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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

Honorable Grace Gilchrist Knie, Circuit Court Judge

Appellate Case No. 2024-001042
Case No.: 2019-CP-46-01258

Rachel Sanders, Respondent,

v.

Novant Health, Inc., Terracon Consultants, Inc., Panther Heating and Cooling, Inc.,
Modern Construction of South Carolina, LLC, Southern Realty, LLC, and, in their
Individual capacities, George White, MD, Nicholas Tuttle, MD, and Malcolm Marion,
MD, Defendants

Of which Modern Construction Services, LLC is the Appellant.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENTS IN REPLY

A reminder of the procedural and factual history:

- April 8, 2019: Respondent Filed the summons and complaint naming Modern Construction of South Carolina, LLC (“Modern of SC”) as a defendant. (R. 042-059).¹
- April 15, 2019: Respondent served Modern of SC in Edgefield, South Carolina. (R. 062).
- July 8, 2021: Respondent sent the summons and complaint to Modern Construction, LLC in Charlotte, North Carolina. (R. 075).
- February 25, 2022: The circuit court issued default judgment against Modern of SC. (R. 011-012).
- March 30, 2022: Respondent moved to vacate the default against Modern of SC. (R. 013-015).
- April 6, 2022: The circuit court issued default judgment against Modern Construction, LLC. (R. 016-017).²
- May 24, 2022: The circuit court issued a new default judgment order that was a proposed order by Respondent, despite no new or amended motion for default judgment, with the name of the defendant unscrupulously altered to “Modern Construction Services, LLC (also known as Modern Construction of South Carolina, LLC)”. (R. 018-019, 297).

¹ Appellant is not Modern Construction of South Carolina, LLC.

² Appellant is not Modern Construction, LLC.

Respondent obtained an over \$1,000,000 judgment order against Appellant Modern Construction Services, LLC (“Appellant”) by default, just by unilaterally, and without leave of the circuit court, altering the pleadings to add Appellant’s name to a proposed order. Instead of explaining the procedural, legal, or ethical basis for altering the pleadings to add Appellant as “Modern Construction Service, LLC (also known as Modern Construction of South Carolina, LLC)” to the proposed order that the circuit court signed, Respondent pretends it sued and served Appellant. Respondent’s unilateral altering of the pleadings was misconduct on the circuit court, and is sufficient grounds for this Court to reverse the circuit court, but other grounds require reversal.

Appellant demonstrated with undisputed evidence that an authorized agent of Appellant was not served with process, therefore the circuit court abused its discretion by denying Appellant’s motions to set aside default and the default judgment order.

The primary issue before this Court is whether the circuit court abused its discretion by denying Appellant’s Rule 55, Rule 59, and Rule 60 motions when the Record clearly demonstrates that Appellant was not served with process, and when Appellant demonstrated that the return receipt was not signed by a person authorized to accept service of process. Also important is the issue of whether the circuit court abused its discretion by failing to exercise discretion. Instead of addressing these issues head on, Respondent attempts to misdirect this Court by

trying to change the primary issues, and by making arguments that are unsupported by the Record.

All of Respondent's arguments are premised on her false assertion that she served Tracy Snowdy, Appellant's authorized agent, which Respondent contends gave the circuit court jurisdiction over Appellant. (Respondent's Br. p. 14). There are foundational questions that must be answered for a Court to find that service was effectuated on a party. Whether the circuit court abused its discretion by refusing to set aside the order of default judgment against Modern Construction Services, LLC ("Appellant") is easily determined by considering the answers to these foundational questions, all of which have answers that are clear from the Record. Respondent did not answer these foundational questions, because the Record does not support Respondent's positions.

1. Does the Record identify the person who signed the certified mail return receipt, which Respondent argues shows service of process on Appellant?

No. Nothing in the Record identifies any person, authorized or not, who signed the return receipt.

2. Does the Record include any evidence from which the circuit court could have concluded that the person who wrote "Modern Construction" in the signature space of the return receipt was an authorized agent of Appellant?

No. The Record undisputably shows that an authorized agent of Appellant did not sign the return receipt. (R. 180).

