THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Hon. Ernest J. Kinard, Judge
Hon. Carmen T. Mullen, Judge
Hon. Marvin H. Dukes, Master In Equity

Appellate Case No. 2012 -206886

Micheal Walters — Appellant-Defendant

v.

Laura Leigh Walters and Jon K.
Walters, Jr., as adult children heirs
Successors and assigns of Jon K.
Walters, Sr., deceased — Respondents- Plaintiffs

INITIAL BRIEF

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SC Court of Appeals

Respectfully submitted,

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June 19, 2013
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STATEMENT OF ISSUES ON APPEAL

I

Was the Court in error, under the facts of this case, in denying the Defendant's Motion for Relief of Judgment on grounds set forth in Rule 60 (B) SCRCP?

II

Was the Court's reversing its initial Memorandum Order after the first hearing of the Motion upon due notice to the Plaintiffs, where the Plaintiffs failed to respond by appropriate pleading to the motion, the Plaintiff nor their counsel did not give due honor to the Court by appearing at the hearing and the Court thereafter, *sua sponte,* commanded Defendants counsel to serve Plaintiff's counsel with a copy of the proposed order and to further allow Defendant's counsel, without proper motion for relief being made, ten (10) days to respond to the proposed order, whose response was not by pleading form as required by the SCRCP, Rules 7,8, 9, and 10 but by unverified letter submitted to the Court by Plaintiff's counsel; an unauthorized procedure not permitted by the SCRCP an abuse of discretion by the Court and therefore constituted a denial of equal protection and due process of law violation prejudicial to the Defendant.

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STATEMENT OF THE CASE

This case was commenced by the filing of a Summons and Complaint on December 9, 2009 as for an action for ejectment and other cause of actions. The Defendant, Michael (Micheal) Walters, was at all times relevant to this action, a resident of Hilton Head Island, Beaufort County, South Carolina. An Affidavit of Non-Service submitted by the Beaufort County Sheriff Department was filed on February 17, 2009. A Motion for and Order for Publication was filed on March 19, 2010. An Affidavit for Default and an Order for Default was filed on June 17, 2010. An Order for Judgment was filed on June 8, 2010 A Writ of Assistance was issued and filed on June 18, 2010. The Writ of Assistance recites that a Motion for the Writ was filed along with the Affidavit of Default but none of the former pleadings in this action appeared in the records of the Court.

On July 13, 2010 on the eve of the execution of the Writ of Assistance, the Defendant filed a Motion to Dismiss and /or for Relief of Judgment an Affidavit in support thereof and for a temporary stay of the Writ of Assistance. The Master in Equity due to the lateness of the afternoon and limited time was unable to assemble a complete hearing to rescind the Writ of Assistance and it was executed upon the following morning, July 14, 2010 with all of the personal property of the Defendant being removed from the premises by the Beaufort County Sheriff Department.

Thereafter the Defendant filed on November 29, 2010 and Amended Motion to Dismiss, To Set Aside the Default and For Relief of Judgment. This matter came to be heard, upon due and proper notice before the Court on April 14, 2010. Present was the Defendant and his counsel. Neither Plaintiffs, nor their counsel appeared. The Court after hearing the matter requested Defendant's counsel to submit a proposed order consistent with the Courts instructions and findings of fact.

In a timely manner and on May 9, 2011 a proposed order was furnished to the Court. Thereafter, *sua sponte*, and not upon motion in any fashion or manner from the Plaintiff, the

Court invited Plaintiff's counsel to respond to the proposed order. Plaintiff's responded by unverified letter. The Court upon considering the letter requested Plaintiff's counsel to submit an Order denying the Defendant's motions. Defendant's counsel then requested a second hearing on the Motion to receive testimony on the record for appeal purposes. This hearing was held on October 18, 2011. From the Order filed on December 11, 2011 denying Defendants Motion the Defendant timely served notice of his intent to appeal.

