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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2013-CP-23-05891

NAI Earle Furman, LLC,

Respondent,

v.

Pleasant Grove Properties, Inc.,

Appellant.

FINAL BRIEF OF APPELLANT

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II. **The trial court erred when it denied Appellant's motion to set aside default and for relief from default judgment when it held that there was insufficient factual evidence of mistake, inadvertence, surprise or excusable neglect.**

STATEMENT OF THE CASE

This case was commenced with the filing of a Summons and Complaint on November 1, 2013, seeking Twelve Thousand Six Hundred and 00/100ths Dollars ($12,600.00) in commission fees arising out of a Commission Agreement between Plaintiff, NAI Earle Furman, LLC (hereinafter "Respondent") and Defendant, Pleasant Grove Properties, Inc. (hereinafter "Appellant). (See R. pp. 16-38). An Affidavit of Service was thereafter filed stating that service was made upon "David Peacock, as Registered Agent via Teresa Fant – Secretary and states authorized to Accept Service" at 4394 Wade Hampton Boulevard in Taylors, SC on January 21, 2014. (See R. p. 36). Subsequently, an affidavit of default and motion for default judgment were filed by the Respondent. (See R. pp. 37-41). On March 20, 2014, the Honorable Letitia Verdin awarded Respondents judgment by default in the amount of Twelve Thousand Nine Hundred Thirty and 00/100ths Dollars ($12,930.00). (See R. pp. 42-43). The default judgment was entered on March 31, 2014. (Id.).

On April 4, 2014, just four (4) days after entry of the default judgment, Appellant filed a motion to set aside the default and to seek relief from default judgment with a memorandum of law in support of its motion. (See R. pp. 44-46; See R. pp. 79-102). Apellant's motion was primarily based upon the grounds that Appellant was not properly served with a copy of the Summons and Complaint, that the trial court lacked jurisdiction as a result, and that the default judgment was void. (Id.). Appellant's motion was supported by affidavits of Teresa Fant and David Peacock, both of which were filed on April 8, 2014. (See R. pp. 47-48 for Fant Affidavit and R. pp. 49-51 for Peacock Affidavit). Appellant also filed an Answer and Counterclaim on April 8, 2014. (See R.

pp. 52-77). On May 20, 2014, a Certificate of Service was filed evidencing that Appellants had served its Motion to Set Aside Default and for Relief from Judgment, and supporting Affidavits on Respondent via United States Mail on April 4, 2014. (See R. p. 78).

On May 23, 2014, a hearing on Appellant's Motion for Relief from Judgment was held before the Honorable Alison Renee Lee at the Greenville County Court of Common Pleas. (See R. p. 3, lines 2-3). On July 23, 2014, Judge Lee entered an Order denying Appellant's motion to set aside default and for relief from default judgment, finding that the Appellant was properly served when the process server delivered an unmarked envelope to the office manager of a separate and distinct company owned by the registered agent of Appellant. (See R. pp. 3-8 and R. pp. 11-12). Specifically, Judge Lee held that the office manager had apparent authority to accept service of process on Appellant. (Id.). The July 23, 2014, Order further found that there did not exist mistake, inadvertence or excusable neglect on the part of Appellant in failing to file an Answer or responsive pleading to the Respondent's Complaint. (See R. pp. 3-8).

Within ten (10) days of receipt of Judge Lee's July 23, 2014, Order denying Appellant's motion to set aside default and for relief from default judgment, Appellant filed and served a Motion to Reconsider, Alter or Amend on August 4, 2014. (See R. pp. 103-127). On September 19, 2014, Judge Lee entered an Order denying Appellant's Motion to Reconsider, Alter or Amend, finding that service was proper by virtue of apparent authority of the office manager to receive service of process and that there was not sufficient good cause to set aside the default judgment (See R. pp. 11-12). Judge Lee

also decided the Motion to Reconsider, Alter or Amend without hearing oral argument. (Id.).

On October 22, 2014, Appellant filed its Notice of Appeal of the Orders entered July 23, 2014 and September 19, 2014 with the South Carolina Court of Appeals and served its Notice of Appeal on Respondent's attorney of record and upon the Greenville County Court of Common Pleas, as shown in Appellant's Proof of Service filed with its Notice of Appeal. (See R. pp. 13-15). This appeal followed.

STATEMENT OF FACTS

This case stems from a 2007 Commission Agreement between Respondent and Appellant concerning Respondent procuring a tenant to lease certain commercial property owned by Appellant in exchange for the payment of a commission. The 2007 Commission Agreement applied to subsequent lease renewals and/or extensions. The Respondent initially procured a tenant to lease Appellant's property and commissions were paid in 2006.

Subsequent to the 2006 lease agreement being entered, Appellant added square footage to the premises at the request of its tenant, and Appellant and its tenant entered into another five-year lease agreement in 2008, which provided for a rental increase to cover the added square footage. Respondent was paid a commission following the rental increase and the execution of the 2008 lease agreement.

