

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master in Equity

Case No. 2016-CP-40-02457

Appellate Case No. 2017-002410

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SC Court of Appeals

MidFirst Bank, Respondent,

v.

Richard Brady; State of South Carolina; and Richland County Clerk of Court, Defendants, of
whom Richard Brady is..... Appellant.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE MASTER IN EQUITY ERR IN FAILING TO FIND THE JUDGMENT VOID DUE TO A LACK OF PERSONAL JURISDICTION OVER RICHARD BRADY?
2. WAS THE ORDER OF PUBLICATION FACIALLY DEFECTIVE?
3. WAS 1816 HAVILAND CIRCLE, COLUMBIA, SOUTH CAROLINA KNOWN NOT TO BE RICHARD BRADY'S *LAST PLACE OF RESIDENCE*?
4. WAS PLAINTIFF'S COUNSEL GROSSLY NEGLIGENT IN FAILING TO ATTEMPT TO LOCATE RICHARD BRADY FOR PERSONAL SERVICE AND TO PROVIDE OTHER NOTICES TO MR. BRADY VIA MAIL AT EITHER HIS POST OFFICE BOX ADDRESS OR HIS LAST KNOWN PLACE OF RESIDENCE (WHEN BOTH OF THESE ADDRESSES WERE KNOWN TO PLAINTIFF)?

STATEMENT OF THE CASE

This is a mortgage foreclosure action instituted by Respondent, MidFirst Bank (hereinafter referred to as "Plaintiff"). Appellant, Richard Brady (hereinafter referred to as "Mr. Brady"), was the owner of the mortgaged property, known as 1816 Haviland Circle, Columbia, South Carolina, which property was sold at the foreclosure sale. Mr. Brady maintains that he was never served with Plaintiff's Summons and Complaint, that the Order for Publication was facially defective, that Plaintiff's attempts to locate him and to notify him of this case were grossly negligent, that the court was therefore without personal jurisdiction over him and that the Order and Judgment of Foreclosure and Sale and the resulting foreclosure sale of Mr. Brady's property were void.

On April 15, 2016, MidFirst Bank instituted this suit in Richland County to collect a principal balance of \$27,384.37 plus interest, advancements and costs of collection (R.p. 97).

On May 13, 2016, Plaintiff's counsel, by Affidavit, informed the Court that Mr. Brady could not be located for personal service of the pleadings and applied for an Order of Publication (R.p. 31). On said date, an Order of Publication was issued and filed by the Office of the Clerk of

Court for Richland County (R.p. 2). Said Order, which was prepared and submitted by Plaintiff's counsel, was issued as proposed by a member of the Clerk of Court's staff.

Following publication in the *Columbia Star*, as directed by the Order of Publication, and after receiving no response from Mr. Brady, Plaintiff declared Mr. Brady to be in default; and after referring the case to the Master in Equity for Richland County, a default hearing on the merits was held on August 27, 2016.

Following the hearing, the Master in Equity issued an Order and Judgment of Foreclosure and Sale (R.p. 4), and the foreclosure sale of the mortgaged property was scheduled, advertised and conducted on October 3, 2016.

Upon subsequently learning of the foreclosure suit and sale, Mr. Brady moved to vacate the judgment and the sale due to the court's lack of personal jurisdiction over him.

Mr. Brady's Motion to Vacate Judgment of Foreclosure and Sale and Foreclosure Sale and Memorandum, which was served on October 20, 2016, and filed on October 24, 2016 (R.p. 41), was denied by an Order filed on May 10, 2017 (R.p. 14).

Mr. Brady's Motion to Reconsider and Alter or Amend Master's Order, which was served on May 18, 2017, and filed on May 26, 2017 (R.p. 91), was denied by an Order filed on September 15, 2017 (R.p. 20).

After receipt of said Order on October 11, 2017, Mr. Brady served and filed his Notice of Appeal on November 6, 2017.

