

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

IN CASE NO. 2009-CP-1000685, THE HONORABLE MIKELL R. SCARBOROUGH

Case No. 2014-001345

CHARLESTON HARBOR RESORT & MARINA.....Respondent,

v.

PAUL DAVIS.....Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. SHOULD THE APPEAL BE DISMISSED BECAUSE THE APPELLANT FAILED TO FILE AN APPEAL IN THE SMALL CLAIMS COURT?
2. IS THIS APPEAL UNTIMELY AS A RESULT OF THE APPELLANT'S FAILURE TO APPEAL THE ORDER ISSUED BY JUDGE DENNIS ON AUGUST 5, 2013?
3. WAS DAVIS PROPERLY SERVED PURSUANT TO RULE 4(d)?
4. DID THE COURT ABUSE ITS DISCRETION IN DENYING THE APPELLANT'S MOTION TO VACATE THE JUDGMENT PURSUANT TO RULE 60(b)(4)?

STATEMENT OF THE CASE

This case involved collection of dockage fees for a 45' sail boat pursuant to a License Agreement for Dockage (hereinafter "Agreement") between Charleston Harbor Resort & Marina (hereinafter "the Marina") and Paul Davis (hereinafter "Davis"). Davis kept his sailing vessel, Grand Cru, at the Marina from April 2007 to May 2008. In January 2009, the Marina filed a complaint in the Small Claims Court for unpaid dockage. Davis failed to file an answer or other responsive pleading and the Small Claim Court entered Judgment against Davis on April 3, 2009. On May 15, 2013, the Honorable Roger Young, Circuit Court Judge, issued an Order for Supplemental Proceedings in the case. Davis, through his attorney, John Hughes Cooper, Esquire, filed a Notice of Motion, Motion for Relief from Judgment, and a Memorandum in Support on June 14, 2013. By Order dated August 5, 2013, the Honorable R. Markley Dennis, Jr. denied the Defendant's Motion for Relief without Prejudice. Davis did not file a Motion for Reconsideration or appeal the Order. A hearing was held in front of the Honorable Michael R. Scarborough on August 19, 2013, and the motion was again denied. A written Order was issued by Judge Scarborough on April 10, 2014, denying Davis' motion. The Court found that Davis

was properly served, that Davis failed to file his Motion for Relief from Judgment within a reasonable time, Davis failed to file a motion with the Small Claims Court, and Davis failed to appeal the Order issued by Judge Dennis on August 5, 2013. This appeal followed.

STATEMENT OF THE FACTS

This case involves the collection of a debt of dockage for a 45' sailboat named Grand Cru. Davis does not dispute that he owes the money.

On April 19, 2007, Davis entered into the Agreement for dockage for the sailing vessel, Grand Cru, with the Marina. (Agreement). On the first line of the Agreement Davis listed himself as "Owner." *Id.* On the second line of the Agreement Davis listed his address as "101 North Fairfield Drive, Dover, DE 19901-5720. *Id.*

The Vessel had been documented with the USCG, documentation No. 1056595; however, the documentation expired on June 30, 2006. (National Vessel Documentation Center Certification of Documentation for Vessel Grand Cru). The documentation identifies the owner as Chesapeake Venture Corp., 101 North Fairfield Drive, Dover, DE 19901. (*Id.*). On March 1, 2008, the charter for Chesapeake Venture Corp. was revoked for non-payment of taxes and/or failure to file a complete annual report. (State of Delaware Certificate for Renewal and Revival of Charter dated April 17, 2013).

On January 16, 2009, the Marina filed a Complaint against Davis in the Small Claims Court for unpaid dockage. On January 28, 2009, the Complaint was sent via U.S. Mail to Paul Davis at 101 North Fairfield Drive, Dover, DE 19901. (Letter to Paul Davis dated January 28, 2009). The letter was not returned by the U.S. Mail. On February 4, 2009, a process server served the Complaint on Joyce Lockhart as registered agent for Paul Davis at 505 Brookfield

Drive, Dover, Delaware.¹ (Return of Private Process Servicer Daniel F. Delcollo dated February 18, 2009). Ms. Lockhart is over the age of 18, and was and is employed by Corporate Systems, Inc. (Affidavit of Joyce Lockhart dated June 10, 2013). Lockhart knew Davis and that he was the owner of Chesapeake Venture Corp. *Id.* Corporate Systems was the registered agent for Chesapeake Venture Corp. *Id.* Davis did not file an answer or otherwise appear in the underlying action.

On April 3, 2009, judgment was entered against Davis by the Small Claims Court in the amount of \$5,286.56. (Transcript of Judgment dated April 3, 2009). On April 28, 2009, the Transcript of Judgment was filed in Circuit Court.

