THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Deadra L. Jefferson, Circuit Court Judge
Kristi Lea Harrington, Circuit Court Judge

Case No. 2016-CP-10-1355

Carolina Construction Solutions .....Respondent,

v.

Eagles Landing Properties, LLC, Myron L. Hyman, Jr., Individually, and as Trustee of the Myron L. Hyman, Jr.,-1998 Trust, U/A Dated June 30, 1998 as Amended Eagles Landing Restaurants, LLC, Eagles Landing International LLC, Elite Construction Company, and Vincent C. Carter ..... Defendants,

Of Whom,
Myron L. Hyman, Jr., Individually, and as Trustee of the Myron L. Hyman, Jr. -1998 Trust, U/A Dated June 30, 1998 as Amended ..... Appellants

INITIAL BRIEF OF APPELLANTS

Walker H. Willcox #72608
Willcox, Buyck & Williams, P.A.
PO Box 1909
Florence, S C 29503-1909
(843) 662-3258 - Tel.
(843) 662-1342 - Fax
Email: wwillcox@willcoxlaw.com
Attorney for Appellants

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN HOLDING THAT A TENANT'S EMPLOYEE MAY ACCEPT SERVICE OF PROCESS FOR THE TENANT'S LANDLORD?

II. DID GOOD CAUSE AND THE INTEREST OF JUSTICE REQUIRE THE TRIAL JUDGE TO SET ASIDE THE DEFAULT JUDGMENT?

STATEMENT OF THE CASE

On March 17, 2016, Carolina Construction Solutions ("Plaintiff") commenced this action seeking a mechanic's lien foreclosure against Eagles Landing Properties, LLC and Myron L. Hyman, Jr. individually and as Trustee of the Myron L. Hyman, Jr.,-1998 Trust, Under Agreement Dated June 30, 1998, as Amended (hereinafter collectively referred to as "Hyman" and the trust referred to as the "Hyman Trust"). Plaintiff also raised claims against Elite Construction Company ("Elite") for a suit on a verified account, and it raised claims against Elite, Hyman and Eagles Landing Properties, LLC, Eagles Landing Restaurants, LLC and Eagles Landing International, LLC (collectively referred to as "Eagles Landing") for quantum meruit.

Plaintiff attempted to serve the summons and complaint on Hyman and Eagles Landing by certified mail restricted delivery to Eagles Landing's office address in Florence, South Carolina. Hyman did not answer or otherwise appear.[1] On March 15, 2017, Plaintiff filed a Motion for Entry of Default Judgment against Hyman. Plaintiff submitted a proposed order with the motion.

On March 22, 2017, Eagles Landing served a Motion to Dissolve the Mechanic's Lien and Response in Opposition to the Motion for Entry of Default against Hyman. Eagles Landing's pleadings were filed on March 30, 2017.

On April 3, 2017, the Honorable Deadra L. Jefferson ("Judge Jefferson") signed the Order granting a Default Judgment against Hyman. On April 13, 2017, Eagles

[1] Eagles Landing and Elite answered the complaint.

Landing served a Motion to Reconsider the Order. The Trial Court issued a notice of hearing for May 17, 2017, on Eagles Landing Motion to Dissolve the Mechanic's Lien, Opposition to the Motion for Default Judgment and Motion to Reconsider. On May 15, 2017, Hyman served a Motion to Set Aside Default and Motion to Dismiss. On May 17, 2017, the Honorable Kristi Lea Harrington ("Judge Harrington") heard all pending motions, and on May 24, Judge Harrington signed an Order denying the motions. The Form 4 Order was filed on June 2, 2017. This appeal followed.

STATEMENT OF THE FACTS

The Hyman Trust owns a commercial building at 771 Daniel Ellis Drive, Charleston, South Carolina ("Property"). Eagles Landing Restaurants, LLC ("Eagles Landing Restaurants") entered into a long term lease with the Hyman Trust to use the property to operate an IHOP restaurant. (Affidavit of Myron L. Hyman, ¶ 1-3; R____ and Affidavit of Mohamed Makawi, ¶ 4; R____). Eagles Landing contracted with Elite for it to perform an up fit to the Property to make it suitable for the IHOP. Elite entered into a contract with Plaintiff for it to provide labor for the up fit. (Complaint, ¶ 12; R_____). The Hyman Trust did not enter into a contract with Plaintiff to perform services at the Property, and it had no knowledge of the work done on the Property. (Affidavit of Myron L. Hyman, Jr., ¶ 6; R____). Neither the Hyman Trust nor Hyman individually had any involvement with the up fit. (Id.).