FACTS

1. Plaintiff's mortgage loan, in the principal amount of \$49,149.00, was originated by West Star Financial Corporation and closed on February 22, 1994 (R.p. 100).

2. The mortgaged property (1816 Haviland Circle) was, when the loan was closed and at all times thereafter, exclusively used by Mr. Brady as investment (rental) property (R.p. 48).

3. Mr. Brady never occupied the mortgaged property as his residence (R.p. 48).

4. After servicing the loan for 21 years (more or less) and reducing the principal amount of the loan by approximately 45% (according to Plaintiff's figures), Mr. Brady defaulted on the payments.

5. On April 16, 2016, Plaintiff, through its process server, attempted unsuccessfully to serve Mr. Brady at 1816 Haviland Circle (R.p. 27); and according to the process server's Affidavit of Non-Service, this property was found to be "tenant occupied" ("Mr. Wiggins resides here, no Richard brady" (sic)) (R.p. 27).

6. The Assessor's Data View on the mortgaged property (1816 Haviland Circle) reflected that the owner of said property was Richard Brady, whose address is P.O. Box 727, Irmo, SC 29063 (R.p. 72).

7. At all relevant times, including as late as September 16, 2016 (two weeks prior to the foreclosure sale; sixteen weeks after Plaintiff's counsel gave up trying to locate Mr. Brady), Plaintiff, through its servicer, Midland Mortgage, communicated with Mr. Brady using the following post office box address: P.O. Box 727, Irmo, South Carolina 29063-0727 (R.p. 50).

8. No effort was made by Plaintiff's counsel to serve Mr. Brady by mail directed to his aforesaid post office box address, notwithstanding that, on or about April 22, 2016, Defendant, State of South Carolina, was served by Plaintiff's counsel using this procedure (R.pp. 29-30).

9. On April 29, 2016, Plaintiff's counsel, through his process server, attempted unsuccessfully to serve Mr. Brady at 3240 Dreher Shoals Road, Irmo, SC 29016; and according to the process server's Affidavit of Non-Service, the house at this property was vacant ("unoccupied, house for sale by exit realty (sic) . . . confirmed he is not living here") (R.p. 62).

10. By his Affidavit, Thomas A. Shook, Esquire (one of Plaintiff's counsel), applied for an Order of Publication on or about May 13, 2016 (R.p. 31). In said Affidavit, Mr. Shook claimed that Mr. Brady could not be located at "the last known address: 1816 Haviland Cir., Columbia, SC 29210."

11. Mr. Shook's Affidavit asserts that "proper due diligence" was performed, but there was no mention of specific efforts made by Plaintiff to effectuate personal service.

12. Mr. Shook's Affidavit makes no mention of the attempted service of Mr. Brady at 3240 Dreher Shoals Road; and in fact, the said Affidavit of Non-Service in connection with this attempted service (R.p. 62) was not filed of record.

13. Accompanying (and referred to in) Mr. Shook's Affidavit was a Certificate of Mailing indicating that the pleadings were mailed, on or about May 9, 2016, to Mr. Brady at 1816 Haviland Cir., Columbia, SC 29210 (R.p. 32).

14. The Order of Publication, which was expressly based upon "the affidavit of Plaintiff's attorney and the affidavit of the process server," was issued by a member of the staff of Jeanette W. McBride, Clerk of Court for Richland County, on May 13, 2016 (R.p. 2).

15. The Order of Publication directed that service upon Mr. Brady be made by publication of "the Summons, together with the Notices" and that a "copy of the Summons, Complaint, Lis Pendens and Notice of Foreclosure Intervention be mailed to said defendant at *the last known address: 1816 Haviland Cir., Columbia, SC 29210*" (R.p. 2). (emphasis added)

16. Publication in the *Columbia Star* was made as directed by the Order of Publication.

17. Although required by the Order of Publication, there is no evidence that Plaintiff's counsel mailed to Mr. Brady a copy of the said pleadings in compliance with the Order of Publication. (A mailing of the said pleadings was allegedly made on May 9, 2016, as acknowledged in the said Order; but the said Order, which was issued on May 13, 2016, with express knowledge of the alleged earlier mailing (on May 9, 2016), nevertheless ordered that the said pleadings, "be mailed to said defendant at the last known address: 1816 Haviland Cir., Columbia, SC 29210" (R.p. 2).)

