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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2014-002242

Windswept Villas III
Horizontal Property Regime,

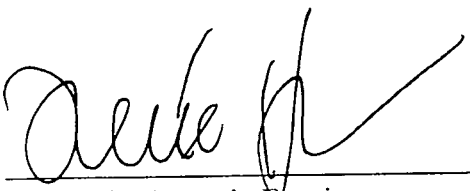
Respondent,

v.

Elaine Devlin Peery a/k/a
Elaine D. Peery

Appellant.

REPLY BRIEF OF APPELLANT



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TABLE OF CONTENTS

	<u>PAGES</u>
Table of Authorities	ii
I. Arguments	1
A. The Master erred in holding that it had personal jurisdiction as the Court did not establish that Appellant was properly served with Respondent’s Cross-Claim for assessments. The Master denied Appellant procedural due process of Law by granting Respondent relief on their Cross-Claim without requiring Respondent to prove Appellant had been served with the Respondent’s Cross-Claim.....	1
B. The Master erred in awarding attorney’s fees to Respondent because Respondent was not entitled to Judgment on its Cross-Claim. Even if the Court determines that Judgment on its Cross-Claim was proper, the Master erred in failing to determine the reasonableness of Attorney’s fees, and by failing to review and support the record with evidentiary findings to support the ruling.....	4
II. CONCLUSION.....	7

TABLE OF AUTHORITIES

State Cases

Blumberg v. Nealco, Inc., 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993)

Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991)

Appellate Cases

New Hampshire Ins. Co. v. Bey Corp., 312 S.C. 47, 435 S.E.2d 377 (Ct. App. 1993)

Rules

Rule 4 (d), SCRPC

Rule4 (g)

The Appellant, Elaine Devlin Peery, respectfully submits this Reply Brief in support of its appeal of the Circuit Court's decision exercising personal and subject matter jurisdiction over the Appellant with regard to Respondent's Cross Claim, and attorneys' fees arising therefrom. ¹The Appellant asserts herein that the Circuit Court erred in finding that it had personal jurisdiction over the Appellant, and thereby deprived Appellant of procedural due process because of this error. Because the Respondent never properly served the Appellant, with its Cross-Claim the Master in Equity never had personal jurisdiction over the Appellant, and therefore did not have subject matter jurisdiction in the case before the Lower Court. Appellant further asserts that an award of attorneys' fees arising from the judgment on the unserved Cross Claim and subsequent supplemental proceedings are in error, and further, that Respondent failed to set forth the factors necessary to award attorney's fees, and to determine the reasonableness of the award attorneys' fees.

I. ARGUMENTS

A. **THE MASTER ERRED IN HOLDING THAT IT HAD PERSONAL JURISDICTION AS THE COURT DID NOT ESTABLISH THAT APPELLANT WAS PROPERLY SERVED WITH RESPONDENT'S CROSS CLAIM FOR ASSESSMENTS. THE MASTER DENIED APPELLANT PROCEDURAL DUE PROCESS OF LAW BY GRANTING RESPONDENT RELIEF ON THEIR CROSS CLAIM WITHOUT REQUIRING RESPONDENT TO PROVE APPELLANT HAD BEEN SERVED WITH THE RESPONDENT'S CROSS CLAIM.**

Appellant does not seek to appeal the underlying judgment of foreclosure granted to Bank of America. Instead, Appellant challenges the Lower Court's exercise of personal and subject matter jurisdiction over the Appellant specifically with respect to the Respondent's Cross Claim which was filed subsequent to the underlying foreclosure action, but which was never served upon the Appellant.

Appellant appeals the underlying orders issued by the Master in Equity on August 29, 2014; specifically, the Order Denying the Motion to Vacate, the Order Holding Funds in Trust, and the Order of

¹The introductory sentence of Appellant's brief inadvertently states that Appellant seeks to appeal the underlying foreclosure judgment granted to Bank of America. The remainder of Appellant's brief, as well as Appellant's Notice of Appeal, clearly indicate that Appellant seeks an appeal of the Master's judgment on the Respondent's cross claim, and not the underlying foreclosure judgment. Respondent was properly noticed of Appellant's appeal of its cross claim, and the underlying orders that support this appeal.

Contempt and Sanctions, wherein the Master determined that there was personal jurisdiction over the Appellant due to her making one appearance, thereby justifying the Court's subject matter jurisdiction in hearing the Respondent's cross claim that was never served on the Appellant.

