

ORIGINAL

STATE OF MICHIGAN

GLENN S. MORRIS,

Plaintiff-Appellee,

Qu 5-29-14

v

No. 315007
Kent Circuit Court
LC No. 09-001878-CB

MORRIS, SCHNOOR & GREMEL, INC.,
CHARRON & HANISCH, P.L.C., and DAVID W.
CHARRON,

C. Yates

Defendants,

and

NEW YORK PRIVATE INSURANCE AGENCY,
L.L.C.,

742

Appellant.

378-CB

MORRIS, SCHNOOR & GREMEL
PROPERTIES, L.L.C.,

ates

Plaintiff-Appellee/Cross-
Appellant/Cross-Appellee,

v

No. 315702
Kent Circuit Court
LC No. 09-011842-CB

MORRIS, SCHNOOR & GREMEL, INC., and
DAVID W. CHARRON,

Defendants,

and

CHARRON & HANISCH, P.L.C.,

Defendant/Cross-Appellee/Cross-
Appellant,

and

NEW YORK PRIVATE INSURANCE AGENCY,
L.L.C.,

Appellant/Cross-Appellee.

GLENN S. MORRIS,

702

Plaintiff-Appellee/Cross-
Appellant/Cross-Appellee,

42-CB

v

No. 315742
Kent Circuit Court
LC No. 09-001878-CB

MORRIS, SCHNOOR & GREMEL, INC., and
DAVID W. CHARRON,

ies

Defendants,

and

CHARRON & HANISCH, P.L.C.,

Defendant/Cross-Appellee/Cross-
Appellant,

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and

NEW YORK PRIVATE INSURANCE AGENCY,
L.L.C.,

S. ROYSTER
CLERK
SUPREME COURT

Appellant/Cross-Appellee.

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APPELLANT NEW YORK PRIVATE INSURANCE AGENCY, LLC'S
APPLICATION FOR LEAVE TO APPEAL

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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

This appeal is from the Order of the Michigan Court of Appeals Case Numbers 315742 and 315702 affirming the Judgments against Appellant New York Private Insurance Agency, LLC, entered by the Kent County Circuit Court in Case Numbers 09-001878-CB and 09-011842-CB. The relief sought by Appellant is the vacating of the Judgments against it.

STATEMENT OF QUESTIONS PRESENTED

1. Did the Circuit Court and the Court of Appeals err by entering and affirming judgments against non-party Appellant New York Private Insurance Agency, LLC (“NYPIA”) in contravention of NYPIA’s due process rights under the United States and Michigan Constitutions by (a) entering judgment against NYPIA in cases to which it was not a party; (b) entering judgment for causes of action on which NYPIA already prevailed on summary disposition; and (c) entering judgment when the court lacked authority to do so against a non-party?

NYPIA answers “yes.”

I. INTRODUCTION

This appeal arises from two judgments that were entered against New York Private Insurance Agency L.L.C. (“NYPIA”) in two separate but related cases. NYPIA was the ultimate buyer of the assets of an insurance agency, Morris, Schnoor & Gremel, Inc. (“MSG”), that were seized by a secured creditor pursuant to a valid security agreement and then sold to NYPIA in an Article 9 sale. The secured creditor, a law firm, sold the assets for the outstanding debt owed to it and an assumption of the debt of MSG owed to a third-party lender. In both cases, Plaintiffs¹ brought suit against NYPIA and certain other defendants asserting several claims, including claims for avoidance of an alleged fraudulent transfer. In both cases, all claims asserted against NYPIA, including the fraudulent transfer claims, were dismissed with prejudice on motions for summary disposition in 2009 and early 2010. Following the dismissal of these claims, NYPIA was no longer a party to either case. NYPIA did not conduct discovery and NYPIA only was the subject of third-party discovery taken of it by Plaintiffs.

The cases proceeded to trial in June 2011 on a single claim for avoidance of fraudulent transfer asserted solely against the two other defendants. NYPIA’s only presence in the Court was as a non-party named in a later motion for civil contempt sanctions (the “Contempt

¹ Plaintiff Glenn Morris was a former shareholder of MSG, who sold his stock to Judd Schnoor without a security interest in the assets of MSB. Schnoor defaulted on his debt to Plaintiff Morris and to Morris, Schnoor & Gremel Properties, L.L.C. (“MSG Properties”), an entity primarily owned by Morris. Schnoor’s attorneys were Charron & Hanisch, L.L.C. (“Charron & Hanisch”), who received a secured interest in the assets of MSG to secure fees incurred out of the firm’s representation of Schnoor in 2007 in shareholder litigation between Morris and Schnoor. The Court in the 2007 case issued an order prohibiting Schnoor from transferring assets outside of the normal course of business. Notwithstanding, Charron & Hanisch foreclosed on the assets and sold them to NYPIA for the sum of the outstanding fees and an assumption of the debt of a third party lender, who also had a security interest in the assets. Schnoor filed for bankruptcy and Morris, in turn, filed suit against MSG, the firm and NYPIA, who has no relationship with Charron & Hanisch other than as the buyer of the assets through the Article 9 sale.

Motion”) in a third and discrete proceeding which the Circuit Court² decided to hear at the same time as it heard the other two cases in 2011. The Circuit Court never consolidated any of the three cases. The Circuit Court also expressly stated at the trial that NYPIA had no potential liability in connection with the fraudulent transfer claims asserted against the other parties.

NYPIA prevailed in full on the Contempt Motion. Nonetheless, in December 2012 the Circuit Court entered judgment against non-party NYPIA in the two cases in which it was not a party based on the fraudulent transfer claims asserted against the other defendants – even though the Circuit Court had three years before dismissed with prejudice the fraudulent transfer claims asserted against NYPIA and confirmed that NYPIA had no potential liability on the remaining fraudulent transfer claims. The Circuit Court thus found NYPIA liable for claims on which it had already prevailed, in suits to which it was no longer a party and had already been dismissed, and for claims that it had no notice would be tried against it and, thus, no opportunity to defend against.

The Circuit Court’s entry of judgments against NYPIA was error. Fundamental principles of due process under the United States and Michigan Constitutions require that, before NYPIA could be subjected to liability, the Circuit Court was required to join NYPIA as a party defendant, give NYPIA notice of that fact and permit NYPIA a fair opportunity for discovery and to defend against any judgments that might be imposed against it. Yet, the Circuit Court did none of this and found against NYPIA on matters as to which it had fully prevailed on summary disposition years earlier. By doing so, the Circuit Court denied NYPIA due process. Moreover,

² Plaintiffs filed a contempt claim against Charron & Hanisch and NYPIA. However, NYPIA had no knowledge of the Circuit Court’s order and no relation to the firm other than as a buyer for assets offered for the sum of the creditor’s outstanding debt. NYPIA prevailed in full on the contempt claim.

under well-settled Michigan law, the claims were barred by *res judicata* since they already had been summarily disposed and the Circuit Court lacked authority to enter a money judgment against a non-party who had been previously dismissed from the actions.

On appeal, the Appellate Court in cursory fashion held that NYPIA was accorded due process because it was an object of third-party discovery by Plaintiffs, because it was present at the unconsolidated hearing in connection with the motion hearing for contempt filed in another case, and because it filed a motion for reconsideration after trial asserting it was deprived of due process by having received judgments against it on claims which had been summarily dismissed three years earlier. These threshold constitutional defects and other errors require that the Judgments against NYPIA should be vacated. These issues raise significant Constitutional and jurisprudence issues important to this state, especially in connection with a court's ability to issue judgments against non-parties and former parties against whom the subject claims had been dismissed but not reinstated prior to judgment.³

II. CONCISE STATEMENT OF FACTS

The Judgments at issue were entered in two cases after NYPIA had been dismissed as a party from those cases on summary disposition. At the time of the trial that was held in the Circuit Court, NYPIA's only involvement was as a non-party named in a motion for civil contempt sanctions in a third and separate case concerning the dissolution of MSG (the "Dissolution Action"). The Circuit Court heard evidence on the Contempt Motion at the same time that it conducted the trial of the other two cases as to other parties. The Circuit Court never

³ Notably, Plaintiffs did not even appeal the lower court's summary dismissal of the UFTA claims against NYPIA.

consolidated any of the three cases. The Circuit Court found in favor of NYPIA in the Contempt Motion.