18. An Affidavit of Default by Publication, which was submitted by Plaintiff's counsel, confirmed the publication in the *Columbia Star*, but the mailing of the said pleadings to Mr. Brady, as directed by the Order of Publication (R.p. 34), was not mentioned.

19. Defendant, State of South Carolina, which had been served by certified mail (R.pp. 29-30),¹ made a formal appearance in this case, claiming a lien on the mortgaged property, which lien was junior in priority to Plaintiff's mortgage.

20. The case was referred to the Master in Equity for Richland County, and a default hearing on the merits was scheduled for August 17, 2016.

21. The Certificate of Service by Mail attached to the Notice of Foreclosure Hearing reflects that said Notice was mailed to Mr. Brady at 1816 Haviland Circle, Columbia, South Carolina on August 1, 2016 (R.p. 37).

22. The said default hearing resulted in the issuance of an Order and Judgment of

¹ One must ask why, when one Defendant was served using this procedure, no effort was made by Plaintiff to serve Mr. Brady, who could not be located for personal service, using this procedure, when a current post office box for him was known and utilized by Plaintiff both before and after the publication of the Summons and Notices.

Foreclosure and Sale, which was filed on September 21, 2016 (R.p. 4).

23. Pursuant to said Judgment, a foreclosure sale of the mortgaged property (1816 Haviland Circle) was scheduled for October 3, 2016, and a notice thereof was advertised in the *Columbia Star*. The sale on said date resulted in Plaintiff being the successful bidder (R.p. 11).

24. Mr. Brady first learned about the foreclosure suit and sale on October 11, 2016, and he immediately instructed his attorney to protect his interests (R.p. 48).

25. Mr. Brady's Motion to Vacate Judgment of Foreclosure and Sale and Foreclosure Sale and Memorandum was served on October 20, 2016, and filed on October 24, 2016 (R.p. 41).

26. Plaintiff submitted Plaintiff's Return to Defendant's Motion for Relief from Judgment and Sale (R.p. 55), and Mr. Brady submitted a Supplemental Memorandum in Support of Motion to Vacate Judgment of Foreclosure and Sale and Foreclosure Sale (R.p. 75).

27. The hearing on Mr. Brady's Motion was held on March 28, 2017. This Motion was denied by Order filed on May 10, 2017 (R.p. 14).

28. Mr. Brady's Motion to Reconsider and Alter or Amend Master's Order was served on May 18, 2017, and filed on May 26, 2017 (R.p. 91).

29. The hearing on this second Motion was held on August 8, 2017. This Motion was denied by Order filed on September 15, 2017 (R.p. 20), which Order was received by Mr. Brady's attorney on October 11, 2017.

30. A Notice of Appeal was served and filed on November 6, 2017 (R.p. 96).

ARGUMENTS

- I. **BECAUSE MR. BRADY WAS NOT SERVED WITH THE SUMMONS AND COMPLAINT, THE JUDGMENT AND ACTIONS TAKEN BASED UPON THE JUDGMENT ARE EACH A COMPLETE NULLITY DUE TO THE COURT'S LACK OF PERSONAL JURISDICTION OVER MR. BRADY.**

Void Judgment

Mr. Brady seeks to overturn the foreclosure decree under Rule 60(b), SCRPC, which provides, in relevant part: “**(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 . . . (4) the judgment is void”

“A judgment is void if a court acts without personal jurisdiction.” *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006); *Stearns Bank Nat. Ass’n v. Glenwood Falls, LP*, 373 S.C. 331, 644 S.E.2d 793 (Ct.App. 2007); rehearing denied; certiorari denied.