As the 2008 lease agreement neared the end of its term, Appellant and its Tenant were in negotiations to extend or renew the lease for another five year term. Respondent was not participating in the negotiations. At some point negotiations grew cold and appeared to be abandoned. During this period of time, David Peacock, the owner and

registered agent of Appellant, witnessed several of Respondent's agents and other agents showing Appellant's current tenant other available rental properties in the area. As a result of this conduct, Appellant approached its current tenant and negotiated and entered into a lease amendment dated May 31, 2013. At no time during or at the termination of the 2008 lease did Respondent contact the Appellant to assist in negotiating a new or extension of the 2008 lease. Following execution of the 2013 lease, Respondent made demand to Appellant for payment of commissions due under the 2007 Commission Agreement. Appellant disputed that commissions were due as a result of the conduct and actions of Respondent. Appellant attempted to compromise payment of the disputed commissions; however the Respondent rejected such attempts. The Appellant acknowledges receipt of an Invoice from Respondent dated June 18, 2013. The Appellant also acknowledges receipt of a letter from Respondent dated August 6, 2013 and a letter from an attorney for Respondent dated September 17, 2013. The Appellant did not hear anything else concerning the matter and assumed the Respondent had abandoned its demand for commissions.

On or about March 20, 2014, David Peacock, the owner and registered agent of Appellant received a call from the office manager of another company that he owns named Rental One, LLC, which is located at 4394 Wade Hampton Blvd, Taylors, South Carolina (See R. pp. 49-51). The office manager, Teresa Fant, is an employee of Rental One, LLC. Ms. Fant informed Mr. Peacock that an individual stopped by the office of Rental One and asked her to sign for an envelope that was sealed with packing tape and had David Peacock's name handwritten on the outside.

Upon receipt of this information from Teresa Fant, David Peacock contacted the Appellant's attorney to inquire as to the attorney's availability to review the contents of the package. David Peacock then instructed the office manager of Rental One to deliver the package to Appellant's attorney. Ms. Fant faxed copies of the contents of the package to Appellant's attorney on March 25, 2014. On April 1, 2014, Appellant's attorney reviewed the contents of the package and discovered it to be a Summons and Complaint filed in the within matter on November 1, 2013. It was then discovered that an Order granting Respondent judgment against the Appellant by default was entered in the within matter on March 31, 2014.

A review of the court file in this case reveals the following sequence of filings:

1. **November 1, 2013: Summons and Complaint 10/29/2013.** The verified Summons and Complaint seeks collection of commission fees from Appellant in the amount of $12,600.00, plus attorney's fees and costs of the action. (See R. pp. 16-35).

2. **January 31, 2014: Affidavit of Service dated 1/21/2014.** The Affidavit of Service provided that the Summons and Complaint was served upon "David Peacock, as Registered Agent via Teresa Fant – Secretary and states authorized to Accept Service." The Affidavit further provides that it was served upon the "Secretary of Pleasant Grove Properties, Inc. . . . at 4394 Wade Hampton Blvd in Taylors, . . . South Carolina, . . .". (See R. p. 36).

3. **March 18, 2014: Affidavit of Default dated 3/14/2014.** The Affidavit of Default provided that service was accomplished "by and through, Teresa Fant, Secretary to the registered agent, David Peacock . . . ." (See R. pp. 37-38).

4. **March 31, 2014: Notice of Motion and Motion for Default Judgment**

dated 3/17/2014. The Appellant would request the Court to take notice that no affidavit of service was filed with the Court indicating that service of the Motion for Default Judgment was attempted or completed. (See R. pp. 39-41).

5. **March 31, 2014: Order awarding default judgment to Respondent** in the amount of $12,930.00, signed by The Honorable Letitia Verdin on March 20, 2014. (See R. pp. 42-43).

6. **April 4, 2014. Notice of Motion and Motion to Set Aside Entry of Default and for Relief From Default Judgment dated 4/4/2014.** The Appellant filed a motion with the trial court seeking relief from the default judgment entered four (4) days earlier. (R. pp. 44-46). The Notice of Motion and Motion to Set Aside Entry of Default and for Relief from Default Judgment, together with the Affidavit of Teresa Fant and Affidavit of David Peacock, and Notice of Motion hearing date were served on Respondent's attorney of record via U.S. Mail and Email on April 9, 2014. (See R. p. 78).

7. **April 8, 2014. Affidavit of Teresa Fant dated 4/4/2014.** The Affidavit of Teresa Fant provides that she is the Office Manager for Rental One, LLC, with principal offices being located at 4394 Wade Hampton Blvd., Taylors, South Carolina 29687. The Affidavit provides that Ms. Fant informed the process server that she was not authorized to accept anything on behalf of David Peacock. (See R. pp. 47-48).

8. **April 8, 2014. Affidavit of David Peacock dated 4/4/2014.** The Affidavit of David Peacock provides that he is the registered agent of Respondent, Pleasant Grove Properties. The Affidavit further provides that he is the registered agent for Rental One, LLC, which is a separate and distinct company that he owns with its

offices being located at 4394 Wade Hampton Blvd., Taylors, South Carolina 29687. (See R. pp. 49-51).

The Appellant filed a Motion to Set Aside Default and for Relief from Default Judgment wherein it argued that the default judgment entered March 31, 2014, was void for lack of jurisdiction as a result of the improper service upon Appellant. (See R. pp. 79-102; See also R. pp. 1-14). The trial court ultimately held that the office manager, of a separate and distinct company owned by the registered agent of Appellant, had apparent authority to receive service of process for Appellant. On July 23, 2014, Judge Lee entered an Order denying Appellant's request to set aside default and for relief from default judgment. Appellant subsequently filed a Motion to Reconsider, Alter or Amend the July 23, 2014, Order. That motion was also denied by Order entered by Judge Lee on September 19, 2014.