A. NYPIA HAS NO INVOLVEMENT WITH OR OWNERSHIP INTEREST IN MSG OR MSG PROPERTIES, THE ENTITIES THAT GIVE RISE TO THESE SUITS

MSG was an insurance agency. The proceedings in the lower court stem from a dispute between the two owners of MSG: Plaintiff Morris and non-party Schnoor. NYPIA had no involvement with this dispute.

In the 1980's, Morris's father, James Morris, started an insurance agency. (Ex. 1 to NYPIA's Opening Brief, Findings of Fact, Conclusions of Law, and Verdicts in Case Nos. 09-001878 and 09-011842 (the "Verdict"), p. 2.) In 1996, James Morris sold the insurance agency's assets to MSG pursuant to a "Purchase and Sale of Insurance Agency" agreement (the "Sale Agreement"). (Ex. 2 to NYPIA's Opening Brief.) In exchange for the assets, MSG gave James Morris a promissory note in the amount of \$200,000. (*Id.*, ¶¶ 2.1, 2.2) The promissory note was incorporated into the Sale Agreement and attached as an exhibit to the agreement. (*Id.*, Ex. A.)

The Sale Agreement also contained the following provision:

Neither Seller [James Morris] nor Purchaser [MSG] shall assign this agreement, or any interest in it, without the prior written consent of the other, except Purchaser may assign any or all of its rights to any subsidiary or affiliated business association owned by Purchaser, without Seller's consent. (*Id.*, ¶ 3.)

For many years thereafter, Morris and Schnoor operated MSG harmoniously selling commercial and personal insurance. (Ex. 1 to NYPIA's Opening Brief, Verdict, p. 3.) Morris and Schnoor also formed a number of other closely-held business entities, including MSG Properties, a company that owned and maintained real property. (*Id.*)

During this time, MSG made regular payments on the promissory note to James Morris. (*Id.*) By 2008, when James Morris purported to declare a default under that note, the outstanding principal on the note had been paid down to approximately \$53,000. (*Id.*, p. 14.)

B. NYPIA IS NAMED IN THE CIVIL CONTEMPT MOTION IN THE DISSOLUTION ACTION

More recently, Morris and Schnoor apparently fell into disagreement about the business operations of MSG. As the disagreement came to a head in 2007, Morris filed a civil action against Schnoor and MSG, docketed as Kent County Circuit Court Case No. 07-006641 – the Dissolution Action. (*Id.*, p. 4.) In the Dissolution Action, Morris sought a judicial order dissolving MSG. (*Id.*)

The Circuit Court denied the requests to dissolve MSG and instead entered an order directing Morris to sell his MSG stock to Schnoor for \$2.5 million. (*Id.*, pp. 4-5.) In late 2007, Schnoor gave Morris a down payment for the MSG stock and signed a promissory note for the remainder of the purchase price. (*Id.*, p. 5.) The note required Schnoor to make monthly payments to Morris beginning in December 2007. (*Id.*) Pursuant to the terms of the court-ordered sale, Morris retained a security interest in MSG's stock, but not its assets. (*Id.*) The terms of the sale did not include a term preventing Morris from competing with Schnoor in the insurance business, and Morris quickly set up his own insurance agency that competed directly with MSG. (*Id.*) Morris took key customers and Schnoor complained that MSG lost significant value as a result. Schnoor began making monthly payments to Morris, but apparently became upset by the loss of clients to Morris's competing agency and ceased making payments. (*Id.*)

In May 2008, MSG granted a security interest in all of its assets to its law firm, Defendant Charron & Hanisch, PLC ("Charron & Hanisch"), to secure payment of outstanding

legal bills. (*Id.*) Meanwhile, Morris pressed ahead with the lawsuit, seeking a court order directing Schnoor to resume making monthly payments under the note. (*Id.*)

The Circuit Court began a hearing as to whether Schnoor should be held in civil contempt for failing to make the monthly payments to Morris. (*Id.*) At the hearing, the Circuit Court entered an order enjoining Schnoor from transferring the assets of MSG “outside the ordinary course of business without authorization from the [Circuit] Court” (the “Injunction Order”). (Ex. 3 to NYPIA’s Opening Brief, Opinion and Order Setting forth Findings of Civil Contempt, Case. No. 07-006641 (the “Contempt Order”), p. 1.)

In November 2008, after the Injunction Order had been entered, Charron & Hanisch foreclosed on and took possession of MSG’s assets to satisfy the preexisting security agreement. (Ex. 1 to NYPIA’s Opening Brief, Verdict, p. 7.) Charron & Hanisch then sold these assets at arm’s-length to NYPIA, a third party which had no prior involvement with MSG, Charron & Hanisch, or any of the other parties. (*Id.*) In exchange for the assets, NYPIA provided substantial value. It paid Charron & Hanisch the sum of its outstanding legal bills, \$395,200; \$100,000 in cash and a promissory note for \$295,200. (*Id.*, p. 7 and n. 8.) In addition, NYPIA paid a line of credit extended to MSG by Fifth Third Bank in the approximate amount of \$250,000. (*Id.*, p. 22.) A creditor sale of assets for the total debt is not atypical as the outstanding debt is a typical bid in a foreclosure sale.⁴

Morris asserted that these transactions violated the Injunction Order and sought to hold MSG, MSG’s counsel Charron & Hanisch, and David Charron in civil contempt for alleged

⁴ Notably, this was not a sale by the debtor, MSG. Rather it was an Article 9 sale by a secured creditor seeking payment of the debt secured by the law firm and by Fifth Third Bank. This was the sum requested by the secured creditors. A buyer in an Article 9 sale is not required to offer more than is requested by the secured creditors. NYPIA was never given an opportunity to raise this issue as it was not a party to the Morris Action or the MSG Properties Action.

violation of the Injunction Order. Morris also named non-party NYPIA in that Contempt Motion. (Ex. 3 to NYPIA's Opening Brief, Contempt Order, p. 1.) As described below, the Circuit Court ultimately heard the Contempt Motion at the same time as it tried the two independent lawsuits brought by Morris and MSG Properties, respectively. These suits were not consolidated. Nor were the trials and hearing consolidated. At the time of the hearings, NYPIA was only before the Court regarding the Contempt Motion in the Dissolution Action.

