

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2012-CP-36-00484

Samantha Hendrix,

Appellant,

v.

Discover Bank

Respondent.

INITIAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in finding that Discover complied with S.C. R. Civ. P. 4(d)(1) by serving process at an address where Hendrix temporarily lived months before the suit commenced?
2. Did the trial court err in finding that service of process complied with S.C. R. Civ. P. 4(d)(1) because the address of service was listed on Discover's credit card application and was the only address known to Discover?
3. Did the trial court err in granting summary judgment to Discover, even though a material issue of fact existed as to whether the trial court had jurisdiction over Hendrix?

STATEMENT OF THE CASE

On August 31, 2012, Plaintiff-Respondent, Discover Bank (Discover), filed an action against Defendant-Appellant, Samantha Hendrix (Hendrix), alleging breach of contract and seeking debt collection. On September 11, 2012, Discover served process at 503 S. Wheeler Ave., Prosperity, SC 29127. On October 11, 2012, Hendrix filed her answer in which she denied that she lived at 503 S. Wheeler Ave. On July 31, 2013, Discover filed a motion for summary judgment that was granted by the trial court on November 21, 2013. On December 10, 2013, Hendrix filed a motion to reconsider the grant of summary judgment. On December 19, 2013, the trial court denied the motion to reconsider the grant of summary judgment. Hendrix filed a notice of appeal with the South Carolina Court of Appeals on January 14, 2014.

FACTS

In 2002, Hendrix accepted a credit card offered by Discover. [Credit Card Application p.1.] Hendrix completed a preprinted application sent by Discover to Hendrix. [Id.] Hendrix's

address on Discover's application was 118 Colony Drive, Prosperity, SC 28127. [Id.] In November or December 2011, Hendrix temporarily resided with her parents for approximately two weeks at 503 S. Wheeler Ave. [Hendrix Affidavit p.1.] In February 2012, Hendrix permanently moved to 136 Forest Hills Blvd., Prosperity, SC 29127, where she continues to reside. [Id.]

On September 11, 2012, Discover attempted service of the summons and complaint upon Hendrix at 503 S. Wheeler Ave. [Affidavit of Non Personal Service.] The Newberry County Sheriff's Deputy left the summons and complaint with Herbert Payton, Hendrix's father, who was neither a party to the action nor had a stake in the action, as stated in the affidavit of non-personal service. [Id.] At that time, Hendrix was not speaking her parents and had no contact with them. [Hendrix Affidavit p.1.] In October 2012, Hendrix answered the complaint in which she denied that 503 S. Wheeler Ave. was her address and moved for dismissal based on lack of personal jurisdiction. [Answer p.1.] Hendrix stated in an affidavit that she moved to 136 Forest Hills Blvd. in February 2012 and had not lived with her parents for fifteen years, except for the two week period in 2011. [Hendrix Affidavit p.1.]

Hendrix's credit reports, accessible by Discover, list 136 Forest Hills Blvd. as Hendrix's current address. [Equifax Credit Report p. 3; Experian Credit Report pp. 1 & 27.] Hendrix's credit reports show that Discover reported on Hendrix's account to the credit reporting agencies. [Equifax p. 7; Experian p. 6.] Both credit reports also list 503 S. Wheeler Ave. as one of Hendrix's previous addresses. [Equifax p. 3; Experian p. 27.] Additionally, in 2009 and 2010, Discover sent Hendrix bills at 601 Chapman Road, Little Mountain, SC 29075, where Hendrix resided at that time. [Discover Account Statements pp. 1, 3, 5, 9, 11, 13, 17, 21, 25, 29, 33, 39,

ARGUMENT

I. Because a material issue of fact exists as to whether the trial court had personal jurisdiction over Hendrix, the trial court erred in granting the motion for summary judgment and denying the motion to reconsider the grant of summary judgment.

A. Because Discover served process at a location that was not the defendant's dwelling or place of abode, the trial court lacked jurisdiction over Hendrix.

According to the S.C. Rules of Civil Procedure, a Discover shall serve the summons and complaint

[u]pon an individual other than a minor under the age of 14 years or an incompetent person, by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy to an agent authorized by appointment or by law to receive service of process.

S.C. R. Civ. P. 4(d)(1). Even though the rule does not require exact compliance, a plaintiff must sufficiently comply so that “the court has personal jurisdiction of Hendrix and Hendrix has notice of the proceedings.” Fassett v. Evans, 364 S.C. 42, 47, 610 S.E.2d 841,844 (S.C. Ct. App. 2005).