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FACTS

Plaintiffs are the niece and nephew of the Defendant Micheal Walters and the beneficiaries of their deceased father, Jon Karl Walters, estate. Prior to his death the two brothers simultaneously executed an agreement on November 13, 2003 (Wydemere Condo Financial Agreement) wherein the property subject to this action was transferred by recorded deed from Micheal Walters to Jon karl Walters. Jon Karl Walters granted Power of Attorney in Fact to Micheal Walters to transfer the property along with a hold harmless agreement in favor of Micheal Walters. The agreement further provided for Jon Karl Walters to pay off an existing mortgage lien and regime fees upon the property. The agreement was not a lease.

After the death of Jon Karl Walters his children, Laurel Leigh and Jon Karl Walters, Jr. brought an action for ejectment against Micheal Walters in the Beaufort County Magistrate Court. Judgment in that action was awarded to the Defendant, Micheal Walters; the Court ruling that no lease was ever created between Jon Karl Walters and Micheal Walters.

Upon the conclusion of that proceeding, Plaintiffs counsel while shaken papers in his hand stated to Micheal Walters "if he could get somebody, he was going to stick it to him"

Plaintiffs subsequently filed this action for ejectment against the Defendant, a permanent resident of Hilton Head Island realleging a lease agreement. The Deputy Sheriff made three attempts to personal serve the defendant at his home. An Affidavit of non service was filed with the Court along with an Affidavit for Publication. The Affidavit for Publication stated upon its face that after *due diligence* defendant could not be found. The Publication, among other things, did not mention the address of the Defendant, misspelled his name as *Michael* Walters rather than his correct name of *Micheal* Walters and did not give or render notice that a copy of the summons would be on file with the office of the Clerk of Court. After publication no copies of the Summons, Complaint and Order for Publication were mailed to the Defendant. The Order for Default was issued upon Plaintiff's counsel's affidavit stating conclusions of law without any underlying facts being stated or an examination being made

by the Court for facts within the Affidavit to support the legal conclusions.

When returning home on July 13, 2011 the Appellant discovered the notice of the Writ laying upon the ground in front of his residence. This was his first knowledge of the case; one (1) day prior to the date set for the Writ of Execution to be executed..

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ARGUMENTS

I

The Defendant adequately displayed facts affording him relief under Rule 60 (B) SCRCP and had a meritorious defense to the action such that the Court abused its discretion in not granting Defendant's Motion for Relief of Judgment.

The gavelmon argument of the Defendant is that he is a permanent resident of South Carolina, he was away when service of process was attempted, he never was served with personally service of process in this action for ejectment, had no knowledge of the institution of this action for ejectment action until he returned home to find a notice for Writ of Ejectment.

The Defendant additionally showed that the probability of his receiving notice had been severely impaired by failure of the Plaintiff's counsel to comply with the strict requirements of § 15-9-710(3) in procuring an Order for Publication. Plaintiff's counsel asserted and the Court utilized the *due diligence* where the law requires the *diligent search* standard to be exercised when the action affects title to real estate before an order for service by publication can be issued. Further, the Defendant showed that his name was deliberately misspelled in the publication, that the address of the property was not listed, a copy of the summons and complaint was never mailed to him, nor was it contained in the files of the Clerk of Courts Office.

I n the case of McClurg v. Deaton, 380 S.C. 563, 574, 671 S.E.2d 87, 93 (Ct. App. 2008) it was held that in order to obtain relief from a default judgment under Rule 60(b)(1) or 60(b)(3), not only must the movant make a proper showing he is entitled to relief based upon one of the specified grounds, he must also make a prima facie showing of a meritorious defense. The Defendant also demonstrated that he had a meritorious defense of *Res*

Judicarta in that the action had been previously brought upon the same issues with the same parties and especially pertinent to this case, with the same plaintiff attorney in the Magistrate Court. There judgment was rendered in the Defendant's favor. Recorded documents were produced into evidence by the Defendant showing that a family business agreement and not a lease agreement were created and that the Plaintiff's cause of action was legally misplaced and defective.