C. THE CIRCUIT COURT DEFINITELY REJECTS MORRIS' CLAIMS AGAINST NYPIA IN CASE NO. 09-001878

In early 2009, after Charron & Hanisch had taken possession of MSG's assets and sold them to NYPIA, Morris brought a separate action against MSG, Charron, Charron & Hanisch, and NYPIA that was docketed as Kent County Circuit Court Case No. 09-001878 (the "Morris Action"). (Ex. 4 to NYPIA's Opening Brief, First Amended Verified Complaint, Morris Action.) The gravamen of Morris's complaint was that the chain of events that culminated in Charron & Hanisch's sale of assets to NYPIA was fraudulent or otherwise improper. (*Id.*) The complaint asserted four claims: (1) fraudulent transfer under the UFTA against all four defendants; (2) "commercially unreasonable sale" against all four defendants; (3) fraud against defendants Charron and Charron & Hanisch, PLC only; and (4) conversion against all four defendants. (*Id.*)

The Circuit Court granted summary disposition in favor of NYPIA on all claims asserted against NYPIA in the Morris Action. First, in October 2009, the Court held that Morris's fraudulent transfer claim against NYPIA failed as a matter of law, reasoning that the alleged transfer of assets to NYPIA "cannot form the basis for the cause of action under UFTA because neither Charron & Hanisch nor NYPI[A] was ever a debtor in relation to Plaintiff Morris. The remedies afforded under UFTA are only to a creditor for fraudulent transfers of a debtor." (Ex. 5

to NYPIA's Opening Brief, p. 5.) In February 2010, the Court granted summary disposition on the two remaining claims against NYPIA for "commercially unreasonable sale" and conversion. (Ex. 6 to NYPIA's Opening Brief.)

Thus, as of February 2010, all three claims against NYPIA in the Morris Action had been dismissed with prejudice. The Circuit Court also dismissed a number of other claims, whittling the case down to only a single claim for fraudulent transfer solely against Defendants MSG and Charron & Hanisch. As discussed below, the Circuit Court conducted a trial on that claim commencing in June 2011.

D. THE CIRCUIT COURT DEFINITELY REJECTS MSG PROPERTIES' CLAIMS AGAINST NYPIA IN CASE NO. 09-011842

After the Morris Action was well underway, a similar case, docketed as Kent County Circuit Court Case No. 09-011842 (the "MSG Properties Action"), was filed by MSG Properties, a Michigan limited liability company primarily owned by Morris. (Ex. 7 to NYPIA's Opening Brief, Verified Complaint, MSG Properties Action.) MSG Properties claimed to be an unsecured creditor of MSG based on three promissory notes that that MSG issued in October 2006.⁵ (*Id.*, ¶8.) In the MSG Properties Action, MSG Properties named the same defendants as those in the Morris Action and asserted three claims that were in substance identical to those asserted in the Morris Action: (1) fraudulent transfer under the UFTA against all Defendants, (2) "commercially unreasonable sale" against all Defendants, and (3) conversion against all Defendants. (*Id.*)

⁵ MSG issued three separate promissory notes to MSG Properties on October 1, 2006. MSG disputes the validity of these notes, but the Circuit Court found that MSG honored one of the three notes, in the amount of \$1,009,152.35. (Ex. 1 to NYPIA's Opening Brief, Verdict, p. 3.) The debt allegedly owing under this note formed the basis of MSG Properties' fraudulent transfer claim.

Just as in the Morris Action, all claims that MSG Properties asserted against NYPIA were dismissed on summary disposition. (Ex. 8 to NYPIA's Opening Brief, Opinion and Order dated February 16, 2010.) The Circuit Court noted that "[t]he claims asserted by MSG Properties in this suit [the MSG Properties Action] are virtually identical to the claims asserted in Morris's suit [the Morris Action], so the Court's analysis of the claims set forth by Plaintiff MSG Properties will closely track the analysis employed by the Court in resolving the summary disposition motions in the suit filed by Morris." (*Id.*, p. 2.) Thus, in February 2010, the Circuit Court issued an Opinion and Order granting summary disposition with prejudice in favor of NYPIA on all three claims in the MSG Properties Action. (*Id.*)

The only claim that remained in the MSG Properties Action, just as in the Morris Action, was a single claim for fraudulent transfer asserted solely against MSG and Charron & Hanisch. As discussed below, this claim was tried together with the corresponding fraudulent transfer claim against MSG and Charron & Hanisch in the Morris Action.

E. WHILE ALL ISSUES IN ALL ACTIONS WERE DECIDED IN NYPIA'S FAVOR, THE CIRCUIT COURT ERRONEOUSLY ENTERS JUDGMENT AGAINST NYPIA

The Dissolution Action, the Morris Action, and the MSG Properties Action were never consolidated, but the Circuit Court heard all three cases together commencing in June 2011. The Contempt Motion was heard in conjunction with the Dissolution Action.

As it was not a party to any of the actions, NYPIA did not conduct any discovery and was only the subject of third-party discovery taken of it by Morris and MSG Properties. As it was not a party to the MSG and MG Properties Actions, NYPIA had no rights of a party, including to discovery⁶ or to other rights afforded under the court rules.

⁶ Parties are only entitled to discovery. MCR 2.302(A)(1).

Also as described above, all claims against NYPIA in the Morris Action and the MSG Properties Action had been dismissed with prejudice almost eighteen months earlier, and NYPIA was no longer a party to either of those cases. The only issue whatsoever pending against NYPIA at the hearings was the Contempt Motion filed by Morris in the separate Dissolution Action. At the outset, the Circuit Court made clear that NYPIA was *not* a party and was *not* participating in any way with respect to either the Morris Action or the MSG Properties Action. Prior to the opening statements in the hearing, NYPIA's counsel and the Circuit Court engaged in the following colloquy:

THE COURT: [...] All right, Mr. Gerling?

MR. GERLING: David Gerling appearing on behalf of non-party New York Private Insurance Agency, I believe, in the '07 case [i.e., the Dissolution Action], no involvement in the two '09 proceedings [i.e., the Morris Action and the MSG Properties Action].

THE COURT: *Correct. Right. Summary disposition's been granted in favor of your client and all claims in both of the 2009 cases, so as far as I can tell, you have no role to play in the 2009 cases. Your client is at no risk of liability. Okay? [...]* (Ex. 9 to NYPIA's Opening Brief, Transcript of June 28, 2010 trial proceedings, pp. 7-8.)

The Circuit Court found in NYPIA's favor on the lone issue raised against it, holding that NYPIA was not subject to civil contempt for violation of the Injunction Order because NYPIA did not have knowledge of the Injunction Order. (Ex. 3. to NYPIA's Opening Brief Contempt Order, pp. 19-21). In December 2012, the Circuit Court issued an Opinion and Order that found "as a fact" that neither the two principals of NYPIA, Guy Hiestand or William Woodworth, "nor any other NYPIA principal knew of the court order that prohibited the transfer of MSG assets outside the ordinary course of the agency's business." (*Id.*, p. 8.) Nor was there any indication or finding of any collusion or collusive activities by NYPIA or its owners with MSG or Charron

& Hanisch (*Id.*) Consequently, the Circuit Court rejected Morris's request for civil contempt sanctions against NYPIA. (*Id.*, pp. 19-21.) The Circuit Court did impose civil contempt sanctions on MSG, Charron & Hanisch, and Charron. (*Id.*, p. 21.)

The Circuit Court also issued its "Findings of Fact, Conclusions of Law, and Verdicts" in the Morris Action and the MSG Properties Action in December 2012. (Ex. 1 to NYPIA's Opening Brief.) The Circuit Court found that MSG and Charron & Hanisch – but not NYPIA – violated the UFTA, MCL 566.34(1)(a), when they entered into the security agreement that gave Charron & Hanisch a secured interest in MSG's assets and when Charron & Hanisch took possession of those assets. (*Id.*, pp. 9-13.)

