

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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MAR 22 2016

Kristi Lea Harrington, Circuit Court Judge

SC Court of Appeals

Case No. 10-CP-10-6239 (Appeal Case No.: 2015-000940)

D.A. Morgan Price, Respondent,

v.

Todd Chas, Jacara Chas, Marsh Winds Owners Association, Inc.
a/k/a Marsh Winds Horizontal Property Regime, and
The Marshland Communities, LLC, Defendants

Of whom Todd Chas and Jacara Chas are the Appellants.

APPELLANTS' FINAL REPLY BRIEF

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March 21, 2015

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REPLY

The Respondent, D.A. Morgan Price (hereinafter “Price”), and his attorney only attempted to serve the Chases at an address the Chases lived at prior to ever buying the condominium at issue in this case, an address that Price and his attorney knew was not the Chases’ address. Price and his attorney never attempted to serve the Chases at any address where they lived after they sold the condominium to Price. The record is void of evidence of any attempt to serve the Chases at their last known address. Price never looked at the most obvious place to find the Chases’ last known address – the closing statement for the sale of the condominium to Price. Further, while Price specifically requested the Chases’ address in discovery and was provided their address, Price ignored that information.

Price’s argument that there were no errors of law is unsupported by the record. Since the trial court failed to issue findings of fact and conclusions of law, there is no basis to support the trial court’s order. If the trial court denied the Chases’ motion to set aside the judgement for lack of a meritorious defense, it would be an error of law. BB & T v. Taylor, 369 S.C. 548, 553, 633 S.E. 2d 501, 503 (2006). Likewise, if the trial court denied the Chases’ motion because it was not filed within a reasonable time and was prejudicial, it would be an error of law. *Id.*

Based on the law and the evidence, service was inadequate and violated the Chases’ due process rights that “not only include notice, but also include an opportunity to be heard in a meaningful way, in judicial review.” Universal Benefits Inc. v. McKinney, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002).

I. STANDARD OF REVIEW

A. Abuse of Discretion

The parties agree 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. [citation omitted.] The trial court’s decision will not be disturbed on appeal as a clear showing of an abuse of that discretion. An abuse of discretion occurs when the judgment was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.” Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (Ct. App. 2010).

As an initial matter, the trial court issued form orders in response to the Chases’ motion to set aside the judgment and motion for reconsideration. The orders do not state legal or factual reasons for denying the Chases’ motions. Without a written order setting forth the basis for the trial court’s decision, it is impossible to determine the trial court’s basis for denying the motions. For that reason, the Chases request the matter be remanded to the trial court for a written decision setting forth the factual and legal basis for denying the motions.

Based on the law, the evidence, and the arguments of counsel at the hearing and in the motions, including the Respondent’s Brief in this matter, the trial court’s denial of the Chases’ motions had to be an abuse of discretion. The decision had to be based on errors of law with absolutely no evidentiary support in the record.

II. ERRORS OF LAW

A. Meritorious Defense

Price argues that the trial court properly denied the Chases' motions because of the Chases' lack a meritorious defense. Assuming the trial court denied the motions based on the lack of meritorious defense, it would be an error of law. The Chases' motion to set aside the judgment was based on Rule 60(b)(4) for lack of proper service. The law is clear that the existence of a meritorious defense does not apply to a motion made pursuant to Rule 60(b)(4). BB&T v. Taylor, 369 S.C. at 553, 633 S.E. 2d at 503 (2006).

A meritorious defense is one of the two bases that Price argued in its motions and at the hearing in opposition to the Chases' motion. Since any argument is contrary to the law, any decision by the trial court based on Price's argument would be an error of law that would require reversal.

B. Prejudice

Price argued at the hearing, in its motion, and in his brief that the Chases' motion should be denied because of prejudice. Price argues that Thomas Chorlton was a witness at the trial and has since passed away. As with the meritorious defense, prejudice is not a legal basis for denying a motion to set aside a judgment pursuant to Rule 60(b)(4). *Id.* Further, since Mr. Chorlton testified at the trial, his testimony is preserved and could be used at any future trial relating to this matter. The Chases would have no objection to his testimony despite the fact that they never had an opportunity to cross examine him.

Again, since prejudice is not a legal basis for denying a motion to set aside a judgment under Rule 60(b)(4), it would be an abuse of discretion for the trial court to have

denied the motion on that basis.

C. Within a Reasonable Time

Price contends that the trial court properly denied the Chases' motions because the motion to set aside the judgment was not filed within a reasonable time. Price's argument is based on prejudice caused by the passing of Mr. Chorlton discussed above. For the reasons discussed above, and since Price's argument for filing within a reasonable time is based on prejudice, any decision based on failing to file within a reasonable time would be an error of law.

Rule 60(b)(4) does not require a motion to set aside a judgment being made within one year. *Id.* A motion under Rule 60(b) must be made within a reasonable time. In this case, the motion to set aside the judgment was filed within thirty (30) days of learning of the judgment. During that time, the Chases had to find an attorney, meet with the attorney, the attorney had to do due diligence investigating the facts of the circumstances, the Chases' attorney contacted the attorney for Price to discuss the matter, and the motion to set aside the judgment was filed. (R. pp. 84-86; 97-99). Thirty (30) days must be considered a reasonable time as a matter of law and fact. Therefore, any decision by the trial court based on not filing the motion to set aside the judgment within a reasonable time would be an error of law.