On March 17, 2016, Plaintiff commenced an action against Hyman, Eagles Landing and Elite claiming that it was not paid for services provided. (Complaint; R_____). Plaintiff sought a mechanic's lien foreclosure and money damages against the defendants. (Id.). Plaintiff did not assert the mechanic's lien against Eagles Landing's leasehold interest; rather, it attempted to assert the lien against the Hyman Trust's ownership interest. (Id.).

Plaintiff attempted to serve Eagles Landing and Hyman by certified mail restricted delivery to Eagles Landing's corporate office located at 1401 B Cherokee Road, Florence, South Carolina. (Certified Mail Receipts; R_____). Plaintiff did not attempt any other type of service against Hyman. Donna Sweat ("Sweat") signed the

certified mail receipts for the mail addressed to Eagles Landing and Hyman. (Id.). Sweat does not have authority to accept service of process for Hyman. (Aff. of Makawi, ¶ 5; R____ and Aff. of Hyman,). Eagles Landing does not have authority to accept service of process for Hyman. (Id.).

Hyman's office is located at Sheridan Plaza Properties, 745 Delaware Road, Buffalo, New York, 14223. (Aff. of Hyman, ¶ 3; R____). A simple google search would have revealed this fact. (Google Search Result; R____). In addition, Hyman's address is on the vesting deed, which Plaintiff would have seen when filing the mechanic's lien. (Special Warranty Deed; R____). Moreover, the certified mail restricted delivery addressed to Hyman was signed by the same person who signed the receipts for Eagles Landing which is another clear indicator that service was ineffective. (Cert. Mail Receipts; R____).

On March 15, 2017, Plaintiff filed a Motion for Default Judgment against Hyman. (Motion for Default Judgment; R_____). On March 22, 2017, Eagles Landing served a response in opposition to the motion and a Motion to Dissolve the Mechanic's Lien. (Response in Opposition and Motion to Dissolve the Mechanic's Lien; R_____). For clerical reasons, Eagles Landings were not filed until Thursday, March 30, 2017. (Id.).

On April 3, 2017, which was a Monday, Judge Jefferson signed the proposed order that was submitted with Plaintiff's Motion for Default Judgment. (Order dated April 3, 2017; R_____). Judge Jefferson likely did not have the benefit of reviewing Eagles Landing's response before she signed the Order. On April 13, 2017, Eagles Landing served a Motion to Reconsider the Order. (Motion to Reconsider; R____). The

Court scheduled a hearing for May 17, 2017, on Eagles Landing's Motion to Reconsider, Motion to Dissolve the Mechanic's Lien and Response in Opposition to the Motion for Default Judgment.

Eagles Landing's attorney notified Hyman of the Default Judgment which was the first notice it received of the lawsuit and judgment. (Aff. of Hyman, ¶ 7; R____). On May 15, 2017, Hyman filed a Motion to Dismiss or to Set Aside the Default Judgment. (Motion to Dismiss or Set Aside Default Judgment; R_____).

On May 17, 2017, Judge Harrington heard Eagles Landing's motion and response, and Judge Harrington also heard Hyman's motion. (Order filed June 2, 2017; R____). Plaintiff waived any notice requirement relating to Hyman's motions. (Transcript for Hearing Dated May 17, 2017, p. 7, l. 18-p. 9, l. 4; R_____). Judge Harrington issued a Form 4 Order denying Eagles Landing's Motion to Reconsider and Motion to Dissolve the Mechanic's Lien and Hyman's Motion to Dismiss or Set Aside the Default Judgment. (Id.).[2] This appeal followed (Notice of Appeal; R_____).

ARGUMENT AND CITATION OF AUTHORITY

STANDARD OF REVIEW

"The decision to grant or deny a motion for relief from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." Stearns Bank National Association v. Glenwood Falls, L.P., 373 S.C. 331,

[2] Hyman's motion was not scheduled to be heard on May 17, 2017. Consequently, counsel emailed Hyman's executed affidavit to Judge Harrington on May 18, 2017, the day after the hearing and before Judge Harrington issued an order. (May 18, 2017, E-mail; R____). The existence of the affidavit was argued and discussed during the hearing. (Transcript for hearing dated May 17, 2017, p. 17, l. 14-p. 18, l.