However, rather than rendering a verdict against MSG and Charron & Hanisch – the named defendants that the Court found violated the UFTA – the Court instead rendered a verdict against NYPIA, which purchased the assets from Charron & Hanisch. (*Id.*, pp. 19-24.) Again, by the time of trials, all claims against NYPIA in the Morris Action and the MSG Properties Action had been dismissed with prejudice, NYPIA was not a party to these cases, and the Circuit Court explicitly stated at the outset of the trial that NYPIA was "at no risk of liability" in these cases. (Ex. 9 to NYPIA's Opening Brief, p. 8.) Regardless, the Circuit Court found that non-party NYPIA could be held liable for the fraudulent transfer as a "subsequent transferee" of the assets pursuant to the UFTA, MCL 566.38(2)(b), a claim not pending against NYPIA, not noticed for trial or tried against NYPIA. (*Id.*)

The Circuit Court subsequently entered two separate judgments against non-party NYPIA in the Morris Action and the MSG Properties Action, respectively (the "Judgments," Exs. 10 and 11). The total amount of the Judgments against NYPIA is \$1,562,675.85: \$67,541.81 in the

Morris Action, and \$1,495,134.04 in the MSG Properties Action. NYPIA appealed from the Judgments.⁷

F. THE COURT OF APPEALS RULING

LC No. 09-001878-CB was assigned Court of Appeals docket number 315742 and LC No. 09-0011842-CB was assigned Court of Appeals docket number 315702. The Opinion of the Court of Appeals is attached hereto as Exhibit 22.

The appellate court held that NYPIA received due process because it participated in discovery as the subject of third party discovery taken by Plaintiffs (Ex 22, p. 26), because NYPIA was present during the “trial” though for the sole purpose of defending a contempt motion in an unrelated case (Ex. 22, p. 27), and because NYPIA filed a motion for reconsideration after the trial claiming it was deprived of due process because it was not a party to the claims in cases in which the judgments were issued against it and because the causes of action on which the judgments were issued were previously dismissed with prejudice on summary judgment motions (Ex. 22, pp. 27-28). Finally, the appellate court rejected NYPIA’s claim that the lower court lacked authority to enter judgment against a non-party against whom the claims had been previously dismissed, on the basis that NYPIA allegedly failed to “object to its non-party status” before the trial court (Ex. 22, p. 30).⁸

⁷ Because it prevailed on the Contempt Motion, NYPIA did not appeal from the order entered in that case. Rather, NYPIA appealed from the judgments entered in the Morris Action and the MSG Properties Action.

⁸ The appellate court cited as authority for its holding MCR 2.205 (Ex. 22, p. 30). However, as will be more fully explained, MCR 2.205(B) requires the court to order necessary parties to appear and to become parties to the action. Here, NYPIA never was ordered to be a party to the action. Nor did Morris or MSG Properties make such a request. Nor is there any requirement that a non-party appear and demand to be a party to an action or otherwise waive any objections to the issuance of judgments against it in an action in which it was not a party.

III. ARGUMENT

A. **THE CIRCUIT COURT DEPRIVED NYPIA OF DUE PROCESS BY ENTERING JUDGMENT AGAINST IT IN THIS CASE TO WHICH IT WAS NO LONGER A PARTY AS TO CLAIMS THAT ALREADY HAD BEEN DISMISSED WITH PREJUDICE**

The Circuit Court's entry of the Judgments against non-party NYPIA violated NYPIA's fundamental due process rights under the United States and Michigan Constitutions and should be vacated. All claims asserted against NYPIA, including the UFTA claims, were dismissed with prejudice on summary disposition, and NYPIA was accordingly dismissed as a defendant from both cases. After it was dismissed, NYPIA had no notice that it was on trial with respect to the UFTA claims and had no reason or ability to prepare or present a defense to those claims, as the claims already had been dismissed with prejudice. Nonetheless, at the conclusion of the trials and hearing, the Circuit Court entered judgment against non-party NYPIA in the Morris Action and the MSG Properties Action based on the UFTA claims.

This was error. The entry of judgments against NYPIA without reversing the earlier summary awards, adding NYPIA as a party, or providing NYPIA with notice and a fair opportunity to litigate the claims that resulted in judgments against NYPIA violates NYPIA's due process rights under the United States and Michigan Constitutions. For these reasons, the judgments against NYPIA should be vacated.

1. **The Circuit Court's Judgments Against NYPIA Violated Due Process**

The Circuit Court's entry of judgments against non-party NYPIA was improper because it violated NYPIA's due process rights under the United States and Michigan Constitutions. Fundamental principles of due process require that, before a third party can be subjected to liability, it must be formally joined as a party defendant, have claims made against with an opportunity to answer and raise affirmative defenses, conduct discovery, and be given reasonable

notice and granted a fair opportunity to discover and defend the claims asserted against it under the applicable rules of procedure. In the Morris Action and the MSG Properties Action, however, NYPIA was neither joined as a party defendant nor given notice and an opportunity to defend the claims on which the Circuit Court entered judgment against it. By the time of trial, NYPIA had been dismissed with prejudice as a party after it prevailed on all claims and was no longer a litigant. Because it was dismissed with prejudice from these cases about eighteen months before the trials commenced, NYPIA was deprived of the necessary procedural protections to which a party defendant is entitled.

Moreover, NYPIA was given no notice that it was at risk of liability on the claims previously dismissed and on which the Circuit Court ultimately issued judgments against NYPIA. To the contrary, the Circuit Court affirmatively stated at the outset of trial that NYPIA was before the Court *only* on the Contempt Motion in the Dissolution Action, and that NYPIA therefore had “no role to play” in the Morris Action and the MSG Properties Action and was “at no risk of liability” in those actions. (Ex. 9 to NYPIA’s Opening Brief, pp. 7-8.) Thus, NYPIA had no notice or opportunity to defend against the UFTA claims or any remedy that might have been imposed in connection with those claims. Because NYPIA had already fully prevailed on these claims, it had no expectation it would have to defend the causes of actions at the trials and did not do so. Because NYPIA’s due process rights were not adequately protected in the Circuit Court proceedings, the judgments against NYPIA should be vacated.

Due process requires that a non-party be joined as a party to an action before it can be subjected to an adverse judgment.⁹ Particularly in the context of UFTA claims, courts have noted that in order to protect due process rights, a transferee must be added as a party defendant before judgment may be entered against the transferee. Joinder of the non-party transferee is “necessary to accord her [the transferee] due process while litigating her and plaintiff’s claims to the disputed property.” *Estes v Titus*, 273 Mich App 356, 385, 731 NW2d 119 (2006), *aff’d in relevant part and vacated in part on other grounds*, 481 Mich 573, 751 NW2d 493 (2008); *see also Havoco of Am, Ltd v Hill*, 197 F3d 1135, 1140 (CA 11, 1999) (in UFTA action seeking to recover property held in tenancy by the entirety, holding that debtor’s wife was an indispensable party: “we do not believe that [the debtor’s] wife’s due process rights are adequately preserved in a proceeding to which she is not a party and in which her property rights may effectively be terminated”). For example, in *Tanaka v. Nagata*, 868 P2d 450 (Haw 1994), the Supreme Court of Hawaii vacated an order permitting execution on property held by a non-party transferee that was alleged to have been fraudulently transferred. The *Tanaka* court held

⁹ *See, e.g., Martin v Wilks*, 490 US 755, 765 (1989) (“Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree.”); *Zenith Radio Corp v Hazeltine Research, Inc*, 395 US 100, 110 (1969) (“It is elementary that one is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been named a party by service of process.”) (citation omitted); *Fletcher Aircraft Co v Bond*, 77 FRD 47, 52 (CD Cal, 1977) (“It is a firmly established procedural maxim that a judgment which substantially affects the rights of a party who is not joined violates due process.”); *Nat’l Union Fire Ins Co v Greene*, 195 Ariz 105, 109 (Ct App, 1999) (“[D]ue process requires that an individual must be joined in the suit to obtain a valid judgment against her”); *Chickasaw Tel Co v Drabek*, 921 P2d 333, 335 (Okla, 1996) (“Extant jurisprudence teaches, and due process requires, that before anyone’s rights in real property may be affected in a judicial proceeding, that individual must be joined as a party defendant in the suit.”) (emphasis in original); *Exceltech, Inc v Williams*, 579 So 2d 850, 853 (Fla Ct App, 1991) (“[T]hird parties must be joined at some stage in the proceedings and given due process before their property rights can be cut off.”)

that the transferee was an “indispensable party” to any action that could result in relief against the transferee, and “[f]undamental principles of due process require that transferees who claim an interest in real property or its proceeds have a full and fair opportunity to contest claims of fraudulent transfer.” *Id.* at 455. The *Tanaka* court therefore vacated the relief that had been ordered against the non-party. *Id.* at 455.