Appellant then filed its Notice of Appeal within thirty (30) days of notice of entry of the September 19, 2014 Order and served all parties with a copy of its Notice of Appeal on October 22, 2014.

STANDARD OF REVIEW

This is an appeal from the trial court's denial of Appellant's motion to set aside default and for relief from default judgment. The South Carolina Supreme Court has held that "the decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial court." Richardson v. P.V., Inc., 383 S.C. 610, 614, 682 S.E.2d 263, 265 (2009) (citing Roberson v. S. Fin. Of South Carolina, Inc., 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005). "The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." Id. "An abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Hill v. Dotts, 345 S.C. 304, 307, 547 S.E.2d 894, 896 (Ct. App. 2001).

ARGUMENT

This Court should find that the trial judge erred when she denied Appellant's motion to set aside default and for relief from default judgment. (See R. pp. 1-14). Specifically, this Court should find that the trial judge erred when she found that the office manager of a separate and distinct company owned by the registered agent of Appellant had apparent authority to receive service of process on behalf of Appellant. (See R. pp. 1-14). Appellant submits that the finding of apparent authority for the office manager to accept service of process is based upon an error of law and that such error constitutes an abuse of discretion such that this Court should reverse the finding and hold that no such apparent authority existed. Furthermore, Appellant submits that there is insufficient factual evidence in the record for the court to have found that the office manager had apparent authority to accept service of process on behalf of Appellant, and, therefore, such a finding constitutes an abuse of discretion such that this Court should reverse the finding and hold that no such apparent authority existed. Lastly, in the absence of such apparent authority, the registered agent of Appellant was never properly served with due process and, thus, the default judgment entered March 31, 2014, is void for lack of jurisdiction and Appellant's April 4, 2014, motion to set aside default and for relief from default judgment should have been granted by the trial judge.

Alternatively, even if this Court finds that service of process was proper and the judgment is not void, Appellant would submit that the trial judge erred when she found that there was an absence of mistake, inadvertence, surprise or excusable neglect and that such a finding was an abuse of discretion in that there were sufficient facts presented in Appellant's Affidavits in Support of its Motion to Set Aside Default and for relief from

default judgment and in arguments made to the court at the May 23, 2014, motion hearing. (See R. pp. 44-51; See also R. pp. 130-159).

I. The trial court erred when it denied Appellant's motion to set aside default and for relief from default judgment, when it found that Appellant was properly served and that the default judgment entered in the case is not void for lack of jurisdiction.

This Court should find that the trial judge erred when she denied Appellant's motion to set aside default and for relief from default judgment. Specifically, Appellant submits that the trial judge's finding that Appellant had been properly served and that the judgment was not void for lack of jurisdiction was based upon an error of law in finding that the office manager of a separate and distinct company owned by the Appellant's registered agent had apparent authority to receive service of process on behalf of Appellant.

The default judgment entered March 31, 2014, is void for lack of jurisdiction. A "void judgment" is one that, from its inception, is a complete nullity and is without legal effect. Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 561 S.E.2d 659 (Ct. App. 2002). A judgment is void if a court acts without personal jurisdiction, which is generally obtained by the service of a summons. See BB&T v. Taylor, 369 S.C. 548, 633 S.E.2d 501 (S.C. 2006).

In this case, the March 31, 2014 Order granting Respondent judgment by default against Appellant is void for want of jurisdiction. The Order is void because Appellant never received proper Service of Process and thus Appellant was not afforded proper due process. The Supreme Court has "noted that a judgment can be successfully attacked if the court issuing the judgment lacked jurisdiction and the lack of jurisdiction appears on

the face of the record." Miles v. Lee, 319 S.C. 271, 273, 460 S.E.2d, 423, 424 (Ct. App. 1995), *citing* Yarborough v. Collins, 293 S.C. 290, 360 S.E.2d 300 (1987).

The general rule cited by the Supreme Court in Webster v. Clanton, 259 S.C. 387, 391, 192 S.E.2d 214 (1972) is as follows:

> It is a fundamental doctrine of the law that a party whose personal rights are to be affected by a personal judgment must have a day in court, or opportunity to be heard, and that without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights. A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied on.

"'Due process is flexible and calls for such procedural protections as the particular situation demands.'" Brown, at 121, 199 (quoting Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health & Envtl. Control, 305 S.C. 90, 94, 406 S.E2d 340, 341 (1991)). Essentially, "the Due Process Clause demands 'notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections.'" Brown, at 121, 199 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

In this case, Appellant was not afforded proper due process and therefore the judgment is void because the Court lacked proper subject matter jurisdiction and personal jurisdiction. The Affidavit of Service filed on January 31, 2014 provides that service of process on Appellant was achieved by service on "David Peacock, as Registered Agent via Teresa Fant, Secretary and states authorized to Accept Service." (See R. p. 36). The Affidavit further states that Teresa Fant is the "Secretary of Pleasant Grove Properties, Inc." (Id.). Finally, the Affidavit provides that service as made at 4394 Wade Hampton

Blvd., Taylors, South Carolina. (Id.). The Affidavit of Teresa Fant and the Affidavit of David Peacock both provide that Teresa Fant is not the Secretary of Appellant, but rather she is the Office Manager for Rental One, LLC. (See R. pp. 47-51). Rental One, LLC, is a separate and distinct company owned by David Peacock, the Registered Agent of Appellant. (Id.). The Affidavits further provide that Rental One, LLC does business from the offices located at 4394 Wade Hampton Blvd., Taylors, South Carolina. (Id.). Appellant does not even have offices at 4394 Wade Hampton Blvd., Taylors, South Carolina.

