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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

J. Cordell Maddox, Jr., Circuit Court Judge

APPELLATE CASE NUMBER: 2022-000242
TRIAL COURT CASE NUMBER: 2019-CP-04-00927

Joyce Porter and Edith Durham,.....Respondents,

V.

Jimmy L. Davis, Inc. and Jimmy L. Davis, Individually,.....Appellants.

APPELLANTS' FINAL REPLY BRIEF

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I. WHETHER OR NOT THE TRIAL COURT ERRED IN FAILING TO SET ASIDE THE ENTRY OF DEAFULT.

It goes without saying that Rule 4, **SCRCP**, has two purposes. Proper service confers personal jurisdiction on the Court, and, secondly, it gives the defendants reasonable notice of the action. *Fassett v. Evans* 364 S.C. 42, 610 S.E.2d 841 (Ct. App. 2004). An affidavit of personal service creates a legal presumption that there has been proper service which cannot be "... impeached by the mere denial of service by the defendant." *Richardson Construction Co., Inc. v. Meeks Engineering and Construction, Inc.,* 274 S.C. 307, 311, 362 S.E.2d 913, 916 (1980). However, even though an affidavit of personal services is **prima facie** proof of proper service, it may be impeached by extrinsic evidence, *Richardson, supra.* The case law is to the effect that the Court may look beyond the face of the affidavit of service where it is directly attacked, and it may be impeached by extrinsic evidence. **See** *MCC Financial Services, Inc. v. Duffel*, 265 S.C. 519, 220 S.E.2d 127 (1975); *Laurens Trust Co. v. Copeland*, 154 S.C. 390, 151 S.E. 617 (1930); and *Dill-Ball Company v. Bailey*, 103 S.C. 233, 87 S.E. 1010 (1916).

The issue before Judge Sprouse was, viz: Were the summons and complaint served on the Appellants so as to make them parties to the action and to confer jurisdiction upon the Court? Due to the unusual circumstances of the case, the Court allowed the parties to present live testimony from the parties in addition to the affidavits, exhibits, and other materials presented.

Again, Appellants assert that Judge Sprouse's order was based on factual conclusions that were not reasonably supported by the substantial evidence in the record. As referred to in Appellants' initial brief, the Appellants submitted substantial evidence by way of affidavits, sworn testimony, google maps tracers on cell phones, invoices, and other documentary evidence which established that Jimmy L. Davis was not present at the B.P. Station on the day and time of the alleged service, May 22, 2019, at 4:06 p.m. Judge Sprouse disregarded the evidence presented by Appellants and found the process server's, McNamara's, testimony "credible and compelling". (R. pp. 90-100 and pp. 112-128).

Judge Sprouse in his order found McNamara had "served Davis with a different lawsuit from another attorney at the exact same location on May 23, 2019, (the very next day). (R. p. 24). It should be noted in his testimony at the hearing in response to his attorney's question, McNamara testified: "I did go back there again for a different attorney. I observed Mr. Davis at that exact same location **later in the day (emphasis added)**. Although I don't have that affidavit in front of me right now." (R. pp. 134-135). In fact, the affidavit of service in this other case was allegedly served on May 23, 2019, not May 22, 2019. (R. p. 197). This alone should call into question the validity of McNamara's affidavit of service and his testimony.

McNamara's affidavit of personal service was not executed until May 26, 2019, four days after the alleged service, and it was based on information he relayed to a database or serve master back at his office. Supposedly this database automatically created an affidavit of service. (R. pp. 130-131). Again, McNamara submitted no independent records, notes, logs, mileage records, computer records, or phone records to verify that he was at the B.P. Station job site on May 22, 2019, at 4:06 p.m. He presented absolutely no independent evidence in support of his affidavit of personal service. (R. pp. 129-140).

