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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Case No. 2008-CP-10-2513

Regions Bank,

Respondent,

v.

Stonebridge Development Group, LLC; Plantation Isle Equity Group, LLC, a Maryland Limited Liability Company; Carolina Federal Savings Bank; Plantation Isle Equity Partners General Partnership; Michael Aiello; Frank M. Harvey aka Francis M. Harvey; Brandon Advertising, Inc; Rubeling & Associates, Inc.; Carolina Custom Docks, LLC; J. Mark Caldwell, individually; Carolina Clearing & Grading, Inc.,

Defendants,

Of Whom Frank M. Harvey aka Francis M. Harvey is the

Petitioner.

PETITION FOR A WRIT OF CERTIORARI OF FRANK M. HARVEY

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 22, 2012.

QUESTIONS PRESENTED

A. Did the Court of Appeals err in affirming the Equity Master's denial of Petitioner's motion under Rule 60(b)(4), SCRCP, for relief from the default judgment entered against him that was void for lack of service of process?

B. Did the Court of Appeals err in holding that the issue of the failure of the Equity Master to conduct a hearing on Petitioner's motion under Rule 60(b)(4), SCRCP, had not been preserved for appeal when Petitioner twice asked for but did not receive a hearing on the record?

C. Did the Court of Appeals err by not holding that Petitioner was denied due process of law when his motion for relief from a void default judgment under Rule 60(b)(4), SCRCP, based on lack of service of process was denied without a hearing and solely on the basis of an impugned Affidavit of Service and despite a traversing Affidavit from Petitioner?

STATEMENT OF THE CASE

Reasons why certiorari should be granted

This Petition for Certiorari asks the Supreme Court to review a decision of the Court of Appeals that affirmed the denial by the Master in Equity of Petitioner's motion for relief from a default judgment under Rule 60(b)(4), SCRCP. The motion for relief argued that the default judgment was void because a summons and complaint had not been served on Petitioner in accordance with Rule 4, SCRCP. As a result of the Equity Master's denial of the motion and the affirmance of the Court of Appeals, Petitioner has had a $733,694.66 personal judgment rendered against him by a Court that did not obtain jurisdiction over him and without even

having had the opportunity to appear in that Court to demonstrate the merits of his motion for relief from the default judgment. The motion for relief from the default judgment is dispositive of the case on the merits because if the motion is granted, the case has to be dismissed and cannot be refiled due to the expiration of the statute of limitations. *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 301, 721 S.E.2d 430, 436 (2012).

Certiorari is proper under the standards of Rule 242(b), SCRAP, because:

1. A novel question of law is present relating to the presumption of service of process that arises from apparent compliance with Rule 4, SCRCP. What is required for that presumption to arise in the first instance; what will prevent the presumption from arising; and what will rebut the fact that is presumed?

2. Another novel question of law is present relating to preservation of an issue for appeal. If a request is made for a hearing and a court reporter, and no hearing is held before a ruling is made, is the issue of the denial of the hearing preserved for appeal? Or, must the trial court expressly, on the record, refuse to hold the hearing for the issue to be preserved?

3. A substantial constitutional question is present. Was Frank Harvey denied procedural due process by the Equity Master's not holding a hearing on his motion for relief from the default judgment under Rule 60(b)(4), SCRCP, despite two requests for a hearing and a court reporter? Was Harvey afforded Due Process when his motion, which was dispositive of the merits of the case, was denied based on a defective Affidavit of Service that was impugned by the record and despite a contrary Affidavit from Harvey?

4. Is the Court of Appeals' affirmance in direct conflict with *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 721 S.E.2d 430 (2012)?

These considerations present special and important reasons for the Supreme Court to exercise its discretionary jurisdiction to review the incorrect decision of the Court of Appeals.

Factual and procedural background relevant to the Petition

A. This case is a mortgage foreclosure and suit against the guarantors.

On May 7, 2008, Regions Bank instituted a mortgage foreclosure action in the Court of Common Pleas of Charleston County against a property owned by Stonebridge Development Group, LLC. Besides foreclosing the mortgage, Regions sued Frank Harvey (the Petitioner), Michael Aiello, and J. Mark Caldwell, the members of Stonebridge who had guarantied the loan. Apx. 91. Harvey and Aiello are Maryland residents. Apx. 118, 120.

B. Regions retained a private-process server to serve the summons and complaint in Maryland.

Regions retained Serve-One, Inc. of Greenville, South Carolina to effect service of process on Harvey and Aiello in Maryland. On September 2, 2008, Regions filed an Affidavit of Service as to service on Harvey and on September 8, as to Aiello. Apx. 118, 120. Each Affidavit of Service was on a partially typed form with handwritten additions that were filled in by the private-process server. Although service of process was purportedly done by the same person, the two Affidavits of Service in their handwritten portions are radically different - so different that they impeach each other and undeniably indicate that they were signed by different people. If one is legitimate, the other is not. Apx 118, 120.

1. The Harvey Affidavit of Service.

In the opening paragraph of the Harvey Affidavit of Service, the private-process server identifies himself in handwriting as "Wm L Angel." The signature line contains a handwritten signature reading "William L Angel," with no printed version of the full name elsewhere on the Affidavit. Apx. 118.

