

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Greenwich Revolving Trust by Wilmington Savings Fund Society, FSB, not in its individual capacity, but solely as Owner Trustee,

Plaintiff,

vs.

Clinton Justus aka Clinton B. Justus, Brandy L. Justus, and The South Carolina Department of Motor Vehicles,

Defendants.

IN THE COURT OF COMMON PLEAS

C/A NO.: 2019-CP-42-03758

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

**RECEIVED**

**Aug 01 2023**

**SC Court of Appeals**

This matter came before the Court for a hearing on the Plaintiff's Motion for Summary Judgment on the Defendant Clinton B. Justus's counterclaim for abuse of process. Present representing the Plaintiff was Damon C. Wlodarczyk. Andrew R. Hart was present on behalf of Mr. Justus.

**BACKGROUND**

This case originated as a foreclosure action which was commenced by the filing of a Summons and Complaint on October 24, 2019. Service of the Summons and Complaint on the Defendants Clinton Justus and Bandy L. Justice was perfected on February 7, 2020, by leaving a copy of the documents at the mortgaged property with Norman Foggan, a person of suitable age and discretion that purportedly resided with the Justus Defendants. [Affidavit of Service filed Marcy 5, 2020]. The process server who completed the Affidavit of Service was Craig Bradley, Deputy Sheriff with the Spartanburg County Sheriff's Department. [*Id.*].

After no Answers or other responsive pleadings were filed and served, a Notice of Default and Order for Reference were filed on March 23, 2020.

On or about August 5, 2020, a Notice of Foreclosure hearing was mailed to the Justus Defendants at the property address where service was perfected. On August 19, 2020, after a hearing, an Order for

Foreclosure and Sale Decree was filed. The sale of the subject property was properly published, and the subject property was sold to a third-party on December 2, 2020.

On January 14, 2021, counsel for Defendant Clinton Justice filed a Motion for Relief from Judgment and supporting affidavit challenging service of process.

After a hearing, on January 26, 2021, an Order setting aside the Order for Judgment was filed finding service was not perfected on Clinton Justus, the Court lacked *in personum* jurisdiction as to Mr. Justus, and the judgment as to Mr. Justus was therefore void.

On April 12, 2021, counsel for Clinton Justus accepted service of the Summons and Complaint. On June 30, 2021, Mr. Justus filed an Answer and Counterclaim for abuse of process. A Reply to the Counterclaim was filed and timely served.

The subject property was sold prior to a second foreclosure hearing and the foreclosure was resolved. The only pending matter is the abuse of process claim.

### **FACTS PRESENTED BY AFFIDAVITS AND SUPPORTING DOCUMENTS**

In support of summary judgment, Plaintiff submitted the following:

It is undisputed that Clinton Justus was a co-maker on the Loan Agreement. [Complaint Exhibit p. 8; Justus Affidavit ¶ 5].

The subject loan was serviced by Fay Servicing, LLC, which referred the foreclosure assignment to the Plaintiff's counsel on September 12, 2019. Part of the referral package included the Notice of Default letter. The default letter dated July 5, 2019, from Fay Servicing to the Justus Defendants was directed to the subject property at 720 Halls Bridge Rd, Campobello, SC 29322-8923. [Supplemental Affidavit Notice of Default].

As part of Plaintiff counsel's initial file setup, the accessor's records for Spartanburg County were obtained on the subject property and mobile home, which identified the owners of the property as Clinton Justus and Brandy Justus. The address of both owners was identified as the subject property at 720 Halls Bridge Rd, Campobello, Sc 29322. [Supplemental Affidavit Accessor Records, p. 4].

On November 4, 2019, Plaintiff's counsel sent the service assignment to ProVest, an independent contractor that provides various legal services including service of process. [Supplemental Affidavit – 11/4/19 Email]. After service could not be perfected by ProVest's employees, Plaintiff's counsel sent a request to ProVest to attempt service via the Spartanburg County Sheriff's Department, which ultimately completed service as evidenced by the affidavit filed with the Court. The affidavit of service stated that substitute service was perfected by leaving a copy of the pleadings at the dwelling house or usual place of abode with a person of suitable age and discretion, specifically Brandy Justus's boyfriend, who resided there. [Supplemental Affidavit – 1/13/20 Email].

In opposition to summary judgment, Clinton Justus submitted the following:

Mr. Justus has been a resident of North Carolina for twenty years prior to and during the pendency of this action. Mr. Justus's drivers license reflects his North Carolina address is 970 Turning Leaf Lane, Mill Spring. Mr. Justus pays property taxes and insurance on his home at 970 Turning Leaf Lane. Mr. Justus provided photographs of his mailbox and photos of his home showing the ease of discovery of his house. Mr. Justus provided a copy of the original loan application and HUD-1 Settlement Statement which showed his address being 970 Turning Leaf Lane.

Mr. Justus's affidavit also stated that he never resided, temporarily or permanently, at the mortgaged property in South Carolina.

