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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable Teasa K. Weaver
Master-in-Equity

Appellate Case No. 2023-000740

John Patton and Tara Paton,

Appellants,

vs.

Palmetto Contracting Services of York County, LLC
and Lester Van Epps,

Respondents.

RESPONDENTS FINAL BRIEF

December 11, 2023

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INDEX

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 4

STANDARD OF REVIEW 6

ARGUMENT 6

 1. The Trial Court’s refusal to consider the transcript of July 28, 2021 was not an
 abuse of discretion6

 2. Notice of the transcript is not equivalent of filing as the Trial Judge directed8

 3. Respondents were never served, so no judgment could be entered and the
 judgment is void 10

CONCLUSION12

TABLE OF AUTHORITIES

Cases:

New Hampshire Insurance Co. v. Bey Corp., 312 S.C. 47, 435 S.E. 2d 377 (Ct. App. 1993).... 10
Richardson v. P.V. and Harbor Inn, Inc., 383 S.C. 610, 682 S.E. 2d 263 (2009) 6

Rules and Statutes:

Rule 3 (a) 10
Rule 4 10
Rule 4 (d) 9
Rule 4 (d) (3) 11
Rule 60 10
Rule 268 S.C. Appellate Rules unpublished..... 9

STATEMENT OF ISSUES ON APPEAL

- I. Did the Trial Court's refusal to consider the transcript of July 28, 2021, an abuse of discretion?
- II. Notice of the transcript is not equivalent of filing as the Trial Judge directed.
- III. Respondents were never served, so no judgment could be entered, and the judgment is void.

STATEMENT OF THE CASE

The action commenced when the Appellants filed a Summons and Complaint on November 16, 2020 against the Respondents (R. pp. 183-189). Appellants alleged causes of actions for breach of contract, negligence, fraudulent, misrepresentation, and violation of the Unfair Trade Practices Act. The Appellants filed an Affidavit of Personal Service as to Lester Van Epps on November 24, 2020 demonstrating personal service on Lester Van Epps (R. p. 190). The Appellants filed an Affidavit of Service by Mailing as to the Respondent Palmetto Contracting Services of York County, LLC on November 24, 2020 asserting service on the corporate Defendant by serving a registered agent (R. pp. 191-192).

The Appellants attorney filed Affidavits of Default of Defendant Lester Van Epps and Palmetto Contracting Services of York County, LLC asserting and referencing the above Affidavits of Service (R. pp. 193-194). The Appellants filed and served the Affidavit of Default, the Motion for Default Order, and an Order of Default and served these documents on Respondent Lester Van Epps personally and filed the Affidavit on May 11, 2021 (R. p. 195). The case was referred to the Master in Equity on May 5, 2021 (R. p. 1). The Appellants served the same documents on the corporation by serving the registered agent and filed the Affidavit of Mailing on May 25, 2021 (R. p. 196-197). United States Corporation Agents, Inc., the company Appellants were serving as the

registered agent for Palmetto Contracting Services of York County, LLC, sent the Clerk of Court a letter on July 6, 2021 advising that it was not the registered agent for Palmetto Contracting Services of York County, LLC (R. p. 208). United States Corporation Agents, Inc. was the registered agent for Palmetto Contracting Services of York, LLC, an entirely different company (R. p. 209).

The court, at the July 28, 2021 hearing, advised counsel that the case was not properly before the Circuit Court and it needed to be scheduled before the Master in Equity since the case had already been referred (R. pp. 24-28). The scheduled hearing of July 28, 2021 did not occur and was continued. Lester Van Epps, III appeared at that hearing to object to jurisdiction, but the court advised that the case was continued (R. pp. 27-28).

The Appellants scheduled a damages hearing for August 31, 2021 (R. p. 238). The Appellants served notice of the damages hearing on Lester Van Epps and Palmetto Contracting Services of York, LLC, care of US Corporation Agents, Inc. (R. p. 239). The Appellants appeared with counsel and the court entered a judgment against the Respondents on October 5, 2021 (R. pp. 3-8). The Appellants served Lester Van Epps with the default judgment personally on October 8, 2021 and served Palmetto Contracting Services of York, LLC on the registered agent by mail on October 14, 2021 but did not serve the Defendant (R. pp. 240-242).