The United States Supreme Court has repeatedly affirmed that due process forbids entry of an adverse judgment against a non-party. For example, in *Nelson v Adams USA, Inc*, 529 US 460 (2000), the defendant won an award of attorney’s fees against the plaintiff. When the plaintiff threatened to liquidate rather than pay the fee award, however, the defendant moved to amend its pleadings to add the plaintiff’s sole shareholder as a party, and also to amend the judgment awarding fees to make it enforceable against the shareholder. The district court granted the defendant’s motions, and the Federal Circuit affirmed, reasoning that the non-party shareholder “fail[ed] to show that anything different or additional would have been done to stave off the judgment had [the shareholder] been a party, in his individual capacity, from the outset of the litigation.” *Id.* at 465.

The Supreme Court reversed, holding that due process forbids the entry of judgment against a non-party without first joining him as a party to the action and permitting him to litigate the matter as prescribed by the applicable rules of procedure. The Supreme Court held that the entry of judgment against the shareholder violated his due process rights, regardless of the fact that the shareholder had notice of the litigation and knew as soon as defendant filed its motion that he might be subjected to personal liability. The Court noted that although one might argue that the shareholder consequently had notice and an opportunity to be heard, “Rule 15 and the due process for which it provides ... demand a more reliable and orderly course.” *Id.* at 466-67.

The Court further explained that this decision rested on the “fundamental unfairness of imposing judgment without going through the process of litigation our rules of civil procedure require.” *Id.* at 470. *See also In re Foster*, 324 Mont 114, 120 (2004) (non-parties that plaintiff sought to add as defendants after entry of judgment must be afforded “all the procedural rights attendant to litigation, such as ... right to ... engage in discovery, and trial by jury”) (citations omitted).

In addition to requiring that a non-party be joined to an action before it may be subjected to an adverse judgment, due process requires that a party be given reasonable notice of the claims against it and a fair opportunity to defend against those claims. *See Matthews v Eldridge*, 424 US 319, 348 (1976) (“The essence of due process is the requirement that ‘a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.’”) (quoting *Joint Anti-Fascist Comm v McGrath*, 341 US 123, 171-172 (1951) (Frankfurter, J., concurring)); *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314 (1950) (“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”); *Dow v Michigan*, 396 Mich 192, 205-206, 240 NW2d 450 (1976) (citing *Mullane*).

More specifically, “[n]otice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure.” *Lankford v Idaho*, 500 US 110, 126 (1991); *see also Bowman Transp, Inc v Arkansas-Best Freight Sys, Inc*, 419 US 281, 289 n4 (1974) (under the Due Process Clause, “[a] party is entitled, of course, to know the issues on which [the] decision will turn”). For example, in *Doubleday & Co, Inc v Curtis*, 763 F2d 495, 502-03 (CA 2, 1985), the trial court dismissed the plaintiff’s claim for damages on the basis of waiver, an affirmative defense that was not plead by the defendant nor raised at trial. The Second Circuit

reversed, reasoning that because the plaintiff “received no notice that its claim was subject to challenge on the basis of waiver...the district court violated [the plaintiff’s] right to fair notice” under the Due Process Clause. *Id.* at 502. *See also, e.g., Cent State Cmty Serv v Anderson*, 292 P3d 36 (Okla Ct Civ App 2012) (vacating judgment against employer in worker’s compensation case based on violation of due process where employer lacked notice that the compensability of certain injuries to employee would be considered at hearing).

Here, NYPIA was not joined as a party to either the Morris Action or the MSG Properties Action and did not receive fair notice that it was potentially subject to liability on the UFTA claims in either of these cases. In fact, these very claims were previously dismissed with prejudice against NYPIA and therefore, in addition to *res judicata* barring a later adverse finding as will be discussed below, the Circuit Court’s entry of judgments against NYPIA on the UFTA claims in these cases violated NYPIA’s due process rights. As set forth above, all claims asserted against NYPIA in these were dismissed on summary disposition as of February 2010, and NYPIA was dismissed as a party to the cases at that time. Moreover, after the claims against NYPIA were dismissed in February 2010, NYPIA was not given any notice that it might ultimately be subjected to liability based on the UFTA claims. (*See Exs. 5, 6, and 8.*) NYPIA also had neither reason nor opportunity to conduct discovery with respect to the UFTA claims or to avail itself of other procedural and substantive protections after the claims were dismissed on summary disposition and NYPIA was no longer a party to either action.

While NYPIA participated in the unconsolidated hearings for the sole, limited purpose of defending against the Contempt Motion in the Dissolution Action, NYPIA had no notice that it could be subjected to liability on the UFTA claims in the Morris Action and the MSG Properties Action. In fact, at the beginning of the hearing, the Circuit Court explicitly affirmed that NYPIA

had “*no role to play*” at trial with respect to the UFTA claims and was “*at no risk of liability*” on these claims. (Ex. 9 to NYPIA’s Opening Brief, pp. 7-8 (emphasis added).) It was only at the conclusion of the last day of the hearings before closing argument that the Circuit Court raised what it characterized as an “unanswered question” whether, even if NYPIA prevailed on the contempt issue – the only issue on which it had participated in the trial – it could “be required to furnish damages as a clawback remedy under the Uniform Fraudulent Transfer Act.” (Ex. 12 to NYPIA’s Opening Brief, Transcript of October 19, 2011 proceeding, pp. 153-154.) Because the Circuit Court did not raise the potential of liability on the UFTA claims against NYPIA until after the presentation of evidence at the trials had already concluded, NYPIA had no notice that it could be subjected to liability on the UFTA claims at trial and no opportunity to discover or present a defense to these claims. NYPIA had neither notice of nor any opportunity to defend against the UFTA claims during the trial. *See also Mullane*, 339 U.S. at 315 (“when notice is a person’s due, process which is a mere gesture is not due process”). NYPIA’s counsel therefore re-emphasized at closing argument that NYPIA was “not a party” (Ex. 13 to NYPIA’s Opening Brief, Transcript of December 1, 2011 closing argument, p.120) and that the UFTA claims against NYPIA “have already been brief thoroughly and decided by the Court” (*id.*, p. 121.)

Due process mandates that, before NYPIA can be subjected to judgment, NYPIA must be added as a party defendant, receive fair notice of the claims and potential remedies against it, and be permitted a fair opportunity to discovery and litigate the claims in the manner prescribed by the Michigan Court Rules. The procedure in the Circuit Court did not satisfy these fundamental requirements of due process, and the Circuit Court’s judgments should therefore be vacated. *Nelson, supra; Estes, supra; Tanaka, supra; Havoco, supra; Matthews v Eldridge*, 424 US 319,

348 (1976) (“The essence of due process is the requirement that ‘a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.’”).

Moreover, beyond merely dismissing with prejudice all claims against NYPIA, the Circuit Court repeatedly and explicitly affirmed on the record that NYPIA was not a part of the fraudulent transfer cases against the other parties and was at no risk of liability on these claims. For example, prior to the hearings, the Circuit Court heard argument on a motion concerning requests to take third-party discovery. At that hearing, the Circuit Court specifically affirmed that NYPIA would appear at the hearings only with respect to the pending contempt motion, and not with respect to the UFTA claims against NYPIA that had previously been dismissed:

THE COURT [to NYPIA’s counsel]: *You’re not in the ’09 case. You’re not in the ’09 cases [i.e., the fraudulent transfer cases].*

[...]