The Affidavit of Service certifies that personal service was made on Harvey on August 14, 2008. Although the typed portion of the opening paragraph gives Harvey's home address at 2109 Foxhall Road, Reisterstown, Maryland 21136,[1] the Affidavit of Service gives no handwritten indication of where that service was made. Apx. 118.

The Affidavit of Service contains a handwritten-physical description of someone, but there is no indication that this is Harvey's physical description or how the private-process server knew he was handing papers to Frank Harvey (such as if the person being served answered to his name). The Affidavit of Service does not indicate how the private-process server knew what Frank Harvey looked like. Nor is there any indication when the physical description was placed on the Affidavit of Service, whether before the alleged service was made (to aid in the identification of the person to be served) or after service was made (to describe the person actually served). Apx. 118.

2. The Aiello Affidavit of Service and its impeaching effect on the Harvey Affidavit of Service.

In the opening paragraph of the Aiello Affidavit of Service, the private-process server identifies himself in handwriting as "Bill Angel," not "Wm L Angel," as was done on the Harvey Affidavit of Service. The signature line contains a handwritten signature reading "Bill Angel," with the name "Bill Angel" printed to the left of the signature. This is in contrast to the signature reading "William L Angel" on the Harvey Affidavit, with no hand-printed name next to the signature. Even the most untrained eye quickly sees that the Aiello and Harvey Affidavits of Service were executed by two-different people with dissimilar handwriting. Apx. 118, 120.

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[1] Reisterstown is a suburb of Baltimore City located to the north east of the City in Baltimore County.

The typed portion of the opening paragraph gives Aiello's home address as 906 Cold Bottom Road, Sparks, Maryland 21152[2] and certifies in writing that Aiello was served on August 16, 2008. Unlike the Harvey Affidavit of Service, this Affidavit of Service includes a second, handwritten notation of Aiello's home address to indicate where service was made. The Harvey Affidavit of Service, in contrast, does not have any handwritten address, only the typed address at the beginning. Apx. 118, 120.

The Aiello Affidavit of Service contains a handwritten-physical description of someone, presumptively of Aiello. This handwritten-physical description on the Aiello Affidavit of Service is consistent with all of the handwriting elsewhere on the Affidavit. Apx. 120.

Just the opposite is true on the Harvey Affidavit of Service. The handwritten-physical description is different than all of the other writing on the Harvey Affidavit of Service. The description could not have been placed there by the same person. Apx. 118.

Of particular note, the handwritten-physical descriptions on the Aiello and Harvey Affidavits of Service are identical in both their characteristics, formatting, and printing. It is apparent that the same person (who signs his name as "Bill Angel" on the Aiello Affidavit and "William L Angel" on the Harvey Affidavit) wrote both physical descriptions when the printing is compared on the two Affidavits. Apx. 118, 120.

C. Regions obtained a default judgment against Harvey.

On May 14, 2010, the Master in Equity entered an Order and Judgment of Foreclosure and Sale. Apx. 8. Besides authorizing the sale of the mortgaged property, this order directed the entry of "a personal or deficiency judgment against ... Frank M. Harvey aka Francis M. Harvey,

[2] Sparks, Maryland is in Baltimore County, north of Baltimore City.

with a credit against the judgment to be given for the net proceeds received by the Plaintiff for the sale, shall be entered upon the judgment rolls for Charleston County." Apx. 14.

Before entering the default judgments, the Equity Master reviewed both the Harvey and Aiello Affidavits of Service. Based on this review of the Affidavits of Service, the Equity Master found in consecutive paragraphs of the Order and Judgment of Foreclosure Sale that "Said pleadings were served upon Michael Aiello via personal service on August 16, 2008, evidenced by the Affidavit of Service item that is of record here" and "[s]aid pleadings were served upon Frank M. Harvey aka Francis M. Harvey via personal service on August 14, 2008, evidenced by the Affidavit of Service item that is of record here." Apx. 9 (at ¶¶ 8, 9). No mention is made in the Order and Judgment of Foreclosure and Sale about the obvious discrepancies in the two Affidavits of Service.

D. Harvey filed a motion for relief from the default judgment entered against him.

Harvey, having learned of the entry of the default-deficiency judgment against him and the scheduling of the foreclosure sale for August 5, 2010, filed an emergency motion for relief from the judgment under Rule 60(b), SCRCP, on August 4, 2010. Harvey asked the Master in Equity to delay the scheduled-foreclosure sale and grant him relief from the default judgment. Apx. 125. Harvey's motion was accompanied by his Affidavit denying that service had been made and contradicting the Affidavit of Service. Apx. 129. When he filed the emergency motion, Harvey requested a hearing and a court reporter. Apx. 125.

In his Affidavit, Harvey swore under the penalties of perjury that:

- The Affidavit of Service was false.
- He was not served on August 14, 2008 at his home at 2109 Fox Trail Court, Reisterstown, Maryland.

- On August 14, 2008, he was vacationing with his family in Berlin, Maryland.[3]
- He had never been served with a copy of the Summons, Complaint to Foreclose Mortgage and Exhibits in the case instituted by Regions Bank against *Stonebridge Development Group, LLC*, Civil Action No. 2008-CP-2513.

Apx. 129.

Despite the request for a hearing and a court reporter, no hearing on the emergency motion was held. Instead, the Equity Master conducted a telephone conference off the record. Apx. 90. The Master in Equity declined to delay the foreclosure sale but authorized further briefing on the question of relief from the default judgment. No transcript was made of the conference, despite Harvey's request for a court reporter.