Respondent asserts in its initial brief that Appellant was served with its Cross Claim on December 3, 2009. Thus would have been after Appellant's counsel filed and served an Answer, Counterclaim and Cross Claim on Bank of America on November 25, 2009. These same pleadings were served on Respondent on November 30, 2009, which was acknowledged by the Respondent in her brief, and in Lydia Davidson's May 5, 2014 affidavit. Respondent first claims that service was attempted, then claims that it understood that Appellant had received its Cross-Claim. (Respondent's Brief) This argument is an impossibility, because under this unsound logic, Appellant would have received Respondent's Cross Claim before the Respondent actually served Appellant with its Cross-Claim. This would indicate that the Appellant's attorney could not have received Respondent's cross claim, because he had not yet received it. Therefore, Respondent could not have understood that Appellant received its Cross-Claim because Appellant had not received it before preparing his pleading. There is no proof of this service except assertions in Ms. Davidson's Affidavit.

Additionally, in Lydia Davidson's first affidavit of March 27, 2012, Ms. Davidson attests that "the Answer and Cross-Claim of Windswept III was duly served upon Defendant Elaine Devlin Peery, a/k/a Elaine D. Peery (hereinafter 'Peery') and Peery appeared, by and through her attorney, and filed a Counterclaim against Windswept III in this matter. There is no date, place or time given in Ms. Davidson's Affidavit. This is a material inconsistency from Ms. Davidson's affidavit submitted to the Lower Court on May 5, 2014, wherein she attests that the Appellant was served through her former attorney on December 3, 2009. These inconsistencies in Ms. Davidson's affidavits are problematic, because they are not supported by contemporaneous documentation as required by Rule 4(g) of the SCRPC, which requires that, "The return along with the receipt or envelope and any other proof shall be promptly filed by the clerk with the pleadings and become a part of the record." (Rule 4(g), SCRPC).

Despite having claimed to have attempted service on the Appellant twelve times, the only proof provided by the Respondent of these attempts at service are affidavits filed by Respondent's current and former counsel, several of which were prepared up to five years after the alleged service was to have been made or attempted. While inventive, Ms. Davidson's affidavits should not be allowed to substitute for proof of service as required by Rule 4(g) of SCRCP. There is also no indication in the record that Respondent filed an affidavit of due diligence and sought the Court's permission to serve the Appellant by publication. Regardless of how Respondent claims to have served the Appellant, Respondent never provides any documentation to substantiate service upon the Appellant in any manner that would support it conforming with the service requirements pursuant to Rule 4(d), SCRCP.

An additional assertion made by Respondent, is that when Windswept responded to Peery's Cross-Claim against it, its prayer for relief was identical to the prayer for relief from its Cross-Claim against Peery (Respondent's Initial Brief, p. 4) Respondent says this is additional notice of its Cross-Claim. However, this does not negate the fact that Appellant was never served with Respondent's Counter-Claim pursuant to the requirements of Rule 4 of the SCRCP. Rule 4(d) states:

Upon 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.

Respondent has asserted that the Appellant made a voluntary appearance that satisfies the requirements of Rule 4 of the SCRCP. In *New Hampshire Ins. Co. v. Bey Corp.*, 312 S.C. 47, 435 S.E.2d 377 (Ct. App. 1993), the Court found that the defendant's appearance at a foreclosure hearing solely to move to set aside the default was not a voluntary appearance. Appellant asserts that in this case, Appellant's appearance at the August 1, 2011 hearing to address the issue of her attorney being relieved, mirrors the circumstances of the case of *New Hampshire v. Bey Corp.*

Appellant asserts that the determination that her appearance at this hearing was voluntary is in error, since the Appellant appeared only two times during the litigation in the Lower Court. At the

August 1, 2011 hearing arising from a Motion by Appellant's counsel to be relieved, the Master specifically addresses the Appellant regarding whether she understood the purpose of the hearing. The court advised the Appellant that it was her chance to speak and be heard. (Transcript p 5 line 19). The Appellant responded; "I only know he wants to be relieved as counsel for health problems. I know of no other reason. I'm not quite sure why we're here at this motion today." (Transcript p 5 lines 20-23). It should be noted that this is the only personal appearance made by the Appellant in all proceedings related to this 2009 litigation, with the exception of the Rule to Show Cause hearing held on August 29, 2014, wherein the Court demanded the Appellant's appearance, or the alternative would be the issuance of a warrant for the Appellant's arrest. The Appellant's appearance at the Rule to Show Cause hearing was clearly made under duress and not voluntary, as she feared that a warrant would be issued for her arrest if she did not appear.

