

DESTATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

PEARLINE WILLIAMS,

Plaintiff,

-vs-

LARITA HIPPI AND MICHELLE
MASARYK

Defendants.

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2015-CP-40-05106

ORDER DENYING DEFENDANT
MASARYK'S MOTION TO SET ASIDE
DEFAULT JUDGMENT

RECEIVED

SEP 29 2016

SC Court of Appeals

RICHLAND COUNTY
FILED
2016 JUL 22 AM 9:16
J. BETTE W. HOBBS
CLERK, C.P. & G.S.

FACTS

Plaintiff was involved in a wreck with both Defendants on December 18, 2014. Suit was filed against both Defendants on August 20, 2015. Defendant Hipp settled with Plaintiff and is no longer a party to this action. Service on Defendant Masaryk was attempted on September 2, 2015 at her address as set forth on both the accident report and her driver's license of 1300 Longcreek Drive, apartment 713. Defendant Masaryk no longer resided at 1300 Longcreek Drive, apartment 713, as stated by the current occupier of apartment 713. An affidavit of non-service was filed by the process server which stated after a 'due and diligent search' the process server was unable to effect service. Plaintiff requested and received a signed Order for Publication by the Richland County Clerk of Court on November 13, 2015. Plaintiff published notice of the suit with the Columbia Star for three consecutive weeks (the weeks of November 27, December 4, December 11) as confirmed by affidavit of service by the Columbia Star. Plaintiff filed an Order of Default which was signed by the Honorable Allison Lee on

March 3, 2016 and filed on March 8, 2016.

A damages hearing was held on March 22, 2016. An Order Awarding Damages Against Defendant Masaryk and a Form 4 Judgment both date stamped March 23, 2016 was issued by this court awarding Forty-Five Thousand Dollars (\$45,000.00). *(Multiple Orders awarding damages against Defendant Masaryk were issued by this Honorable Court on March 21, 2016 and March 23, 2016. Upon review of the record, a clerical error occurred resulting in multiple Orders being recorded and granting damages against Defendant Masaryk. The Order date stamped March 23, 2016 in the amount of Forty-Five Thousand Dollars (\$45,000.00) is the binding and correct Order and judgment as reflected in the transcript.)*

Defendant filed a motion to set aside any and all Orders awarding damages against Defendant Masaryk. Defendant sets forth two arguments to set aside the default judgment. First, Defendant argues that Plaintiff's affidavit of due diligence filed to obtain an Order of service by publication fails to comply with the requirements set forth in S.C. Code Section 15-9-710. Secondly, Defendant argues that the notice by publication in this matter is factually insufficient to satisfy both South Carolina's policy to resolve cases on the merits and the Constitutional requirements of due process.

ARGUMENT OF PARTIES

Defendant argues that Plaintiff failed to comply with S.C. Code Section 15-9-710 and cites *Caldwell v. Wiquist* to support her position. 402 S.C. 565 (Ct. App. 2013). In *Wiquist*, the Plaintiff attempted service on a Defendant. Defendant was not found at his last known address. An affidavit of non-service was filed stating "ADDRESS VACANT". The affidavit requesting service by publication stated "The Defendant who is a non-resident of Beaufort County, South

Carolina, cannot be served a copy of the Summons in Beaufort County and it is necessary and proper to serve her by publication.” A default judgment was entered against Defendant. Defendant filed a motion to set aside the default judgment alleging the affidavit requesting service by publication failed to comply with S.C. Code Section 15-9-740 (a companion statute addressing service by publication). The trial court denied Defendant’s motion and Defendant appealed. The Court of Appeals overruled the trial court and set aside the default judgment for failure to comply with S.C. Code Section 15-9-740. The Court stated that the affidavit filed by the process server only indicated that Defendant could not be served in Beaufort County and contained no information regarding whether or not Defendant could be found in the State of South Carolina. The Court found that the affidavits requesting publication were defective on their face because they clearly displayed that Plaintiff tried to serve Defendant *only* in one county. Furthermore, the affidavits did not contain *any* statements regarding the due diligence and *did not even contain the phrase ‘due diligence’*. The Court of Appeals concluded that the affidavit requesting publication must include some factual basis upon which the court issuing the order of service by publication can find that the defendant cannot, after due diligence, be found within the state.