E. The Master in Equity denied Harvey's motion for relief from the judgment without a hearing after a hearing and court reporter had been requested.

Harvey supplemented his initial motion on August 20, 2010 with a memorandum pointing out that the default judgment was void under Rule 60(b)(4), SCRCP because process had never been served on him and the Court of Common Pleas had not attained jurisdiction over him. Apx. 134. In filing this memorandum, Harvey again requested a hearing and the presence of a court reporter at the hearing. Apx. 134.

Regions responded with a memorandum in opposition on September 17, 2010. Apx. 142. Regions did not enhance or supplement the Affidavit of Service it had filed earlier. Instead, Regions argued that it was entitled to a presumption of proper service because it followed the South Carolina Rules of Civil Procedure. Apx. 142.

The Master in Equity denied Harvey's motion on October 29, 2010, agreeing with Regions that Regions was entitled to a presumption that service was accomplished. Apx. 89.

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[3] Berlin, Maryland is a town near Ocean City, Maryland, a resort on Maryland's Eastern Shore. Berlin is approximately 150 miles away from Reisterstown.

The Master in Equity did not conduct a hearing on the record to resolve the factual conflict in the Affidavit of Service and Harvey's Affidavit and the patent discrepancies in the Harvey and Aiello Affidavits of Service. He simply denied Harvey's motion in favor of a presumption, essentially treating the presumption as irrebuttable. Apx. 89.

F. Harvey appealed.

After the Master in Equity denied his motion and reduced the amount of the default-deficiency judgment on November 30, 2010 to reflect the credit for the purchase price of the real estate at the foreclosure sale (Apx. 87), Harvey noted an appeal to the Court of Appeals, which in a *per curiam* decision affirmed the Master in Equity. Apx. 179, 261. The Court of Appeals then denied Harvey's Petition for Rehearing. Apx. 289. Harvey has now asked this Court to issue a writ of certiorari to review that affirmance.

G. The issue of service is dispositive of the case.

The issue of whether Regions properly served Harvey is dispositive of the case. If Harvey was properly served, the default judgment stands. If he was not properly served, the case must be dismissed under Rule 3(a), SCRCP, and cannot be refiled due to the expiration of the statute of limitations.

ARGUMENT

A. The Court of Appeals erred in affirming the Equity Master's denial of Petitioner's motion under Rule 60(b)(4), SCRCP, for relief from the default judgment entered against him that was void for lack of service of process.

1. A default judgment is void if entered against a defendant who has not been served with process.

A default judgment is void if it is entered by a court without jurisdiction over the defendant. *Fin. Fed. Credit Inc. v. Brown*, 384 S.C. 555, 562, 683 S.E.2d 486, 490 (2009);

Thomas & Howard Co. v. T.W. Graham & Co., 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). Jurisdiction over a defendant is obtained by service of process in compliance with Rule 4, SCRCP. *BB & T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006); *Patel v. S. Brokers, Ltd.*, 277 S.C. 490, 492, 289 S.E.2d 642, 643 (1982). If Harvey was not served with process, the default judgment against him was void, and he was entitled — as a matter of right — to relief from the judgment under Rule 60(b)(4), SCRCP. *Richardson Const. Co., Inc. v. Meek Eng'g & Const., Inc.*, 274 S.C. 307, 309, 262 S.E.2d 913, 915 (1980) ("Rather, the motion for relief herein was grounded upon the court's lack of jurisdiction over appellant by reason of respondent's alleged failure to serve the Summons. Such relief, when warranted, is not discretionary but a matter of right."); *Dill-Ball Co. v. Bailey*, 103 S.C. 233, 87 S.E. 1010 (1916).

2. Regions did not establish that the Court of Common Pleas had jurisdiction to enter a default judgment against Harvey.

Regions, as the plaintiff, had the burden of establishing that the Court entering the default judgment had personal jurisdiction over Harvey. *BB & T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006); *Fassett v. Evans*, 364 S.C. 42, 47, 610 S.E.2d 841, 843 (Ct. App. 2005). When process has been served in apparent compliance with the procedures of Rule 4, SCRCP, a presumption arises that the service is effective and jurisdiction over the defendant has been obtained. *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 295, 721 S.E.2d 430, 433 (2012); *BB & T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006). Substantial, not exacting, compliance, with Rule 4, SCRCP is required for the presumption to arise. *Roche v. Young Bros. of Florence*, 318 S.C. 207, 209-10, 456 S.E.2d 897, 899 (1995). Regions, to carry its burden of establishing the jurisdiction of the Court of Common Pleas to enter the default, relied solely on this presumption. But the presumption should not arise when the record, including the Affidavit of Service, does not reveal substantial compliance with Rule 4, SCRCP.

Rule 4, SCRPC, provides that a proof of service be filed demonstrating that the Rule's requirements have been met. When service is by a private-process server, Rule 4(g) specifies that the proof of service be in the form of an affidavit from the private-process server.