The Affidavit of Service clearly shows that the service was ineffective as proper service on the registered agent of Appellant. Rule 4(d)(3), SCRCP, states that service shall be made on a corporation as follows:

> Upon a corporation . . . which is subject to suit under a common name, by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the Defendant.

The Affidavit of Service filed in this case demonstrates that service of process was ineffective pursuant to Rule 4(d)(3), SCRCP, because the summons and complaint were not delivered to an officer, a managing or general agent, or to any other agent authorized by appointment or law to receive service of process. Teresa Fant is neither an officer of, nor an agent of Appellant. Teresa Fant is the Office Manager of Rental One, LLC, which just happens to also have David Peacock as its registered agent. Accordingly, Appellant, nor its registered agent, were ever properly served with a summons and complaint in the within action, and, as such, the Order entered March 31, 2014 is void for lack of subject matter and personal jurisdiction.

In the Order dated July 23, 2014, Judge Lee notes that Plaintiff was unable to achieve service upon Appellant's registered agent personally or by United States Mail. (R. p. 6, lines 17-27). The Order provides discussion on whether Appellant adequately maintained current and updated information with the Secretary of State and how Appellant has the responsibility to keep such records updated. (Id.). Though this discussion may call into question Appellant's record keeping practices, it only supports Appellant's assertions that it was not properly served with a copy of the Summons and Complaint. Clearly, Plaintiff attempted service by mailing copy of the pleadings to Appellant's Registered Agent at multiple different addresses and the Exhibits submitted by Respondent demonstrate that such mail was sent U.S. Certified, Return Receipt Requested, and Restricted Delivery, as required pursuant to Rule 4(d)(8) of the South Carolina Rules of Civil Procedure. However, it is also clear that none of the mailings were signed for by Appellant's Registered Agent.

Rule 4(d)(8), SCRCP, sets forth the requirements for service by Certified Mail. The Rule provides, in sum, that it must be restricted delivery to the addressee and that service is effective upon the date of delivery as shown on the return receipt. Furthermore, the rule provides that "[s]ervice pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing the acceptance by the defendant." Id. And, finally, "[i]f delivery of the process is refused or is returned undelivered, service shall be made as otherwise provided by these rules." Id.

Here, the Respondent submitted several copies of Certified Mail correspondence wherein it attempted to serve the Appellant's Registered Agent via Certified Mail. (R.

pp. 186-194). None of the Exhibits submitted by Respondent contained a signed return receipt. (Id.). Whether Appellant maintained adequate records and updated addresses with the Secretary of State is not set forth as a contingency under Rule 4(d)(8) and, as such, it should not have been a consideration of the Court in the instant case. In fact, Appellant submits that Rule 4(d)(8) contemplates just such a situation as exists in this case where it states that service shall be made as otherwise provided by these rules when "delivery of the process is refused." Arguably, failure to keep updated records with the Secretary of State is no different than refusing to sign for the service.

The Order goes on to point out that service upon the registered agent is only one of the ways that a corporation may be served pursuant to Rule 4, SCRCP. (R. p. 6, lines 28-29). Judge Lee then cites Graham Law Firm, P.A. v. Makawi, 396 S.C. 290, 721 S.E.2d 430 (2012) and Richardson v. P.V., Inc., 383 S.C. 610, 682 S.E.2d 263 (2009), wherein the South Carolina Supreme Court addressed proper service of process upon an agent of a corporation and/or individual. (R. p. 6, line 2 – p. 7, line 3). In Graham Law Firm, the Supreme Court stated that "[s]ervice on an employee is effective when the employee has apparent authority to receive it on behalf of the employer." 396 S.C. 290, 721 S.E.2d 430, 433 (citing Richardson, 383 S.C. 610, 682 S.E.2d 263 (2009) (holding that hotel receptionist had authority to receive service of process where she was only employee present in office, which represented to third parties that she was in charge)).

In support of its Motion to Set Aside Default and for Relief from Default Judgment, Appellant submitted Affidavit of Teresa Fant and Affidavit of David Peacock. The affidavits provided in sum that Teresa Fant was an employee and office manager of Rental One, LLC, a separate and distinct company owned by David Peacock. (See R. pp.

47-51). David Peacock is the Registered Agent for Rental One, LLC and the Appellant. The affidavits also provide that Teresa Fant regularly receives mail on behalf of Peacock but cannot open it and Peacock reviews the mail when he comes to the office; that is, the offices of Rental One, LLC. (Id.). Teresa Fant also stated in her affidavit that she did not tell the process server that she was authorized to accept service of process (R. p. 47, lines 11-16), despite the Affidavit of Service providing that service was made upon "David Peacock, as Registered Agent **via Teresa Fant – Secretary and states authorized to Accept Service.**" (R. p. 36) (emphasis added).