At the motion hearing, Plaintiff's counsel did not dispute that based on the information provided with the filing of the Motion to Set Aside Judgment and in opposition to the summary judgment motion, that Mr. Justus did not reside at the mortgaged property when substitute service was perfected by the deputy sheriff.

Discovery is complete pursuant to this Court's Scheduling Order and this motion is ripe for adjudication. Having reviewed the motion, memoranda and supporting documents submitted, and hearing arguments from counsel, the Court hereby grants the Motion for Summary Judgment as more fully set forth below.

## LAW

Summary Judgment is warranted only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC. “In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party.” *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000). The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. However, once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent must come forward with specific facts showing there is a genuine issue for trial.” *Garvin v. Bi-Lo, Inc.*, 337 S.C. 436, 523 S.E.2d 481 (Ct. App. 1999).

The tort of abuse of process is intended to compensate a party for harm resulting from another party’s misuse of the legal system. *Pallares v. Seinar*, 407 S.C. 359, 370–72, 756 S.E.2d 128, 133–34 (2014) (internal citations omitted). Abuse of process is the employment of legal process for some purpose other than that which it was intended by the law to effect—the improper use of a regularly issued process. *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 210, 153 S.E.2d 693, 695 (1967)

The elements of abuse of process are (1) an ulterior purpose, and (2) a willful act in the use of the process that is not proper in the regular conduct of the proceeding. *Seinar*, 407 S.C. 370-72, 756 S.E.2d 133-134.

As to the first element, an “ulterior purpose” exists if the process is used to secure an objective that is “not legitimate in the use of the process.” “One who uses a legal process, whether criminal or civil, against another *primarily* to accomplish a purpose for which it is not designed, is subject to liability for harm caused by the abuse of process.” *Id.* The collateral objective must be the “sole or paramount reason for acting.” *Id.* The tort centers on events occurring outside the process; the improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club. *Id.*

The second element, a “willful act,” has been described as “[s]ome definite act or threat not authorized by the process or aimed at an object not legitimate in the use of the process[.]” The “willful act” element consists of three components: (1) “a ‘willful’ or overt act”; (2) “in the use of the process”; (3) “that is improper because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective.” *Id.*

“The mere commencement of a civil action by the service of a summons . . . cannot amount to the tort known as abuse of process, which is the ‘malicious misuse or perversion of the process for an end lawfully warranted by it \* \* \*.’ *Russell v. Risher*, 272 S.C. 182, 185, 249 S.E.2d 908, 909 (1978) (internal citation omitted). Where the process is used only for the conventional purpose of obtaining jurisdiction of the defendant in a civil action, there is no abuse of process. *Id.*

“South Carolina has a rule protecting attorneys from suits for malicious prosecution and abuse of process while acting within their professional capacity. *Kozel v. Kozel*, 299 F. Supp. 3d 737, 756 (D.S.C. 2018) citing *Gaar*, 339 S.E.2d at 889 (“[the South Carolina] Supreme Court has cautioned against allowing suits for malicious prosecution to inhibit free access to the courts. Attorneys must be free to act and advise their clients without constant fear of harassment from lawsuits.”).

### **CONCLUSIONS OF LAW**

As evidenced by the documents presented to this Court, Plaintiff’s counsel had a sufficient good faith basis in the form of the address on the servicer’s breach letter and the address of the owners on the county assessor’s website to conclude that Clinton Justus did reside at the subject property address at 720 Halls Bridge Rd, Campobello, SC 29322. Based on the good faith basis, Plaintiff’s counsel requested through its independent contractor ProVest LLC, to perfect service on Clinton Justus at the subject property.

Plaintiff’s counsel received an affidavit of due diligence from ProVest dated December 17, 2019, which set forth the multitude of attempts made to serve Clinton Justice at the subject property, as well as his personal residence located in North Carolina without success.

While Mr. Justus has presented evidence showing that the statements made by the process server in the affidavit of due diligence were not true, e.g., that the North Carolina address did not exist, that there

was no mailbox showing the North Carolina property on the subject road, and that the North Carolina property could not be located, nothing in Mr. Justus's affidavit shows that Plaintiff's counsel should have known the sworn statements in the affidavit of due diligence were untrue. Mr. Justus has not presented any affidavit or case law showing Plaintiff's counsel did not have the right to rely on the affidavit of due diligence prepared by an independent contractor retained for the purpose of completing service.

Regardless, while the affidavit of due diligence would have been sufficient to serve the Justus Defendants via an Order for Publication,<sup>1</sup> Plaintiff's counsel took the additional step of requesting that an additional attempt at service be handled by the Spartanburg County Sheriff's Department because there was evidence that the mortgaged property was occupied. It was the sole act of Deputy Sheriff Craig Bradley who determined that the person at the subject residence, Norman Foggan, resided at the subject property and presumably based on the representation of Mr. Foggan to the deputy, that Clinton Justice also resided at the subject property.