Regions filed an Affidavit of Service as required by Rule 4(g), SCRCP. But the Affidavit of Service that Regions filed is facially insufficient and does not demonstrate that Rule 4's requirements were satisfied by the private-process server. When an Affidavit of Service is facially insufficient, the presumption should not apply. *See BB & T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006) (Affidavit of Service based on speculation of private-process server insufficient and default judgment set aside); *Collins Music Co., Inc. v. Lord*, 289 S.C. 458, 460-61, 346 S.E.2d 724, 726 (1986) ("We agree with the respondent that . . . the affidavit in this case is deficient because it fails to state that the person served was a person of discretion or employed by the respondent, and it fails to show that the address served was respondent's place of business."); *MCC Fin. Services, Inc. v. Duffel*, 265 S.C. 519, 522, 220 S.E.2d 127, 128 (1975) ("The original affidavit of service fails to show that the said Rodney Duffel, with whom the pleadings were left, was a person of discretion, nor does it show that appellant resided at that place."). Yet Regions was afforded that presumption.

a. The Affidavit of Service was facially irregular and defective and was not *prima facie* evidence of service of process.

i. The Affidavit of Service fails to state the place where service was made.

Rule 4(g), SCRCP, requires the process server to state in the proof of service the "place of such service." The Affidavit of Service does not do so. While Frank Harvey's residence address was typed on the Affidavit of Service form delivered to the process server (presumptively by the person who prepared the form for delivery to the process server), the

private-process server did not write on the form where he allegedly served Harvey. Does he contend he served process at Harvey's residence in Reisterstown, Maryland or somewhere else?

This fact is of critical importance in this dispute because Harvey has sworn that he was not at his residence on the date the process server contends he effected personal service. Harvey has sworn he was vacationing at his home in Berlin, Maryland on Maryland's Eastern Shore on the date the private-process server swears he served the summons and complaint. The place where service allegedly was accomplished is a cornerstone in the dispute about whether service was made. Yet the Affidavit of Service, despite the express requirement of the Rule, is facially defective under and non-compliant with Rule 4(g), SCRCP, for not stating the place where service was made.

ii. The Affidavit of Service contains two distinct forms of handwriting by the private process server.

Two distinct forms of handwriting are on the Affidavit of Service. The physical description on the Affidavit of Service is in handwriting that is different than the handwriting on the rest of the Affidavit.

iii. The Affidavit of Service does not contain a physical description of the person actually served as opposed to the person to be served.

No physical description of the person to whom the process was allegedly delivered, in the handwriting of the private-process server, is on the Affidavit of Service. The handwritten description is from a person other than the private-process server. Hence, the Affidavit of Service gives no physical description from the private-process server of the person to whom he delivered process based on the private-process server's observation of that person. Rule 4(g), SCRCP.

b. Regions never amended the Affidavit of Service.

While Rule 4(i), SCRCP, permits an Affidavit of Service to be amended with leave of Court, Regions never filed an amended Affidavit of Service, even after Harvey filed his Affidavit raising the issue of his location on the date service allegedly was made. *See Foster v. Crawford*, 57 S.C. 551, 36 S.E. 5, 8 (1900) (Proof of service can be amended to state time and place of service.). Regions did not confront the factual discrepancy arising over where service was made. Regions just argued that the Affidavit of Service was entitled the benefit of a presumption that service had been accomplished.

c. Regions was not entitled to the presumption because of the uncorrected defects in the Affidavit of Service.

The filing of this facially defective and non-compliant Affidavit of Service should not have entitled Regions to a presumption that service was accomplished, particularly when the Affidavit of Service does not provide a specific, critical item of information required by the Rule 4(g), SCRCP: where was service made upon the defendant? Regions should not have been afforded a presumption that service occurred. The Equity Master's determination that service of process had been accomplished, solely on the basis of the presumption, was error that should have been be reversed by the Court of Appeals.

d. The record demonstrated that the Affidavit of Service was fraudulent.

In addition to the facial defects in the Harvey Affidavit of Service, the record before the Equity Master demonstrated that the Harvey Affidavit of Service was fraudulent.

Besides the Harvey Affidavit of Service, Regions filed an Affidavit of Service for Michael Aiello, another defendant. Service on both Harvey and Aiello allegedly was accomplished by the same private-process server on August 14 and 16, 2008. Yet the private-

process server's handwriting is obviously different on each Affidavit of Service. Anyone looking at the Affidavits of Service can see the difference in the two handwritings. Contrast Apx. 118 with Apx. 120.

Worse, in the Harvey Affidavit of Service, the process server identifies himself as "Wm. L. Angel" and signs his name as "William L. Angel." In the Aiello Affidavit of Service, the private-process server identifies himself as "Bill Angel" and signs his name "Bill Angel," with a printed "Bill Angel" placed next to the signature. Hence, the supposed same man used different handwriting and a different signature style and format on each Affidavit of Service. More likely, the Harvey Affidavit of Service was not executed by the person purporting to give the affidavit and was instead executed by someone else perpetrating a fraud on the Court.

Other disparities abound. The Aiello Affidavit, consistent with Rule 4(g)'s requirement, contains a handwritten notation of the place Aiello was served, which was Aiello's residence. This handwritten notation of the place of service is in addition to the typed-residence address for Aiello, even though the two addresses, one typed and one written, are the same. Why does the Harvey Affidavit of Service omit a statement of where service was made? This information is material to the dispute about whether Harvey was served. If the private-process server knew to state where service was made on the Aiello Affidavit of Service, why did he not know to do so on the Harvey Affidavit of Service?