To sufficiently comply with the rule, a plaintiff must serve the defendant at the defendant's “dwelling house or usual place of abode.” S.C. R. Civ. P. 4(d)(1). A defendant's “dwelling or place of abode is determined by the particularized facts of each case.” Fassett, at 47, 610 S.E.2d at 844. Generally, a person establishes a dwelling by demonstrating an intent to return to a location. Id. However, for the service of process, a defendant's intention to return is

merely an indication “as to whether or not it is likely in a particular case that the one served will actually receive notice of the commencement of the action and thus be advised of the duty to defend.” A temporary residence is not a person's dwelling or usual place of abode if a more permanent residence is shown to exist.

Id.

In Fassett, Hugh Evans (Evans) sought to set aside a default judgment because he was served at his marital home while he and his wife were temporarily separated. Id. at 46, 610 S.E.2d at 843. The South Carolina Court of Appeals held that “[i]n the case of a married person, the usual place of abode is presumed to be with the family.” Id. at 47, 610 S.E.2d at 844. The Court found that Evans bore the burden of overcoming the presumption of proper service. Id. at 49, 610 S.E.2d at 845. Because Evans could not prove that he established a usual place of abode elsewhere or had no intention to return to the marital home, then Evans was properly served, and the trial court had personal jurisdiction over Evans. Id.

Here, Discover served Hendrix at 503 S. Wheeler Ave., the residence of defendant’s parents, on September 11, 2012. [Affidavit of Non Personal Service.] Copies of the summons and complaint were left with Hendrix’s father. [Id.] In the answer, Hendrix denied living at 503 S. Wheeler Ave. and moved for dismissal based on lack of personal jurisdiction. [Answer p.1.] In the affidavit accompanying the motion to reconsider the grant of summary judgment, Hendrix stated that she temporarily lived at 503 S. Wheeler Ave. “for about two weeks in November or December 2011.” [Hendrix Affidavit p.2.] In February 2012, Hendrix established a permanent residence at 136 Forest Hills Blvd., where she still resides. [Id.] Because 503 S. Wheeler Ave. address was only a temporary address, it did not qualify as Hendrix’s “dwelling house or usual place of abode” for service of process. Unlike Evans in Fassett, Hendrix clearly established a usual place of abode at 136 Forest Hills Blvd. months before Discover filed suit, as evidenced by Hendrix’s credit reports. [Equifax Credit Report p. 3; Experian Credit Report pp. 1 & 27.] The Equifax Credit Report lists 136 Forest Hills Blvd. as Hendrix’s current address since August 2012.

[Equifax p. 3] It lists 503 S. Wheeler Ave. among Hendrix's previous addresses. [Id. at 3.] The Experian Credit Report lists 503 S. Wheeler Ave. among Hendrix's address and indicated on the first page that Hendrix's current address is 136 Forest Hills Blvd. [Experian pp. 1 & 27.] Discover could have easily requested Hendrix's personal information from the two credit reporting agencies.

Furthermore, Hendrix also demonstrated an intention not to return to 503 S. Wheeler Ave. by voluntarily ceasing contact with her parents. [Hendrix Affidavit p.1.] Unlike Fasset where the home in issue was a marital home, the home in question here belongs to Hendrix's parents, not Hendrix. Typically, an adult child establishes a separate, permanent dwelling outside of her parents' home and does not plan to return. Here, a reasonable person would conclude that Hendrix's parents' home at 503 S. Wheeler Ave. was no longer Hendrix's dwelling or usual place of abode when she left to establish a dwelling at 136 Forest Hills Blvd. Because Hendrix can prove that she only temporarily resided with her parents, established a usual place of abode elsewhere, and had no intention to return to her parents' home; she can overcome any presumption of proper service. Therefore, the trial court did not have personal jurisdiction over Hendrix.

B. The trial court erred in finding that the address of service was listed on the credit card application and that Discover did not have access to another address for Hendrix.