A review of the entire record reveals that the trial court erred when it found Appellants had not presented sufficient evidence to justify overturning the default. Appellants' evidence was substantial and compelling, and it effectively impeached the affidavit of service and McNamara's testimony. It is submitted that the unique and extrinsic factors of this case require that the finding of default be vacated. Appellants refer to their initial brief and the entire record.

Additionally, public policy favors disposing of a case only after a trial on the merits. The trial court again, did not address whether or not "good cause" existed to grant relief under Rule 55(c), **SCRCP.**, and there was no "good cause" analysis. Rule 55(c), **SCRCP**, should be "... liberally construed to promote justice and dispose of cases on the merits". **See** *Dixon v. Besco Engineering*, 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct. App. 1995).

II. WHETHER OR NOT THE TRIAL COURT'S AWARD OF DAMAGES WAS SUPPORTED BY THE EVIDENCE.

The Respondents had the burden of proving the amount of their damages by competent evidence, and the proof must be by a preponderance of the evidence. *Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87, 757 S.E.2d 557 (Ct. App. 2014). The Respondents' repeatedly refer to their unverified complaint in their brief as some justification for the damages awarded by Judge Maddox. As noted the complaint was unverified. The amounts stated in a prayer for relief frequently bear little relationship to the amount of damages a plaintiff is entitled to recover, and the prayer in an action may not act as a substitute for competent proof. *Howard v. Holliday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978). Appellants refer to their initial brief and the entire record and reiterate that Respondents did not prove by competent evidence that trial judge's award of actual damages is the amount of $147,391.76.

Respondents cite Rule 408, **SCRE**, as support for the proposition that the settlement agreement was not competent evidence relevant to the amount of damages. Appellants submit that Rule 408, **SCRE**, is not applicable to this case. This agreement was not an offer to compromise. It was a settlement agreement and release entered into and executed by Appellants and Respondents on January 3, 2018, settling all issues between them for Twenty-Five Thousand and no/ 100 ($25,000.00) Dollars. The Respondents pled breach of this agreement as one of their causes of action, and it was attached to their complaint as an exhibit. This agreement clearly had probative value as to the amount of the Respondent's damages.

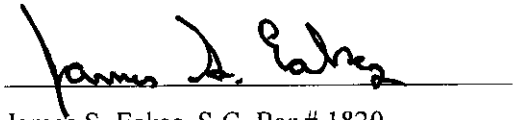
The Respondents were awarded $12,500.00 for loss of value in the resale price of their lot. This is totally unsupported by the evidence. Respondent Joyce Porter testified that she purchased land that was subdivided into two lots. (R. p. 161). She repeated this a number of times. The evidence is uncontroverted that she acquired two lots on August 15, 2017. These were lots 1 and 2 of Creekwalk Subdivision. She retained only Lot 1 at 102 Creekwalk for the construction of her home, and she had only $12,500.00 invested in this lot. (R. pp. 172-176). Respondent Joyce Porter testified that she learned after the construction of her home that this lot "was not a buildable lot by itself." (This is an allegation of her complaint). However, she later testified in direct contradiction of this that a house was later built on this same lot after she sold it. (R. pp. 166-167). It is further uncontested that Respondents sold this lot back to the developer for $12,500.00 on December 12, 2017, which is exactly what she paid for it. Respondents offered no proof that they lost money on the sale of their lot or that it had increased in value in four months.

CONCLUSION

Based upon their initial brief and their reply brief and the foregoing points and authorities contained therein, Appellants respectfully request that the Court reverse the trial court's order denying Appellants' motion to overturn the default and allow Appellants to file an answer or other appropriate responsive pleadings and to defend this action on the merits.

November11, 2022

Respectfully submitted,



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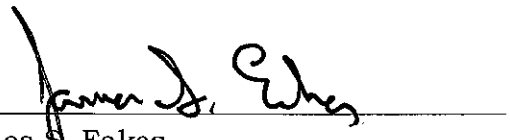
CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellants' Final Brief and Final Reply Brief comply with Rule 211(b) of the South Carolina Appellant Court Rules.

November 28, 2022



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