The Aiello Affidavit of Service contains a handwritten description of Aiello that is consistent with the other handwriting on the Affidavit. This handwritten description is in the same hand writing as the description on the Harvey Affidavit of Service but is different than all of the other handwriting on the Harvey Affidavit of Service.

Regions provided no explanation for these disparities and anomalies.

Both the Harvey Affidavit of Service and the Aiello Affidavit of Service were before and reviewed by the Equity Master at the time he entered the default judgments against Harvey and Aiello. Apx.9 (at ¶¶ 8 and 9). In this context, when the record before the Equity Master demonstrated these types of discrepancies, why was Regions entitled to a presumption that service was made on Harvey? An observably fraudulent affidavit should not entitle the party submitting it to any favorable presumption. The Equity Master should not have denied Harvey's motion for relief under Rule 60(b)(4), SCRCP, with this type of record before him, without even holding a hearing. The Court of Appeals should not have affirmed the Equity Master.

e. Harvey's Affidavit rebutted the Affidavit of Service and required Regions to satisfy its burden of proving that service had been accomplished.

Harvey filed a detailed Affidavit traversing the Affidavit of Service. In his Affidavit, Harvey did not just assert in bald, conclusory language that he had not been served. He explained that he was not at his residence and was at his vacation home in a different part of Maryland on the date the Harvey Affidavit of Service says he was served. The deficient Affidavit of Service does not state where service occurred and certainly does not state that it was made at Harvey's vacation home. The record is devoid of any indication that Regions or Angel knew of Harvey's Berlin, Maryland residence or his actual whereabouts on the date service was supposedly made.

The presumption afforded an Affidavit of Service compliant with Rule 4,SCRCP, may be impeached and rebutted by extrinsic evidence that service in accordance with the Rule did not actually occur. *Richardson Constr. Co. v. Meek Eng'g & Constr.*, 274 S.C. 307, 311, 262 S.E.2d 913, 915 (1980); *MCC Fin. Services, Inc. v. Duffel*, 265 S.C. 519, 522, 220 S.E.2d 127, 128-29 (1975) ("[T]he Affidavit of Service is only prima facie evidence of the facts stated therein and,

where directly attacked, may be impeached by extrinsic evidence."); *Laurens Trust Co. v. Copeland*, 154 S.C. 390, 151 S.E. 617, 620 (1930).

This Court has ruled that a bald, conclusory denial of receipt of the summons and complaint, without more, is not sufficient to impeach and rebut an otherwise proper affidavit of service. *Patel v. S. Brokers, Ltd.*, 277 S.C. 490, 493, 289 S.E.2d 642, 644 (1982) (Defendant refused receipt of certified letter and baldly denied having been served). But this Court has ruled that other presumptions are rebutted by a simple, conclusory denial of the presumed fact. *See Foster v. Ford Motor Credit Co.*, 302 S.C. 450, 452, 395 S.E.2d 440, 441 (1990) (Presumption of delivery of properly addressed and mailed letter rebutted by simple denial of receipt); *Simpson v. Sanders*, 314 S.C. 413, 414, 445 S.E.2d 93, 93 (1994). The question of what factual showing is required to rebut a presumption of service is directly at issue in this case.

In either instance, the Harvey Affidavit is more than a mere denial of receipt of process. Besides confirming that he never received the summons and complaint, Harvey provided the reason he did not receive the process and could not have received it: he was in a different part of the state on the date he allegedly was served. And the facial defects in the Affidavit of Service (including its failure to specify where service occurred) and the impeachment by the record via the Aiello Affidavit of Service should have rebutted the presumption and put Regions to its proof. *Richardson Constr. Co. v. Meek Eng'g & Constr.*, 274 S.C. 307, 312, 262 S.E.2d 913, 916 (1980) ("Moreover, **it is not the mere denial of service by appellant**, but the extrinsic factors surrounding the service as well which require as a matter of law that we vacate the default judgment, set aside the service of the Summons, and reverse the order of the lower court.") (emphasis added).

The presumption arising from the filing of an affidavit of service in accordance with Rule 4, SCRCP, does not shift the burden of proof. If the defendant presents a proper, factually detailed affidavit that rebuts the presumption of service, the rebutted presumption vanishes, the burden of proof remains on the plaintiff, and the plaintiff must present sufficient evidence to overcome any counter-evidence from the defendant. The rebutted presumption alone, resting solely on a contested affidavit, is not sufficient to prove that service occurred. The plaintiff must prove this fact, unassisted by the rebutted presumption. See Rule 301, SCRE; *Gastineau v. Murphy*, 323 S.C. 168, 177, 473 S.E.2d 819, 825 (Ct. App. 1996) ("A presumption is a rule of law by which the finding of a basic fact gives rise to the existence of the presumed fact until the presumption is rebutted by evidence produced by the defendant."), *rev'd on other grounds*, 331 S.C. 565, 503 S.E.2d 712 (1998).

If a defendant subjected to a default judgment moves for relief based on Rule 60(b)(4), SCRCP, asserting that the default judgment is void due to lack of service, the defendant must establish initially that *prima facie* grounds for relief are present. *BB & T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006). To demonstrate that *prima facie* grounds for relief are present, the defendant must present facts that establish that service did not occur. Once the defendant does so, the plaintiff cannot simply continue to rely on the presumption arising from an affidavit of service. The plaintiff must then prove that service actually occurred.