In another case against Davis for failure to pay dockage, *Sunset Cay v. Davis*, Case 2012-CV-1010600380, the attorneys for Sunset Cay Marina, who also represents the Plaintiff in this action, sent a settlement proposal to Wendy Keefer, Esq., the attorney for Davis at that time, that states, “There is an existing Judgment against Mr. Davis in favor of Charleston Harbor Resort and Marina for \$5,286.56” (Letter to Wendy J. Keefer, Esquire, dated June 8, 2012). Ms. Keefer forwarded the letter to Davis on June 11, 2012. (Email from Wendy Keefer to Lynn Davis dated June 11, 2012).

Davis continued to claim to be the owner of the vessel in the litigation between Sunset Cay Marina and Davis. Davis alleged in his Answer that “an entity owned solely by Davis is the registered owner of the vessel but that entity no longer exists or operates and that its property is now the property of Davis.” (Defendants’ Answer and Counterclaim dated June 12, 2012).

¹ The address for Corporate Systems, Inc. changed from 101 North Fairfield Drive, Delaware, to 505 Brookfield Drive, Dover Delaware.

On April 17, 2013, Davis renewed and revived the charter for Chesapeake Venture Corp., and listed Corporate Systems, Inc. as the registered agent. (State of Delaware Certificate of Renewal and Revival of Charter dated April 17, 2013). Davis also renewed the documentation for the vessel with the United States Coast Guard and identified Chesapeake Venture Corp. as the owner.

June 18, 2013, Davis filed a complaint in federal court, Civil Action No. 2:13-cv-01657, against Gary Schwab, d/b/a Sunset Cay Marina, claiming the Vessel was owned by Chesapeake Venture Corp. and that he was not the owner of the Vessel, but that he had chartered the vessel. (*Chesapeake Venture Corp., et al. v. Sunset Cay Marine, et al.*, Civ. No. 2:13-cv-01657-DCN (D.S.C. filed June 18, 2013)).

ARGUMENT

STANDARD OF REVIEW

Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the trial court, *Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992); therefore, the standard of review is limited to determining whether there was an abuse of discretion. *Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 18, 594 S.E.2d 478, 482 (2004). An abuse of discretion arises when the order was controlled by an error of law or when the order is based on factual conclusions that are without evidentiary support. *Tri-County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990).

An individual may be served “by delivering a copy of the summons and complaint to him personally or by leaving copies 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.” Rule 4 (d)(1), South Carolina Rules of Civil Procedure (SCRCP).

The principal objective of service of process is to give notice to the defendant of the proceedings against him. Rule 4 serves at least two purposes. First, it confers personal jurisdiction on the court; and, second, it assures the defendant of reasonable notice of the action. Exact compliance with the Rule is not required to effect service of process. The Court must inquire whether the plaintiff had sufficiently complied with the Rules such that the Court has personal jurisdiction of the defendant and the defendant has notice of the proceedings. *Mull v. Ridgeland Realty, LLC*, 387 S.C. 479, 485, 693 SE 2d 27, 30, (Ct. App. 2010). “There is a presumption of proper service when the civil rules on service are followed.” *Fassett v. Evans*, 364 S.C. 42, 47, 610 S.E.2d 841, 843 (Ct. App. 2005). “An officer’s return of process creates the legal presumption of proper service that cannot be ‘impeached by the mere denial of service by the defendant.’ *Richardson Constr. Co. v. Meek Eng'g and Constr.*, 274 S.C. 307, 311, 262 S.E.2d 913, 916 (1980).” *Id.*

I. THE APPEAL SHOULD BE DISMISSED BECAUSE DAVIS FAILED TO FILE AN APPEAL IN THE SMALL CLAIMS COURT.

The lower court correctly ruled that in supplemental proceedings, the court accepts a judgment as valid, and that Davis failed to file a motion to set aside the judgment in the correct court. (Order dated April 10, 2014, p. 8).

Davis did not file an appeal in the proper court. In this case, the judgment Davis appeals from was entered by the Small Claims Court. Rule 12, South Carolina Rules of Magistrates Court (SCRMC), provides for an appeal from a final judgment when a judgment is void. Rule 12(b)(4), SCRMC. The motion must be filed with a reasonable time. *Id.* In this case, since the

judgment Davis challenges was issued by the Small Claims Court, Davis had to file a motion for relief from the judgment in the Small Claims Court, as opposed to the circuit court. The Master-in-Equity did not have jurisdiction to vacate the order because it assumed the judgment entered by the Small Claims Court was valid.

Since Davis failed to challenge the judgment in the proper court, the lower court properly determined that the judgment was valid. Therefore, this appeal should be denied.

