalgia recovered the $36,000 remaining in the account.

Next, Nostalgia sued Rayle and his girlfriend in a diversity action in federal court in Illinois, where the couple lived. Nostalgia sought $307,000, the difference between the $343,000 to which it was entitled, and the $36,000 it collected in the Indiana action. Nostalgia moved for summary judgment, and Rayle and his girlfriend argued that the claim was barred by res judicata (claim preclusion). The district court entered summary judgment in Nostalgia's favor, and Rayle and his girlfriend appealed. The Seventh Circuit affirmed, holding: "[r]es judicata itself (claim preclusion) is clearly inapplicable. Otherwise a judgment creditor would be unable to use separate proceedings to seize property of the debtor that might be scattered all over the country, or for that matter the world. What sense would that make?" *Nostalgia*, 315 F.3d at 720-721 (internal citations omitted).

Therefore, *Nostalgia* stands for the obvious and uncontroversial proposition that where a creditor is precluded from bringing proceedings supplementary in one action – i.e. because property or funds the creditor needs to satisfy the judgment is located in different jurisdictions – it is permitted to seek satisfaction through multiple proceedings supplementary against the same judgment debtor. *See also Beavans v. Groff*, 5 N.E. 2d 514 (Ind. 1937) (where creditor obtained judgment and initiated proceedings supplementary in one county to have real property fraudulently transferred by the judgment-debtor subjected to payment of the judgment, claim splitting and res judicata did not bar creditor's subsequent

proceedings supplementary action in a different county to have different real property subjected to the still-unsatisfied judgment).

In this case, the trial court relied on *Nostalgia* and *Beavans* in ruling that the Appellants' claim splitting and res judicata defenses were not valid defenses to CDR's proceedings supplementary. That ruling was erroneous because *Nostalgia* and *Beavans* are factually distinguishable from this case.

In this case, CDR had valid, outstanding judgments which were domesticated in Miami-Dade County. Nothing prevented CDR from attempting to collect on its money judgments during the Manno Schurr litigation. Nonetheless, it declined to do so, instead electing to split its claims for strategic reasons. First, it pursued, and was granted, equitable relief in the Manno Schurr litigation, where CDR alleged it was entitled to equitable relief because it could not collect in Florida. Then, after securing equitable relief, it initiated proceedings supplementary to collect on the judgments, impleading the same defendants it sued in the Manno Schurr case.

CDR admitted as much at the proceedings supplementary summary judgment hearing. The trial court asks counsel for CDR why it failed to file money damage claims along with its equitable claims in the Manno Schurr case. Counsel responds:

> MR JIMENEZ: Well, the reason why we focused on the Manno Schurr action is that we were seeking to recover equitable title.
>
> THE COURT: The Florida property?
>
> MR JIMENEZ: The Florida properties. We already had judgments against these '08 entities and you can attempt to collect on them at any time. So we chose at that time not to collect a money judgment against those corporate entities in part because they didn't have assets here.

(R. Vol. XXIII at 3995). Therefore, CDR made a tactical decision. *Nostalgia* and *Beavans* should not control this case. CDR was not precluded from attempting to satisfy its judgments by circumstances beyond its control, such as the presence of assets in different jurisdictions, which would necessitate multiple proceedings. Instead, in the same jurisdiction, CDR desired certain properties held by the Corporate Defendants, sued in equity to get those properties, and was granted precisely the relief it requested.

CDR's decision to split its claims into separate proceedings was not random. It was calculated. CDR had an excellent reason not to pursue money damages in the Manno Schurr litigation: the defendants in the Manno Schurr case would have been entitled to a jury trial on money damages. *See, e.g., 381651 Alberta, Ltd. v. 279298 Alberta, Ltd*., 675 So. 2d 1385, 1388 (Fla. 4th DCA 1996) (holding that an action seeking a money judgment is one at law and that the right to a jury trial "applies only to legal and not to equitable causes of action."). CDR did not want a

jury trial on damages, because it would have had to prove the amount of damages it incurred as a result of the alleged fraud.

This would have been disadvantageous for CDR, because CDR recovered at least $105 million of its damages when it sold the debt from the underlying loan to a third party. (Appx. V. 3, A-12 at ¶ 9). Therefore, the damages incurred by CDR would have been offset significantly. CDR knew that the money damages it would be able to establish in the Manno Schurr litigation would be far less than the amounts of its money judgments. This is precisely why CDR dropped its equitable lien claim in the Manno Schurr case. The Manno Schurr defendants argued that if the court imposed an equitable lien, it would have to establish a damage amount, which would entitle the defendants to a jury trial. In the face of that argument, CDR dropped the equitable lien claim[4].

