

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

MidFirst Bank,

PLAINTIFF,

vs.

Richard Brady; State of South Carolina; and
Richland County Clerk of Court,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2016-CP-40-02457

ORDER

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SC Court of Appeals

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RICHLAND COUNTY
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JEANETTE R. GOSWAMI
CLERK OF COURT

Date of Hearing: August 8, 2017
Presiding Judge: Hon. Joseph M. Strickland
Plaintiff's Attorney: Carl D. Hiller, Esquire
Defendant Richard Brady's
Attorney: Leonard R. Jordan, Jr., Esquire

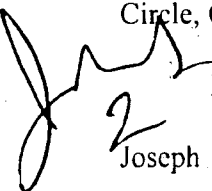
The parties were before the Court on a Motion to Reconsider and Alter or Amend Master's Order ("Motion") filed by Defendant Richard Brady ("Defendant"). Plaintiff was represented in the courtroom by its attorney, Carl D. Hiller of the Finkel Law Firm, LLC. Defendant was represented in the courtroom by his attorney, Leonard R. Jordan, Jr. No representatives for Defendant the State of South Carolina or Defendant Richland County Clerk of Court were present at the hearing.

BACKGROUND

This is an action for foreclosure on real property. The monthly payments due on the subject note and mortgage are in default. The Summons, Lis Pendens, Complaint, and Notice of Foreclosure Intervention were filed April 15, 2016. Plaintiff's agent for service of process attempted service on the Defendant at the subject property located at 1816 Haviland Circle on April 16, 2016, and at 3240 Dreher Shoals Road, Irmo, South Carolina on April 29, 2016. Defendant was unable to be served at either location.

In a prior foreclosure action against Defendant regarding the subject property, civil action 2014-CP-40-05813, Plaintiff effectuated personal service upon Defendant at the 3240 Dreher Shoals Road address on September 24, 2014. At that time, the 3240 Dreher Shoals Road address was Defendant's residence. This address is also where Defendant was personally served in another foreclosure, civil action 2014-CP-40-04625 on October 19, 2014.

An Order of Publication for service upon Defendant was issued by the Court and filed on May 13, 2016. The Order was supported by affidavit of Plaintiff's counsel, attesting that Defendant could not be located for service after due diligence and that a copy of the pleadings was sent to the subject property. An Affidavit of Default by Publication was filed with the Court July 16, 2016, indicating that service was completed by publication in the Columbia Star on May 27, 2016, June 3, 2016, and June 10, 2016 and requiring that a copy of the Summons, Complaint, Lis Pendens and Notice of Foreclosure Intervention be mailed to Defendant at 1816 Haviland Circle, Columbia, SC 29210.



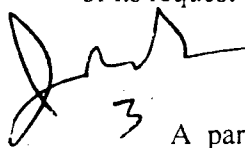
Pursuant to Order entered on July 26, 2016, the matter was referred to the Honorable Joseph M. Strickland, Master in Equity for Richland County. An Order and Judgment of Foreclosure and Sale was entered on September 21, 2016, and for three consecutive weeks the property was advertised for public auction to be held on October 3, 2016. The subject property sold to Plaintiff as the successful bidder at the foreclosure sale, and a Master's Deed was recorded November 7, 2016 in Book R2162 at Page 3151 in the Richland County Register of Deeds Office.

Defendant filed a Motion to Vacate Judgment of Foreclosure and Sale and Foreclosure Sale on October 24, 2016, alleging that service upon him by publication was improper and thus the Order and Judgment of Foreclosure and Sale was void. Defendant also sought to set aside

the judicial sale held October 3, 2016. Defendant contends that Plaintiff and Plaintiff's counsel knew that Defendant did not reside at either 1816 Haviland Circle or 3240 Dreher Shoals Road when it submitted its affidavit to the clerk of court in support of its request for an Order of Publication. Defendant further contends that Plaintiff and Plaintiff's counsel knew that Defendant maintained a post office box (PO Box 727, Irmo, SC 29063), and that Plaintiff failed to attempt to serve Defendant at this post office box.

This Court issued an Order on May 10, 2017 denying Defendant's Motion to Vacate Judgment of Foreclosure and Sale and Forclosures Sale. The Order is attached hereto as **Exhibit A** and incorporated herein. On May 22, 2017, Defendant filed this Motion reiterating his previous arguments and contending that the affidavit submitted by Plaintiff's counsel in support of its request for the Order of Publication was facially defective.

STANDARD



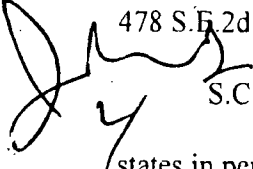
A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief. *Bowers v. Bowers*, 304 S.C. 65, 67 403 S.E.2d 127, 129 (Ct. App.1991). Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. *Coleman v. Dunlap*, 306 S.C. 491, 494 413 S.E.2d 15, 17 (1992). Rule 60, SCRPC, is entitled "Relief from Judgment or Order," and subsection (b) states in pertinent part as follows:

- (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
 - (1) ***
 - (2) ***
 - (3) ***

(4) the judgment is void;

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken.