MR. GERLING [NYPIA’s trial counsel]: And the order to show cause [on the pending motion] relates to the ’07 case [i.e., the contempt proceeding]?

THE COURT: Correct. Right. *You’re out of the 2009 case for once, for all, and forever.* (Ex. 16 to NYPIA’s Reply Brief, June 3, 2011 hearing transcript, pp. 11, 42.)

At the opening of the hearings, the Circuit Court again explicitly affirmed that NYPIA was *not* subject to any potential liability on the fraudulent transfer claims, and that its *only* role was to defend against the contempt motion:

MR. GERLING: David Gerling appearing on behalf of non-party New York Private Insurance Agency, I believe, in the ’07 case, no involvement in the two ’09 proceedings.

THE COURT: *Correct. Right. Summary disposition’s been granted in favor of your client and all claims in both of the 2009 cases, so as far as I can tell, you have no role to play in the 2009 cases. Your client is at no risk of liability. Okay? [...]* (Ex. 9 to NYPIA’s Opening Brief, pp.7-8.)

Plaintiffs have asserted that, despite the glaring errors underlying the judgment against NYPIA, NYPIA somehow still received due process. But the cases that Plaintiffs previously cited to support their assertion have nothing to do with the circumstances in this case, where the court entered judgment against a non-party that had already prevailed in a final judgment on the merits. By contrast, the *only* decisions that Plaintiffs cite with respect to the “opportunity to be heard” imposed remedies against *parties* to a case *with active claims pending against them*.¹⁰ The cases previously relied on by Plaintiffs thus have no application here. Plaintiffs did not and cannot cite a single case that approves of what the Circuit Court did here: enter summary disposition with prejudice in favor of NYPIA, proceed through trials without NYPIA as a party, and then enter judgment against NYPIA on the very claims that were previously dismissed with prejudice.

Plaintiffs cannot erase these fundamental errors or show that NYPIA received its due process rights. For example, Plaintiffs asserted, without explaining, that NYPIA must have had an opportunity to defend itself at trial from the previously-dismissed fraudulent transfer claims, because NYPIA presented evidence related to the valuation of the assets it purchased from Charron & Hanisch and whether the purchase transaction was made at “arms-length.” (See Response Brief, pp.12, 16, 18-19.) Plaintiffs miss the point: NYPIA presented this evidence *only* with respect to the *contempt motion* – the only issue on which it appeared at the trial.¹¹

¹⁰ *Bay Home Medical & Rehab, Inc v Dept of Treasury*, 2005 WL 658828 (Mich Ct App, Mar 22, 2005) (attached as Ex 2 to Plaintiffs’ Response Brief); *Hicks v Ottewell*, 174 Mich App 750, 436 NW2d 453 (1989).

¹¹ The Circuit Court explained that the evidence offered by NYPIA was relevant to the contempt proceedings, not the fraudulent transfer cases: “THE COURT: [...] And if this is, in fact, shown by the evidence to have been a legitimate arms-length transaction, then I don’t think there’s any way that New York Private could be held in contempt.” (Ex. 17 to NYPIA’s Reply Brief, June 30, 2011 transcript, p.31.) Indeed, Plaintiffs filed a motion in the Circuit Court to

NYPIA fully prevailed on that motion. It had neither reason nor opportunity to defend itself against the previously-dismissed fraudulent transfer claims at trial.¹²

Plaintiffs also pointed on appeal below to a March 19, 2010 hearing, at which Plaintiffs sought leave to file amended complaints after NYPIA had been dismissed on summary disposition. But the transcript of that hearing only strengthens the conclusion that NYPIA had prevailed in full on all claims and thereafter did not have any ability to participate in the cases. Indeed, Plaintiffs' counsel stated that NYPIA "doesn't have to be here" because the claims against NYPIA had been dismissed. (Ex. 19 to NYPIA's Reply Brief, 6:10-15.) The Circuit Court also explained at the hearing that it had already determined as a matter of law that "there was no way we could proceed" against NYPIA:

THE COURT: [...] In other words I've ruled as I've ruled, and *the fact that I'm allowing [Plaintiffs] to file these proposed amended complaints doesn't somehow resurrect the claims on which I've granted summary disposition. Those rulings remain the law of the law case.* [...]

[W]hen Ms. White told me that we had motions up to – for me to file amended complaints in this case, *I was at first frustrated*

designate a valuation expert specifically in the contempt proceedings – not the fraudulent transfer cases. (Ex. 18 to NYPIA's Reply Brief, Plaintiffs' Motion to Endorse Additional Experts in Case No. 07-06441.) Plaintiffs' counsel also acknowledged on the record that the Circuit Court had denied Plaintiffs' request to designate an expert in the fraudulent transfer cases, and that the parties were utilizing valuation experts in the contempt proceedings. (Ex. 17, p.133.)

¹² Plaintiffs also point out that NYPIA filed Affirmative Defenses to Plaintiffs' "claims of recovery of [NYPIA's] property" on April 14, 2010, more than a year before the trial. (Response Brief, pp.21-22.) NYPIA filed the Affirmative Defenses out of an abundance of caution, and the Affirmative Defenses are on their face addressed to the potential for some kind of equitable remedy by which the Circuit Court would unwind the sale of assets and transfer "NYPIA's property" back to MSG – not a judgment for money damages, as the Circuit Court ultimately imposed. In any event, the Affirmative Defenses cannot change the fundamental facts that NYPIA fully prevailed on all claims against it, was dismissed from and did not participate in the litigation of the remaining claims against other defendants, and received unequivocal assurance from the Circuit Court that it was at "at no risk of liability" on these claims.

before I read them because I thought this was going to be another effort to drag New York Private and some of these other entities back into it. I'm not saying that they're without culpability in some moral sense, but I made a legal determination that there was no way we could proceed against them. So I was very pleasantly surprised to see that all [Plaintiff's counsel] was trying to do here was just simply formally state a right of recovery against a party that was still in action anyway, Morris, Schnoor and Gremel, on promissory notes that we've been talking about ever since we got started with this whole thing. (Id., 11:11-25 (emphasis added).)

Furthermore, after the March 19 hearing, Plaintiffs, NYPIA, and the remaining defendants entered into a stipulated order in which Plaintiffs specifically acknowledged that all claims against NYPIA had been dismissed, and that the dismissed claims against NYPIA were included in Plaintiffs' amended complaints "only...to preserve [Plaintiffs'] rights on appeal." (Ex. 20 to NYPIA's Reply Brief, Stipulated Order.) This Stipulated Order is an admission by Plaintiffs that the claims against NYPIA had been fully and finally resolved in NYPIA's favor, and that Plaintiff was only preserving a right to appeal the summary disposition orders – *not* any supposed right to seek a judgment against NYPIA in the Circuit Court on the claims that had already been dismissed.

Plaintiffs also suggested that NYPIA was put on notice of liability at a later hearing on May 28, 2010. (Response Brief, p.11.) However, Plaintiffs deliberately failed to mention that NYPIA's counsel was not present at that hearing, because NYPIA had already been dismissed and thus was no longer participating in the UFTA cases. (Ex. 21 to NYPIA's Reply Brief.)