“When a defendant is not properly served, ‘the Court has no jurisdiction of the defendant, and all proceedings based on the pretended service are void.’” *Momani v. Van Surdam*, 296 S.C. 409, 410, 373 S.E.2d 691 (Ct.App. 1988).

“A void judgment is one that, from its inception, is a complete nullity and is without legal effect . . . The definition of void under the rule only encompasses judgments from courts which failed to provide proper due process, or judgment from courts which lacked subject matter jurisdiction or personal jurisdiction.” *Belle Hall Plantation Homeowner’s Ass’n, Inc. v. Murray*, 419 S.C. 605, 617, 799 S.E.2d 310, 316 (Ct.App. 2017).

Lack of Personal Jurisdiction

The plaintiff has the burden to establish that the court has personal jurisdiction over the defendant . . . The Plaintiff need only show compliance with the rules. . . When the civil rules on service are followed, there is a presumption of proper service . . . Exacting compliance with the rules is not required to effect service of process . . . Rather, inquiry must be made as to whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings. (internal citations omitted)

Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 66 (Ct.App. 1996).

Plaintiff failed to comply with S.C. Code Ann. §§15-9-710 and 740 (quoted hereinafter), and the court, therefore, never acquired personal jurisdiction of Mr. Brady. The service by publication and the proceedings in this case leading up to the entry of the Judgment and the actions taken based upon the Judgment, including the foreclosure sale of Mr. Brady's property, are each a complete nullity and without legal effect (with regard to Mr. Brady); the Judgment should, pursuant to Rule 60(b)(4), be vacated; and Plaintiff should be directed to properly serve the Summons and Complaint upon Mr. Brady.

II. PLAINTIFF PERFORMED INSUFFICIENT DUE DILIGENCE TO LOCATE MR. BRADY AND THEN RELIED UPON SERVICE BY PUBLICATION WITHOUT COMPLYING WITH THE PUBLICATION STATUTES. THE ORDER OF PUBLICATION WAS FACIALLY DEFECTIVE.

Statutory Authority for Service by Publication

In South Carolina, service may be made by publication in accordance with S.C. Code Ann. §§ 15-9-710 and 740, relevant portions of which are set forth below:

§15-9-710

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. . . 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 . . . may grant an order that the service be made by the publication of the summons in any one or more of the following cases: . . .

(2) when the defendant, being a resident of this State, has departed therefrom, with intent to defraud his creditors or to avoid the service of a summons or keeps himself concealed therein with like intent;

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

(5) when the subject of the action is real or personal property in this State and the defendant has or claims a lien or interest, actual or contingent, therein or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein;

§15-9-740

The order of publication shall direct the publication to be made in one newspaper, to be designated by the officer before whom the application is made, most likely to give notice to the person to be served . . . The court . . . shall also direct that a copy of the summons be forthwith deposited in the post office directed to the person to be served at his 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. . .

In all cases in which publication is made the complaint must first be filed and the summons, as published, must state the time and place of such filing. When service is made by publication the ten days' notice of application for judgment to be made at chambers as required in contested cases of certain kinds as provided by law may be inserted in the first or any subsequent publication mailed to the last known residence of the defendant

Insufficient Due Diligence

In accordance with Code Section 15-9-710, it must appear to the court's satisfaction that due diligence has been performed.

Plaintiff's Affidavit requesting service by publication (R.p. 31) fails to mention any efforts made to serve or contact Mr. Brady, except:

3. Based upon the affidavit of the process server on file herein, and after proper

due diligence, the aforementioned defendant could not be located for service at the last known address: 1816 Haviland Cir., Columbia, SC 29210.

4. As evidenced by the Certificate of Mailing included herewith, a copy of the Lis Pendens, Summons, Complaint and Notice of Foreclosure Intervention has been mailed to the last known address of the Defendant pursuant to S.C. Code Anno. §15-9-740.

This Affidavit is facially defective because it fails to state specifically what due diligence was undertaken, including attempts to locate Mr. Brady at any address other than the mortgaged property.