3. Does the Record include any evidence from which the circuit court could determine the date of delivery for service of process?

The return receipt does not show the date of delivery, and the Record contains no other evidence from which the date of delivery could be determined. (R. 075). The Record does not even contain the date that Respondent asserts that her counsel received the return receipt from the United States Postal Service.

4. Does the Record contain a return receipt showing the acceptance of service by Appellant?

No. The return receipt includes the words “Modern Construction” in the signature space, not the name of Appellant’s only authorized agent Tracy Snowdy, or Ms. Snowdy’s signature. (R. 075). Furthermore, the Affidavit in support of Respondent’s Amended Motion for Default Judgment says that Respondent served Modern Construction, LLC, which is not Appellant. (R. 070).

5. Was Appellant ever a Defendant in the Underlying Lawsuit?

No. The Record does not contain a summons or complaint identifying Appellant as a defendant.

6. Are Appellant and Modern of SC the same company?

No. The Record undisputedly shows that Appellant and Modern of SC are not related, and that Appellant has never been known as Modern of SC. (R. 163-165).

Instead of referring this Court to the Record to answer these fundamental questions, Respondent ignores these questions and the Record, and instead attempts to misdirect this Court with red herring arguments and unsupportable statements.

The following table lists some examples of unsupportable statements made by Respondent.

Respondent's Brief	Record Fact
<p>"Appellant instead recognized that it had been misnamed and chose to ignore the lawsuit"</p> <p>Respondent's Br. p. 10. (no citation to the Record)</p>	<p>Not in Record.</p>
<p>"Appellant had apparently authorized the acceptance of mail in this fashion."</p> <p>Respondent's Br. p. 14. (Record cited does not support Appellant's statement)</p>	<p>Not in Record.</p>
<p>"Appellant had notice of the action and all proceedings, but chose to ignore the matter while banking on the mistake in identity to prevail."</p> <p>Respondent's Br. p. 15. (no citation to the Record)</p>	<p>Nothing in the Record shows that Appellant had notice of "all proceedings", that Appellant "chose to ignore" anything, or that Appellant recognized a "mistake in identity."</p>
<p>"Appellant was well aware that it was the intended Defendant."</p> <p>Respondent's Br. p. 19. (no citation to the Record)</p>	<p>Not in Record.</p>
<p>"Appellant was the entity that did the faulty work at Novant's facility resulting in injuries to Respondent."</p>	<p>Not in Record.</p>

Respondent's Br. p. 19. (no citation to the Record)	
"Appellant chose to ignore the matter" Respondent's Br. p. 19. (no citation to the Record)	Not in Record.
"Appellant is the entity who did work at the Novant facility and, although misnamed, is the proper defendant in this case." Respondent's Br. p. 26. (no citation to the Record)	Not in Record.
"Instead, after being served with the pleadings and notices, Appellant chose to sit back" Respondent's Br. p. 27. (no citation to the Record)	Not in Record.

I. THE CIRCUIT COURT ERRED BECAUSE IT DID NOT HAVE JURISDICTION OVER APPELLANT WHEN IT ENTERED THE JUDGMENT ORDER

The circuit court never had jurisdiction over Appellant because Appellant was never served and because no summons was issued naming Appellant as a defendant. Respondent ignores the fundamental issue of jurisdiction, and instead attempts to misdirect this Court to the irrelevant issue of misnomer.

Nowhere in Appellant's Brief does it argue, or even suggest, that it was misnamed, yet Respondent repeatedly mischaracterizes Appellant's arguments by claiming that Appellant relies on the fact that it was misnamed. For example, in

“The Dispute in this Appeal” section of Respondent’s brief, Respondent falsely states, “Appellant essentially contends that because it is misnamed as ‘Modern Construction of South Carolina, LLC’ in the complaint, the circuit court erred as a matter of law in refusing to set aside the default judgment the circuit court entered even though Appellant totally ignored service upon it as well as subsequent communications from the Court. (Respondent’s Br. p. 10). The Record does not support Respondent’s assertion that Appellant contends that it was misnamed, or that Appellant ignored service. Appellant was never served with the summons and complaint, and Appellant could not ignore a summons and complaint that it did not know existed.