2. NYPIA's Motion For Reconsideration Did Not "Cure" The Due Process Violations

The appellate court's holding that NYPIA's filing of a motion for reconsideration after the trials "cured" the fundamental due process violations is unavailing. The two cases that Plaintiffs had cited for this proposition have no application here. In both of those cases, active

parties with pending claims against them were given fair notice of and an opportunity to conduct discovery on the claims and defenses at issue from the outset of the proceedings.¹³ Not so here: as noted above, NYPIA was dismissed from the case and had no ability to take discovery or participate in the trial of the UFTA claims. The fact that NYPIA filed a motion for reconsideration after the trial was over does not “cure” the violations of NYPIA’s due process rights. *See Growney Equip, Inc v Shelley Irrigation Dev, Inc*, 834 F2d 833, 835 (CA 9, 1987) (trial court violated due process when it imposed sanctions against non-party without notice, even when the non-party was permitted to file motion for reconsideration).

Furthermore, the Court of Appeals only relied on MCR 2.119(F) for its holding (Ex. 22, p. 27), which only permits the trial court to “correct mistakes” but does not permit causes of action to be re-instated, does not permit a party to be added to the actions, does not provide an opportunity for discovery or to present a case in defense of pending claims against an accused. As such, MCR 2.119(F) cannot, and did not, cure the violations of due process. *See Nelson v Adams USA, Inc*, 529 US 460 (2000) (holding that entry of judgment against non-party violated due process and reversing the lower court’s determination that there was no due process violation because the non-party “fail[ed] to show that ‘anything different or additional would have been done’ to stave off the judgment had [he] been a party”); *Growney Equip, Inc, supra*.

3. The Circuit Court Granted Summary Disposition In Favor of NYPIA, and Therefore Could Not Subsequently Enter Judgment Against NYPIA

There is no dispute that all claims that Plaintiffs asserted against NYPIA, specifically including claims pursuant to the UFTA, were dismissed with prejudice on motions for summary

¹³ *Boulton v Fenton Township*, 272 Mich App 456, 463-64 (2007); *In re Moon Estate*, No 294176, 2011 WL 254934 (Mich Ct App, Jan 27, 2011) (Ex. 11 to Plaintiff’s Response Brief).

disposition based on MCR 2.116(C)(8).¹⁴ Summary disposition “is a judgment on the merits which bars relitigation on principles of res judicata.” *Capital Mortgage Corp v Coopers & Lybrand*, 142 Mich App. 531, 536; 369 NW2d 922 (1985); *see also Van Wulfen v Montmorency Cty*, 345 F Supp 2d 730, 740 (ED Mich, 2004) (“Michigan law treats summary judgments as a final decision on the merits.”); *ABB Paint Finishing, Inc v Nat’l Union Fire Ins Co*, 223 Mich App 559; 567 NW 2d 456 (1997) (summary disposition pursuant to MCR 2.116(C)(8) is “with prejudice”). Thus, when the Circuit Court granted summary disposition in favor of NYPIA, it entered a full and final judgment against NYPIA on the UFTA claims.

Because it had entered summary disposition *in favor* of NYPIA on the UFTA claims, the Circuit Court was not permitted to enter a later judgment *against* NYPIA on those same claims. *See Teamsters v Gen Cty Bd of Cmm’rs*, 401 Mich 408; 258 NW2d 55 (1977). In *Teamsters*, the plaintiffs brought suit challenging the defendants’ suspension of law enforcement officers from their job duties. The trial court granted summary judgment in favor of defendants, but then entered a subsequent order imposing injunctive relief and money damages against the defendants. The Michigan Supreme Court held that this was error. The Michigan Supreme Court ruled that the trial court’s grant of summary judgment in favor of defendants was a final judgment on the merits, and the trial court therefore could not impose any subsequent remedies against the defendants. *Id.* at 410-11.

¹⁴ Count I of Plaintiffs’ complaints asserted a claim for violation of the UFTA against NYPIA and requested a judgment against NYPIA as a subsequent transferee, as well as other relief. (Exs. 4 and 7 to NYPIA’s Brief on Appeal, p. 10.) The Circuit Court dismissed Count I and the other causes of action asserted against NYPIA under MCR 2.116(C)(8). (Exs. 5 and 8 to NYPIA’s Brief on Appeal.)

The same law applies here: the Circuit Court granted summary disposition in favor of NYPIA on all claims asserted against it, including the claims under the UFTA, and dismissed the claims with prejudice. Plaintiffs did not appeal the lower court's granting of summary disposition by the court in favor of NYPIA on the UFTA claims. The dismissals were a final judgment on the merits in favor of NYPIA. The Circuit Court therefore could not enter a later judgment *against* NYPIA under the UFTA. *Teamsters, supra*. The Circuit Court's judgments against NYPIA were erroneous and should be vacated.

In response to this argument on appeal, Plaintiffs contended that the judgments that were imposed against NYPIA were permitted because they were, according to Plaintiffs, "a remedy ... and not a cause of action." (Response Brief, p.23, n.26.) But as Plaintiffs went on to acknowledge, the UFTA "merely allows relief from subsequent transferees...*if the plaintiff prevails on a claim created under the act.*" (*Id.*) Here, Plaintiffs did not prevail on their UFTA claims against NYPIA – to the contrary, NYPIA prevailed on these claims on summary disposition. Michigan law is clear that, a party seeking a statutory remedy must "show not only a violation of the statute but ...[also] that all the conditions and limitations prescribed by the statute have been complied with." *Jones v Chennault*, 323 Mich 261, 265; 35 NW2d 256 (1948). *See also Grand Rapids Ind Pub Co v City of Grand Rapids*, 335 Mich 620, 631; 56 NW2d 403 (1953) ("When a remedy is given by statute, all requirements imposed by [the statute] must be complied with.").¹⁵ In short, "[t]here can be no court-imposed remedy without a finding of

¹⁵ Here, MCL 566.38 is a remedy section for transfers voidable under MCL 566.37(1)(a), which in turn is predicated on an action for relief under the UFTA. The UFTA in sections 566.34-566.36 provides for the conditions that must be met in order to qualify a transfer as a voidable against a party. Here, the Circuit Court specifically dismissed such liability against NYPIA in the subject motions for summary disposition (Exs. 5 and 8 to NYPIA's Opening Brief). Thus, the UFTA does not permit such relief against a part who already has been found not liable under the liability sections of the act.

liability.” *EEOC v Hiram Walker & Sons, Inc.*, 768 F2d 884, 892 (CA 7, 1985) (emphasis added).¹⁶ Because the Circuit Court determined as a matter of law that NYPIA had no liability on the fraudulent transfer claims, NYPIA cannot be subject to a remedy on those claims.¹⁷

4. The Circuit Court Lacked Authority to Enter Judgment Against Non-Party NYPIA

Besides the other due process infirmities, under federal and Michigan law NYPIA was a necessary party to any claim that could result in a judgment against NYPIA. Therefore, the Circuit Court was required to add NYPIA as a party defendant before any such claim proceeded to trial or judgment. Contrary to these well-established rules, however, the Circuit Court simultaneously conducted two trials and a hearing on three cases and a motion, and then entered judgments against NYPIA in two cases in which NYPIA was not a party. The Circuit Court lacked authority to enter judgment against non-party NYPIA, and the judgments should therefore be vacated.

Under the Michigan Court Rules, NYPIA was a necessary party to both the Morris Action and the MSG Properties Action to the extent that these actions had the potential to result in a judgment against NYPIA. MCR 2.205(A) provides that “persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests.” The Michigan Supreme Court has held that, if a UFTA claim may result in a judgment against a subsequent transferee of the debtor’s assets, then the

¹⁶ The court rejected the notion that victims can be whole under the remedial provisions of a statute when the defendant had not been found liable under the substantive requirements of the statute.