In this instance, the Master in Equity, agreeing with Regions' incorrect argument, imposed a presumption arising from an affidavit of service that had been rebutted by a traversing affidavit and went no further. But the presumption alone, when rebutted by the opposing affidavit presented by Harvey, could not satisfy Regions' burden of proof.

f. The summary judgment standard should apply when conflicting affidavits about service are presented.

The Supreme Court has expressed an aversion to deciding factual disputes solely on paper submissions, particularly where due process considerations are present. *S.C. Nat'l Bank v. Cent. Livestock Mkt., Inc.*, 289 S.C. 309, 314, 345 S.E.2d 485, 488 (1986) ("We have previously condemned the use of affidavits to determine disputed issues of fact."); *Union Savs. Bank v. Hubbard*, 138 S.C. 328, 328, 136 S.E. 481, 482 (1927) ("This court has decided in several cases that to decide an issue of fact on affidavits in most cases is unsatisfactory."). Yet that is what the Equity Master did. His decision on the merits, based entirely on conflicting affidavits, was affirmed by the Court of Appeals.

In assessing conflicting affidavits, one averring that service was made and one averring that service was not made, a Court should evaluate the affidavits by a standard analogous to that used in summary judgment motions. If the defendant presents an affidavit legitimately disputing service of the summons and complaint, the Court should regard the defendant's affidavit as establishing a genuine dispute as to a material fact and require evidence to resolve the material factual dispute. The Court in that instance should no more decide a motion under Rule 60(b)(4), SCRCP, on conflicting affidavits than it should decide a motion for summary judgment based on affidavits that genuinely dispute a material fact.

This is particularly so in the context of South Carolina's scintilla of evidence standard applicable to motions for summary judgment. *Hancock v. Mid-S. Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). If a scintilla of evidence establishes that a genuine dispute of material fact exists and that scintilla of evidence precludes entry of summary judgment and requires a trial, how can an affidavit of service that is gainsaid in all of its material respects by a

traversing affidavit be sufficient to justify a denial of relief under Rule 60(b)(4), SCRCP, without even a hearing?

In this case, a genuine dispute of material fact about service was generated and should have required a hearing in which Regions had the ultimate burden of proving that service had been accomplished. That hearing should have been an evidentiary hearing as the natural and proper type of hearing to be held when a material fact is in genuine dispute. *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 299, 721 S.E.2d 430, 435 (2012). At an evidentiary hearing, cross-examination would have been possible and conflicting testimony, tested. The Equity Master could have judged the credibility of the witnesses (particularly Harvey and Angel) and the persuasiveness of the evidence presented. Regions should have been required to prove at an evidentiary hearing that the Court of Common Pleas had jurisdiction to enter the default judgment against Harvey because he was properly served with a summons and complaint.

3. Because Regions did not establish that service had been made, the Master should have set aside the default judgment and dismissed the complaint as to Harvey.

Regions had the burden of proving that service had been accomplished under Rule 4, SCRCP. Once the presumption was rebutted, Regions could no longer rest on the Affidavit of Service but had to come forward with evidence to satisfy its burden of proof that the Court obtained jurisdiction through the proper service of process before the default judgment was entered. But Regions did not do so and rested solely on the rebutted presumption.

The Master should have set aside the default judgment and dismissed the case. The Master entered a default judgment when the Court had not acquired jurisdiction and then refused to correct the error. The Court of Appeals incorrectly affirmed the Master. This Court should grant certiorari to review the Court of Appeals erroneous affirmance.

B. The Court of Appeals erred in holding that the issue of the failure of the Equity Master to conduct a hearing on Petitioner's motion under Rule 60(b)(4), SCRCP, had not been preserved for appeal when Petitioner twice asked for but did not receive a hearing on the record.

Regions argued that Harvey was not entitled to a hearing on his motion under Rule 60(b)(4) because he did not ask for one. Apx. 233-4. The Court of Appeals, accepting Regions' contention, ruled that Harvey had not preserved the issue of a lack of a hearing by not raising it below. Apx. 262. Yet Regions' assertion that Harvey did not request a hearing before the Master is incorrect, as was pointed out by Harvey in his Reply Brief and in his Petition for Rehearing. Apx. 240 (Reply Brief at 6-7); Apx. 263 (Petition for Rehearing at 2, 12). The Court of Appeals ruling that the issue of a hearing was not preserved for appeal is incorrect.

1. Harvey twice requested a hearing and a court reporter.

Regions had scheduled a foreclosure sale of the mortgaged property for August 5, 2010. On August 4, 2010, Harvey filed an emergency motion under Rule 60, SCRCP, for relief from the judgment to forestall the foreclosure sale. The motion was supported by Harvey's Affidavit. He accompanied his motion with a request for a hearing and a court reporter. Apx 125.

No hearing was held. Instead, the Master conducted a telephonic conference with counsel but without a court reporter. Apx. 90. At the telephonic conference, the Master refused to delay the foreclosure sale but did not rule on the motion for relief from the judgment under Rule 60(b), SCRCP. He directed further briefing by the parties.

Harvey filed a supplemental brief on August 20, 2010 and relied on his previously filed Affidavit. He again requested a hearing and a court reporter. Apx. 134. Regions responded on September 17, 2010. Regions did not supplement, amend, or in any way enhance the Affidavit of Service, standing pat despite the traversing Harvey Affidavit.