The trial court found, in part, that Discover sufficiently complied with the requirements of Rule 4(d)(1) because Discover only knew 503 S. Wheeler Ave. as Hendrix's address, and that address was the address listed on her credit card application. [Order Denying Defendant's Motion to Reconsider Grant of Summary Judgment.] In actuality, the 2002 credit card application listed 118 Colony Dr. as Hendrix's address. [Discover Credit Card Application.] In

2009 and 2010, Discover sent Hendrix multiple statements at 601 Chapman Rd. [Discover Account Statements pp. 1, 3, 5, 9, 11, 13, 17, 21, 25, 29, 33, 39, 43.] Furthermore, Hendrix's current address at 136 Forest Hills Blvd. was listed as the current address on the credit reports from Experian and Equifax. [Equifax Credit Report p. 3; Experian Credit Report p. 1]. 503 S. Wheeler Ave. was listed as one of several previous addresses on both credit reports but not as Hendrix's current address. [Equifax p. 3; Experian p. 27.] Both credit reports list Discover's account with Hendrix. Discover could have easily requested Hendrix's current personal information from both credit reporting companies. Instead, Discover chose to forego reasonable investigation and serve Hendrix at a previous temporary address rather than at her current permanent address. Because Discover had access to Hendrix's current address and served Hendrix at a previous address instead, Discover failed to sufficiently comply with S.C. R. Civ. P. 4(d)(1) thereby failing to establish the trial court's personal jurisdiction over Hendrix.

C. The trial court erred granting summary judgment to Discover because a material issue of fact existed as to whether Discover established personal jurisdiction over Hendrix.

A plaintiff has the burden of proving that "service of process was correctly made 'and that 'the Court has personal jurisdiction over Hendrix.'" Jensen v. Doe, 292 S.C. 592, 594, 358 S.E.2d 148, 149 (S.C. Ct. App. 1987). A plaintiff must sufficiently comply with S.C. R. Civ. P. 4(d)(1) so that "the court has personal jurisdiction of Hendrix and Hendrix has notice of the proceedings." Fassett, at 42, 610 S.E.2d at 844. Without compliance with the rules for service of process, a court cannot establish jurisdiction over Hendrix. See Jensen, at 595, 398 S.E.2d at 149.

Summary judgment shall be granted when a moving party shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

S.C. R. Civ. P. 56(c). To determine whether a genuine issue of material fact exists, a court must view “the evidence and all inferences which can be reasonably drawn ... in the light most favorable to the nonmoving party.” Lanham v. Blue Cross and Blue Shield of South Carolina, 349 S.C. 356, 361-2, 563 S.E.2d 331, 333 (2002). A court should not grant summary judgment when the application of the law requires “further inquiry into the facts” or when the parties “[disagree] concerning the conclusion to be drawn from those facts.” Id. at 362, 563 S.E.2d at 333. “In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). When reviewing a grant of summary judgment, an appellate court applies the same standard as the trial court. Lanham, at 361, 563 S.E.2d at 333.

Here, Discover moved for summary judgment, and Hendrix objected to the court’s jurisdiction over Hendrix because Discover failed to properly serve Hendrix. [Motion for Summary Judgment; Motion to Reconsider Grant of Summary Judgment pp.1-2.] Discover claimed that it complied with the rules by serving Hendrix at 503 S. Wheeler Ave. [Reply to Motion to Reconsider Grant of Summary Judgment p.1.] Hendrix countered that she established her permanent residence at 136 Forest Hills Blvd. months before Discover filed suit. [Hendrix Affidavit p.1.] The court could not determine personal jurisdiction without further examining the disputed facts to determine whether the address at which Discover served process qualified as Hendrix’s “dwelling house or usual place of abode” under S.C. R. Civ. P. 4(d)(1). Hendrix supplied an affidavit stating that she had not resided at 503 S. Wheeler Ave. for months and denied that she lived at 503 S. Wheeler Ave. in the answer. [Answer p. 1; Hendrix Affidavit p.1.]

Because Discover and Hendrix disagreed about whether 503 S. Wheeler Ave. was Hendrix's dwelling house or place of abode, a material issue of fact existed as to whether Discover established personal jurisdiction over Hendrix. Hendrix's affidavit and the credit reports showing Hendrix's current address at 136 Forest Hills Blvd. provided the mere scintilla of evidence required to defeat a summary judgment motion on the issue of jurisdiction. Taking the facts in the light most favorable to Hendrix, a material question of fact existed as to whether Discover established personal jurisdiction over Hendrix. Because Hendrix provided a mere scintilla of evidence that an issue of material fact existed as to whether Discover properly served Hendrix and as to whether the trial court had personal jurisdiction over Hendrix, the trial court improperly granted Discover's motion for summary judgment.