The obvious reason for Respondent’s misdirection and unsupported arguments is because the Record does not support Respondent’s contention that Appellant was served or that a summons was ever issued naming Appellant as a defendant. Respondent simply cannot overcome the undisputed evidence that Appellant’s only authorized agent for service in North Carolina, Tracy Snowdy, never signed the return receipt. (R. 183-184).³ Unable to support her contention of service with a reference to the Record, Respondent next makes the unsupported and incorrect assertion that “Although the green card was signed ‘Modern Construction’ and not Ms. Snowdy’s name, Appellant had apparently authorized the acceptance of mail in this fashion.” (Respondent’s Br. p. 14). But the Record does not contain any evidence that Appellant authorized the acceptance of mail, or service of process, in this fashion, and Ms. Snowdy’s affidavits disprove this contention. Respondent simply glosses over

³ Respondent does not cite to anything in the Record to show that the circuit court did not abuse its discretion if it chose to disregard the undisputed facts set forth in the affidavits of Tracy Snowdy.

her failure to establish service of process by making the false and unsupported statement that Appellant authorized acceptance of mail in a fashion that attempts to bridge the gap in Respondent's favor. Respondent's bridge collapses because the Record does not provide foundational support.

II. NO PRESUMPTION OF PROPER SERVICE EXISTS BECAUSE RESPONDENT DID NOT FOLLOW RULES

Respondent claims a presumption of proper service because Respondent asserts that she followed the rules regarding service. (Respondent's Br. p. 17). As discussed in Appellant's Initial Brief, Respondent did not follow the rules.

To reach her conclusion, Respondent conflates sending process with serving process, refuses to examine what actually happened in this case, and fails to point to a single fact in the Record to show that she actually served a copy of the summons and complaint on (1) Tracy Snowdy, (2) an authorized agent of Appellant, or (3) an agent with authority to accept service on behalf of the Respondent. Respondent cannot show compliance with the Rules because she cannot show actual service on Appellant, or anyone associated in any way with Appellant.

Moreover, Respondent's conclusion that she followed the Rules ignores that she cannot show the date that service was effective, and instead she relies on the date that Respondent "sent" process to Appellant. Rule 4, SCRCF. Although Respondent admits that the return receipt does not contain a date, and admits that Ms. Snowdy's signature is not on the return receipt, Respondent glosses over these undisputed facts by claiming that exacting compliance with the rules is not required. However, Rule 4(d)(8) clearly requires the return receipt show acceptance by the defendant, and

further provides that service is only effective “upon the date of delivery as shown on the return receipt.” Rule 4(d)(8), SCRC.P.

Even if Respondent had complied with the Rules, any presumption has been unequivocally rebutted through the undisputed evidence in the Record that no authorized agent of Appellant ever signed the return receipt or accepted service.

III. ABUSE OF DISCRETION FOR FAILURE TO EXERCISE DISCRETION IS PROPERLY RAISED ON APPEAL

Respondent argues that because Appellant did not raise the Circuit Court’s failure to exercise discretion with the Circuit Court, Appellant’s argument was not preserved for appellate review. Respondent’s argument fails in light of the Court of Appeals’ decision in *State v. Hughes*, and because it places the impossible burden on appellants of requiring appellants to anticipate the circuit court’s reasoning before a decision is even issued by the circuit court.

In *Hughes*, this Court determined that the trial court erred in failing to exercise its discretion. *State v. Hughes*, 346 S.C. 339, 343, 552 S.E.2d 35, 37 (Ct.App. 2001). This Court made its determination, notwithstanding the fact that the appellant had not raised the argument with the trial court prior to the appeal. *Id.* at 345-46, 552 S.E.2d at 38. (Goolsby, dissenting).

Like in *Hughes*, Appellant could not have anticipated that the circuit court would fail to exercise discretion. Accordingly, Appellant may properly raise the issue of whether the circuit court abused its discretion by failing to exercise discretion in this appeal.