III. LACK OF ANY SUPPORTING EVIDENCE

A. Service by Publication was Grossly Inadequate and Flawed

Price argues that the numerous defects where service were at most irregularities, but not jurisdictional ones. "Generally, a judgment is void only if a court acts without

jurisdiction. Irregularities which do not involve jurisdiction do not render a judgment void.” Thomas & Howard Co., Inc. v. T.W. Graham & Co., 318 S.C. 286, 457 S.E. 2d 340, 343 (1995). What Price fails to recognize is that in order to meet due process service requirements that provide the court jurisdiction over the Chases, the Chases had to receive notice. BB & T v. Taylor, 369 S.C. at 551. In this case, the numerous irregularities and failure to comply with the rules regarding service by publication resulted in the Chases never receiving notice and denied the Chases’ their right to due process. As pointed out in the Chases’ initial brief, the following are some of the defects:

1. The record is void of any attempt to serve Todd Chas. The Affidavit of Non-Service is only for Jacara Chas. (R. pp. 74-75). There is no Affidavit of Non-Service relating to any attempt to serve Todd Chas.
2. The Affidavit of Non-Service expressly acknowledges the Chases were not residents at the place where service was attempted. (R. pp. 74-75). Price was required to try to find the Chases at their last known address, not an address that they lived at years before they sold the condo to Price and where Price knew the Chases did not live.
3. There is no evidence of a diligent search. Price failed to look at the closing statement that provided the address for the Chases. Price failed to read the responses to discovery where Price requested the address for the Chases, the other defendants provided the address for the Chases, and Price never attempted to serve them at any of those addresses. Price failed to request any information from the Post Office regarding the Chases’ address.

4. The Affidavit of Price's attorney in support of the Order for Service by Publication is defective. (R. p. 77). The affidavit states that the Chases cannot be found after a diligent search, but the affidavit of non-service upon which the attorney relies only references Jacara Chas. There is nothing in the record about any search for Todd Chas, or anything supporting a diligent search for the Chases at any address after they sold the condo.
5. The Affidavit of Publication shows the Notice of Publication was published in The Post and Courier, on October 7, 14, and 21, 2010. (R. p. 76). However, Plaintiff did not file an Affidavit in Support of an Order of Publication until November 18, 2010. The Publication Order was filed November 22, 2010. (R. p. 78). Plaintiff attempted to serve the Chases by publication, but did not have the required order at the time of publication.
6. The Order for Service by Publication is defective because the Order refers to an "Amended Summons" and an "Amended Complaint" be served by publication on the Chases. (R. p. 78). There is no Amended Summons or Amended Complaint filed in this case. The Publication Order orders the service of documents that do not exist.
7. The Order for Service or Publication was not issued properly, was not in accordance with the law, and is null and void. There is no law that supports the issuance of the Publication Order *nunc pro tunc*;
8. The Notice of Publication is defective because it does not state when the Complaint was filed. (DM19). S.C. Code Ann. § 15-9-740.

The irregularities acknowledge by Price demonstrate that nothing was done properly regarding service by publication. Based on the defects with the service by publication, service was voided as a matter of law and there is no evidentiary support of service by Publication.

B. Chases Make No New Arguments That Were Not Made During the Hearing

Price contends that the Chases failed to argue that service by publication was defective because the published summons did not note the date of its filing and this issue cannot be brought up now. Price's contention is not supported by the record. The Chases' original motion to set aside the judgment and supporting memorandum of law states on page 7 of 8 that, "the Notice of Publication is defective because it does not say when the Complaint was filed." (R. pp. 67, para. 5). This is just one more example of where Price failed to follow the required rules for service by publication and demonstrates the complete inadequacy of service.

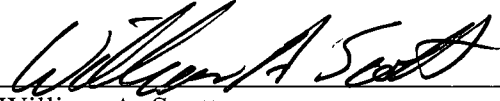
CONCLUSION

For the foregoing reasons, the Chases request that this matter be remanded to the trial court for a reasoned decision on the Chases' Motion to Set Aside the Judgment, or alternatively, that this court issue an order setting aside the judgment, and that the case against the Chases be remanded so that the Chases can properly defend themselves in a trial on the merits.

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Respectfully submitted.

PEDERSEN & SCOTT, P.C.

A handwritten signature in black ink, appearing to read "William A. Scott", written over a horizontal line.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellants' Final Reply Brief complies
with Rule 211(b), SCACR.

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Dated: March 21, 2016

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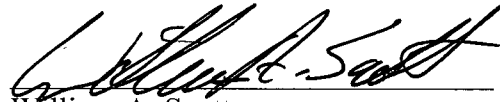
Of whom Todd Chas and Jacara Chas are the.....Appellants.

PROOF OF SERVICE

I certify that I served the Appellants' Final Reply Brief, Certificate of Counsel and Proof of Service by depositing a copy of it in the United States Mail, postage prepaid, on March 21, 2016, addressed to counsel for Respondent, Andrew S. Radeker, Esq., Harrison & Radeker, P.A., Post Office Box 50143, Columbia, SC 29250.

[SIGNATURE ON NEXT PAGE]

PEDERSEN & SCOTT, P.C.

A handwritten signature in black ink, appearing to read "William A. Scott", written over a horizontal line.

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