[4] CDR also may have feared that pursuit of a constructive trust, as well as money damages, would have required it to elect a remedy. *See, e.g. Sannini v. Casscells*, 401 A.2d 927, 931 (Del. 1979) (holding that the remedy of a constructive trust is irreconcilably inconsistent with the remedy of money damages and that the choice to proceed in equity to impress a constructive trust constituted an election of remedies: "the pursuit of that choice to final judgment now precludes them from seeking damages…Having pursued their equitable remedy to final judgment, ... does not permit [plaintiffs] to turn this typical equity case into a law suit for damages…Because of this inconsistency, the plaintiffs were obliged to choose between remedies when they began their suit, and the pursuit of one remedy to final judgment precludes recourse to the other remedy.").

2. The Question This Court Must Answer is One of First Impression in Florida: if a party sues in equity, seeking compensation for outstanding judgments and claiming it is entitled to equitable relief because it cannot collect on the judgments, can res judicata principles bar subsequent proceedings supplemental against the same parties, on the same judgments, for the same alleged wrongs?

CDR put the cart before the horse. The equitable relief requested in the Manno Schurr case was only available because CDR averred that it was unable to collect on the judgments. *See, e.g., 381651 Alberta, Ltd. v. 279298 Alberta, Ltd*., 675 So. 2d 1385, 1388 (Fla. 4th DCA 1996) (when the remedies for satisfaction of a judgment are inadequate, parties may resort to equitable remedies such as utilizing supplemental proceedings to reach property not subject to levy); *see also Gantz v. First Nat'l Bank of Miami*, 138 So.2d 367, 368-369 (Fla. 3d DCA 1962) ("The only time that resort to a court of equity to enforce a common law judgment is permitted is when the remedies provided for the satisfaction of such judgment have been exhausted, are inadequate or are of no avail. The judgment creditor then has recourse to supplementary proceedings provided by statute or a creditor's bill to reach equitable interests not subject to levy of execution.") (emphasis added).

It follows that the question this Court must answer to resolve this appeal is: if a party sues in equity, seeking compensation for outstanding judgments and swearing under oath it is entitled to equitable relief because it cannot collect on the judgments, can res judicata principles bar subsequent proceedings supplemental

against the same parties, on the same judgments, for the same alleged wrongs? This is a question of first impression in Florida, and it should be answered in the affirmative.

3. CDR's Pursuit of Money Damages in the Proceedings Supplementary Violates the Rule against Claim Splitting because those Damages Could have been Pursued in the Manno Schurr Litigation.

The rule against claim splitting is "an aspect of the doctrine of res judicata" which "makes it incumbent upon [plaintiffs] to raise all available claims" in one action and which "precludes subjecting ... defendants to another successive action based on this same conduct." *Greenstein v. Greenbrook,* Ltd., 443 So.2d 296 (Fla.3d DCA 1983) (purchaser's failure to raise breach of contract claim in first action precluded second action for breach of contract and tortious interference with contractual relationship based on same contract). Courts properly look not only to the claims actually litigated in the first suit, but also to "every other matter which the parties might have litigated and had determined, within the issues as [framed] by the pleadings or as incident to or essentially connected with the subject matter of the first litigation." *Zikofsky v. Marketing 10, Inc.*, 904 So.2d 520, 523 (Fla. 4th DCA 2005) quoting *Tyson v. Viacom, Inc.*, 890 So.2d 1205, 1214 (Fla. 4th DCA 2005) (en banc) (Gross, J., concurring specially).

The rule "is founded on the sound policy reason that the finality established by the rule promotes greater stability in the law, avoids vexatious and multiple

lawsuits arising out of a single tort incident, and is consistent with the absolute necessity of bringing litigation to an end." *McKibben v. Zamora*, 358 So.2d 866, 868 (Fla.3d DCA 1978) citing *Mims v. Reid*, 98 So.2d 498 (Fla.1957). *See also* 1 Fla.Jur.2d Actions § 56 (1977); s*ee also AMEC Civil, LLC v. Dept. of Transp.*, 41 So. 3d 235, 238-39 (Fla. 1st DCA 2010) quoting *Kimbrell v. Paige*, 448 So.2d 1009, 1012 (Fla. 1984) ("The doctrine of res judicata makes a judgment on the merits conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.") (emphasis added).

The rule against claim splitting is closely linked with the doctrine of merger. The doctrine of merger provides that, "a cause of action upon which an adjudication is predicated merges into the judgment and that, consequently, the cause of action's independent existence perishes upon entry of the judgment." *See Vernon v. Service Trucking, Inc.*, 565 So.2d 905, 906 (Fla. 5th DCA 1990). The doctrine of merger is based on the reasoning that the judgment is considered to be superior to the cause of action on which it is founded. 32 Fla. Jur.2d Judgment and Decree § 113 (1994). By extinguishing the cause of action on which a judgment is based, the doctrine of merger bars a subsequent action for the same cause. 32 Fla. Jur.2d Judgment and Decree § 116 (1994). *See also Sunshine Utilities Equipment, Inc. v. Treasure Coast Utilities, Inc.*, 421 So.2d 1096 (Fla. 4th DCA 1982).