Respondents filed a Motion to Set Aside Judgment on May 5, 2022 and attached to the Motion Exhibits A through E as evidence that that the lawsuit was against Lester Van Epps and not Lester Van Epps, III and that Palmetto Contracting Services of York County, LLC had never been served with the pleadings or any other documents (R. pp. 206-216). The Appellants are attempting to assert that the judgment is against Lester Van Epps, III who was listed as the registered agent for Palmetto Contracting Services of York County, LLC at the address of 2532

Killian Rd., Edgemoor, SC 29712 (R. p. 209). The Appellants have served Palmetto Contracting Services of York, LLC and not the named Defendant (R. p. 210). The corporation which the Appellants served was not the named corporation in the lawsuit.

Since the Appellants were attempting to assert the judgment is against Lester Van Epps, III, Lester Van Epps, III filed the Motion to Set Aside the Judgment as being void (R. p. 206-207). The Motion was filed on May 5, 2022. The hearing was scheduled and heard on June 30, 2022. Appellant's counsel served on the day prior to the hearing a Prehearing Brief, and attempted to produce and introduced numerous documents, which were not part of the record at the hearing, most notably a portion of the transcript of the hearing which did not occur on July 28, 2021 (R. pp. 217-245). Respondents objected to the evidence being presented for the first time and provided for the first time at that hearing without notice. The court took the matter under advisement and issued an Order which was filed on September 15, 2022 (R. pp. 9-11). Respondents filed a Motion to Alter or Amend on September 25, 2022 (R. pp. 268-269). Appellants also filed a Motion to Correct a Clerical Mistake to change the name of the Defendant from Lester Van Epps to Lester Van Epps, III (R. pp. 270-271). The Motions were heard on November 1, 2022. At the hearing, the court was advised that there was no transcript of the June 30, 2022 hearing. The court issued an Order vacating the Order Denying Respondents Motion to Set Aside Judgment (R. pp. 12-14). The court ordered that a new hearing de novo would be held on Respondents Motion to Set Aside as well as Appellants Motion to Correct Clerical Mistake (R. pp. 12-14). The court advised both parties that any exhibit that is part of the record does not need to be refiled. The court further ordered that the parties may present other exhibits or witnesses (R. pp. 12-14).

The Motions came before the court on January 11, 2023. Both Appellants attorney and Respondents attorney were present. The court issued an order on January 31, 2023, granting Respondents' Motion to Set Aside Judgment and denying Appellants' Motion to Correct a Clerical Mistake (R. pp. 18-21). The Appellants filed a Motion to Alter or Amend on February 1, 2023 (R. pp. 272-277). The Appellants filed a Memorandum of Law in support of Motion to Alter or Amend on February 27, 2023. It was with the post Motions that the Appellants filed the transcript as well as other documents. The case came before the court for argument on March 1, 2023 (R. pp. 123-181). The court issued an Order Denying Appellants Motion to Alter or Amend on April 6, 2023 (R. pp. 15-17).

The Appellants filed notice of appeal on April 26, 2023 appealing the Trial Court's November 16, 2022 Order, the January 31, 2023 Order and the April 6, 2023 Order.

STATEMENT OF FACTS

The statement of the case set forth above is complex. Basically, the Appellants filed a lawsuit against the Respondents asserting four causes of action and seeking actual damages, punitive damages, attorneys' fees, and treble damages. The Appellants named two Defendants (Respondents), Lester Van Epps, and Palmetto Contracting Services of York County, LLC. All of the problems with this case stem from the named Defendants as opposed to who the Appellants want named in the lawsuit as well as who the Appellants served with the Summons and Complaint. As to the business Palmetto Contracting Services of York County, LLC, it is a business registered to do business in South Carolina and its registered agent is Lester Van Epps, III, 2532 Killian Rd., Edgemoor, SC 29712 (R. p. 209). The Appellants served Palmetto Contracting Services of York, LLC through its registered agent United States Corporation Agents, INC, 1591 Savannah

Highway, Suite 201, Charleston, SC 29407, a different corporation (R. p. 210). The Appellants Affidavit of Default references the service on the wrong corporation. The registered agent Appellants were serving notified the court and Appellants' counsel that it was not the registered agent for Palmetto Contracting Services of York County, LLC. Despite this notice and the notice to the court, Appellants continued to serve the Notice of Damages Hearing as well as the Default Order on the wrong registered agent.

