

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE DORCHESTER COUNTY

Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

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Case No. 2012-CP-18-1647

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RECEIVED

MAY 29 2015

SC Court of Appeals

Diane S. Goodstein, ..... Respondent,

v.

Seal-O-Flex, Inc. and Latitude Construction Services, LLC, ..... Defendants,

Of Whom Seal-O-Flex, Inc. is the ..... Appellant.

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FINAL REPLY BRIEF OF APPELLANT

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### 1. Appellant Disagrees With Respondent's Statement of the Case

Appellant disagrees with Respondent's recitation of the Statement of the Case. Specifically, Appellant disputes that the Summons and Complaint were served on Sealoflex,<sup>1</sup> that Ms. Wanda Gumbs is a customer service representative, and that Ms. Gumbs represented that she could sign for Mr. Kauffmann, Appellant's registered agent, on restricted delivery mailings. See Initial Brief of Respondent ("Response") at 2. Each of these contentions is addressed more fully in Appellant's Initial Brief.

### 2. The Circuit Court's Decision Was Controlled by Some Error of Law and Is Without Evidentiary Support

Respondent posits that the only standard by which the Circuit Court's decision should be judged is whether "the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." See Response at 5. However, that is not the only basis for Appellant's appeal.

- "An abuse of discretion occurs when the judgment is controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Regions Bank v. Owens, 402 S.C. 642, 647, 741 S.E.2d 51, 54 (Ct.App. 2013) citing In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct.App. 1997) (emphasis added). Appellant requests that the Circuit Court's decision be overturned both because it is controlled by some error of law and because it is without evidentiary support. Id., 402 S.C. at 647, 741 S.E.2d at 54.

First, the standard by which the Circuit Court evaluated whether the default judgment should be set aside was controlled by some error of law. That standard, as set forth in Rule

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<sup>1</sup> Sealoflex, Inc. is the correct name for the Appellant. However, the original filings in the Circuit Court identified Appellant as Seal-O-Flex.

4(d)(8), provides that “[a]ny such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the return receipt was signed by an unauthorized person.” Rule 4(d)(8), S.C.R.C.P.; see also Order Denying Defendant Seal-O-Flex’s Motion to Set Aside Default Judgment (“Order”) at 3 (R. p. 10). Although the Circuit Court acknowledged that this was the proper standard by which to evaluate Sealoflex, Inc.’s Motion to Set Aside Default Judgment (“Motion”), it appears to have ruled against Appellant on other grounds. See Order at 3 (R. p. 10). Specifically, the Circuit Court ruled that “[b]ased upon Plaintiff’s compliance with Rule 4, SCRCPP, and Defendant’s admission that it had notice of the action, the Court can find no reason why it should hold that service of process was not proper.” Id. at 3 (R. p. 10). The fact that Appellant had notice of the action does not negate the fact that Ms. Gumbs was unauthorized to sign the return receipt—the test by which to judge Appellant’s Motion.

Second, the Circuit Court appears to have failed to use the appropriate tests to evaluate whether Appellant met its burden to demonstrate that the return receipt was signed by an unauthorized person. It is unclear by what standard the Circuit Court judged the evidence presented by Sealoflex. As discussed in Appellant’s Initial Brief, the correct test is whether the person who signed the return receipt was actually appointed by the registered agent, or had express, implied or apparent authority. It is unclear from the Order whether the Circuit Court evaluated the evidence presented by Sealoflex using any of these tests.

Finally, the Circuit Court’s ruling that “Seal-O-Flex has not carried its burden” is without evidentiary support. See Order at 3 (R. p. 10). The Circuit Court’s Order’s only reference to the evidence presented by Sealoflex is that “Defendant makes several arguments based on the authority conferred upon Gumbs by Defendant Seal-O-Flex. Because Gumbs lacked actual,

apparent, or implied authority, Defendant Seal-O-Flex argues, the return receipt was signed by an unauthorized person, service of process was improper, and the Court did not obtain personal jurisdiction over Defendant Seal-O-Flex.” Id. The Circuit Court does not set forth any facts to support its conclusion that Sealoflex did not meet its burden.

### 3. Appellant Did Not Have “Notice” and, Therefore, Was Not Required to Answer

Respondent repeatedly argues that “[a]t no time does Appellant maintain it failed to have notice of the Summons and Complaint.” Response at 2, 5. Respondent is using the term “notice” as it would be used in layman’s terms. Appellant has admitted that it had a copy of the Complaint in its office. But, what Appellant has never admitted, and will never admit, is that it was properly served such that it had “notice” under Rule 4(d). Because Appellant was never properly served, it was not required to answer the Complaint.