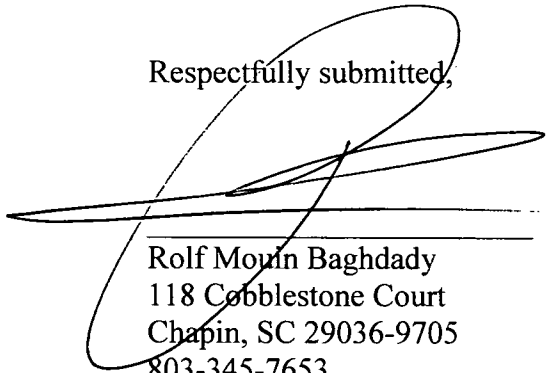
CONCLUSION

Summary judgment should not be granted when a genuine material issue of fact exists. A defendant need only submit a mere scintilla of evidence to defeat a motion for summary judgment. S.C. R. Civ. P. 4(d)(1) requires a plaintiff to serve a defendant at the defendant's dwelling or usual place of abode. Hendrix provided a mere scintilla of evidence that Discover did not serve Hendrix at her dwelling or usual place of abode, even though Hendrix's address was readily available to Discover. Because a material issue of fact existed as to whether Discover properly served Hendrix, then the court could not conclude Discover established personal jurisdiction over Hendrix. Therefore, the trial court improperly granted summary judgment to Discover.

Wherefore, the Court of Appeals should reverse the trial court's grant of summary judgment and remand the case for trial.

February 25, 2014

Respectfully submitted,

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the left.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2012-CP-36-0484

Samantha Hendrix

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DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

1. Motion for Summary Judgment;
2. Order of Summary Judgment;
3. Motion to Reconsider Grant of Summary Judgment;
4. Reply to Motion to Reconsider Grant of Summary Judgment;
5. Order Denying Defendant's Motion to Reconsider Grant of Summary Judgment;
6. Complaint;
7. Answer;
8. Affidavit of Non Personal Service;
9. Affidavit of Samantha Hendrix
10. Equifax Credit Report;
11. Experian Credit Report;
12. Discover Credit Card Application;
13. Discover Card Account Statements.

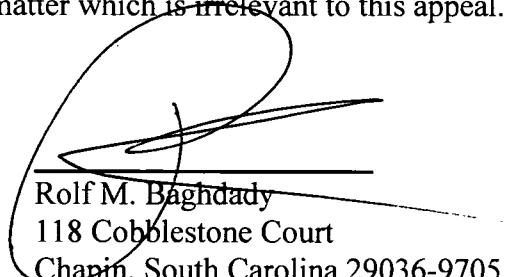
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I certify that this designation contains no matter which is irrelevant to this appeal.

February 25, 2014



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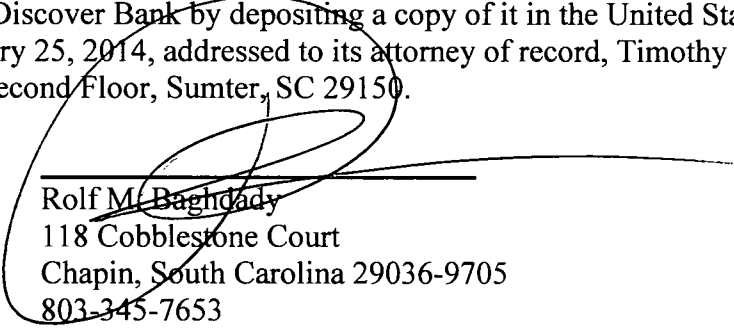
Discover Bank

Respondent.

PROOF OF SERVICE

I certify that I have served the initial brief and designation of matter to be included in record on appeal, on Respondent Discover Bank by depositing a copy of it in the United States Mail, postage prepared, on February 25, 2014, addressed to its attorney of record, Timothy Lee Griffith, 360 W Wesmark Blvd, Second Floor, Sumter, SC 29150.

February 25, 2014



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February 25, 2014

The Honorable Jenny Abbott Kitchings
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RE: Samantha Hendrix v. Discover Bank
Case No.: 2012CP3600484

Dear Ms. Kitchings:

Enclosed for filing please find the original and one copy of the Initial Brief of Appellant, Designation of Matter to be included in record on appeal, and the corresponding proof of service to Timothy Lee Griffith, Esq.

Please return a clocked copy in the included self-addressed, stamped envelope.

Very truly yours,

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