In the July 23, 2014, Order, Judge Lee concluded that Teresa Fant had authority to accept service of process on behalf of Defendant Pleasant Grove Properties, Inc. or that she had authority to accept service of process on behalf David Peacock, Defendant's registered agent, simply because she was the Office Manager for a separate and distinct company owned by David Peacock. (See R. pp. 3-8). It also appears that Judge Lee relied on the Richardson and Graham Law Firm cases in concluding that Teresa Fant had such apparent authority. Defendant submits that these cases are clearly distinguishable from the facts in the instant case and that Teresa Fant did not have authority, actual or apparent, to accept service on behalf of Defendant Pleasant Grove Properties, Inc.

In Richardson v. P.V., Inc., the South Carolina Supreme Court held that hotel desk clerk had apparent authority to accept service on behalf of the Defendant hotel. 383 S.C. 610, 682 S.E.2d 263 (2009). The facts in the Richardson case were that Plaintiff was suing the owner of a hotel after a person drowned in the pool on the hotel premises. The process server went to the hotel to serve a copy of the Summons and Complaint and a woman named Cruel was the only person working at the hotel. Cruel was the hotel

desk clerk. The Plaintiff in the Richardson case argued that her being the only employee present demonstrated that she had apparent authority to accept service of process. However, a closer reading of the case indicates that there were additional facts that the Court obviously took into consideration. All parties—the process server, Cruel, and the registered agent—in the Richardson case acknowledged that Cruel called the registered agent while the process server was present. The process server testified that when he talked to the registered agent on the phone, he identified himself as a process server and explained the reason for his visit and that the registered agent then told him that he could leave the papers with Cruel or that he could come back when he was there. The process server also testified that Cruel told him that the registered agent gave her permission to accept the papers and she said "yes." The registered agent also testified that he told the process server that it was up to him whether or not to leave the papers. Plaintiffs in the Richardson case were awarded a default judgment after the registered agent did not file an Answer.

In holding that the hotel desk clerk in Richardson had authority to accept service of process, the South Carolina Supreme Court noted that Rule 4 of the South Carolina Rules of Civil Procedure "serves at least two purposes: it confers personal jurisdiction on the court and **assures the defendant of reasonable notice of the action.**" 383 S.C. at 615, 682 S.E.2d at 265 (citing Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1955). The Court further noted that "[e]xacting compliance with the rules is not required to effect service of process."" Id. However, the Court then clarified its "exacting compliance" statement when it stated that "[w]hether an employee may accept service on behalf of a corporation depends on the authority the corporation

conferred upon the employee[,]" and, further, that "the court must look to the circumstances surrounding the relationship and find authority which is either express or implied from the type of relationship between the defendant and the alleged agent." Richardson, 383 S.C. at 615, 682 S.E.2d at 265 (citing Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 67 (Ct. App. 1996).

The Richardson court then noted that Cruel had apparent authority to accept service of process (383 S.C. at 615, 682 S.E.2d at 265); that Cruel was the only employee present when the process server entered the hotel, which represented to third parties that she was in charge (Id.); that the process server testified that the registered agent told him that he could leave the papers with Cruel or that he could come back (383 S.C. at 615-616, 682 S.E. 2d at 265-266); and that the registered agent testified that he told the process server that it was up to him whether to leave the papers (383 S.C. at 616, 682 S.E.2d at 266). The Richardson court then reasoned that under those facts, "we find that [the Registered Agent] knowingly permitted Cruel to exercise authority to accept service of process and further find that his manifestations to [the process server] indicated that Cruel had such authority." Id. The Court then concluded that Cruel was authorized to accept service.

Here, the facts in the within case are clearly distinguishable from the facts in Richardson. First, the process server and registered agent in Richardson discussed the matter on the telephone while the process server was present. David Peacock and the process server never discussed what was in the package that was delivered to Teresa Fant. (See R. p. 36; R. pp. 49-51; R. pp. 47-48). Second, the process server in Richardson asked the hotel desk clerk where the registered agent was and if she would

call him to discuss the situation. Here, there is no evidence in the record to establish that the process server requested that Teresa Fant try to contact David Peacock. Lastly, and perhaps most importantly, the process server in the Richardson case was actually at the Defendant's hotel, while the process server in the instant case was at an entirely separate and distinct business. There is no evidence in the record to indicate that Teresa Fant was an employee of Appellant Pleasant Grove Properties, Inc. The only evidence as to her employment was the affidavits submitted by Appellant, which indicated that Teresa Fant was an employee of Rental One, LLC, not Appellant Pleasant Grove Properties, Inc. (See R. pp. 47-51).

The Richardson case requires that the Court look to all circumstances surrounding the relationship of Teresa Fant and Defendant Pleasant Grove Properties, Inc. and determine whether authority, express or implied, exists from the type of relationship between the defendant and the alleged agent. Here, the only circumstance that the Court appears to have considered are the Exhibits submitted by Respondent that showed that Teresa Fant signed for certified mail that was addressed to Appellant "Pleasant Grove Properties, Inc. c/o David Peacock, President" at the mailing address for Rental One, LLC, a separate and distinct company owned by David Peacock. (See R. pp. 167-171). The mail was sent back in September 2013 and was not sent restricted delivery. Teresa Fant is the Office Manager for Rental One, LLC, and signed the return receipt on that letter.