II. THE APPEAL MUST BE DISMISSED BECAUSE DAVIS FAILED TO APPEAL THE ORDER ISSUED BY JUDGE DENNIS ON AUGUST 5, 2013 DENYING THE MOTION.

The lower court correctly ruled that Davis failed to appeal the Order issued by Judge Dennis on August 5, 2003; therefore, the Davis' argument is moot. (Order dated April 10, 2014, p. 9).

Notice of an appeal must be filed within thirty (30) days of a final order. Rule 203, South Carolina Appellate Court Rules (SCACR). In this case, Judge Dennis issued a written Order on August 5, 2013 denying Davis' motion for relief from judgment. (Judgment denying Defendant's Motion for Relief Without Prejudice dated August 5, 2013). Davis did not appeal that order. Instead, Davis scheduled a hearing with the Master in Equity, argued the motion, and then filed an appeal. The failure to appeal the Order issued by Judge Dennis precludes the appeal of the Order issued by Judge Scarborough, and this appeal should be denied.

III. DAVIS WAS PROPERLY SERVED.

Davis was properly served at the address he gave as his address as owner of the vessel on the Agreement. The first line of the Agreement identifies Davis as the "Owner's Name." (Agreement). The second list "101 N. Fairfield Drive, Dover, Delaware 19901-5720" as the

“Address” for the owner. *Id.* Davis was served at that address by hand delivering a copy of the Summons and Complaint to Joyce Lockhart. (Return of Private Process Server Daniel F. Delcollo dated February 18, 2009).

Service was proper for two reasons. First, service was proper on Ms. Lockhart because she resides at the address listed by Davis on the Agreement and she is over the age of 18. (Affidavit of Joyce Lockhart dated June 10, 2013). Second, the lower court properly concluded that Lockhart was the agent for Davis. The lower court concluded that Davis, by identifying himself as the owner and giving the address of Corporate Systems, Inc. to the Marina, appointed Corporate Systems, Inc. as his agent for service of process. The Marina perfected service on Davis by serving his agent. Rule 4(d)(1), SCRCP.

What is noticeably missing from the record is anything that suggests Davis did not receive notice of the Complaint. Significantly, Ms. Lockhart did not state in her affidavit that she did not provide a copy of the Summons and Complaint to Paul Davis, whom she knew, even as the owner of Chesapeake Venture Corp. It is inconceivable that Lockhart, who was in the business of accepting service and knew Davis, did not provide him with a copy of the Summons and Complaint when she was served. Likewise, the record is void of any statement from Davis that he did not receive a copy of the Summons and Complaint. One would think that if Davis really did not receive the Summons and Complaint, he would have provided an affidavit so stating.

Based on the record, there is ample evidence that Davis was properly serviced in accordance with Rule 4(d)(1), SCRCP. Therefore, lacking any evidence of an abuse of discretion, the lower court’s ruling should be sustained.

IV. DAVIS FAILED TO APPLY FOR RELIEF FROM THE JUDGMENT WITHIN A REASONABLE TIME.

Even if service was not proper, the lower court properly ruled that Davis failed to challenge the judgment within a reasonable time. Rule 60(b), SCRCP, requires that a challenge to a judgment must be made within a reasonable time. Rule 60(b), SCRCP. In *McDaniel v. United States Fidelity and Guarantee Company*, 324 SC 639, 478 SE 2d 868 (Ct. App. 1997), the Court of Appeals held that the reasonable time requirements apply to Rule 60 (b)(4) motions that attack a judgment as void.

Davis received notice of the judgment no later than June 11, 2012, when his attorney, Wendy Keefer, was made aware of the judgment. (Letter to Wendy Keefer, Esquire, dated June 8, 2012). Ms. Keefer forwarded the letter advising of the judgment to Davis. (Email from Wendy Keefer to Lynn Davis dated June 11, 2012). However, Davis took no action to contest the judgment for over a year. Davis waited until June 14, 2013, after Supplemental Proceedings were initiated in this case, before contesting the judgment. Once Davis learned of the judgment in June of 2012, he had an affirmative obligation to contest it within a reasonable time if he intended to do so. He did not. Further, there is nothing in the record that suggests that the amount due is not legitimate or that Davis has a meritorious defense.

Based on the record, the lower court properly determined that Davis failed to contest the judgment within a reasonable time. Therefore, lacking any evidence of an abuse of discretion, the lower court's ruling should be sustained.

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CONCLUSION

For all of the foregoing reasons, and any reasons appearing in the record, Charleston Harbor Resort and Marina respectfully requests that this Court deny the appeal and affirm the Order issued by the Master-in-Equity.

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