### 4. Appellant Met Its Burden to Demonstrate That Ms. Gumbs Was an “Unauthorized Person”

Respondent tries to draw a distinction between “lack[ing] authority to accept the Summons and Complaint” and being “unauthorized to sign the ‘return receipt.’” Response at 6-7. Respondent then posits that the latter is the appropriate inquiry and that Appellant cannot demonstrate it. Id. This is a distinction without a difference.

The very case that Respondent relies on as support for this position, Richardson v. P.V., Inc., 383 S.C. 610, 682 S.E.2d 263, 265 (2009),<sup>2</sup> explains that the tests that are used to evaluate whether a person is unauthorized to sign a return receipt revolve around whether the agent lacked authority to accept service of process. These are the same tests that Appellant addressed in detail in its Initial Brief.

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<sup>2</sup> A case that is factually dissimilar to the present case. Please see Appellant’s Initial Brief at Fn. 3.

Not every employee of a corporation is an agent of the corporation for the purposes of service of process. See Roberson, 365 S.C. at 11, 615 S.E.2d at 115 (holding that a clerical employee was not an agent authorized to accept service of process for the corporation). Whether an employee may accept service on behalf of a corporation depends on the authority the corporation conferred upon the employee. In order to determine whether an employee is an authorized agent, 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. Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 67 (Ct.App.1996). While actual authority is expressly conferred upon the agent by the principal, apparent authority is when the principal knowingly permits the agent to exercise authority, or the principal holds the agent out as possessing such authority. Roberson, 365 S.C. at 10-11, 615 S.E.2d at 115.

Richardson, 383 S.C. at \_\_\_, 682 S.E.2d at 265. As is more fully discussed in its Initial Brief, Appellant has met its burden with respect to each of these tests.

Respondent also argues that “[i]n none of the case cited by Appellant is there even a similarity to the following facts: an employee who repeatedly accepted return receipts and affirmatively represented that she was an agent for the addressee (the agent for Service of Process) and then delivered timely the documents to defendant.” Response at 6. This argument fails.

First, the attempted service at issue is certified, return receipt requested, restricted delivery mailing. Respondent has never before attempted the exact same type of mailing. The previous mailing to which Respondent refers was not a restricted delivery mailing.

Furthermore, as was addressed in Roberson v. S. Fin. of S.C., Inc., 365 S.C. 6, 10, 615 S.E.2d 112, 115 (2005), the fact that someone signed for a certified letter a year earlier does not mean that she had apparent authority to sign for the Summons and Complaint. That action does not establish apparent, or implied, authority because it is the past behavior of the company—and not the employee—that is relevant. Id., 365 S.C. at 11-12, 615 S.E.2d at 115.

Second, Respondent argues that because Appellant did not challenge the non-restricted mailing from a year earlier that somehow Appellant is picking and choosing what it challenges. Response at 7. But, there was no reason for Appellant to challenge the mailing from a year earlier. The earlier mailing did not contain a legal document that subjected Appellant to liability.

Also, because the earlier mailing was not a restricted delivery mailing it did not need to be delivered to a specific person at Sealoflex. The earlier mailing was certified and registered, with return receipt requested. That type of mailing provides evidence of delivery, along with mailing receipts and the possibility of using electronic verification to see if a delivery was made or attempted to be made. It does not provide a guarantee that the mailing will be delivered to a specific person. Mailing Standards of the United States Postal Service, Domestic Mail Manual §§ 503.6.2.1, 503.2.2.2, 503.3.2.1 (May 7, 2012).

Third, Ms. Gumbs signed for a document that she did not realize was restricted delivery and did not know included a summons and complaint.

Finally, as was discussed in detail in its Initial Brief, the case of Roberson is factually similar to the present case.

#### 5. Ms. Gumbs Was Not Authorized in Writing to Receive Restricted Delivery Mail

Respondent argues that “nothing prohibits an agent for the addressee of certified mail restricted delivery from accepting the mail on his or her behalf so long as the agency is indicated in writing on the on the form, exactly as Ms. Gumbs did in this instance.” Response at 8. The form to which Respondent refers is the return receipt. However, that writing neither complies with the requirements of the Postal Regulations nor can it be used to demonstrate that Mr. Kauffmann gave Ms. Gumbs authority to sign for him.

The Postal Regulations state that “[m]ail marked ‘Restricted Delivery’ is delivered only to the addressee or the person authorized in writing as the addressee’s agent to receive the mail, subject to 508.1.0, Recipient Options, and 508.2.0, Conditions of Delivery.” Mailing Standards of the United States Postal Service, Domestic Mail Manual § 503.7.4.1 (May 7, 2012). The regulation is clear with respect to who may receive restricted delivery mail—either the addressee or someone who the addressee has authorized in writing to accept service of the addressee’s restricted mail. The referenced writing must be made by the addressee—not the proposed agent. Respondent has set forth no evidence, nor can she, that Robert Kauffmann ever authorized, in writing, Ms. Gumbs to act as his agent and accept Restricted Delivery mail on his behalf.

