

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Judge

Case No. 2009-CP-46-01941

Jackie Hartley, Respondent,

v.

A.P. Karras, LLC d/b/a Eat Well Family Restaurant,
Andrew P. Karagounis,
Lucas Giannatos and Stacey Giannatos,

of whom

Lucas Giannatos and Stacey Giannatos are Appellants.

AMENDED INITIAL BRIEF OF APPELLANTS

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SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities
Statement of Issues on Appeal
Statement of the Case
Facts
Arguments
I. THE ISSUE IN THIS CASE IS HOW THE APPELLANTS CAN PROVE NON-RECEIPT OF MAILED
DISCOVERY REQUESTS.
II. THE APPLICABLE PRECEDENT ALLOWS THE APPELLANTS TO PROVE NON-RECEIPT OF
THE DISCOVERY REQUESTS.
III. THE APPELLANTS MEET THE STANDARD REQUIRED FOR RULE 60(B) RELIEF.
IV. THE PRECEDENT IN SEEMING OPPOSITION TO ALLOWING PROOF OF NON-SERVICE IS
ITSELF SUBJECT TO FACTUAL EXCEPTIONS.
Conclusion

TABLE OF AUTHORITIES

CASES: SOUTH CAROLINA SUPREME COURT

Richardson Construction Co. v. Meek Engineering and Construction, 274 S.C. 307, 262 S.E.2d 913 (1980)

CASES: SOUTH CAROLINA COURT OF APPEALS

Regions Bank v Stonebridge Development Group, LLC, 2012-UP-276 (Ct.App. May 9, 2012).

McClurg v. Deaton, 380 S.C. 563, 671 S.E.2d 87 (Ct.App. 1987)

CASES: OTHER STATES

Tyson v. Automotive Controls Corp., 147 Ga.App. 409, 249 S.E.2d 100 (1978).

CASES: FEDERAL: CIRCUIT COURTS

Augusta Fiberglass Coatings v. Fodor Contracting, 843 F.2d 808, 810-811 (4th Cir. 1988)

Davis v. Musler, 713 F.2d 907 (2d Cir. 1983)

Feliciano v. Reliant Tool Co., Ltd., 691 F.2d 653 (3d Cir. 1982)

Harrell v. DCS Equipment Leasing Corp., 951 F.2d 1453, 1459 (5th Cir. 1992)

IN RE Roxford Foods, Inc., 12 F.3d 875, 879, 881 (9th Cir.1993)

United Coin Meter Co. v. Seaboard Coastline Railroad, 705 F.2d 839 (6th Cir. 1983)

United States v. \$48,595, 705 F.2d 909 (7th Cir. 1983)

CASES: FEDERAL: DISTRICT COURTS

Ark-Tenn Distributing Corp. v. Breidt, 110 F.Supp. 644 (D.C.N.J. 1953, aff'd 209 F.2d 359 (3d Cir. 1954)

Freed v. Plastic Packaging Materials, 66 F.R.D. 550 (E.D.Pa. 1975)

United States v. Turk, 139 F.R.D. 615 (D.Maryland 1991)

Williams v. Kreiger, 61 F.R.D.142 (S.D.N.Y. 1973).

CASES: FEDERAL BANKRUPTCY

IN RE Savage, 303 B.R. 766 (Bankr.D.Md. 2003).

RULES OF CIVIL PROCEDURE

Rule 60(b), S.C.R.C.P

OTHER AUTHORITY

J. Moore *et al.*, MOORE'S FEDERAL PRACTICE, § 60.22 (3d ed. 1999)

STATEMENT OF ISSUES ON APPEAL

- I. THE ISSUE IN THIS CASE IS HOW THE APPELLANTS CAN PROVE NON-RECEIPT OF MAILED DISCOVERY REQUESTS.
- II. THE APPLICABLE PRECEDENT ALLOWS THE APPELLANTS TO PROVE NON-RECEIPT OF THE DISCOVERY REQUESTS.
- III. THE APPELLANTS MEET THE STANDARD REQUIRED FOR RULE 60(B) RELIEF.
- IV. THE PRECEDENT IN SEEMING OPPOSITION TO ALLOWING PROOF OF NON-SERVICE IS ITSELF SUBJECT TO FACTUAL EXCEPTIONS.

