

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Appeal 2012-213499
Case No. 08-CP-42-00475

John Doe.....Appellant

v.

City of Duncan..... Respondent

MOTION TO DISMISS

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SC Court of Appeals

Pursuant to Rules 240 and 260 of the South Carolina Appellate Court Rules, Respondent City of Duncan (hereinafter “Respondent”) hereby moves to dismiss the above-captioned appeal filed by Appellant John Doe (“Appellant”). Appellant commenced this appeal on November 23, 2012, raising a single issue for review: Whether the trial court erred when it dismissed this action under state law time limits without applying the Servicemember’s Civil Relief Act. However, because *it is undisputed that Appellant never served Respondent with a summons and complaint in this matter*, no civil action has been commenced as a matter of law and therefore this Court lacks jurisdiction over Respondent. Accordingly, the Court should grant Respondent’s Motion and dismiss this appeal in its entirety.

Procedural Background

The following facts are undisputed in the record below.

Appellant filed this civil action on January 28, 2008 (“January 2008 Complaint”), asserting a single claim against Respondent for negligent supervision based upon alleged sexual abuse that occurred at the City of Duncan Fire Department. (Compl. ¶¶ 2, 4-11 attached as *Exhibit A*.) Specifically, Appellant claimed that he was sexually abused by a City of Duncan police officer sometime in or around 2001, while he attended a program for children sponsored by the Fire Department. (*Id.* ¶ 8.)

Appellant never served Respondent with the January 2008 Summons and Complaint. On February 3, 2009, Appellant’s counsel sent an email to the Spartanburg County Clerk of Court acknowledging that the Summons and Complaint had not been served and stating that he would voluntarily dismiss the action. (Email from Gregg Myers to Spartanburg County Clerk of Court, attached as *Exhibit B*.) Appellant, however, failed to submit a stipulation of dismissal or take any other action to close the case.

On February 21, 2012, over four years after filing the original Complaint, Appellant filed an Amended Complaint in which he again asserted a single claim against Respondent for negligent supervision based upon alleged sexual abuse that occurred sometime in or around 2001. (Am. Compl. ¶¶ 6-14, attached as *Exhibit C*.) The Amended Complaint was accompanied by neither a summons nor a motion to amend pursuant to Rule 15 of the South Carolina Rules of Civil Procedure.

On March 15, 2012, Respondent filed a Motion to Dismiss pursuant to Rules 12(b)(1), (b)(2), (b)(4), (b)(5) and (b)(6) of the South Carolina Rules of Civil Procedure, contending that Respondent had never been served with the Summons and Complaint and

thus Appellant had failed to properly commence an action pursuant to Rule 3 of the South Carolina Rules of Civil Procedure. (Resp't Mem. Supp. Mot. Dismiss 1-3, attached as *Exhibit D*.) Alternatively, Respondent argued that Appellant's Amended Complaint should be dismissed because Appellant failed to file a motion to amend as required by Rule 15 of the South Carolina Rules of Civil Procedure. (*Id.* at 3-4.)

On May 16, 2012, the Honorable J. Derham Cole held a hearing on Respondent's Motion to Dismiss. Following the hearing, Judge Cole issued an Order finding that Appellant had failed to properly serve Respondent with the summons and complaint and concluding that the Court lacked jurisdiction over Respondent. (Oct. 29, 2012 Order 2-3, attached as *Exhibit E*.) From that Order, Appellant filed this appeal.

I. The Court of Appeals Lacks Jurisdiction Over Respondent Because Appellant has Failed to Serve Respondent With A Summons and Complaint.

Appellant contends the trial court erred by dismissing this action under "state law time limits" because the Servicemember's Civil Relief Act operated to toll any time period prescribed by law while Appellant was deployed to Afghanistan. (Appellant Br. 2-3.) This Court, however, is unable to reach the issue presented by Appellant because, as the trial court found, Appellant never properly served Respondent with a summons and complaint. Thus, under well established South Carolina law, no civil action has been commenced and this Court lacks jurisdiction over Respondent. Therefore, the Court should dismiss this appeal in its entirety.