Further, it simply cannot be that Ms. Gumbs’ signing of the return receipt is the writing that the Postal Regulations require. The writing must be made by the addressee. If this was not the case, anyone could sign a return receipt addressed to someone else and say that, because he signed the receipt, he has authority to receive restricted delivery mail for the addressee.<sup>3</sup>

#### 6. Respondent Propounds the Wrong Standard for Timeliness

Respondent argues that Appellant’s Motion was not timely because Appellant failed to move to be relieved from the default judgment before the default judgment was even entered. See Response at 9. This argument is without merit.

As required under South Carolina Rule of Civil Procedure 60(b), Appellant made its motion to be relieved from the default judgment “within a reasonable time”—six days after it

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<sup>3</sup> As Respondent cannot bring criminal charges against Ms. Gumbs, and as Ms. Gumbs did not violate the law, Appellant will not address Respondent’s arguments regarding 18 USC § 1701. Leeke v. Timmerman, 452 U.S. 83 (1981), affirmed the precedent in Linda R.S. v. Richard D., 410 U.S. 614 (1973); Diamond v. Charles, 476 U.S. 54, 64-65 (1986) (applying Linda R.S. and collecting cases); Collins v. Palczewski, 841 F. Supp. 333, 340 (D. Nev. 1993) (“Long ago the courts of these United States established that ‘criminal statutes cannot be enforced by civil actions.’”).

received notice of the default judgment.<sup>4</sup> See Motion (R. pp. 11-40); Order for Judgment at Exhibit G to Motion (R. pp. 36-39).

#### 7. Respondent Misrepresents Sealoflex's Position in the Underlying Case

Respondent alleges that Exhibit 5 to her Opposition to Sealoflex's Motion to Set Aside Default Judgment proves that Sealoflex admitted liability and that Sealoflex stated that it would honor its warranty as to the alleged defects at issue in the underlying case. Response at 9. This misrepresents the content of these documents.

Exhibit 5 is a compilation of two emails that have nothing to do with each other. See Memorandum in Opposition to Defendant Seal-O-Flex, Inc.'s Motion to Set Aside Default Judgment at Exhibit 5 (never filed with the lower Court) (R. pp. 51-52). The first email is dated August 2009. It reflects Sealoflex informing Latitude (the installer and defendant in the underlying case) that it can issue the warranty for the job because Latitude has confirmed that it completed its installation of the product. This email does not reflect Sealoflex agreeing that the warranty covers the alleged defects at issue in the underlying case. The second email is dated July 2011. This email confirms that Sealoflex is willing to help with repairs to blisters on the roof, but that blisters on the roof do not necessarily indicate a failure of the product.

These emails are two years apart, have nothing to do with each other, and do not prove that Sealoflex admitted liability or that it admitted that the alleged defects were covered under its warranty.

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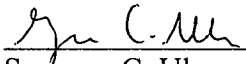
<sup>4</sup> "THE COURT: . . . I don't think you disagree that Sealoflex acted promptly in filing this Motion, because we had a hearing, why they didn't show I don't know, we had the hearing, well, actually entered my Order on, I think the day of the hearing, January 7<sup>th</sup>, 2014. I think the Motion was filed on January 9<sup>th</sup>, 2014. You concede that that would be timely? MR. GOODSTEIN: I hadn't really thought about that, but it probably is. THE COURT: That's one of the factors. MR. GOODSTEIN: But I agree, I don't think it was timely." Transcript of Record of July 9, 2014 Hearing on Motion to Set Aside Default Judgment 20:10-21 (R. p. 78, lines 10-21).

8. Conclusion

For the reasons stated, this Court should reverse the judgment of the Circuit Court and set aside the default judgment.

Respectfully submitted,

May 28, 2015

  
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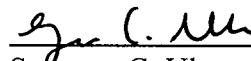
Seal-O-Flex, Inc. and Latitude Construction Services, LLC, ..... Defendants,

Of Whom Seal-O-Flex, Inc. is the ..... Appellant.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 28, 2015 she served a copy of **Final Brief of Appellant and Final Reply Brief of Appellant** by depositing the same in the U.S. Mail, First Class postage prepaid, and addressed to the following:

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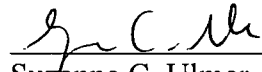
Seal-O-Flex, Inc. and Latitude Construction Services, LLC, ..... Defendants,

Of Whom Seal-O-Flex, Inc. is the ..... Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Appellant and Final Reply Brief of Appellant comply with Rule 211(b), SCACR.

May 28, 2015

  
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