There is no affidavit or case law showing that Plaintiff's counsel was operating outside of the professional norms of attorneys in effectuating service of process by retaining both ProVest LLC, and the Spartanburg County Sheriff's Department to serve the Summons and Complaint, and in relying on the sworn affidavits provided by ProVest concerning due diligence and the Spartanburg County Sheriff's Department in substitute service.

The Court concludes there is no evidence of an "ulterior purpose." It is undisputed that Clinton Justus was a co-maker on the Loan Agreement and a signatory on the Mortgage and, therefore, was a proper party to the foreclosure action. There is no dispute that the subject loan was in default. In fact, Clinton Justus states in his affidavit that had he known about foreclosure at the proper time, he would have been

---

<sup>1</sup> A decision to order service by publication is final absent fraud or collusion. *Wachovia Bank of S.C., N.A. v. Player*, 341 S.C. 424, 428–29, 535 S.E.2d 128, 130 (2000).

able to catch up the past-due payments. [Justus Affidavit, ¶ 16]. Accordingly, the use of the process was a legitimate means to obtain personal jurisdiction over a necessary party and not as a threat or club.

To find liability against the Plaintiff, the Court would have to find liability against the law firm in requesting service to be perfected as there is no evidence the Plaintiff participated in any part of the litigation after having the case referred to Plaintiff's counsel to prosecute the foreclosure. Since "South Carolina has a rule protecting attorneys from suits for malicious prosecution and abuse of process while acting within their professional capacity," law firm would be immune from suit and, therefore, the principal can not be liable in tort if the actions of its agent are not subject to a claim. *Kozel*, 299 F. Supp. 3d at 756 citing *Gaar*, 339 S.E.2d at 889.

In response, Mr. Justus argued that Plaintiff's counsel acted in bad faith because Plaintiff had actual or constructive knowledge based on the evidence presented that Mr. Justus did not reside at the mortgaged property where substitute service occurred and, therefore, law firm is not entitled to immunity. However, there is no evidence showing Plaintiff's counsel deviated from any generally accepted standard of care in using the outside entities to perfect service and relying on the affidavits submitted by those entities. Simply arguing there was evidence Mr. Justus resided at one location versus another is insufficient as a matter of law in showing bad faith thereby exempting counsel from immunity, absent an affidavit of professional negligence or case law to the contrary.

Additionally, there is no evidence of any (1) "a 'willful' or overt act"; (2) "in the use of the process"; (3) "that is improper because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective." *Id.*

As stated, the mere commencement of a civil action by the service of a summons cannot amount to the tort of abuse of process. Moreover, the mere fact that Plaintiff's counsel relied upon sworn affidavits in support of due diligence and substitute service is insufficient to show evidence of an unauthorized or illegitimate collateral objective.

No appellate cases in South Carolina have addressed the factual issues presented here. While not binding, the Court finds instructing the Fourth Circuit Court of Appeals' decision in *Ashland Oil, Inc. v. Cardinal Fuels, Inc.*, 872 F.2d 416 (4th Cir. 1989). In *Ashland* it was alleged service was erroneously perfected by the plaintiff at an alternative address when the plaintiff knew or should have known the correct address for service on the defendant. After the defendant successfully had the default set aside for improper service, it asserted a counterclaim for abuse of process for the service issue. The Fourth Circuit stated a claim for abuse of process lies for the perversion of regularly issued process to accomplish some ulterior purpose for which the procedure was not intended. The essential elements of the claim are the existence of an ulterior purpose and an act in the use of the process not proper in the regular prosecution of the proceedings. *Id.*

The Fourth Circuit stated the abuse of process counterclaim rested on the use by the plaintiff of the incorrect personal address of defendant to attempt service of process rather than the address contained in its file. The Fourth Circuit concluded the district court properly granted summary judgment to plaintiff because the essence of claim was the allegedly improper manner in which plaintiff issued the process. "The gravamen of the tort [of abuse of process] lies in the abuse or the perversion of the process after it has been issued, not in the issuance of the process." *Id.*

As the facts in *Ashland* are substantially similar to the facts in the present case, and the law on abuse of process in the *Ashland* case is the same as that in South Carolina, the Court elects to adopt the well-reasoned rationale in the *Ashland* case and concludes that serving Mr. Justus at an address other than the one on record at the time the loan was applied for is insufficient to sustain an abuse of process claim.

IT HERE HEREBY ORDERED, ADJUDGED AND DECREED that there is no genuine issue of material fact as discussed above and Plaintiff is entitled to judgment as a matter of law in its favor as to Defendant Clinton Justus's counterclaim for abuse of process.

IT IS FURTHER ORDERED that this case is hereby dismissed with prejudice as to all claims and counterclaims.

IT IS SO ORDERED.

*SIGNATURE ON NEXT PAGE*



Spartanburg Common Pleas

**Case Caption:** Greenwich Revolving Trust , plaintiff, et al VS Clinton Justus ,  
defendant, et al  
**Case Number:** 2019CP4203758  
**Type:** Order/Summary Judgment

IT IS SO ORDERED.

s/ Shannon M. Phillips - 3087