Rule 3(a) of the South Carolina Rules of Civil Procedure provides that "[a] civil action is commenced when the summons and complaint are filed with the clerk if: (1) the summons and complaint are served within the statute of limitations in any manner

prescribed by law; or (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.” The Supreme Court of South Carolina has interpreted Rule 3(a) to mean that “a civil action is commenced by the filing *and* service of a summons and complaint.” *First Palmetto State Bank & Trust Co. v. Boyles*, 302 S.C. 136, 139, 394 S.E.2d 313, 315 (1990). “A summons is not a mere notice, but a means for giving jurisdiction to the court, and unless it is waived, the court cannot otherwise obtain personal jurisdiction.” *Brown v. Evatt*, 322 S.C. 189, 194, 470 S.E.2d 848, 850 (1996); *see also Fin. Federal Credit, Inc. v. Brown*, 384 S.C. 555, 562, 683 S.E.2d 486, 490 (2009) (“A court generally obtains personal jurisdiction by service of a summons.”); *Louden v. Moragne*, 327 S.C. 465, 468, 486 S.E.2d 525, 526 (Ct. App. 1997) (“Service of the summons brings the defendant within the court’s jurisdiction and gives the court the power to render a personal judgment against the person served.”). It is well settled that “[a] judgment is void if a court acts without personal jurisdiction,” *Ex parte S.C. Dep’t of Revenue*, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct. App. 2002) (internal alterations omitted), and therefore, a plaintiff’s failure to properly serve a defendant with a summons compels dismissal of the action. *See, e.g., Brown*, 322 S.C. at 194, 470 S.E.2d at 850 (“Brown admits that he never served and filed a summons and complaint in this matter. Therefore, original jurisdiction was not properly instituted and the circuit court did not have personal jurisdiction over Respondent.”); *Estate of Corley*, 299 S.C. 525, 527, 386 S.E.2d 264, 266 (Ct. App. 1989) (affirming lower court’s dismissal of case where defendant was not served with a summons). The burden rests with the plaintiff to demonstrate that it has properly filed and served defendant with a summons and complaint sufficient to confer

personal jurisdiction on the Court. *See Fassett v. Evans*, 364 S.C. 42, 47, 610 S.E.2d 841, 843 (Ct. App. 2005).

Despite filing this civil action over five years ago, Appellant has failed to properly serve Respondent with a summons and complaint. In fact, Appellant readily concedes that he never served the January 2008 Summons and Complaint upon Respondent. (May 16, 2012 Hr'g Tr. 10, attached as *Exhibit F*.) Although Appellant served Respondent with the Amended Complaint in February 2012, the Amended Complaint was accompanied by neither a summons nor a motion to amend pursuant to Rule 15 of the South Carolina Rules of Civil Procedure. Indeed, the Spartanburg County Clerk of Court has confirmed that Appellant failed to file a summons with his Amended Complaint. (*Id.* at 15.)

As the trial court correctly found, Appellant has failed to proffer any demonstrable proof that he ever served Respondent with a summons for this civil action. *See Fassett*, 364 S.C. at 47, 610 S.E.2d at 843-44 (explaining that the plaintiff shoulders the burden in demonstrating proper service sufficient to confer personal jurisdiction over defendant). Because Appellant has failed to show that he properly served a summons and complaint upon Respondent, no civil action has been commenced and this Court lacks jurisdiction over Respondent. Accordingly, the Court should grant Respondents' Motion to Dismiss.

Conclusion

For the foregoing reasons, Respondent respectfully requests that the Court dismiss this appeal in its entirety.

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May 29, 2013

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J. Derham Cole, Circuit Court Judge

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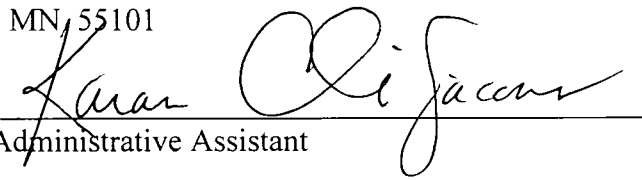
City of Duncan..... Respondent

CERTIFICATE OF SERVICE

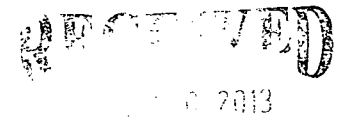
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: MOTION TO DISMISS

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May 29, 2013



SC Court of Appeals

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May 29, 2013

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
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Columbia, SC 29201

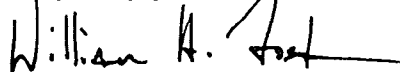
RE: John Doe v. City of Duncan
Appellate Case No. 2012-213499
Case No. 2008-CP-42-0475
Our File No. 15407.01504

Dear Ms. Kitchings:

Enclosed for filing, please find an original and seven copies of the Respondent's Motion to Dismiss, Certificate of Service and filing fee in the above-referenced matter. Please return one file-stamped copy in the enclosed self-addressed stamped envelope.

By copy of this letter, we are hereby serving all counsel with a copy of these documents.

Very truly yours,



William H. Foster

WHF:kd
Enclosure

cc: Gregg Meyers, Esq.