The Respondent also submitted Exhibits showing that it attempted to serve the Registered Agent (David Peacock) for Appellant by U.S. Certified Mail, Return Receipt Requested, Restricted Delivery, by sending the mail to several addresses, including the

address of Rental One, LLC. Respondent's Exhibits show that the return receipts were never signed for on the attempts to serve process through the mail. (R. pp. 186-194). Clearly, Teresa Fant was not authorized to go to the post office and sign for mail that was sent restricted delivery to David Peacock.

In the July 23, 2014, Order, Judge Lee states that "Peacock never states in his affidavit that Fant is not authorized to receive documents or mail on his behalf." (R. p. 7, lines 14-15). The Affidavits of Fant and Peacock make it clear that Fant was allowed to accept mail on behalf of Peacock, but that she was not allowed to open it. (See R. pp. 47-51). In her Affidavit, Teresa Fant specifically disputed the Affidavit of Service which purported to claim that Teresa Fant stated she was authorized to accept service. (R. pp. 47-48). The Affidavits established that Teresa Fant was not even the Secretary of Defendant Pleasant Grove Properties, Inc., despite the fact that the Affidavit of Service states "via Teresa Fant – Secretary . . . ." Just because David Peacock never specifically stated that Fant is not authorized to receive documents or mail on his behalf does not show that Fant had authority, express or implied, to accept service on behalf of a Defendant Corporation for which she does not work.

In Graham Law Firm, P.A. v. Makawi, 396 S.C. 290, 721 S.E.2d 430 (2012), the South Carolina Supreme Court addressed the issue of service of process upon a corporation and an individual when service was claimed to have been achieved by Rule 4(d)(8), SCRCP. Specifically, the issue of whether the person(s) who signed the return receipt were authorized to do so on behalf of the corporation and the individual defendant. In Graham Law Firm, the Plaintiff was awarded a default judgment after the Defendant failed to file an Answer to the Summons and Complaint. The trial court

initially denied Defendant's Rule 60(b) motion to set aside the default, but subsequently granted it after reconsidering the matter. In Graham Law Firm, the Defendant, concurrently with its motion to reconsider, filed a second affidavit providing that the persons who signed for the certified mail were not authorized to do so. The Plaintiff appealed the trial court's decision to grant Defendant relief from the judgment.

The Graham Law Firm court stated that "[w]hen the civil rules on service are followed, there is a presumption of proper service." (quoting Roche v. Young Bros., Inc., 318 S.C. 207, 211, 456 S.E.2d 897, 900 (1995). Furthermore, that "[o]nce a Plaintiff has demonstrated compliance with the rules, the defendant can rebut an inference that service was effected only by showing [that the Agent purporting to accept service was unauthorized]." (citing Rule 4(d)(8), SCRCP).

Here, the Respondent failed to follow the rules for service of process on a corporate defendant. Here, Respondent relied on an Affidavit of Service which purported to serve process on a Corporate Defendant (Appellant) by serving process on the Office Manager of a separate and distinct company (Rental One, LLC); a company that happens to be owned by the same person who owns Appellant. Defendant submitted affidavits in support of its motion to set aside default and for relief from the default judgment that indicated that Teresa Fant was not authorized to accept service. The affidavits indicated that she was employed by an entirely separate and distinct corporation. (R. pp. 47-51).

The only evidence of Teresa Fant's "authority" to accept service on behalf of Defendant appears to have been that she signed for certified mail that was sent to Appellant some six (6) months prior to entry of the default judgment and when such mail was sent to the address where Teresa Fant works as the Office Manager of a separate and

distinct company. (R. pp. 167-171). None of the other Exhibits submitted by the Respondent at the May 23, 2014 hearing provide any insight into the "authority" of Teresa Fant to accept service on behalf of Appellant. The Respondent failed to follow the rules on effecting service of process on a corporate defendant.

The Appellant submits that the line of reasoning set forth by the court in the Graham Law Firm case indicates that Respondent should have been required to set forth evidence to support that Teresa Fant had authority to accept service of process on behalf of Defendant. Nevertheless, Judge Lee seems to indicate in her Order that because David Peacock did not specifically state that Fant was not authorized to accept service on behalf of the Appellant, she must have been authorized. It appears that Respondent was afforded a presumption of proper service of process that should have only been warranted were the rules to have been followed. The Respondent should have had the burden to show that Fant had apparent authority to accept service.

For instance, in Graham Law Firm, the South Carolina Supreme Court noted that "the trial court's finding that [the alleged agents] were unauthorized persons within the meaning of Rule 4(d)(8) is sufficiently supported by the evidence in the record—or, specifically, the lack of evidence in the record to rebut [Defendant's] affidavit." 396 S.C. at 298, 721 S.E.2d at 434. The Graham Law Firm court further noted that "[plaintiff] had not offered 'any evidence of declarations or conduct on the part of the [Defendants] that could potentially give rise to apparent authority in [Agents]." Like Graham Law Firm, the Respondent in the instant case has failed to offer sufficient evidence that Fant had authority to accept service of process on behalf of a Defendant Corporation that she was not even employed by at the time the alleged service of process occurred. In fact, the

only piece of evidence offered to show that Fant had such apparent authority in this case was that she had signed for a piece of certified mail sent to Appellant at the address where Fant works as the Office Manager for a separate and distinct company.