¹⁷ Though this issue was briefed by the parties, the Court of Appeals did not directly address it in its Opinion.

transferee is a necessary party and must be added as a defendant to the action. *Estes*, 481 Mich at 592-93; *see also* 37 Am Jur 2d Fraudulent Conveyances and Transfers § 162 (“In all actions brought by creditors to subject property which it is claimed was fraudulently transferred, the person to whom the property has been transferred is a necessary party.”); *Tanka v Nagata*, 76 Haw 32, 36 (1994) (“where a creditor alleges a fraudulent transfer of property from a judgment debtor to a transferee who retains title to the subject property ... the transferee is a necessary party to any action seeking to set aside the transfer”) (collecting cases).

The Michigan Court of Appeals, in its decision in *Estes*, explained that the rule requiring joinder of a subsequent transferee is necessary to protect the transferee’s due process rights: “Not only is [the transferee’s] joinder necessary to accord her due process while litigating her and plaintiff’s claims to the disputed property, her presence is also essential to permit the trial court to render complete relief if plaintiff’s UFTA claim is successful.” *Estes*, 273 Mich App at 385; *see also Havoco* 197 F3d at 1140 (in UFTA action seeking to recover property held in tenancy by the entirety, holding that debtor’s wife was an indispensable party: “we do not believe that [the debtor’s] wife’s due process rights are adequately preserved in a proceeding to which she is not a party and in which her property rights may effectively be terminated”). Other courts are in agreement.

Despite the rule requiring that NYPIA be joined as a defendant with respect to any claim that could result in a judgment against NYPIA, NYPIA was not a defendant at the trial of the Morris Action and the MSG Properties Action. Because NYPIA was a necessary party but had not been joined as a defendant, the Circuit Court could not properly proceed to trial on the UFTA claims that could result in a judgment against NYPIA. *See Glover v Diggs*, 368 Mich 430, 434, 118 NW2d 278 (1962) (“[N]ecessary parties were not joined as defendants and, in consequence,

the trial court could not properly proceed to a trial of the issues sought to be raised by plaintiff in her bill of complaint.”); *see also Reed v Reed*, 277 Neb 391, 398-401 (2009) (trial court lacked jurisdiction to adjudicate UFTA claim against subsequent transferees where transferees were not joined as party defendants).

For the same reason, the Circuit Court could not properly enter judgment against non-party NYPIA in either the Morris Action or the MSG Properties Action. “Michigan courts have consistently recognized that court may not make ‘[a]n adjudication affecting’ the rights of a person or entity not a party to the case.” *Shouneyia v Shouneyia*, 291 Mich App 318, 323, 807 NW2d 48 (2011) (alteration in original) (quoting *Capitol Savings & Loan Co v Standard Savings & Loan Ass’n*, 264 Mich 550, 553, 250 NW 309 (1933)); *see also Spurling v Battista*, 76 Mich App 350, 353, 256 NW2d 788 (1977) (concluding that “the trial court did not have the power to compel [a law firm] to pay witness fees” when the law firm “was not a party to this action”).

In particular, Michigan courts have recognized that they lack the authority to enter an order or judgment against a transferee of property where the transferee has not been joined as a party defendant. *Valente v Valente*, No 266638, 2007 Mich App LEXIS 1853, at *4-5 (July 31, 2007).¹⁸ In *Valente*, the defendant transferred title to a parcel of disputed real property to a non-party. The trial court granted plaintiffs’ motion to compel the defendant and the transferee to execute a quitclaim deed conveying the property to two of the plaintiffs. The Michigan Court of Appeals reversed, holding that the trial court lacked authority to grant relief against a non-party: *Id.* at *4-5 (citations omitted). The same principle applies here: NYPIA, the ultimate transferee

¹⁸ An appendix of the unpublished authority cited herein was attached as Ex. 15 to NYPIA’s Opening Brief.

of MSG's assets, was not a party to the Morris Action or the MSG Properties Action, and the Circuit Court therefore lacked authority to enter judgment against NYPIA.

The Circuit Court recognized that it is generally "impermissible" to enter judgment against a non-party such as NYPIA. (Ex. 1 to NYPIA's Opening Brief, Verdict, p. 16., n.13.) Nonetheless, the Circuit Court concluded that it was proper to enter judgment against NYPIA in the Morris Action and the MSG Properties Action because NYPIA "participated in the trial" of those actions. (*Id.*) The sole authority that the Circuit Court cited in support of this conclusion is a single, unpublished decision from the Michigan Court of Appeals: *Zigmond Chiropractic, PC v AAA Mich Auto Ins Ass'n*, No 300286, slip op at 7 (Mich App, Aug 7, 2012). But *Zigmond* does not hold that a court may enter judgment against a non-party that "participates" in a trial. To the contrary, *Zigmond reversed* a judgment against a non-party transferee in a UFTA case, holding that entry of judgment without notice to the non-party violated the non-party's right to due process. *Id.* at p.7. The holding of *Zigmond* does not permit entry of judgment against NYPIA in this case, and NYPIA is unaware of any authority, from Michigan or any other jurisdiction, that permits a court to enter judgment against a non-party transferee in a UFTA case.¹⁹ Furthermore, the Circuit Court expressly stated that NYPIA's participation in the Contempt Motion was limited to defending against the Contempt Motion. (Ex. 9.) The Circuit Court's Judgments against NYPIA are therefore unsupported by Michigan authority and contrary to the well-established rule that Michigan courts may not enter judgment against a non-party.

¹⁹ The other decision cited in the relevant portion the Circuit Court's Verdict, *John Ceci, PLLC v Johnson*, No 288856, slip op (Mich App, May 11, 2010), does not address the question of whether judgment can be entered against a non-party transferee. The decision merely notes in passing that "[t]he UFTA does not by its terms require joinder of the *debtor transferor* in an action against a transferee." (Emphasis added.) *John Ceci* is therefore inapposite to the issue of whether the Circuit Court had the authority to enter judgment against non-party transferee NYPIA.

In addressing and dismissing this argument in its Opinion, the appellate court relied on two findings. First, the appellate court found that MCL 566.37(2) permits, “If a creditor has obtained a judgment against the debtor [here Morris and MSG Properties], if the court so orders, may levy execution on the asset transferred or its proceeds.” (Ex. 22, p. 29). Here, the proceeds were the \$395,000 Charron & Hanisch agreed to and the \$250,000 paid by NYPIA to Fifth Third Bank. Notably, neither was Fifth Third Bank made a party to the actions. Moreover, instead of entering judgments against Charron & Hanisch for the proceeds from the sale, the trial court instead entered judgments against non-party NYPIA for the balance of debts owed by MSG to Plaintiffs (Ex. 1, pp. 19-24). Equally important is that MCL 566.37(2) does not provide authority to enter judgment against a non-party and, especially, against a party for whom the court had previously dismissed with prejudice all UFTA causes of action.

Second, the appellate court held that the “burden falls upon a defendant” to object when a plaintiff fails to comply with MCR 2.205. However, NYPIA was not a “defendant” in either the Morris Action or MSG Properties Action. No defendant or plaintiff in either action, nor the trial court *sua sponte*, ever moved to make NYPIA a defendant in either action subsequent to the trial court’s 2009 and 2010 orders granting summary disposition with prejudice to NYPIA on all causes of action, including the UFTA claims. The appellate court simply erred by holding that a non-party has the burden to object under MCR 2.205 to the fact that it is not a party to an action. The lower courts erred as a matter of law and denied NYPIA its constitutional rights. Further, these cases have caused grave precedent where monetary judgments have been entered against a non-party on claims previously dismissed with prejudice and not reversed.

IV. **CONCLUSION**

For all of the reasons stated in herein, the subject rulings of the Court of Appeals should be reversed, and the Circuit Court's judgments against NYPIA should be vacated.

Respectfully submitted,

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