Facts, sufficient to show collusion on the part of the Plaintiff's in securing the judgment was made when combining Plaintiff's counsel's statement to the Defendant at the end of the hearing in the Magistrate Court and the irregularities counsel thereafter utilized to avoid his receiving notice of the action.

The errors and omissions of law that occurred that severely diminished the probability of the Defendants receiving notice or knowledge that the action had been brought are discussed as follows:

1. *Service of process was insufficient under* SCRCP, Rule 12 (b) (4) requirements.

The defendant was never personally served with process. The Plaintiff has the burden to establish that the Court has personal jurisdiction over the Defendant. The Plaintiff need only show compliance with the rules. When the rules on service are followed there is a presumption of proper service. Moore v. Simpson 322 S.C. 518, 473 S.E. 2d 264(Ct. App.1966).

This action, among other claims not pursued to completion by the Plaintiff, is an action for ejectment of the defendant from the premises subject to this action that is situated in Beaufort County, SC. From a review of the records of this proceeding, particularly the Plaintiff's motion for a Writ of Assistance the Plaintiff alleges that "Michael Walters still occupy [occupies] the subject premises..." and the Affidavit submitted by the Defendant Walters states that he in fact resided their; factually establishes him was a resident of Beaufort County.

As a resident of the County in which this action has been brought SCRCP Rule 4 requires that the he must be personally served with a copy of the Summons and Complaint. This having never been accomplished the Court never acquired jurisdiction provided by

SCRCP Rule 4.

The applicable statutes for the Court to acquire jurisdiction of the Defendant by the publication of service of process were not complied with by the Plaintiff to confer the Court's personal jurisdiction over the Defendant.

2. *§ 15-9-740 Et. Seq. and § 15-9-710 S.C. Code Ann. were not complied with.*

Service by Publication is in derogation of the common law and the statutes § 15-9-740 Et. Seq. and § 15-9-710 S.C. Code Ann. must be strictly construed and complied with.

In this case service was purportedly made upon the Defendant under § 15-9-710(a) (3) Code of Laws of South Carolina. This Statute provides for service of process upon a defendant by publication when after the exercise of **due diligence** the defendant cannot be found and (a) that fact appears by affidavit to the satisfaction of the court or judge thereof and (3) when the defendant is a resident of this State and after a **diligent search** cannot be found. Additionally, the law suit clearly affects the title to real estate and therefore is subject to the provisions of § 15-9-710(5) Code of Laws of South Carolina.

3. The Affidavit for Publication was premised upon the wrong standard of service.

The Defendant challenges the validity of the Order for Publication on the grounds that it was secured by collusion and fraudulent representations made by the Plaintiff's to the Court to induce the Court to issue the Order for Publication and the subsequent Order of Default. Plaintiff counsel's Affidavit for Publication did not set forth any factual basis demonstrating the standard for *due diligence* had been exercised to perfect personal service upon the Defendant, Walters.

The Affidavit/Motion of the Plaintiff for Publication merely recited the conclusion that *due diligence* had been exercised but did not include any factual basis or show what attempts were made by the Plaintiff to serve the Defendant. The evidence supporting this point is The Unit Work Sheet for Deputy K. Korinek, Serving Officer of the Beaufort County Sheriff Department The document states that attempts to personally serve the Defendant were made on only three separate occasions and during the hours when he was at work: the first on January 11, 2010 at 8:50 A.M. and the second attempt the following morning at 9:30 A.M. The last attempt was made on January 29, 2010 at 11:45 A.M. It is therefore factually

questionable if these attempts would even comply with the lower due diligence threshold standard.