Between the Manno Schurr case and the proceedings supplementary at issue in this appeal, nothing changed, aside from CDR's sworn averment in the Manno Schurr case that it was unable to collect on the judgments in Florida. In the proceedings supplementary, no new allegations of fraudulent transfers or squirreling away of assets were levied that were not advanced in the Manno Schurr case. In the Manno Schurr case, CDR used the same alter ego allegations it advanced in the proceedings supplementary when it sought to pierce the corporate veil of the alter egos to reach the Florida properties. Further, as admitted by CDR, the same parties were involved in the Manno Schurr case and the proceedings supplementary. Nothing prevented CDR from recovering money damages against the defendants in the Manno Schurr litigation.

It is also critical to remember that not only did CDR have the potential to bring claims for money damages in the Manno Schurr case, it did, in fact, bring a money damage claim. As explained above, while CDR's equitable lien claim was framed in equitable terms, CDR sought a determination of damages as a basis for the amount of the lien. (Appx. V. 3, A-12). Only after the default judgment was entered did CDR abandon its equitable lien claim because it preferred to use proceedings supplementary to seek money damages, rather than prove and quantify its money damages to a jury in the Manno Schurr case.

The problem for CDR is that its equitable relief was predicated on its verified averment that it could not collect on the judgments. The proceedings supplementary, on the other hand, were predicated on CDR's strategic belief that it could, in fact, collect on the judgments from the very same parties. Thus, CDR elected one remedy (equity) in the Manno Schurr litigation, which was inconsistent with the remedy sought in the proceedings supplementary. Having elected its remedy in the Manno Schurr case, CDR is precluded from obtaining the inconsistent relief it seeks in proceedings supplementary. *Perry v. Benson*, 94 So. 2d 819, 821 (Fla. 1957) ("Where more than one remedy for the enforcement of a particular right actually exists, and such remedies considered with reference to the relation of the parties as asserted in the pleadings are inconsistent, the pursuit of one with knowledge of the facts is in law a waiver of the right to pursue the other inconsistent remedy.") (emphasis added); *see also United States v. Oregon Lumber Co.*, 260 U.S. 290, 295 (1922) ("Any decisive action by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and one of the most unequivocal of such determinative acts is the bringing of a suit based upon one or the other of these inconsistent conclusions.").

CDR will likely argue, as it did below, that principles of res judicata have no bearing on proceedings supplementary, simply because proceedings supplementary do not represent a new or independent cause of action. This argument is

unavailing under the facts of this case. CDR should not be allowed to avoid long-standing res judicata principles simply because the common law has described, under circumstances not present here, that proceedings supplementary are not properly characterized as independent actions.[5] CDR averred under oath that it could not collect on the judgments in order to attain equitable relief. It contradicted that averment when it initiated proceedings supplementary. CDR swore it could not collect on the judgments and in doing so, elected the remedy of equitable relief. Now it must accept the consequences of that election and its proffered sworn statements.

In sum, there is no logical reason not to extend basic res judicata principles to the proceedings supplementary in this case. The rule against splitting causes of action is predicated on the following basic policy considerations: (1) finality in court cases promotes stability in the law; (2) multiple lawsuits arising out of a single incident are costly to litigants and an inefficient use of judicial resources; and (3) multiple lawsuits cause substantial delay in the final resolution of disputes.

[5] For instance, the trial court relied on *Zureikat v. Shaibani*, 944 So. 2d 1019 (Fla. 5th DCA 2006) for the proposition that a proceeding supplementary is not an independent causes of action. However, that case involved a judgment-debtor's claim that the statute of limitations barred an equitable lien imposed in the course of proceedings supplementary. The court held that the underlying claim was timely, and because the proceeding supplementary was not an independent cause of action, the equitable lien did not have to be imposed within the statute of limitations for equitable liens. While it may make sense in the context of statute of limitations concerns to declare proceedings supplementary are not independent actions, it does not make sense here.

See Stanley Builders, Inc. v. Nacron, 238 So.2d 606 (Fla.1970). All of those considerations are at issue in this case, and there is no reason they should be diluted simply because they arise in the context of proceedings supplementary, as opposed to an independent lawsuit.

Finally, the Appellants understand that this Court may be reticent to bar CDR's ability to have its judgments fully satisfied. However, the United States Supreme Court has made it abundantly clear that the interests served by res judicata principles trump equity concerns. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) ("[t]he doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata.'") quoting *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946). CDR's initiation of proceedings supplementary to accomplish what could have been done in the Manno Schurr litigation violates basic res judicata principles.

CONCLUSION

Based on the foregoing, this Court should vacate the final judgment in favor of CDR, and enter judgment in favor of the Appellants.

DATED this 14th day of June, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to all counsels of record in this matter via the 3d DCA's efiling system on June 14, 2013.

/s/ Michael M. Brownlee
Michael M. Brownlee, Esquire

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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