STATEMENT OF THE CASE

Respondent Hartley sued the Appellants Giannatos as partial Guarantors on a commercial lease in the amount of \$21,467.72, unknown repair costs and interest. The Giannatos timely responded with a general *pro se* answer. By its Certificate of Service for March 10, 2010, the Respondent served discovery requests on the Giannatos, including Requests to Admit restating the allegations of the Complaint. No answer was made.

By Motion of December 6, 2010, the Respondent moved for Summary Judgment based upon the Giannatos' admission by reason of their failure to answer. At hearing of the Motion on January 27, 2011, the Appellants Giannatos denied receiving the discovery requests.

The Court granted Summary Judgment for the Respondent Hartley. The Appellants filed a Letter which counsel argued to be a timely Motion or Motions for reconsideration under Rule 59. Other Counsel later filed for relief under Rule 60, accompanied by Affidavits stating that the discovery requests were not received. On June 13, 2011, the Giannatos, by their retained counsel, submitted Answers to the Requests for Admission.

The Motions referenced above were heard on June 16, 2011. The Special Circuit Judge denied their Motions by Order of July 6, 2011, citing a lack of evidence for the Appellants' claim of non-service. That Order did not address the argument that the earlier letter constituted a Rule 59 Motion. This appeal followed.

FACTS

Any additional facts relevant to this Appeal are set out and referenced in the Argument below.

ARGUMENT

1. THE ISSUE IN THIS CASE IS HOW THE APPELLANTS CAN PROVE NON-RECEIPT OF MAILED DISCOVERY REQUESTS.

This case resolves into the question of how the Appellants are to prove that they did not receive the Discovery which the Respondent's Order for Summary Judgment is based upon.

Several points need to be clarified in light of past precedent. The Giannatos are not raising the lack of service on them at a late date. This lack was stated by them in their first, *pro se* hearing.¹ They stated it again in their sworn Affidavits.² It was argued at their second hearing, that on their Motions, by counsel.³

Under these facts, those precedents disposing of claims of lack of service raised only on appeal or late in the proceedings have no value here. *See, e.g., Tyson v. Automotive Controls Corp.*, 147 Ga.App. 409, 249 S.E.2d 100 (1978).

For all the reasons stated, the only basis for appeal contained in the Record or in the Appellant's Initial Brief which might have a basis is the beginning date for the reduction in his child support obligation. He has failed to preserve that issue.

Equally, the Respondent cannot invoke those cases where service of the summons and complaint was denied though evidenced by an Affidavit of Personal Service or a signed receipt. *See, e.g., McClurg v. Deaton*, 380 S.C. 563, 671 S.E.2d 87 (Ct.App. 1987); *Regions Bank v Stonebridge Development Group, LLC*, 2012-UP-276 (Ct.App. May 9, 2012).

In this case, we have a Certificate of Service signed by counsel for Respondent and filed. This is the sole item proving service of the Requests to Admit upon them.

1 RECORD ON APPEAL, p.____.

2 RECORD ON APPEAL, p.____.

3 RECORD ON APPEAL, p.____.

As noted by the Circuit Court ⁴, the Appellants do not deny the accuracy of the address stated on the Certificate. They do not deny receipt of the Summons and Complaint. They received the notice for the Motion Hearing which was sent to the same address and received after the date of the discovery requests in question.⁵ They received a copy of the first Order, for Summary Judgment at the same address.⁶

In their behalf, the Appellants have argued their receipt of a set of discovery documents directed to their co-defendant and his counsel. They deny receipt of documents directed to themselves.⁷ They have suggested a mailing error, by which they received the wrong documents.

The Appellants argue that this case resolves to a question of how much weight can be given to a Certificate of Service as against their sworn denial. To state this in another way: if this Court finds they were not served, what action could they be called upon to undertake that they neglected.

At the second hearing, counsel for Respondent argued that the Giannatos should be held responsible for failing to move to file their responses late.⁸ The argument overlooks the fact that the said responses were filed, once counsel was obtained.⁹ This fact was acknowledged during the argument of the Appellants' Motions.¹⁰ The argument also begs the question of whether the Appellants were in receipt of the Requests in the first place.

II. THE APPLICABLE PRECEDENT ALLOWS THE APPELLANTS TO PROVE NON-RECEIPT OF THE DISCOVERY REQUESTS.

The Appellants argue that the applicable rule in this case is that stated in *Ark-Tenn Distributing Corp. v. Breidt*, 110 F.Supp. 644 (D.C.N.J. 1953, aff'd 209 F.2d 359 (3d Cir. 1954)):

It is true that failure to deny is tantamount to an admission, but it is equally true under this rule as under the others, that technical considerations will not be allowed to prevail to

4 RECORD ON APPEAL, p.____.

5 RECORD ON APPEAL, p.____.

6 RECORD ON APPEAL, p.____.

7 RECORD ON APPEAL, p.____.

8 RECORD ON APPEAL, p.____.

9 RECORD ON APPEAL, p.____.

10 RECORD ON APPEAL, p.____.

the detriment of substantial justice. [Citations omitted.]