Further, since this action pertained to title to real estate with service of process upon a resident defendant, the Court acquiring jurisdiction of this action was subject to the strict provisions of § 15-9-710(5) Code of Laws of South Carolina. This section requires a diligent search standard which the Plaintiff's counsel did not allege nor did the Court require. Thus the Court was in error when it applied the improper and wrong standard of *due diligence* instead of *diligent search* in granting its Order for Publication predicated upon plaintiff's counsel's Affidavit for Publication.

4. *§ 15-9-740 was not complied with.*

That strict statutory compliance requires the plaintiff under § 15-9-740 to mail a copy of the Summons, by registered mail, to the defendant at his place of residence or (b) that such residence is not known to him, service of the summons may be made upon the defendant by three weeks' public notice thereof in the manner provided by law for publication of summons in civil actions. The Defendant was alleged to be a tenant of the premises subject to this action. Therefore his address was known by the Plaintiffs. The record does not reflect that a registered letter was sent to the Defendant; a statutory requirement prerequisite to obtaining an Order for Publication of Process when the defendant's address is known. This omission the defendant asserts constitutes a jurisdictional defect.

A further grounds for establishing that the Court erred in ruling that it had acquired personal jurisdiction of the defendant is that there is no evidence in the record that *a copy of the summons be forthwith deposited in the post office directed to the person to be served*...as required by § 15-9-40 was complied with. Nor does it appear in the record, as required by this code section *that the publication must state the time and place of such filing* was neglected, and not complied with also.

5. *Defendant's name was purposefully misspelled in the Publication.*

The Service by Publication and the caption of the case deliberately named another person, i.e. Michael Walters and not the Defendant, Micheal Walters and thus, was facially defective. Miles v. Lee (In re Miles), 319 S.C. 271, 460 S.E.2d 423, 1995. The Defendant

argues and suggests that especially where the Plaintiffs are relatives of the Defendant and knew the correct spelling of his name; that this misspelling of the Defendant's name was deliberate and calculated to increase the probability that the Defendant or persons who may inform him of the publication would think the notice was intended for someone else other than the Defendant.

The Defendant/Appellant has thus adequately shown that he has a meritorious defense and has made a particularized showing of mistake, inadvertence, excusable neglect, surprise, misrepresentation, or 'other misconduct of an adverse party qualifying Defendant's default as excusable an entitled him to the relief provided by Rule 60(b), SCRCP. Sundown Operating Co. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885 (2009).

ARGUMENT

II

The Court by reversing its initial Order from the Bench after the first hearing of the Motion upon due notice to the Plaintiffs, where the Plaintiffs had failed to respond by appropriate pleading to the motion, the Plaintiff nor their counsel did not give due honor to the Court by appearing at the hearing. At the hearing the court stated "your motion is granted. Please prepare an Order". After that term of court, the Court, *sua sponte,* commanded Defendants counsel to serve Plaintiff's counsel with a copy of the proposed order and to allow Plaintiff's counsel ten (10) days to respond. Plaintiff's counsel response was not by pleading form as, required by the SCRCP, Rules 7,8, 9, and 10 but by unverified letter; was a procedure not authorized by the SCRCP and prejudice to the Defendant.

The counsel for the Plaintiff stated in his response to the Court that he did not attend the hearing because he no longer represented the Plaintiffs (No order for Release of Counsel had been issued) and they had not responded to his giving them notice of the hearing. He further stated he would submit a proposed Order to the Court. This procedure, we suggest, is appropriate for finding upon review, was improper, contrary to the standing rules of court and would constitute an abuse of discretion by the Court as it stands in denial and derogation of the equal protection and due process provisions afforded to the Defendant by both the South

Carolina and the Constitution of the United States.

Appellant's counsel admits that this issue was not raised in a formal manner before the Court and counsel did not raise it after the Court's ruling least his further argument after a ruling be interpreted as contemptuous conduct. In instances where the Court departs from its assigned roles, counsel is confronted with the dilemma of whether to object and risk alienating the judge or remain silent and risk waiving the issue for appeal purposes. Morris v. State, 845 S.W.2nd 882(Tex. 1992).

