

THE STATE OF SOUTH CAROLINA
In the Court of Appeal

The Honorable Alison Renee Lee
Dorchester County
Appellate Case Number 2017-000803

RECEIVED
JAN 02 2018
SC Court of Appeals

Case No.: 2015-CP-18-1891

H. Wayne CharpiaAppellant

V.

Rene McMasters Ronagham, Frank M. Cisa and Cisa & Dodds, LLP, Defendants, of whom

Rene McMasters Ronagham is the.....Respondent

INITIAL BRIEF OF RESPONDENT

This 28th day of December, 2017

Appellant of record:
Howard W. Charpia
717 Old Trolley Road, Suite 6#360
Summerville, SC 29485

Frank M. Cisa
Cisa & Dodds, LLP
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Attorney for Respondent

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STATEMENT OF THE CASE

The Appellant filed this action in the Court of Common Pleas for Dorchester County on September 23, 2015 wherein the Appellant attempts to assert causes of action for breach of contract, negligent misrepresentation, intentional infliction of emotional distress, malicious prosecution, and fraud. (ROA____; filed copy of Complaint). The Defendants , Frank M. Cisa and Cisa & Dodds,LLP were dismissed from this action pursuant to Rule 12(b)(6) for failure to state facts sufficient to constitute causes of action by order of Judge Thomas L . Hughston, Jr. filed December 31, 2015. (ROA___; Order of Dismissal). The Appellant filed an Affidavit of Default as to the Respondent on March 3, 2016, (ROA___: Affidavit of Default and return receipt).The Respondent then filed a Motion to Strike the Affidavit of Default and to Dismiss the Case on August 22, 2016. (ROA___Motion To Strike and to Dismiss). The motion was supported by the affidavit of the Respondent filed on August 22, 2016 .(ROA___; Affidavit of Renee McMasters)

The Motion to Strike the Affidavit of Default and to Dismiss came before Judge Alison Renee Lee on February 6, 2017. By Order dated February 23, 2017 Judge Lee granted the Respondent's Motion to Strike the Affidavit of Default and to Dismiss the Case (ROA___; Order of Judge Allison Renee Lee filed March 2, 2017). Appellant served the Notice of Appeal on March 22, 2017.

STATEMENT OF THE FACTS

This is an appeal of Judge Allison Renee Lee's Order filed March 2, 2017granting the Respondent's Motion to Strike and Dismiss the Case.

The Appellant commenced this action by filing his Complaint on September 23, 2015. (ROA___; Filed copy of Complaint).

The Defendants, Frank M. Cisa and Cisa & Dodds, LLP, were dismissed from this action pursuant to Rule 12(b)(6)SCRCP for failure to state facts sufficient to constitute causes of action by Order of Judge Thomas L. Hughston, Jr. filed December 31, 2015 (ROA___; Order of Dismissal filed December 31, 2015).

The Appellant filed an affidavit of default as to the Respondent on March 3, 2016. Attached to the affidavit of default was a return receipt addressed to Rene McMasters c/o Keller Williams, 1030 Assembly Drive, Fort Mill, S.C., 29708. The return receipt was not signed by the Respondent. (ROA___; Affidavit of Default and return receipt filed March 3, 2016).

The Appellant stated at the hearing before Judge Lee that he tried to serve the respondent on September 15, 2015 and it was returned to him; that he tried to serve Respondent again though the Buncombe County Sheriff's office in Asheville, North Carolina and an affidavit was returned stating the Respondent no longer worked for Keller Williams; and that on January 8, 2016 the Appellant sent a certified return receipt through the US Post Office and that it was signed for by Stephanie Neal (ph). (Tr. P. 12, L1 to p.13, L.16).

The Appellant filed an affidavit on February 2, 2017 stating " That the defendants will not and had not received service." (ROA___; Affidavit of Howard W. Charpia)

As shown by the affidavit of the Respondent which was filed in support of her motion to Strike and Dismiss, the Respondent had no agents located at Keller Williams who are authorized to accept service on her behalf. (ROA___ Affidavit of the Respondent filed August 22, 2016)

Judge Alison Renee Lee granted the Respondent's Motion to Strike the Affidavit of

Default and to Dismiss the case as the Respondent had not been served with the Summons and Complaint. ROA___; Oder of Judge Lee filed March 2, 2017..