336, 644 S.E.2d 793, 795 (Ct. App. 2007). "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." Id.

I. THE TRIAL COURT ERRED IN HOLDING THAT A TENANT'S EMPLOYEE HAS AUTHORITY TO ACCEPT SERVICE OF PROCESS FOR THE TENANT'S LANDLORD

Plaintiff decided to rely solely on Rule 4(d)(8), SCRCP to effectuate service of process and establish personal jurisdiction over Hyman. *See* BB&T v. Taylor, 369 S.C. 548, 551-552, 633 S.E.2d 501, 503 (2006)(a court generally obtains personal jurisdiction by the service of a summons and complaint).

Rule 4(d)(8) states as follows:

> *Service by Certified Mail.* Service of a summons and complaint upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule may be made by the plaintiff or by any person authorized to serve process pursuant to Rule 4(c), including a sheriff or his deputy, by registered or certified mail, return receipt requested and delivery restricted to the addressee. Service is effective upon the date of delivery as shown on the return receipt. Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing the acceptance by the defendant. **Any 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.** If delivery of the process is refused or is returned undelivered, service shall be made as otherwise provided by these rules.

Rule 4(d)(8), SCRCP (emphasis added).

A. Sweat was not authorized to accept service of process for Hyman

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24; R____). Plaintiff did not object to the affidavit, and Judge Harrington did not indicate in her order that she did not consider the affidavit.

The class of persons authorized to sign a return receipt on behalf of a defendant is narrow. Graham Law Firm v. Makawi, 396 S.C. 290, 294, 721 S.E.2d 430, 433 (2012). "Actual appointment for the specific purpose of receiving process normally is expected and the mere fact a person may be considered to act as a defendant's agent for some purpose does not necessarily mean that the person has authority to receive process." Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 67 (Ct. App. 1996).

The courts should 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 alleged agent. Id. Evidence must exist that a defendant intended to confer authority. Id. Apparent authority must be based on manifestations of a defendant, not the agent, that the agent was authorized to accept process. Roberson v. Southern Finance of South Carolina, Inc., 365 S.C. 6, 10, 615 S.E.2d 112, 115 (2005).

The undisputed evidence establishes that Sweat was an office worker at Eagles Landing's corporate office in Florence. (Aff. of Makawi, ¶ 6; R____). Neither Eagles Landing nor Sweat had authority to accept service of process for the Hyman Trust or Hyman individually. (Id. and Aff. of Hyman, ¶ 4; R____). Nothing about the relationship between either Sweat and Hyman or Hyman and Eagles Landing would lead one to believe that Sweat, who was an office worker for one of the Hyman Trust's tenants, was authorized to accept service for Hyman. Sweat was an unauthorized person to sign the return receipts for the Hyman Trust and Hyman individually.

B. No statute or rule authorizes substitute service of a landlord on a tenant

Plaintiff did not offer proper evidence to rebut Hyman's production of evidence that an unauthorized person signed the return receipts. Plaintiff relied on the argument that it could use Eagles Landing's office for service because it was the location where the Charleston County *ad valorem* tax notices were sent. However, no statute authorizes substitute service of process on a landlord through service on a tenant or the recipient of a tax notice.

Landlords and tenants are often not aligned and commercial tenants are typically responsible for paying property tax on a commercial space. Allowing this new common law rule of substitute service requested by Plaintiff would likely lead to harsh and unfair results. The inequitable result in this case is compounded by Plaintiff's constructive knowledge of Hyman's correct address in New York.

C. Conclusion

Hyman demonstrated that Sweat was not authorized to accept service of process for them, and Plaintiff offered no evidence to rebut Sweat's lack of authority. Moreover, the Trial Court did not state the evidence it relied on to deny Hyman's motion, and its decision lacked evidentiary support. (Form Order dated May 24, 2017 and filed June 2, 2017; R____). The failure of evidentiary support provides another ground for reversal. *See* Stearns Bank National Association, 373 S.C. at 336, 644 S.E.2d at 795 (abuse of discretion when factual conclusion lacks evidentiary support).