Simple justice demands that a person who has no knowledge of a request for admission should not be held liable for his failure to deny.

[*Id.*, 110 F.Supp. at 646.]

See, also, Williams v. Kreiger, 61 F.R.D.142 (S.D.N.Y. 1973).

The above would seem to be the rule as followed by our own Supreme Court. In *Richardson Construction Co. v. Meek Engineering and Construction*, 274 S.C. 307, 262 S.E.2d 913 (1980), that Court was faced with a defective Affidavit of Service and a denial of service. The Supreme Court also noted that the service in question was made by an employee of opposing counsel. The Court held that “within the ambit of this appeal and as a matter of law” they could not ignore the challenge to service. *Id.*, 274 S.C. 309L, 262 S.E.2d 915.

The Appellants argue that the implicit reasoning of the Supreme Court in *Richardson* must apply here. The Circuit Court found the Appellants' receipt of other documents at their residence compelling enough to allow it to disregard their sworn denial of receipt of the Requests to Admit. They argue that this fact cuts in exactly the opposite direction: if they intended to perpetrate a fraud on the Court, their denials would have been more absolute. They would not have admitted receipt of other documents.

III. THE APPELLANTS MEET THE STANDARD REQUIRED FOR RULE 60(B) RELIEF.

South Carolina precedent does not discuss, in general terms, the effect of seeking relief against a default judgment under Rule 60(b), S.C.R.C.P. The precedent which does exist is more narrowly concerned with whether the Rule 60 Movant has met the evidentiary standard under that Rule.

The Appellants would note that, in the absence of precedent on Rule 60(b) relief from a grant of summary judgment due to a failure to respond to discovery, the nearest examples would be those dealing with default.

Under Federal precedent, which has developed a general approach to Rule 60(b) relief from default, the rule has been stated as follows:

Although a Motion for relief from a judgment is committed to the sound discretion of the trial court, a trial court's abuse of discretion in refusing relief does not have to be glaring in order to justify a reversal by an appellate court in the case of a default judgment.

[J. Moore *et al.*, MOORE'S FEDERAL PRACTICE, § 60.22 (3d ed. 1999.)]

Applying this standard in the context of Rule 60, the Fourth Federal Circuit has stated, *per curiam*, in its leading case of *Augusta Fiberglass Coatings v. Fodor Contracting*, 843 F.2d 808, 810-811 (4th Cir. 1988):

[W]here default judgments are art issue, over the years this court has taken an increasingly liberal view of Rule 60(b) . . .

[*Id.*]

The Fifth Federal Circuit has adopted the same reasoning as to Rule 60(b) relief, noting of defaults that “[t]runcated proceedings of this sort are not favored.” *Harrell v. DCS Equipment Leasing Corp.*, 951 F.2d 1453, 1459 (5th Cir. 1992).

While the Seventh Federal Circuit has been more conservative in their language, both have granted Rule 60(b) relief as to default judgments. *United States v. \$48,595*, 705 F.2d 909 (7th Cir. 1983).

The Ninth Federal Circuit, quoting the language of MOORE'S FEDERAL PRACTICE above, has held that, as to Rule 60(b) relief and in the presence of a meritorious defense, “doubt, if any, should be resolved in favor of the motion so that cases may be decided on their merits.” *IN RE Roxford Foods, Inc.*, 12 F.3d 875, 879, 881 (9th Cir. 1993).

The same result has been reached by the Second Federal Circuit [*Davis v. Musler*, 713 F.2d 907 (2d Cir. 1983)]; the Third Federal Circuit [*Feliciano v. Reliant Tool Co., Ltd.*, 691 F.2d 653 (3d Cir. 1982)]; and the Sixth Federal Circuit [*United Coin Meter Co. v. Seaboard Coastline Railroad*, 705 F.2d 839 (6th Cir. 1983).]

The Appellants have acted timely in seeking Rule 60(b) relief. They possess a meritorious defense. The grounds applied by the Circuit Court, to determine what it felt was the truth of their receipt of the Requests to Admit, are (at a minimum) too vague and subject to factual interpretation to result in the imposition of summary judgment. The Appellants are entitled to Rule 60(b) relief setting aside the judgment, and allowing this matter to proceed to trial.