IV. NOTICES, FOR WHICH NO CONFIRMED DELIVERY EXIST, ARE NOT A SUBSTITUTE FOR SERVICE OF PROCESS

Respondent repeatedly discusses two other notices that Respondent claims Appellant received and allegedly ignored, attempting to create an improper inference of service or notice. (Respondent's Br. passim). The record, however, does not support Respondent's contention that Appellant received and ignored any notices. The Record does not contain a single document showing the Appellant received any mail.

Even if Respondent had supported its contention of notice, jurisdiction requires legally sufficient service of process, and the mere fact that some suit-related documents may have been mailed to Appellant does not confer jurisdiction. As Respondent's counsel correctly admitted to the circuit court, notices allegedly sent to Appellant are completely irrelevant to the issue of proper service of the summons and complaint. (R. 287, lines 18-19 "I know the other notices aren't proper service...").

V. APPELLANT IS NOT MODERN CONSTRUCTION OF SOUTH CAROLINA, LLC

Respondent states that Appellant "carefully navigates the various names related to 'Modern Construction.'" (Respondent's Br. p. 25). Respondent's statement is an attempt to sow confusion by blending together multiple companies that are not related. There are not "various names related to 'Modern Construction.'" As is clear from Appellant's Brief and the Record, three distinct companies have the words "Modern Construction" included in their names. One of those companies, Modern of SC, the defendant in the underlying case, is a South Carolina company. (R. 065). The

other two companies, one of which is Appellant, are North Carolina companies, and are both located in Charlotte, North Carolina. (R. 117).

Instead of admitting the distinction between the three companies, Respondent vacillates between its argument that it misnamed Appellant, and its argument that it sued the correct entity. Respondent only sued and served one of the three companies, Modern of SC. (R. 042-059, 064-065). Appellant is not Modern of SC. (R. 163).

In one instance, Respondent attempts to blend Modern of SC and Appellant into the same entity by failing to distinguish between them, and arguing that Respondent “sued the correct entity.” (Respondent’s Br. p. 26). Respondent also claims that she identified Appellant “in the Complaint as ‘Modern Construction Services of South Carolina, LLC.’” (*Id.* p. 7). If Respondent’s assertions are true, which they are not, Respondent would not have moved to vacate the default against Modern of SC. (R. 066-067).

Respondent also attempts to blend Appellant and Modern of SC by referring only to “Modern Construction” without explaining which company she is referring to, and by stating Appellant did not respond to the mailing to the “South Carolina or North Carolina” address. (Respondent’s Br. p. 2). Respondent makes these assertions despite the undisputed evidence in the Record that Appellant, Modern of SC, and Modern Construction, LLC are not related. Respondent also makes these assertions despite knowing that the “South Carolina address” to which she refers is the address for the registered agent of Modern of SC, not Appellant’s address. (R. 062-065).

Respondent's argument that Appellant chose to ignore the lawsuit and mailing from the Court because the lawsuit misnamed Appellant, is not only unsupported by the Record, but it also undermines Respondent's alter ego argument. Respondent's misnomer argument requires that Respondent sued and served the wrong entity, Modern Construction of South Carolina, LLC.

VI. THE CIRCUIT COURT ABUSED ITS DISCRETION BY DENING APPELLANT'S MOTIONS TO SET ASIDE THE JUDGMENT BECAUSE APPELLANT DEMONSTRATED FRAUD, MISREPRESENTATION, OR OTHER MISCONDUCT BY RESPONDENT

Respondent's fraud, misrepresentation, and misconduct (collectively "fraud"), which started in the circuit court, and which has crept into its brief in this Court, although sometimes veiled, is utterly disturbing. (Respondent's Br. p. 2).