- B. THE MASTER ERRED IN AWARDING ATTORNEYS FEES TO RESPONDENT BECAUSE RESPONDENT WAS NOT ENTITLED TO JUDGMENT ON ITS CROSS CLAIM. EVEN IF THE COURT DETERMINES THAT JUDGMENT ON THE CROSS CLAIM WAS PROPER, THE MASTER ERRED IN FAILING TO DETERMINE THE REASONABLENESS OF ATTORNEY'S FEES, AND BY FAILING TO REVIEW AND SUPPORT THE RECORD WITH EVIDENTIARY FINDINGS TO SUPPORT THE RULING.

The Respondent asserts that the attorney's fees were awarded to Respondent because the Master determined that the Appellant was in contempt for failing to appear at the hearings regarding Supplemental Proceedings. Respondent further argues that because the award of attorney's fees was based on the Master's finding of contempt, there was no requirement by the Court to determine the reasonableness of the attorney's fees awarded to the Respondent, or to articulate the factors required by *Glasscock v. Glasscock*, since the attorneys' fee award is in the form of a sanction. To the contrary, at the hearing held on June 20, 2014, a hearing on Supplemental Proceedings, Motion to Vacate, and a Rule to Show Cause, were before the Lower Court. At this hearing, the Court allowed the Respondent to provide documentation regarding the Respondent's request for attorneys' fees and costs, and post judgment interest. Appellant's counsel vehemently opposed the Respondent's request for attorneys' fees and costs, and post judgment interest, in addition to the fact that the fees were reviewed in

camera, without counsel for the Appellant having the opportunity to review or question the Respondent regarding her attorneys' fees. This request was objected to and denied by the Lower Court. At the Rule to Show Cause hearing held on August 29, 2014, the Master referred to attorneys' fees of Respondent that accrued as of the June 20, 2014 hearing. Clearly, the attorneys' fees that were awarded were not additional fees or sanctions, but were in fact provided to the Court in camera, prior to the Rule to Show Cause hearing and outside of the presence of Appellant's counsel. Respondent's counsel stated the following at the June 20, 2014 hearing:

Ms. Monoc: Your Honor, I provided you for in camera review our last attorney's fees. And I have an updated bill that I'll provide for your in camera review. And just so the record's clear the attorney's fees are \$20,231. The costs are a [sic] \$553.12. And the interest is \$4,818.05. As I've set forth in the proposed order the attorney's fees and costs were recoverable in the underlying matter, and therefore they're recoverable in supplemental proceedings. (Transcript dated June 20, 2014 p. 20, Lines 3-12).

In another exchange between Counsel for Respondent and the Master at the August 29, 2014 hearing. Respondent's counsel indicates that she is supplementing her attorneys' fees by updating her affidavit of attorneys' fees.

Ms. Monoc: Your Honor, just to clarify, when are [sic] the attorney's fees order due?

The Court: Those are due within 30 days.

Ms. Monoc: Your Honor, this supplements the previous submission.

The Court: Thank you.

Ms. Monoc: I've just updated the Affidavit. Thank you. (Transcript dated August 29, 2014, p. 24, Lines 7-14).

As this exchange between the Court and Respondent illustrates these attorney's fees and costs clearly accrued prior to the finding of contempt. Respondent's counsel has erred in arguing that the entire award of attorneys' fees constituted a sanction for contempt of court.² This is not the case, since Respondent's counsel clearly indicates during the August 29, 2014 hearing that the attorneys' fees included fees that accrued prior to the Rule to Show Cause hearing and prior to the Appellant being found in contempt of court, and were strenuously objected to on the record by Appellant's attorneys.

² The Master issued an Order on August 3, 2011, allowing Appellant's former counsel to be relieved, despite the fact that he had not submitted discovery, which was over eight (8) months late.