The Order entered July 23, 2014, in the within case seems to indicate that simply because an individual signs for certified mail on behalf of a corporation—when that mail was sent to an address for a different company where the individual is employed by the different company—then that individual must have been authorized to accept service of process on behalf of the corporation for which the individual does not work. The Appellant submits that such a holding could lead to a great deal of misinterpretation in all future cases in which one person owns multiple corporations, and, further, that such a holding is inconsistent with the case law relied upon in the instant case. Further, Appellant submits that were this Court to affirm this holding and find that simply signing a return receipt on certified mail somehow creates apparent authority to accept service, the heart and soul of the reasoning behind service of process would be undermined. This Court should consider how many times the postal carrier enters a business on his/her mail route and requests a busy receptionist to sign return receipts and how many times that busy receptionist would sign the return receipt without even looking to see whether it was properly addressed to her employer. One can only imagine the consequences of such a holding. Companies and businesses that use registered agents that serve as registered agents for multiple companies and businesses could arguably be said to have granted apparent authority to unknowing receptionists all over the state.

In Graham Law Firm, while discussing persons authorized to accept service on behalf of a corporation, the South Carolina Supreme Court stated that "[a] rule permitting certain persons to receive service of process on behalf of others does not imply that 'anyone who happens to pick up the mail' can stand in for the defendant." Here, the Respondent's only evidence that Fant was authorized to accept service of process for Appellant was an Exhibit showing that she had previously signed for certified mail addressed to Appellant at the address of a separate and distinct company that employed Fant as its Office Manager.

Here, the holding that Appellant was properly served was based upon the conclusion that Fant had apparent authority to accept service of process on behalf of Appellant. Appellant submits that this holding is wholly unsupported by the evidence or, alternatively, that the conclusion was the result of an error of law. Accordingly, for the hereinbefore set forth reasons, Appellant requests that this Court reverse the trial judge's finding that Appellant was properly served and remand this case with instructions that the default judgment be set aside for lack of jurisdiction and that relief from default judgment be granted to Appellant.

II. The trial court erred when it denied Appellant's motion to set aside default and for relief from default judgment, when it held that there was insufficient factual evidence of mistake, inadvertence, surprise or excusable neglect.

In the event this Court determines that service of process was proper, the Appellant submits that the Court should still reverse the trial judge's Order denying Appellant's motion to set aside entry of default and for relief from default judgment in that its failure to file an Answer or otherwise respond to the Complaint in this case was the result of mistake, inadvertence, surprise or excusable neglect.

In the event this Court maintains that service upon Teresa Fant was proper service upon Appellant, Appellant would still submit that good cause exists to set aside entry of default and for relief from default judgment as a result of mistake, inadvertence, surprise or excusable neglect. The package delivered to Teresa Fant was simply a sealed white envelope with the name "David Peacock" written on the outside of the envelope. (See R. pp. 47-51). The package made no reference to Appellant specifically. The package did not even make reference to David Peacock, as a Registered Agent. It was just a simple white package with the name "David Peacock" written on the outside. The process server did not tell Teresa Fant what was inside when he delivered it. (See R. pp. 47-61). Teresa Fant did not open the package. (See R. pp. 47-48). David Peacock did not instruct Teresa Fant to open the package when he first learned of it. He instructed her to contact an attorney immediately to see how to handle the package. Defendant has asserted that there did exist a delay between Fant and Defendant's attorney being able to communicate about the package. (See R. pp. 47-51). The affidavits and arguments of Defendant indicate that David Peacock was not aware of the contents of the package until six (6) days after it was finally sent to Defendant's attorney for review. (See R. pp. 47-51; R. p. 134, lines 13-20).

In the July 23, 2014, Order, Judge Lee found that Appellant failed to establish a factual basis for mistake or surprise. (R. p. 8, lines 1-4). The Order provides that there is no evidence of any surprise as Appellant was aware that Respondent had hired an attorney to collect the commission based upon the letter sent in September 2013. (Id.). Appellant would submit that knowledge of the fact that Respondent requested an attorney to send a demand letter in September 2013, is not the same as knowledge that Respondent

had filed a Summons and Complaint against it when an unmarked package was delivered to a totally separate and distinct company owned by David Peacock almost six (6) months later. Appellant submits that it was surprised when it learned that Respondent had filed the within action. (R. pp. 49-51). Appellant further submits that it was also surprised when it learned that a default judgment had been entered against it when he had just received notice of a pending suit. (Id.). The assertions that a period of time passed between the time Peacock instructed Fant to contact the attorney and the time Fant and the attorney actually communicated further supports excusable neglect. Neither Peacock nor Fant knew for certain what was in the package until March 25, 2014.

Moreover, Appellant submits that it was excusable neglect that Appellant did not file an Answer or otherwise respond to the Complaint in the within case. The excusable neglect is that it took time for the contents of the package, all of which were unknown to the Defendant as established by the affidavits, to be submitted to its attorney for review. (See R. pp. 47-51; R. p. 137, lines 1-9). Judge Lee found that such a delay is not a basis to set aside a judgment and cited Hill v. Dotts, 345 S.C. 304, 547 S.E.2d 894 (2011) (Party has a duty to monitor the progress of his case and the lack of familiarity with legal proceedings is unacceptable.).