ARGUMENT

1. **The Court did not err in Striking the Affidavit of Default and Dismissing the case pursuant to Rules 4 and 5 SCRPC.**

Rule 4(d)(1) SCRPC provides that service of a summons and complaint may be made “by delivering a copy to an agent authorized by appointment or by law to receive service of process”. In this case the appellant failed to offer any evidence that service of the summons and complaint was made on an agent of Respondent. The affidavit of the Respondent states that she has no agents located at Keller Williams who are authorized to accept service on her behalf. (ROA___; Affidavit of Respondent filed August 22, 2016, Paragraph 3.)

Rule 4 SCRPC provides that service of the summons and complaint may be made upon a defendant “ by registered or certified mail, return receipt requested and delivery restricted to the addressee“. Rule 4 SCRPC further provides that “ Service pursuant to this paragraph shall not be the basis for the entry of default or a judgment by default unless the record contains a return receipt showing the acceptance by the defendant”. Rule 4(d)(8) SCRPC. In this case the record does not contain a return receipt showing the acceptance of the summons and complaint by Respondent.

Rule 5 SCRPC does not authorize service of the original summons and complaint on a parties attorney.

“ Upon failure to serve the summons and complaint, the action may be dismissed by the court on the court’s own initiative or upon application of any party” Rule 5(d) SCRPC. This

action was commenced by the Appellant on September 23, 2015. At the time the Motion to Strike and Dismiss were heard more than sixteen (16) months had lapsed since the filing of the Complaint.(ROA__ ; Filed Complaint; ROA__ Order of Judge Lee filed March 2, 2017). Judge Lee was authorized by Rule 5 SCRPC to dismiss the case.

2. Judge Lee did not err in failing to recuse herself due to a conflict of interest.

Appellant sought to challenge the Court's jurisdiction by arguing that he had filed a class action law suit against the First Judicial Circuit and therefore Judge Lee had a conflict. (Tr. P. 6, L17 to p. 9, L9.) Judge Lee properly pointed out that she does not represent the First Judicial Circuit and that she was in Dorchester County by appointment of the Chief Justice. The First Judicial Circuit is a location not an entity. The appellant failed to articulate any valid reason for Judge Lee to recuse herself.

3. The trial court did not err in failing to issue an Order allowing service by publication.

At the time of the hearing on Respondent's Motion to Strike Affidavit of Default and to Dismiss on February 6, 2017, the Appellant pointed out that he filed an affidavit on February 2, 2017 requesting an order to serve the Respondent by publication. Although the affidavit indicated that counsel for the Respondent was copied with the affidavit, Appellant admitted he had not copied or served Respondent's counsel with the affidavit. In the affidavit Appellant stated "That the defendants will not and had not received service".(Tr.p.13,L. 23 to p.14,L. 24). The Motion to Strike and Dismiss was filed on August 22, 2016 and was heard prior to Appellant's request or service of the affidavit for an order of publication. The case was dismissed before Appellant's request for publication was heard.

CONCLUSION

The Foregoing reasons, the Respondent respectfully requests that the Court affirm the Order of Judge Allison Renee Lee Striking the Affidavit of Default and Dismissing the Case.

Respectfully Submitted by,

CISA & DODDS, LLP



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Attorney for the Respondent

This 28th day of December, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeal

The Honorable Alison R. Lee
Dorchester County
Appellate Case Number 2017-000803

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H. Wayne Charpia.....Appellant

Rene McMasters Ronagham, Frank M. Cisa and Cisa & Dodds, LLP, Defendants of whom

Rene McMasters Ronagham is the.....Respondent

PROOF OF SERVICE

I certify that I have served a copy of the Respondent's Initial Brief and Designation of Matter, by United States Mail, postage prepaid, on December 28, 2017, addressed to the Appellant, H. Wayne Charpia, located at 717 Old Trolley Road , Suite 6 #360, Summerville, SC 29485.

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December 28th, 2017

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December 28, 2017

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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SC Court of Appeals

RE: H. Wayne Charpia V. Rene McMasters Ronagham
Case No.: 2015-CP-18-1869
Appellant No.: 2017-000803
Our file: 09-084

Dear Ms. Kitchings:

Enclosed is the original and one (1) copy of the Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal together with my Proof of Service. I would appreciate you filing the original and returning one (1) filed copy to me in the self-addressed stamped envelope provided.

With kindest regards, I am

Very truly yours,

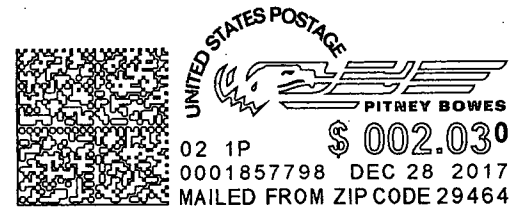


Frank M. Cisa

FMC/alp

Enclosures

cc: H. Wayne Charpia (w/enc.)



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