

STATE OF SOUTH CAROLINA)
PLEAS)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON
FIRST JUDICIAL CIRCUIT

Devontae Grundy,)
)
Plaintiff,)

Case No.: 2019-CP-38-01646

vs.)
HELTON'S)

ORDER GRANTING
DEFENDANT LARRY

Estate of Rebecca Burch, Ruby)
Gilland, Larry Helton, and Leah)
Hodge,)
)
Defendants.)
_____)

MOTION TO SET ASIDE
JUDGMENT OF DEFAULT

RECEIVED

Mar 06 2023

SC Court of Appeals

THIS MATTER came before me for a hearing on August 02, 2021, upon Defendant Larry Helton’s (“Helton”) Motion to Set Aside Judge of Default. At this hearing, Plaintiff was represented by Attorney Trevor P. Eddy, and the Defendant Helton was represented by Attorney Glenn Walters, Sr. After consideration of the pleadings, arguments of counsel, and submissions of the parties, I conclude that Defendant Helton’s motion should be and is **GRANTED**.

FINDINGS OF FACT

I make the following findings of fact:

1. Plaintiff instituted this premise liability case by filing a Summons and Complaint on December 02, 2019, naming the four defendants¹ as captioned above.
2. Plaintiff purported to served Defendant Helton by publication as the result of an Order of Publication granted by the Clerk on June 4, 2020.
3. At the time the Clerk granted Plaintiff's an Order of publication on June 4, 2020, the 120 days to serve the Defendant, as required by Rule 3(a), SCRCPP, had already expired. After the complaint expired, Plaintiff did not file an amended summons and complaint. As such, the Plaintiff served the Defendant an action that he failed to commence in accordance with the rules and common law of this state.² Consequently, the Court still had subject matter jurisdiction in the case, but the Court could not obtain personal jurisdiction and did not have personal jurisdiction over Defendant Helton because the case was not properly commenced—even if the service of publication was proper (which is disputed by Defendant).
4. The affidavit giving rise to the order for publication was facially defective for one or more of the following reasons:

1

¹From a review of the public index, it appears that the Plaintiff abandoned his cause of action against the Estate of Rebecca Burch because no proof of service exists in the record and because no judgment was obtained attains the estate of Rebecca Burch. Defendant Ruby Gilland is deceased. For the same reasons, it appears that the Plaintiff abandoned the cause of action against Ruby Gilland.

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²The Summons and Complaint that were served by publication were stale. In that the statute of limitation has not expired in this action, the Plaintiff can procedurally cure the stale Summons and Complaint and “re-commenced the action by filing an Amended Summons and Complaint See, *Mims vs. Babcock Centers, Inc.*, 399 SC 341 (2012). Otherwise, the case has not been commenced because it has not been served within 120 days as required by

- a. The affidavit did not allege that the Attorney had taken “due diligence” actions to find Defendant Helton within the state. The affidavit shows that Plaintiff’s effort to locate Defendant Helton was centered solely on one address located in one county. Further a fair reading of the affidavit, when read in conjunction with the Non-Service Affidavit of the process servicer, leads to the inescapable conclusion that the Plaintiff’s counsel had simply attempted to serve Defendant Helton at 1244 Classic Road address. The address is completely facially devoid of any due diligent efforts on the part of the affiant.
- b. The affidavit and Non-Service Affidavit filed in support of the request for the Order of Publication unequivocally establish that the Plaintiff had located Defendant Helton within the State of South Carolina.
- c. In sum, the affidavit on which publication is devoid of any allegation that the person on whom the summons is so served cannot, after due diligence, be found within the State.

LEGAL STANDARDS:

The legal standards that govern resolution of this Motion are very clear.

1. “The power to set aside a default judgment is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent a clear showing of an abuse of discretion.” *Melton v. Olenik*, 379 S.C. 45, 50, 664 S.E.2d 487, 489–90 (Ct.App.2008).

2. “An abuse of discretion arises when the court issuing the order was controlled by an error of law or when the order, based upon factual conclusions, is without evidentiary support.” *Id. at 50, 664 S.E.2d at 490.*
3. When the person on whom the service of the summons is to be made cannot, after due diligence, be found within the State and (a) that fact appears by affidavit to the satisfaction of the court or judge thereof, the clerk of the court of common pleas, the master, or the probate judge of the county in which the cause is pending and (b) it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made or that he is a proper party to an action relating to real property in this State, the court, judge, clerk, master, or judge of may grant an order that the service be made by the publication of the summons in any one or more of the following cases: ... (3) when the defendant is a resident of this State and after a diligent search cannot be found. . . See, S. C. Code §15-9-710 (2012); *see also, Caldwell v. Wiquist, 402 S.C. 565 (Ct. App. 2013)*
4. Where a party contests the validity of an order of publication based on a lack of diligence in attempting to locate the party, our Court of Appeals has held that the trial court is “without authority to overrule the finding of the clerk of court. *Montgomery v. Mullins, 325 S.C. 500, 505–06, 480 S.E.2d 467, 470 (Ct. App. 1997).*
5. “[I]n the absence of fraud or collusion, the decision of the officer ordering service by publication is final.” *Id. at 506, 480 S.E.2d at 470.*

6. An order granting service of publication must be set aside if the affidavit upon which the order is based is facially defective. *Caldwell v. Wiquist, 402 S.C. at 575.*
7. If the trial court finds that the affidavit upon which service of publication was based upon a facially defective affidavit, it must grant the Motion to Set Aside Judgment by Default in order to comply with due process requirements. *Caldwell v. Wiquist, 402 S.C at 575-577.*

CONCLUSIONS

1. I conclude that this Court has subject matter jurisdiction to hear this matter.
2. That the Court did not have jurisdiction over Defendant Helton because the affidavit giving rise to the order for publication was facially defective for one or more of the following reasons:
 - d. The affidavit did not allege that the Attorney had taken “due diligence” actions to find Defendant Helton within the state. The affidavit shows that Plaintiff’s effort to locate Defendant Helton was centered solely on one address located in one county. Further a fair reading of the affidavit, when read in conjunction with the Non-Service Affidavit of the process servicer, leads to the inescapable conclusion that the Plaintiff’s counsel had simply attempted to serve Defendant Helton at 1244 Classic Road address. The affidavit is completely facially devoid of any due diligent efforts on the part of the affiant to find Defendant Helton within the State of South Carolina. As a matter of fact, the affidavit and Non-Service Affidavit filed in

support of the request for the Order of Publication unequivocally establish that the Plaintiff had located Defendant Helton within the State of South Carolina. In sum, the affidavit on which publication is predicated is fatally defective in the absence of an allegation that the person on whom the summons is so served cannot, after due diligence, be found within the State. Therefore, service of process by publication was improper as a matter of law.

- e. As the result of defective service by publication, the Court did not have jurisdiction to enter a judgment of default against Defendant Helton.
- f. As a result of the Plaintiff's failure to serve Defendant Helton, Helton's state and federal due process rights were violated by the entrance of a default judgment.

NOW, THEREFORE, IT IS ORDERD, ADJUDGED AND DECREED that Defendant Helton's Motion to Set Aside Judge by Default is **HEREBY GRANTED**.

AND IT IS SO ORDERED!

Date: _____, 2022

Judge, Presiding



Orangeburg Common Pleas

Case Caption: Devontae Grundy VS Estate of Rebecca Burch , defendant, et al

Case Number: 2019CP3801646

Type: Order/Set Aside Judgment

So Ordered

s/ Maite Murphy 2166