Despite Harvey's two requests for both a hearing and a court reporter, the Master did not hold a hearing with a court reporter present. The Master denied Harvey's motion without any hearing, implicitly rejecting Harvey's request that he be afforded a hearing on his motion for relief from what was a void judgment.

2. The two requests for a hearing preserved for appeal the failure to hold a hearing.

To be the subject of an appeal, an issue must be raised in and ruled upon by the trial court. Otherwise, the issue is not preserved for appeal and is considered to have been waived. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011); *S. Carolina Dept. of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007). But the trial court is not required to expressly rule on an issue for that issue to be preserved for appeal. Once an issue is raised, an implicit ruling is all that is required to preserve the issue for appeal.

Because Harvey twice asked for a hearing and a court reporter and because a hearing was never held, the issue of his entitlement to a hearing was raised in the trial court and denied implicitly by the Equity Master's ruling on his motion without ever holding the requested hearing. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 413, 529 S.E.2d 543, 546 (2000) (Negligence issue had been raised in the trial court due to the summary judgment ruling even though the motion to amend the complaint to add a negligence claim was never ruled on by the trial court.); *Pryor v. Nw. Apartments, Ltd.*, 321 S.C. 524, 528, 469 S.E.2d 630, 633 (Ct. App. 1996) ("Northwest further argues the issue is not preserved for appeal because the trial court did not expressly rule on it and Pryor failed to raise the issue in a Rule 59(e) motion to alter or amend the judgment. However, Pryor's pleadings clearly asserted the RLTA was applicable to the facts of this case. Moreover, **the trial court implicitly ruled on and rejected this**

argument in finding Northwest had no duty to warn of dangerous conditions existing on its property.) (emphasis added).

Once the Equity Master decided the motion under Rule 60(b)(4) without conducting a hearing, Harvey had no practical recourse to obtain a hearing. It would have been futile to have filed a motion to ask, for the third time, the Equity Master to hold a hearing on a matter on which he had already ruled without a hearing. *See State v. Bryant*, 316 S.C. 216, 220, 447 S.E.2d 852, 855 (1994) ("Further, we find that it would have been futile to move to strike testimony which the trial court had already ruled was proper."); *State v. Ross*, 272 S.C. 56, 60-61, 249 S.E.2d 159, 162 (1978) ("Once the court rules on an objection to a line of questioning, it is not necessary that counsel repeat his objection after each question."). The Master's decision, issued without a hearing in the face of the two requests for a hearing, preserved for appeal the issue of whether a hearing should have been held.

C. The Court of Appeals erred by not holding that Petitioner was denied due process of law when his motion for relief from a void default judgment based on lack of service of process was denied without a hearing and solely on the basis of an impugned Affidavit of Service and despite a traversing Affidavit from Petitioner.

1. Due process requires an opportunity for a hearing, the right to introduce evidence, and the right to confront and cross-examine witnesses.

The Master's failure to hold an evidentiary hearing denied Harvey procedural due process. Harvey was denied the right to appear in Court to express his position, to introduce evidence and testify, and to cross-examine the opposition's key witness. This denial was inconsistent with the fundamental fairness required by procedural due process.

The Supreme Court has noted that "Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to

confront and cross-examine witnesses." *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007). *Accord Moore v. Moore*, 376 S.C. 467, 473, 657 S.E.2d 743, 746 (2008). When a decision affecting a substantial right of a party turns on a question of disputed fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *Moore v. Moore*, 376 S.C. at 473, 657 S.E.2d at 746; *S. Carolina Dept. of Soc. Services v. Wilson*, 352 S.C. 445, 452, 574 S.E.2d 730, 734 (2002); *Brown v. S. Carolina State Bd. of Educ.*, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) ("Procedural due process often requires confrontation and cross-examination of one whose word deprives a person of his or her livelihood."). "'[D]ue process of law requires that a person shall have a reasonable opportunity to be heard before a legally appointed and qualified impartial tribunal before any binding decree, order, or judgment can be made affecting his rights to life, liberty, or property.'" *LaSalle Bank Nat'l Ass'n v. Davidson*, 386 S.C. 276, 279, 688 S.E.2d 121, 122-23 (2009) (quoting *State v. Brown*, 178 S.C. 294, 300, 182 S.E. 838, 841 (1935).). *See also Tobias v. Rice*, 386 S.C. 306, 311, 688 S.E.2d 552, 554 (2010), *reh'g denied* (Feb. 18, 2010) (Judgment entered after trial without defendant's presence set aside under Rules 55(c) and 60(b) because of denial of procedural due process, citing *Moore v. Moore*.); *Patel v. S. Brokers, Ltd.*, 277 S.C. 490, 494, 289 S.E.2d 642, 645 (1982) (Technical objections to service of process may be overruled "where the defendant has not been denied due process.). These fundamental due process requirements were not satisfied by the process employed by the Master in denying Harvey's motion for relief from the default judgment.