The Appellants filed Affidavits showing service of process on Lester Van Epps but Appellants have attempted to assert that the judgment is against Lester Van Epps, III. Appellants assert in a Motion to Correct Clerical Mistake, as well as in its arguments, Lester Van Epps is actually Lester Van Epps, III. Lester Van Epps, III is the registered agent for Palmetto Contracting Services of York County, LLC and his address is in Edgemoor, South Carolina. The Appellants Affidavit of Service for the individual Defendant lists Lester Van Epps with an address in Catawba, South Carolina. The pleadings name Lester Van Epps. The Appellants do not want a judgment against Lester Van Epps, but want the judgment to be against Lester Van Epps, III.

The Appellants had the case referred to the Master in Equity (Order of Reference). The Appellants, or the court, scheduled a damages hearing before the Circuit Court which is the hearing Appellants are trying to assert is the basis for asserting Lester Van Epps, III was served. The problem is that the hearing did not occur and was continued. The Trial Judge noted that the case should never had been scheduled before the Circuit Court. The Appellants are relying in all of their arguments on the fact that Lester Van Epps, III was at the courthouse on July 28, 2021, when the first damages hearing was to have proceeded and wanted to contest the court's jurisdiction, but the court determined the case was not properly scheduled and continued the

hearing. There was no evidence that Lester Van Epps, III ever received the pleadings. The parties were allowed to file and present such evidence as they deemed appropriate for the court to decide the Motion to Set Aside. The parties were allowed to present testimony if they wanted to present it to the Trial Judge. The Trial Judge set aside the judgment as the Appellants did not present evidence that Lester Vann Epps, III nor Palmetto Contracting Services of York County, LLC were served with the Summons and Complaint and as such, the judgment is void.

STANDARD OF REVIEW

On appeal, the decision of whether to set aside a judgment lies solely within the sound discretion of the Trial Court, and the decision will not be disturbed on appeal, absent a clear showing of an abuse of that discretion. Richardson v. P.V. and Harbor Inn, Inc., 383 S.C. 610, 682 S.E.2d 263 (2009).

- I. THE TRIAL COURT’S REFUSAL TO CONSIDER THE TRANSCRIPT OF JULY 28, 2021 WAS NOT AN ABUSE OF DISCRETION.

Appellants argue that the Trial Court erred in its order and decision setting aside the default judgment because its original decision declined to set aside the judgment. The Appellants included in their appeal the Order vacating its original decision on the Motion to set Aside the Default Judgment. The Appellants do not set forth any law upon which they rely to assert that the Trial Court erred in setting aside the original order. The court heard arguments at the original Motion and at the Motion to Alter or Amend, decided to allow the parties to present all their arguments and evidence again and argue everything. The court directed the parties to reschedule the hearing, and advised the parties that they could rely upon anything which was of record, and the parties were allowed to present additional exhibits and even testimony (Order vacating Order). At the time of the hearing of January 11, 2023, Appellants had not filed the transcript

upon which they want to rely or any other documents nor made them a part of the record. The Appellants did not present any additional exhibits nor did the Appellants present any testimony at the hearing. The hearing of January 11, 2023 was a do-over as the court stated and both sides had the opportunity to present the Trial Judge any information upon which they wanted to rely for the court to decide the issue, whether the judgment was void for lack of service of process (R. pp. 79-127). What became clear was that Appellants did not file or provide the Court with the transcript upon which they want to rely at the time of the January 11, 2023 hearing. While the Respondents deny that the transcript makes any difference, Appellants did not provide it to the court. The Appellants cannot present new evidence to the court at the Motion to Alter or Amend. The Appellants had the burden to ensure the information upon which they would rely was in the record. The Trial Judge questioned Appellants' attorney about his failure to file the documents (R. pp. 131-147). The Appellants asserts it was oversight, thinking he had previously filed it with the court, and continued to argue to the court that he referenced it in his Motions. The Trial Judge advised Appellants' counsel that she had directed them to file the documents before the hearing. The court order vacating the prior order enabled counsel for each party to provide exhibits and even testimony at the hearing of January 11, 2023. Appellants did neither. Appellants cannot claim that the judge's decision, just because it was different from a prior decision, is therefore error. Respondents submitted that the Judge's original decision in not setting aside the default judgment was the error. In fact, as will be set forth below, it was error for the Judge not to originally set aside the default judgment and the Court's decision setting aside the judgment was the accurate and correct decision, consistent with the law, regardless of the alleged transcript.