On August 29, 2014 hearing the lower Court stated "if she wants to she can send you a redacted copy of whatever you've got....! looked at the last one. It was 15,000. With the amount of work its sounds like you-all have been doing on appeal and otherwise I would imagine that 5,000 is de minimus between June 20th and August 29th. All right? I find that to be a reasonable sanction." (Transcript dated August 29, 2014, pp 24 lines 19-21, lines 22-25, pp 25 lines 1-3). Therefore, the Appellant asserts that there is an implication that unreasonable attorney's fees could have been awarded for matters that were not even before the lower Court as well as other unsubstantiated fees. The Court failed to allow the Appellant the opportunity to review the Respondent's itemized Affidavit of fees.

At the August 29, 2014 hearing, the Court found that the Appellant was found in contempt of Court, and declared that as a sanction for contempt, Appellant would be required to pay attorneys' fees that were substantially similar to the fees, costs and post judgment interest that were submitted by the Respondent and reviewed in camera regarding invoices that accrued from April 2014 through May, 2014. The Master should have applied the factors of *Blumberg* and *Glasscock* in setting forth the factors for the initial award of attorneys', and in determining the reasonableness of those fees for the underlying matter. Appellant's attorney clearly articulated Appellant's objection to the award of attorneys' fees (Transcript dated June 20, 2014, pp 18-19).

The Lower Court did not require the Respondent to itemize or submit its attorney's fees upon Appellant's request, which increased substantially in the span of several months. The decision by the Lower Court to allow the Respondent to provide proof of its attorney's fees in camera, outside of the presence of Appellant's counsel, is puzzling. The *Blumberg* case, *supra*, sets forth bright line factors to be applied by Courts in determining the reasonableness of an award of attorney's fees. By not setting forth what factors that were used to determine the reasonableness of the attorney's fees in this case, the Lower Court only added to the perception that unfairness toward the Appellant was at work in this case.

CONCLUSION

Respondent's multiple attempts to serve the Appellant with its Cross-Claim in the Lower Court, while certainly inventive, do not comport with the requirements of Rule 4 of the SCRPC. The Respondent used the first ten pages of Respondent's Brief to attempt to explain how service of its Cross-Claim was served on Appellant to no avail, which only served to highlight the lack of compliance with Rule 4 of the SCRPC, and the very straightforward requirements of proof of service set forth therein. Respondent had ample opportunity to accomplish service on the Appellant by using the conventional means set forth in Rule 4. The methods chosen by the Respondent to accomplish service upon the Appellant failed miserably, resulting in a deprivation of procedural due process rights of the Appellant, and exposing her to excessive attorney's fees. The Master allowed the submission of Respondent's sworn affidavits attesting to service on the Appellant, without requiring proof of such service, after repeatedly expressing doubt throughout the litigation in the Lower Court that Appellant had been properly served with Respondent's Cross-Claim, and never required the Respondent to provide adequate proof of service, either of the Respondent's Cross-Claim, or Notice of the Supplemental Proceedings. Further, the Master erred in making improper rulings denying the Appellant's Motion to Vacate pursuant to Rule 4 based upon an inaccurate conclusion that the Appellant made a voluntary appearance under Rule 4, SCRPC. These inquiries by the Master regarding proof of service have persisted throughout the litigation in the Lower Court, up to and including the supplemental proceedings. Thus, the case should be remanded to the lower Court.

The public is notoriously cynical about lawyers and the judicial system. The convoluted, undocumented methods of service of process chosen by the Respondent in this case, serves only to enhance the impression of the Appellant, and the public at large, that they do not have a fair chance to be heard in a court of law, thereby undermining confidence in the judicial system.

Respectfully submitted,
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By: _____

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Horizontal Property Regime,

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v.

Elaine Devlin Peery a/k/a,
Elaine D. Peery,

Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Final Reply Brief by depositing a copy of it in the United States Mail, postage prepaid, on March 23, 2015, addressed to their attorney of record, Katie Monoc, PO Drawer 22247, Charleston, South Carolina 29413-2247

March 23, 2015.



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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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Re: Windswept Villas III Horizontal Property Regime vs. Elaine Devlin Peery a/k/a Elaine D. Peery
Appellate Case No.: 2014-002242

Dear Ms. Kitchings:

Pleas find attached the original Appellant's Final Reply Brief and Proof of Service in this matter to be filed.

Very truly yours,

Vernee C. Hancock

cc: Katie F. Monoc, Esquire



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