Respondent first admits that it "filed suit against ... Modern Construction of South Carolina, LLC (Modern of SC)," and that Respondent served Modern of SC in Edgefield, South Carolina. (*Id.*) Respondent then states that it "sent the summons and complaint, via certified mail, to the registered agent Tracy Snowdy" in "Charlotte, NC." (*Id.*) Here, Respondent falsely leads this Court to believe that Tracy Snowdy is the registered agent to Modern of SC. Thereafter, in her attempt to maintain her alter ego fallacy, Respondent refers only to "Modern Construction" or "Defendant," without distinguishing between Modern of SC and Appellant. (Respondent's Br. *passim*). Respondent then exclaims to this Court that "Defendant Modern Construction did not respond to either mailing to South Carolina or North Carolina, not even to contest whether it was properly named." (*Id.* p. 2). At first

glance, Respondent's statements seem harmless. Unfortunately, Respondent's conduct is simply a continuation of the wrongful conduct by Respondent in the circuit court. For example, the affidavit that Respondent relies on for service on Appellant does not say that Respondent served Appellant Modern Construction Services, LLC. (R. 070). Instead, the affidavit states that Respondent served "Modern Construction, LLC" at "4 Crest Road Edgefield, SC 29824." (*Id.*) The same affidavit states that Respondent served "Modern Construction, LLC" at "5900 Harris Technology Boulevard, Suite D, Charlotte, NC 28269." (*Id.*) Neither Appellant or Modern of SC are "Modern Construction, LLC," but Respondent chose to make Appellant and Modern of SC alter egos when preparing a proposed order for the circuit court to sign. (R. 297).

As clearly explained in Appellant's Brief, Respondent altered the pleadings in the circuit court by changing the defendant from "Modern Construction of South Carolina, LLC," to "Modern Construction Services, LLC (also known as Modern Construction of South Carolina, LLC)," without leave of the court to make an amendment. (R. 018-019, 297). By doctoring the pleadings to change the name of the defendant, Respondent added Appellant, a party never before named in any pleading, and Respondent attempted to make two unrelated legal persons, alter egos. Respondent now argues that no fraud occurred, but fails to explain why she changed the name on the proposed order submitted to the circuit court.

Furthermore, despite clearly making allegations in the Complaint against Modern of SC, Respondent states in her brief, that allegations were made against

“Modern Construction.” (Respondent’s Br. pp. 7-8). Thereafter, Respondent states, “[t]he only remaining claims relevant to this appeal are the claims against Modern Construction Services, LLC (which [Respondent] had identified in the Complaint as ‘Modern Construction of South Carolina, LLC’). (*Id.* p. 9).

Respondent next asserts that “there was no ‘changing of the party’ since Respondent had sued the correct entity.” (*Id.* p. 26). Respondent’s argument here is disingenuous as best. Respondent sued and served, Modern of SC, an actual South Carolina company, with no relationship to Appellant, and Respondent is fully aware of this fact. (R. 018-019, 062-065). Modern of SC is not Appellant, accordingly Respondent did not sue Appellant.

There is no summons naming Appellant. There is no complaint naming Appellant. There is no affidavit of service naming Appellant. There is no Motion for Default Judgment naming Appellant. The April 6, 2022 Order for Default Judgment does not name Appellant, and says that Modern of SC was served on July 8, 2021.⁴ (R. 016-017). Despite all these instances of not naming Appellant as a party, Respondent listed Appellant as a party in a May 24, 2022 proposed order that says that Modern of SC, not Appellant, was served on July 8, 2021. (R. 197). Respondent did not rely on any rule that allowed her to add Appellant to the pleadings, she just added Appellant to wrongfully obtain a judgment against Appellant. Respondent’s conduct should not have been rewarded with a judgment order against Appellant.

⁴ See April 6, 2022 Order for Default Judgment granting default against Modern Construction of South Carolina, LLC, which has never been vacated.

This Court should reverse the circuit court, and Appellant should be granted relief from judgment.

CONCLUSION

For the reasons stated herein, the circuit court abused its discretion when it denied Appellant's Motions to set aside the default and default judgment issued against it, and for relief from judgment, therefore this Court should REVERSE the circuit court's decision, set aside the default, and grant Appellant relief from the default judgment. Alternatively, this Court should remand the case to the circuit court for findings of fact and conclusions of law consistent with this Court's opinion and South Carolina law.

Respectfully submitted,

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