Appellant submits that the facts and circumstances of the Hill case are readily distinguishable from the facts and circumstances of this case. In Hill, the Defendant was actually served with a copy of the Summons and Complaint. The Defendant knew he had been served and he failed to file an Answer. The Plaintiff in the case was awarded a default judgment.

In discussing the grounds for relief from a default judgment, the Hill Court noted that "[i]n determining whether a default judgment should be set aside under Rule 60(b)(1), '[t]he promptness with which relief is sought, the reasons for the failure to act promptly, the existence of [a] meritorious defense, and the prejudice to the other parties are relevant.'" Hill, 345 S.C. at 309, 547 S.E.2d at 897 (quoting New Hampshire Ins. Co. v. Bey Corp., 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993) (citations omitted). In Hill, the Defendant failed to satisfy the fourth factor, the reason for the failure to act promptly. 345 S.C. at 310, 547 S.E.2d at 897. The Court noted that his failure to understand the legal process was not a sufficient reason to excuse his tardy reply. Further, as Judge Lee cited, "[a] party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard that is applied to an attorney." Id.

Here, the affidavits establish that neither Teresa Fant nor David Peacock knew what was enclosed inside of the sealed package delivered to Rental One, LLC. (See R. pp. 47-51). Their only knowledge consisted of knowing that it had David Peacock's name written on the outside. (Id.). Though Peacock stated in his affidavit that he knew that the private investigator who delivered the package sometimes served process on people, it did not say that he knew for a fact that Respondent had filed suit against Appellant. Unlike the defendant in Hill, Peacock did not know what was inside the package. He did not know that a Summons and Complaint was inside. Peacock's affidavit establishes that he did not know what was inside of the package until his attorney contacted him with that information. Even though he did not know what was inside the package, he instructed Teresa Fant to immediately get it to the Attorney for review and handling.

Even if this Court deems that Appellant was properly served with process, this Court should still find that the trial judge's denial of Appellant's motion to set aside default and for relief from default judgment was erroneous in that there did exist factual evidence of mistake, inadvertence, surprise or excusable neglect, and that such error constituted an abuse of discretion. Appellant filed a Motion to Set aside the default and for relief from the default judgment within six (6) days of entry of the default judgment and within four (4) days of learning of its entry. Appellant's reasons for failure to act promptly were that it did not have sufficient knowledge or notice that the within action was pending. Appellant was waiting to hear from its attorney as to the contents of the package. Appellant has a meritorious defense to the complaint in this case, as was set forth in its memorandum in support of its motion to set aside default and for relief from default judgment and alleged in the Answer filed concurrently with its Motion to set aside default and for relief from default judgment. Lastly, there is absolutely no prejudice and no evidence of any prejudice to Respondent in the event Appellant was granted the requested relief.

CONCLUSION

After a careful review of the record in this case, this Court should find that the trial judge erred when she denied Appellant's motion to set aside default and for relief from default judgment in that Appellant was never properly served with due process and the default judgment is void for lack of jurisdiction. Appellant submits that this error was the result of the erroneous finding that apparent authority to receive service of process existed in an office manager for a separate and distinct company owned by a registered agent who happens to be the registered agent for a defendant company. This error

constitutes an abuse of discretion such that this Court should view all information herein and make its own determination. For these reasons, this Court should reverse the trial judge's Order denying Appellant's motion to set aside default and for relief from default judgment and hold that Appellant is relieved from the default judgment for lack of jurisdiction, the entry of default is set aside, and that Appellant may assert its defenses and counterclaims as set forth in its Answer filed April 8, 2014.

Alternatively, and only in the event this Court determines that service of process on the office manager was proper, Appellant would request this Court to reverse the trial judge's finding that there did not exist any factual evidence to support a claim of mistake, inadvertence, surprise or excusable neglect on the part of Appellant in failing to file an Answer timely and hold that such grounds did exist as to grant Appellant's motion and permit Appellant to assert its defenses and counterclaims as set forth in its Answer filed April 8, 2014.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2013-CP-23-05891

NAI Earle Furman, LLC,

Respondent,

v.

Pleasant Grove Properties, Inc.,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with Rule 211 (b) of the South Carolina Appellate Court Rules.

Date: 4/28/15

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PROOF OF SERVICE

I certify that I have, this 29th day of April, 2015, filed one (1) original, unbound copy and fourteen (14) bound copies of the Final Brief of Appellant in the within appellate case with the South Carolina Court of Appeals and served one (1) bound copy of the Final Brief of Appellant in the within appellate case upon the Attorney of Record for Respondent, Paul S. Landis, by depositing a copy of the same in the United States Mail, postage prepaid, and addressed as follows:

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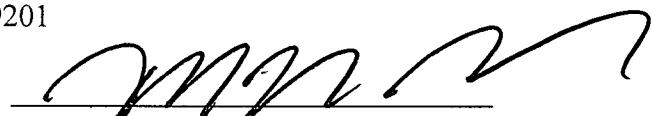

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