IV. THE PRECEDENT IN SEEMING OPPOSITION TO ALLOWING PROOF OF NON-SERVICE IS ITSELF SUBJECT TO FACTUAL EXCEPTIONS.

The Appellants acknowledge the existence of a later and harsher view of the Rules in question. Basing itself on a reading of the revised Federal Rule 36, in *Freed v. Plastic Packaging Materials*, 66 F.R.D. 550 (E.D.Pa. 1975) that United States District Court stated:

It makes no difference whether the requested admissions are received and unanswered or never received. Thus, where a request for admissions is properly served to which no timely response is made, all matters therein are admitted and may well form the basis for Summary Judgment. The Rules of Procedure permit no other considerations.

[*Id.*, 99 F.R.D. 553.]

Beyond commenting upon the sheer severity of a rule that would take no account of a litigant's actual knowledge of what he is to be charged with, the Appellants would cite the ruling of the District Court in *United States v. Turk*, 139 F.R.D. 615 (D.Maryland 1991). In that case, the Court took notice of *Freed* and similar precedent, but concluded:

In this case, however, the Court is reluctant to grant summary judgment against a pro se defendant based solely upon his failure to comply with the discovery requirements of the Federal Rules of Civil Procedure.

[*Id.*, 139 F.R.D. 617].


The above case is not cited to invoke solely the Appellants (then) *pro se* status, but to set out the precedent acknowledging that for a rule so severe, exceptions must be allowed to work justice. This was also the conclusion of *IN RE Savage*, 303 B.R. 766 (Bankr.D.Md. 2003).

CONCLUSION

The ruling of the Circuit Court imposes an impractical and inequitable standard upon a litigant who has failed to receive discovery requests. Any rule of procedure must allow for factual error and exceptions. The alternative to this conclusion is to allow the post office to

determine the outcome of cases, regardless of any errors in delivery.

Respectfully submitted,



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Attorney for Appellants

September 10, 2012

Rock Hill, South Carolina

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Judge

Case No. 2009-CP-46-01941

Jackie Hartley, Respondent,

v.

A.P. Karras, LLC d/b/a Eat Well Family Restaurant,
Andrew P. Karagounis,
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of whom
Lucas Giannatos and Stacey Giannatos are Appellants.

PROOF OF SERVICE

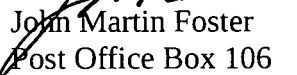
I certify that I have served the Amended Initial Brief of Appellants, dated May 21, 2012,
on the following counsel of record:

W. Chaplin Spencer, Jr.
Jeremy D. Melville
Spencer & Spencer, PA
226 East Main Street, Suite 200
Post Office Box 790
Rock Hill, SC 29731-6790

by depositing the same with the United States mail, with sufficient first class postage
attached, properly addressed to the clerk of the Court, and with a copy also directed to the
respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at
that person's office with that person's clerk or some other person in charge thereof, or by leaving
it in a conspicuous place therein; of if the office was closed or the person to be served has no
office, by leaving a copy at that person's dwelling place or usual place of abode with some
person of suitable age and discretion then residing therein, all pursuant to Rule 233(b),
S.C.A.C.R.

May 21, 2012



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September 10, 2012

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Jackie Hartley, Respondent,
v. A.P. Karras, LLC d/b/a Eat Well Family Restaurant,
Andrew P. Karagounis,
Lucas Giannatos and Stacey Giannatos,
of whom Lucas Giannatos and Stacey Giannatos are Appellants.

Case No. 2009-CP-46-01941

Dear Ms. Gee:

In accordance with Rules 208 and 209, S.C.A.C.R., enclosed herewith please find the original and one (1) copy of the Appellants' Initial Brief, amended pursuant to the Court's Order of August 21, 2012, together with Certificate of Service for the same in the above referenced case.

By copy of this letter, I am serving the attorneys for the Respondents with copies of the said Motion, as evidenced by the Certificate of Service.

Please return the extra conformed copy to my office in the enclosed self-addressed, stamped envelope. As always, thank you, and your staff, for your assistance in these matters.

Sincerely yours,


John Martin Foster

JMF/es
enclosures

cc: W. Chaplin Spencer, Jr.
Jeremy D. Melville
Spencer & Spencer, PA
Attorneys for Respondent
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