Plaintiff argues that she complied with all requirements set forth in S.C. Code Sections 15-9-710 and 15-9-740. Plaintiff filed an affidavit of non-service which states as follows-- ‘Resident stated, he does not know defendant, his/her whereabouts or contact information. He moved into apartment 6 months ago.’ Furthermore, the affidavit of non-service states ‘After due and diligent search, undersigned was unable to effect service.’ (*Exhibit #1*). Plaintiff filed an affidavit for publication which stated in part ‘that after due diligence, the Defendant cannot be

found...and that this affidavit is made for the purposes of serving Defendant by publication.’ Plaintiff argues that the Court of Appeals in *Wiquist* overturned the default judgment due to Plaintiff’s failure to state *any* facts regarding service and due diligence. Plaintiff further argues the scope of *Wiquist* is limited to the facts in that case where Plaintiff only searched one county for Defendant’s residence and *specifically* stated such in his affidavit of service. Plaintiff Williams asserts that the affidavit of her process server *as well as* the affidavit for publication both provide ample facts to support a finding that Plaintiff used due diligence in her attempt to obtain Defendant Masaryk’s proper address and whereabouts in the State of South Carolina. Furthermore, as supported by Defendant’s affidavit filed with her Motion to Set Aside the Default Judgment, Defendant had *moved out of state* at the time of attempted service; therefore, service could not have been obtained on Defendant *within the state (Exhibit #2)*. Additionally, Plaintiff filed an affidavit from her process server stating he performed a ‘skip trace’ (internet search) for all possible addresses of Defendant and no addresses came back for Defendant *(Exhibit #3)*.

Defendant’s second argument to this Court is that Plaintiff’s notice by publication is factually insufficient to satisfy South Carolina’s policy to resolve cases on its merits and the Constitutional requirements of due process. Defendant cites and relies on multiple cases including *Roberts* supporting the argument that Plaintiff must take multiple and sufficient steps to locate the Defendant. *Jacob v. Roberts*, 223 U.S. 261, 267, 32 S. Ct. 303, 305-306, 56 L. Ed. 429 (1912). Defendant also argues Plaintiff must publish the notice of publication in a statewide newspaper. Defendant alleges Plaintiff failed to conduct a proper search for Defendant to satisfy due process. Defendant argues the newspaper that published service on Defendant does not

cover a large enough area of the State of South Carolina and therefore does not satisfy the definition of requirement of service per S.C. Code Section 15-9-740.

Plaintiff argues her process server took all necessary steps to locate Defendant and properly published notice to Defendant in a newspaper as required per S.C. Code Section 15-9-710. Plaintiff argues her process server used due diligence in an attempt to located Defendant in the State of South Carolina. Plaintiff further argues that due process was satisfied when she published the notice to Defendant in the newspaper as required and in compliance with S.C. Code Section 15-9-740.

FINDINGS

1. I find Plaintiff provided ample evidence to this Court that due diligence was used in her attempt to locate and serve Defendant in the State of South Carolina.
2. I find Plaintiff's affidavit of non-service on Defendant includes all necessary facts concerning the process server's efforts to locate the Defendant and supports a finding of due diligence by the process server in his attempts to locate Defendant in the State of South Carolina.
3. I find Plaintiff's affidavit requesting service by publication provided documentation of due diligence and complied with all statutory requirements set forth in S.C. Code Section 15-9-740.
4. I find that Plaintiff's process server's subsequent affidavit stating he performed a 'skip trace' which documented Defendant did not have a South Carolina address at the time of attempted service, coupled with Defendant's affidavit that she moved out of state, further supports the court's finding that due diligence was used by Plaintiff.
5. I find Plaintiff's notice of publication and use of the newspaper to publish notification to

Defendant is in compliance with S.C. Code Section 15-9-710 and satisfies all due process and South Carolina requirements regarding service and notice.

6. I find Plaintiff complied with all statutory requirements as set forth in S.C. Code Section 15-9-710 in serving Defendant by publication.

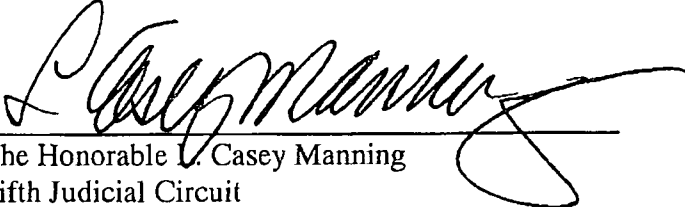
7. I find the Richland County Clerk of Court properly issued an Order for Publication to Plaintiff based on the facts as set forth in Plaintiff's process server's affidavit of non-service and Plaintiff's affidavit requesting service by publication.

8. I find Defendant has failed to provide evidence that the default judgment entered against Defendant was void, and therefore the motion to set aside the default judgment fails to satisfy Rule 60(b)(4) SCRPC.

9. I find the default judgment against the Defendant for Forty-Five Thousand Dollars (\$45,000.00) is affirmed.

THEREFORE, Defendant's motion to set aside the default judgment is hereby **DENIED** and Plaintiff's award and default judgment of Forty-Five Thousand Dollars (\$45,000.00) is hereby **AFFIRMED**.

AND IT IS SO ORDERED.


The Honorable U. Casey Manning
Fifth Judicial Circuit

Richland, South Carolina

July 20, 2016