The Trial Court abused its discretion in refusing to set aside the default judgment as void and dismiss Hyman from the action. *See* Roberson, 365 S.C. at 10, 615 S.E.2d at

115 (2005)(there is no need to address remaining factors to set aside default judgment when no valid service exists as the default judgment is void).

II. GOOD CAUSE AND THE INTEREST OF JUSTICE REQUIRE SETTING ASIDE THE DEFAULT JUDGMENT

Under Rule 55(c), SCRCP, a default judgment may be set aside for good cause. Melton v. Olenik, 379 S.C. 45, 54, 664 S.E.2d 487, 492 (Ct. App. 2008). "Rule 55(c) should be liberally construed to promote justice and dispose of cases on the merits." Id. Courts should consider the following factors to decide whether to grant relief from a default judgment: (1) the timing of the motion for relief, (2) whether the defendant has a meritorious defense, and (3) the degree of prejudice to plaintiff. Sundown Operating Co. v. Intedge Industries, Inc., 383 S.C. 601, 607-608, 681 S.E.2d 885, 889 (2009).

1. Timing of the motion for relief

Hyman discovered that the lawsuit had been filed and judgment entered against it after the Trial Court simultaneously entered default and default judgment in April 2017. (Aff. of Hyman, ¶ 7; R_____). Hyman filed a motion for relief before the Trial Court heard Eagles Landing's motion to reconsider the order. Hyman timely moved for relief and the first factor favors setting aside default.

2. Meritorious defense

South Carolina Code Section 29-5-10 provides in pertinent part as follows:

> A person to whom a debt is due for labor performed or furnished or for materials furnished and actually used in the erection, alteration, or repair of a building ... by virtue of an agreement with, or by consent of, the owner of the building or structure, or a person having authority. . . from, or rightfully. . . acting for, the owner in procuring or furnishing the labor or materials shall have a lien

> upon the building or structure and upon. . . the interest of the owner of. . . the building or structure ... to secure the. . . payment of the debt due.

See also F & D Elec. Contractors, Inc. v. Powder Coaters, Inc., 350 S.C. 454, 458, 567 S.E.2d 842, 843–44 (2002).

A contractor who deals with a tenant may assert a mechanic's lien against the landlord-owner's interest in the real estate if the landlord or its agent specifically consents to the work. Id. at 462 and 846. Specific consent is more than giving a tenant permission to perform repairs or improvement to the premises. Id.

Hyman had no knowledge that Plaintiff performed work on the Property, and Hyman had nothing to do with the up fit. (Aff. of Hyman, ¶ 6; R____). Hyman did not specifically consent to the work allegedly performed by Plaintiff, and Plaintiff cannot assert a mechanic's lien against the Hyman Trust's interest in the Property.

In addition, a subcontractor may only assert quantum meruit claims against the owner of real property if the enrichment to the owner is unjust. Columbia Wholesale Co., Inc. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). Enrichment in this context is unjust if the owner promises to pay the contractor for the work and fails to do so. Id.

Hyman did not request the work performed on the Property and Hyman did not owe any money for the work. No alleged enrichment to Hyman was "unjust," and Plaintiff cannot state a claim for quantum meruit against Hyman.

Plaintiff does not raise cognizable claims against Hyman. The claims against Hyman individually are more egregious as he does not own the Property. This factor strongly counsels in favor of setting aside default.

3. The degree of prejudice to plaintiff

Plaintiff has claims pending against Elite and Eagles Landing. It may seek money damages against the remaining defendants. Allowing Plaintiff to not only retain Hyman in the lawsuit but have a judgment against Hyman does not amount to prejudice against Plaintiff. Rather, doing so is inequitable and not in the interests of justice.

4. Conclusion

Plaintiff fails to assert cognizable claims against either the Hyman Trust or Hyman individually. Hyman timely moved for relief upon learning of the action and default judgment. Setting aside the default judgment will not prejudice Plaintiff. Conversely, doing so will promote the interests of justice and fairness.

CONCLUSION

The Trial Court incorrectly held that a tenant may accept service of process for a landlord. In addition, the relevant factors which are considered to determine whether interests of justice and equity require a court to set aside a default judgment strongly favor Hyman. Hyman requests that the Court reverse the Trial Court's decision, and grant Hyman's Motion to Set Aside Default Judgment and Motion to Dismiss them from the action. In the alternative, Hyman requests that the Court set aside the default judgment and either instruct the Trial Court to decide Hyman's Motion to Dismiss or allow Hyman to submit an answer to the complaint.