The Court vacated the order filed September 15, 2022 in its entirety. As it relates to the evidence which Appellants assert exists to support its claim of appropriate service of process, they have not presented any evidence at any of the hearings, other than what has been contested and Respondents Motion to Set Aside the Judgment. The Appellants could have presented testimony of the process server as to whom she served. The Appellants did not rely upon anything, except the Affidavit of Service, which asserts that an individual named Lester Van Epps was served. Appellants are seeking to assert that Lester Van Epps, III was served. What is so confusing is that Appellants pleadings have named Lester Van Epps and their Affidavits of Service state that they served Lester Van Epps. Appellants want the judgment to be against a different person, Lester Van Epps, III. The Appellants filed a Motion to Correct Clerical Mistake to name Lester Vann Epps, III while at the same time relying upon Affidavits of Service naming Lester Van Epps (a different person) supports the Trial Court's decision to set aside the default judgment.

II. NOTICE OF THE TRANSCRIPT IS NOT EQUIVALENT OF FILING AS THE TRIAL JUDGE DIRECTED

The Appellants second argument focuses on the notice requirement. The Appellants argument is misplaced. Respondents objected at the hearing June 30, 2022 for the Court to consider the transcript which had only been provided to Respondents' counsel the day prior to the hearing. Respondents objected, asserting that he should have been provided with the transcript at least two days prior to the hearing consistent with Rule 6 of the South Carolina Rules of Civil Procedure. The Trial Judge, at the June 30, 2022 hearing, sustained Respondents objection. Despite sustaining the objection, the Order referenced the transcript which resulted in the Respondents filing a Motion to Alter. After the hearing, the Court decided to set aside the decision in its entirety and give both parties the opportunity to present anything he or she wanted

to present. The Trial Judge resolved the issues of the Respondents objections by allowing everyone to present all the information. As such, the Court's decision to exclude the transcript at the first hearing is not relevant to the issues on appeal. The Appellants did not file the transcript for the Court to consider at the hearing where the parties were given a second opportunity to argue their positions and to present the evidence, affidavits, or testimony, upon which they wanted to rely. The Appellants had the burden of ensuring that the transcript was part of the record. Apparently, it was not.

Appellants attempt to rely upon a Trial Court's decision in another case in South Carolina. Respondents submit that a Trial Court's decision is of no presidential value. Pursuant to Rule 268 of the South Carolina Appellate Rules, unpublished appellate opinions have no presidential value and should not be cited except in proceedings in which they were directly involved. If an unpublished appellate decision has no presidential value, another Trial Court's decision in an entirely separate case has no value in this case. Even considering Appellants argument, the facts are entirely inapplicable to the facts at hand. In the case Appellants cite, the individual testified under oath at the hearing about service of process. In the case at hand, there was no hearing. Lester Van Epps, III was not under oath. He is not the named Defendant. He began to address the Court regarding jurisdiction, but the Court advised no hearing was taking place. There is no evidence of record to demonstrate that any pleadings were ever served upon him. Appellants could have done many things to present evidence regarding service of process and identity but they did not. Appellants wish to argue facts which do not exist in the record.