2. The Court of Appeals decision cannot be reconciled with this Court's decision in *Graham Law Firm, P.A. v. Makawi*.

A decision by the Supreme Court issued on January 17, 2012, bears directly on the issue of whether Harvey's due process rights entitled him to an evidentiary hearing before his motion

was denied. In *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 292, 721 S.E.2d 430, 431 (2012), a law firm sued its client to collect fees. Service was made by mail and was accepted by the defendants' employees. After judgment by default was entered, the defendants moved under Rule 60(b), SCRCP, for relief from the default judgment based on an improper service of process upon a person lacking authority to accept service. Defendants submitted affidavits about the lack of authority of the person served to accept service. The law firm requested discovery and an opportunity to cross-examine witnesses but its request was refused by the trial court, which granted the defendants' motion for relief from the default judgment. The Court of Appeals certified the matter to the Supreme Court, which reversed.

Because the issue of service would (as in this case) be dispositive of the merits due to the expiration of the statute of limitations and the requirement that the suit be dismissed if service were not effective, the Supreme Court held that the law firm's due process rights required that it be afforded an opportunity both to take discovery and to cross-examine adverse witnesses. As the Supreme Court stated:

> In this case, if the court finds that no proper service was effected, Graham will be unable to dispute a statute of limitations defense. Thus, due process requires that Graham receive an opportunity to conduct adequate discovery on this question and confront adverse witnesses.

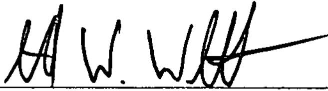
Graham Law Firm, P.A. v. Makawi, 396 S.C. at 301, 721 S.E.2d at 436. The Supreme Court concluded the opinion with an observation that is apposite to this case: "On this record, it cannot be said that Graham had a full and fair opportunity to be heard on an issue that may be determinative of its legal rights." *Graham Law Firm, P.A. v. Makawi*, 396 S.C. at 302, 721 S.E.2d at 436.

The Equity Master was aware that Harvey wanted a hearing but did not afford him one before ruling against him and conclusively deciding his rights on the merits. The issue of whether a hearing should have been held was properly raised before the Master but was rejected by him. The Court of Appeals then affirmed the Master in a decision that cannot be reconciled with *Graham Law Firm, P.A. v. Makawi* and should be reversed.

III.
Conclusion

Frank Harvey has had a $733,694.66 default judgment entered against him without ever having had the opportunity to present his case. He was never served with process, and the Court of Common Pleas never acquired jurisdiction over him. The default judgment entered against him was sustained on the basis of a facially defective, non-compliant Affidavit of Service that, as shown by the record, was fraudulent. Harvey's traversing Affidavit was completely rejected and the facially defective, fraudulent Affidavit of Service, completely accepted. Harvey was refused the opportunity to come to Court and both testify and confront the witnesses against him. This result is simply unfair and is not procedurally correct under South Carolina law and the requirements of Due Process as interpreted by the Supreme Court. *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 292, 721 S.E.2d 430, 431 (2012).

This Court should issue a writ of certiorari to review the affirmance by the Court of Appeals of the Master's denial of relief from the default judgment.



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUL 23 2012
S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2008-CP-10-2513

Regions Bank,

Respondent,

v.

Stonebridge Development Group, LLC; Plantation Isle Equity Group, LLC, a Maryland Limited Liability Company; Carolina Federal Savings Bank; Plantation Isle Equity Partners General Partnership; Michael Aiello; Frank M. Harvey aka Francis M. Harvey; Brandon Advertising, Inc; Rubeling & Associates, Inc.; Carolina Custom Docks, LLC; J. Mark Caldwell, individually; Carolina Clearing & Grading, Inc.,

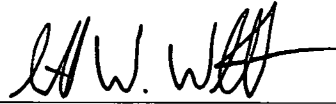
Defendants,

Of Whom Frank M. Harvey aka Francis M. Harvey is the

Petitioner

PROOF OF SERVICE

I, Seth W. Whitaker, of Duffy & Young, LLC, certify that I have served the **PETITION FOR WRIT OF CERTIORARI OF** Petitioner**, FRANK M. HARVEY** on Regions Bank by depositing a copy of it in the United States Mail, postage prepaid on July 20, 2012, addressed to Attorney Louise M. Johnson at her office located at Haynsworth Sinkler Boyd, P.A., 1201 Main Street, Suite 2200, PO Drawer 118899 (29211), Columbia, South Carolina 29201.



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JUL 23 2012
S.C. Supreme Court

July 20, 2012

VIA HAND DELIVERY

Daniel E. Shearouse
South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

RE: **Regions Bank v. Stonebridge Development Group, LLC**
Civil Aciton No.: 2008-CP-10-2513

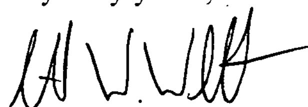
Dear Mr. Shearouse:

Enclosed for filing in the above-referenced matter, please find the following: the original and seven (7) copies of the Petition for a Writ of Certiorari of Appellant, Frank M. Harvey; the original and one (1) copy of the Proof of Service regarding same; the original and two (2) copies of the Appendix to Petition For a Writ of Certiorari of Appellant, Frank M. Harvey; and one (1) filing fee in the amount of one hundred and no/dollars ($100.00). Kindly return one (1) stamped copy of each document to us in the envelope provided.

Thank you in advance for your assistance. Please do not hesitate to contact me with any questions or concerns.

With best regards, I am,

Very truly yours,



Seth W. Whitaker

SWW/lc
Enclosures
cc: Louise M. Johnson, Esq. (via U.S. mail)
Lawrence J. Gebhardt, Esq. (via e-mail)

COA # 2010-180209

Check #10424
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