A judgment of a court without subject matter jurisdiction is void and constitutes grounds for the court to vacate the judgment under Rule 60(b)(4). *Thomas & Howard Co., Inc. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995); Rule 60(b)(4) (stating a court may relieve a party from a final judgment if the judgment is void). "A void judgment is one that, from its inception, is a complete nullity and is without legal effect and must be distinguished from one which is merely 'voidable.'" *Id.* 318 S.C. at 291, 457 S.E.2d at 343 (1995). The definition of "void" under Rule 60, SCRCF only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction. *See McDaniel v. U.S. Fidelity and Guar. Co.*, 324 S.C. 639, 478 S.E.2d 868, 871 (Cl. App. 1996) (citing *Thomas*, 318 S.C. 286, 457 S.E.2d 340 (1995)).

 S.C. Code § 15-9-710 grants the ability to serve a defendant via publication. § 15-9-710

states in pertinent part:

When the person on whom the service of the summons is to be made cannot, **after due diligence**, be found within the State **and (a) that fact appears by affidavit to the satisfaction of the court or judge thereof, the clerk of the court of common pleas**, the master, or the probate judge of the county in which the cause is pending and (b) it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made or that he is a proper party to an action relating to real property in this State, the court, judge, clerk, master, or judge of probate **may grant an order that the service be made by the publication of the summons in any one or more of the following cases:**

(1) ***

(2) ***

(3) when the defendant is a resident of this State and **after a diligent search cannot be found;**

(emphasis added). The order shall direct the publication to be made by newspaper and it shall also direct "that a copy of the summons be forth with deposited in the post office directed to be served at his last place of residence, **unless it appears that such residence is neither known to the party making the application nor can, with reasonable diligence, be ascertained by him.**" S.C. Code Ann. § 15-9-740.

Generally, "when the issuing officer is satisfied by the affidavit, his decision to order service by publication is final **absent fraud or collusion.**" *Yarbrough v. Collins*, 293 S.C. 290, 360 S.E.2d 300 (1987) (emphasis added). *See also Montgomery v. Mullins*, 325 S.C. 500, 506, 480 S.E.2d 467, 470 (Ct. App. 1997), *Ingle v. Whitlock*, 282 S.C. 391, 318 S.E.2d 367 (1984); *Gibson v. Everett*, 41 S.C. 22, 19 S.E. 286 (1894); *Yates v. Gridley*, 16 S.C. 496 (1882). When the affidavit submitted is "facially defective" and not in compliance with the publication statute, a court may overturn the order of publication in the absence of fraud of collusion. *See Belle Hall Plantation Homeowner's Association v. Murray*, 419 S.C. 605, 799 S.E.2d 310 (Ct. App. 2017) and *Caldwell v. Wiquist*, 402 S.C. 565, 741 S.E.2d 128 (Ct. App. 2013).



FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon review of the Motion and the Order, the arguments of the parties' respective counselors, and the statutory and decisions law of the State of South Carolina, I find and conclude the following:

1. I have jurisdiction over this action pursuant to Order entered on July 26, 2016;
2. Defendant has failed to provide sufficient evidence to convince this Court that Plaintiff and/or Plaintiff's counsel committed fraud, colluded, or was grossly negligent in any manner in obtaining an Order of Publication from the clerk of court.

Plaintiff attempted personal service of the Defendant at the subject property located at 1816 Haviland Circle and at 3240 Dreher Shoals Road, Irmo, South Carolina on April 29, 2016. Defendant was served at 3240 Dreher Shoal Road successfully in two previous foreclosure actions;

3. Defendant has failed to provide sufficient evidence to convince this Court that the Affidavit filed in support of Plaintiff's request for an Order of Publication is facially defective. Plaintiff stated that it attempted to personally serve Defendant with proper due diligence, including attempting to serve him at the subject property. Plaintiff was not aware of the Defendant's residence (the reason an Order of Publication was necessary), therefore it was appropriate for the clerk of court to issue an Order of Publication requiring that the Summons, Complaint, Lis Pendens and Notice of Foreclosure Intervention be mailed to the subject property in accordance with S.C. Code Ann. § 15-9-740; and
4. Since there is no basis for finding the judgment void, there is no basis for vacating the judicial sale held October 3, 2016.

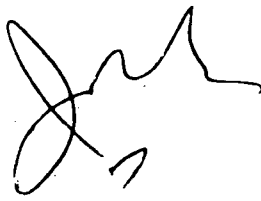
NOW, THEREFORE, based on the pleadings duly filed, the evidence before the Court and the Findings of Fact and Conclusions of Law set forth above,

IT IS HEREBY ORDERED THAT:

- a. Defendant has again failed to provide sufficient evidence to convince this Court that Plaintiff and/or Plaintiff's counsel committed fraud, colluded, or was grossly negligent in any manner or that the affidavit submitted by the Plaintiff was facially defective in and therefore Defendant's Motion must be **DENIED**.

IT IS SO ORDERD.

Columbia, South Carolina
Sept 13, 2017



JOSEPH M. STRICKLAND
MASTER IN EQUITY
FIFTH JUDICIAL CIRCUIT