As it relates to Appellants assertion that Respondent made a voluntary appearance, Appellants are incorrect. While Rule 4 (d) of the SCRCR does set forth that voluntary appearance

by a Defendant is equivalent of personal service, there must be voluntary appearance for the purpose of litigation. The hearing of July 28, 2021 did not occur and was continued. The Circuit Court did not have jurisdiction, so nothing happened and there was no appearance. In addition, Respondent was present for purposes of contesting jurisdiction. At the trial level, there was no appearance. In New Hampshire Insurance Co. v. Bey Corp., 312 S.C. 47, 435 S.E.2d 377 (Ct. App. 1993) rehearing denied, cert denied., “Defendants appearance at a foreclosure hearing was limited to setting aside the default; consequently, Defendants appearance was not a voluntary appearance, as contemplated by Rule 4, SCRCP.” In the case at hand, Respondents did not make a voluntary appearance. First, no hearing existed or occurred. Second, Respondent Lester Van Epps was at a hearing at which the court had no jurisdiction. He asserted he was there to contest jurisdiction. Nothing happened and no hearing occurred.

Appellants in their arguments assert prejudice will occur if the judgment is set aside. Prejudice occurs when any judgment is set aside. Appellants arguments as it relates to land transactions, and other matters are not relevant to the issue as to whether the judgment was properly set aside.

III. RESPONDENTS WERE NEVER SERVED, SO NO JUDGMENT COULD BE ENTERED IN THE JUDGMENT IS VOID

Lester Van Epps, III and Palmetto Contracting Services of York County, LLC, filed their motions to set aside the judgment pursuant to Rule 60 on the basis that the judgment is void. The facts and the evidence which exists support the Trial Court’s decision that the judgment is void. In order for an action to commence, the pleadings must be filed and served. This is a basic rule of due process. South Carolina Rule of Civil Procedure, 3(a) requires the filing and service for the commencement of an action. The Respondents have set forth above that neither Respondent

was served. The Affidavits of Service all reference Lester Van Epps as the individual served with the pleadings.

An officer of a corporation or a registered agent for the corporation can be served in order to affect service of process pursuant to Rule 4(d)(3). In this case, Lester Van Epps, III is the registered agent for the corporation and the South Carolina Secretary of State in the public records lists him as the registered agent with his address in Edgemoor, South Carolina. The Appellants' attorney filed an Affidavit of Service, serving the registered agent for a different corporation and relied upon that Affidavit of Service for its Entry of Default against Palmetto Contracting Services of York County, LLC. Even after Appellants were notified and the Court was notified the registered agent was not the correct registered agent for the named Defendant, counsel continued to serve the wrong registered agent and relied upon the Affidavit of Service as a basis for service of process of the corporation. The Appellants have never filed an Affidavit of Service demonstrating service of process on Lester Van Epps, III as the registered agent for Palmetto Contracting Services of York County, LLC. Therefore, the Appellant never obtained service of process over the business.

As it relates to the individual, Lester Van Epps, the Appellants sued Lester Van Epps and allegedly served Lester Van Epps, not Lester Van Epps, III. Appellants argue and want to collect a judgment against Lester Van Epps, III. Appellants filed a Motion to assert an attempt to correct the name to change the identity of the named Defendant, in order to proceed with collection efforts against Lester Van Epps, III. The name of the Defendant cannot be a clerical error. What is most telling is public records clearly demonstrate that the individual associated with Palmetto Contracting Services of York County, LLC is Lester Van Epps, III and yet the Appellants named Lester Van Epps as the Defendant.

As the Trial Court noted, the process server did not use a suffix identifying the person she served as Lester Van Epps, III. The process server did not list any physical description. She did not include details regarding service address in Catawba, South Carolina, or note what connection it had to the individual. The Appellants could have called the process server as a witness or offered other exhibits or even an Affidavit from the process server, but they did not.

The transcript upon which Appellants attempt to rely does not solve the problem. All the transcript shows is that Lester Van Epps, III was at the courthouse. No hearing occurred. No evidence exists which establishes that Lester Van Epps, III was served with any papers. All that can be inferred is that he was at the courthouse on the date a hearing was to take place and he was going to question jurisdiction. No hearing took place so no appearance could have occurred.

CONCLUSION

For the above reasons, Respondents submit that the Trial Court's decision setting aside the default should be upheld. The judgment is void.

Respectfully submitted,

December 11, 2023

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Respondents Final Brief complies with Rule 210(g), SCACR.

December 11, 2023

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PROOF OF SERVICE

I certify that I have served this Final Brief of Respondents on the following as addressed below on this 11th day of December, 2023:

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