Respectfully Submitted

Walker H. Willcox #72608
Willcox, Buyck & Williams, P.A.
PO Box 1909
Florence, S C 29503-1909
(843) 662-3258 - Tel.
(843) 662-1342 - Fax
Email: wwillcox@willcoxlaw.com
Attorney for Appellant

November 21, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Deadra L. Jefferson, Circuit Court Judge
Kristi Lea Harrington, Circuit Court Judge

Case No. 2016-CP-10-1355

Carolina Construction Solutions ..... Respondent,

v.

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Of Whom,
Myron L. Hyman, Jr., Individually, and as Trustee of the Myron L. Hyman, Jr. -1998 Trust, U/A Dated June 30, 1998 as Amended ..... Appellants,

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PROOF OF SERVICE

I certify that on November 21, 2017, I served Appellants' Initial Brief and Designation of Matter to be Included on the Record on Appeal on the Respondent, through its attorney of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

Alan R. Belcher, Jr.
Hall Booth Smith, P.C.
40 Calhoun Street
Charleston, SC 29401
Attorney for Respondent

WILLCOX, BUYCK & WILLIAMS, P.A.

By: 

Walker H. Willcox I.D. No. 72608
PO Box 1909
Florence, SC 29503-1909
(843) 664-3373 - Tel - (843) 662-1342 - Fax
Attorney for Appellants

November 21, 2017

Mark W. Buyck, Jr.
Hugh L. Willcox, Jr.
Wm. Reynolds Williams♦
Mark W. Buyck, III
E. Lloyd Willcox, II
John H. Muench † GA & KY
Tracy L. Wright
J. Scott Kozacki
Walker H. Willcox
Paula A. Sartor
Katherine M. Ryan † AL

† Additionally Licensed
♦ Certified Mediator

LAW OFFICES
WILLCOX, BUYCK, & WILLIAMS
PROFESSIONAL ASSOCIATION
www.WillcoxLaw.com
248 West Evans Street (29501)
Post Office Box 1909
Florence, South Carolina 29503-1909

ESTABLISHED 1895

Telephone (843) 662-3258
Fax (843) 662-1342

2050 Corporate Centre Dr
Suite 230
Myrtle Beach,SC 29577
Telephone (843) 650-6777
Fax (843) 650-6767

Reply To: Florence

November 21, 2017

HONORABLE JENNY ABBOTT KITCHINGS
CLERK OF COURT
SC COURT OF APPEALS
PO BOX 11629
COLUMBIA SC 29211

RE: *Carolina Construction Solutions v. Eagles Landing Properties, LLC, et al*
Case No.: 2016-CP-10-1355
Our File No. 14445.16986

Dear Ms. Kitchings:

Enclosed please find an original and one copy of the Initial Brief of the Appellant and the Appellant's Designation of Matter to be Included in the Record on Appeal.

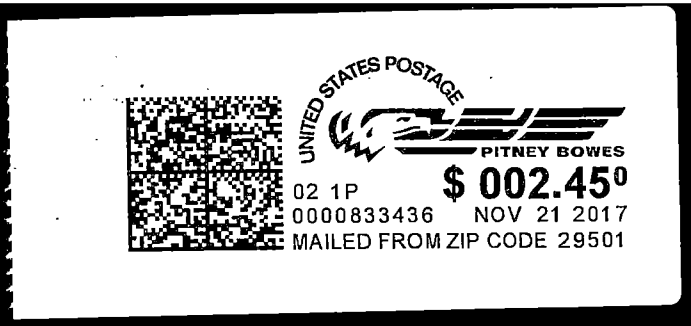
Please return a filed copy to me in the enclosed envelope and if you should have any questions please contact me at (843) 664-3373.

Yours very truly,

Walker H. Willcox
Email: wwillcox@willcoxlaw.com

WHW/bls
enclosure

cc: Mr. Alan Ross Belcher, Jr.
Hall Booth Smith, P.C.
40 Calhoun Street
Charleston, SC 29401



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Post Office Box 1909
Florence, SC 29503

TO: HONORABLE JENNY ABBOTT KITTINGS
CLERK OF COURT
SC COURT OF APPEALS
PO BOX 11629
COLUMBIA SC 29211