Defendant suggests and would request the Court to strike from the record all proceedings after the initial hearing of the motion as improperly conducted or in such manner as the Court may deem appropriate.

The issuing of an Order for Publication under S.C. Code Ann. § 15-9-710(3) by the Court without an examination of the moving party and the making of finding of specify facts to support the conclusion of law that due diligence had been exercised by the Plaintiff to personally serve the resident defendant with service of process is a denial of the constitutionally protected due process of law provisions afforded to the Defendant pursuant to Amendment 5 of the Constitution of the United States and Article 1 Section 3 Constitution of South Carolina, not withstanding the "satisfactory to the issuing officer" standard as applied in Wachovia Bank of South Carolina, N.A. v. Player *341 S.C. 424 535 S.E.2d* , Yarbrough v. Collins,293 S.C. 290 360 S.E. 2d. 300 (1987); Ingle v. Whitlock, 282 S.C. 391, 318 S.E.2d 367 (1984); Gibson v. Everett, 41 S.C. 22, 19 S.E. 286 (1894); Yates v. Gridley, 16 S.C. 496 (1882). The distinction being that in the present case the Court predicated its finding upon the incorrect standard of due *diligence* where the statute required the more stringent *diligent search* standard when title to property involving a resident of the state are present. This is imperatively necessary to give the Court jurisdiction of the person thus sought to be brought into court. These cases in effect stand on the same principle as the SCRFC, Rule 8 which requires the Court to make specific findings of facts as foundational

The defendant having shown by credible evidence that the requirements set forth in these statutes have not been compiled would have been proper grounds for dismissal of the action under SCRCP, Rule 12(b) (2) (4) or to set aside the Order for Default under SCRCP

Rule 55. Here the Appellant has shown that this defective and insuffiency in service severely diminished his opportunity to obtain notice of the action and his lack of knowledge under these circumstances should justify a finding of excusable neglect under SCRCP, Rule 60 (b) which in due justice he should receive.

Likewise, the Court upon review, would be constrained not to find ample evidence of fraud and collusion, another ground upon which relief of Judgment may be granted; especially where Plaintiff's counsel had unsuccessfully brought the same action previously in the Magistrate Court, had sworn revenge against the Defendant and knew that when he filed the same suit in the Circuit Court that it would be subject to being dismissed there upon the grounds of *res adjudicarta,* if the Defendant were to receive knowledge of the suit. The niece and nephew of the Defendant, the Plaintiffs in this case, knew or would be reasonably charged with knowing the correct spelling of their uncle's name as well as knowing when he would be away from home. The totality of the facts and circumstances would establish fraud and collusion.

CONCLUSION

The Defendant won and was granted his Motion for Relief of Judgment only for it to be reversed by improper Court proceedings subsequent to the Order that was not supported by the credible evidence. By clear and convincing evidence the Defendant has shown he is entitled to the relief afforded under SCRCP, Rule 609b). A case for excusable neglect predicated upon no notice or knowledge of the case being instituted against him, coupled with faulty service of process not complying with the applicable statutes and tainted with a promise of revenge carried forth by fraud and collusion against a Defendant who has a meritorious defense to this action would command the granting to him relief from the judgment procured under these facts. Every citizen of South Carolina under these circumstances would never leave on an extended missionary trip or vacation in fear that when they returned home they would find all of their possession on the street because the service of process as performed in this case was used to obtain a judgment against them in their absence irrespective of their having no knowledge of the lawsuit and the lawsuit having merit.

Respectfully submitted,

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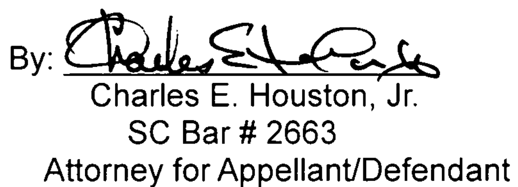
By: 
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