Simply stating “after proper due diligence” is insufficient. Plaintiff must demonstrate that sufficient attempts were made to locate Mr. Brady “within the State” not just at the mortgaged property. In *Caldwell v. Wilquist*, 402 S.C. 565, 574, 741 S.E.2d 583 (Ct.App. 2013), this Court found that, “. . . the affidavit 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.”

Also in *Caldwell*, pp. 573-576, this Court cited the following authorities as persuasive:

Affidavits devoid of averments of facts showing that due diligence was exercised to make service have consistently been held to be insufficient, and orders for service by publication based (upon such affidavits) have uniformly been held to have been beyond jurisdiction and void. *Calvin Mem'l Corp. v. Requa*, 5 Cal. App. 3d 345, 85 Cal. Rptr. 107, 113 (Cal. Ct. App. 1970).

[S]ervice by publication is constitutionally insufficient where actual notice by mail is feasible. *United States v. Borromeo*, 945 F.2d 750, 752 (4th Cir. 1991).

If the name and address of an individual is reasonably ascertainable, then notice by publication is insufficient to satisfy due process. *Montgomery v. Scott*, 802 F. Supp. 930, 935 (W.D.N.Y. 1992). (402 S.C. at 576).

. . . [E]verything necessary to dispense with personal service of [the] summons must appear by affidavit. . . . [a]n affidavit on which publication is predicated is fatally defective in the absence of an allegation that the person on whom the summons is so served cannot, after due diligence, be found within the State. *Nash Cnty. v. Allen*, 241 N.C. 543, 85, S.E.2d 921, 923 (N.C. 1955).

This Court also pointed-out in *Caldwell*, p. 575, that the South Carolina Constitution provides that “[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard.” S.C. Const. art. I, §22.

Again, the Affidavit submitted by Plaintiff’s counsel fails to provide “some factual basis” to support a finding by the court that due diligence was performed and that Mr. Brady could not be located within the state. The Affidavit is insufficient and misleading (“facially defective”), and the Order of Publication based on this Affidavit fails to comply with the publication statutes.

Facially Defective Order of Publication

The Order of Publication, which was unquestionably prepared and submitted by Plaintiff’s counsel, directs Plaintiff to mail the pleadings to Mr. Brady “*at the last known address: 1816 Haviland Circle, Columbia, SC 29210.*” (R.p. 2) (emphasis supplied)

Notwithstanding the Affidavit of Plaintiff’s process server, which stated that 1816 Haviland Circle was known to be a bad address for Mr. Brady (R.p. 27), of which Plaintiff’s counsel had actual knowledge, Plaintiff’s counsel prepared the Order of Publication to reflect that the address of the mortgaged property (1816 Haviland Circle) was *the last known address* of Mr. Brady. This address was never an address for Mr. Brady (R.p. 48).

Due to the fact that the Order of Publication incorrectly stated that the last known address of Mr. Brady was 1816 Haviland Circle, and the facts that (1) a post office box for Mr. Brady was determined by the process server to be, likely, a current address (R.p. 67) and that this address was used regularly (for many years) by Plaintiff’s loan servicer to communicate with Mr. Brady, even as late as September 16, 2016 (shortly before the foreclosure sale on October 3, 2016) (R.p. 50);

and (2) Mr. Brady's last known residence (3240 Dreher Shoals Road) was actually known by Plaintiff's counsel but was not even mentioned in the said Order, the said Order was erroneous and misleading ("facially defective").

Failure to Comply with Requirement of Mailing Contained in Order of Publication

Section 15-9-740 requires the court to direct that a copy of the summons be mailed to the person to be served "*at his place of residence.*" This statute also uses the phrase "*mailed to the last known residence of the defendant.*" (emphasis added)

The Order of Publication (R.p. 2) directed that the Summons, Complaint, etc., "*be mailed to said defendant at the last known address: 1816 Haviland Cir., Columbia, SC 29210.*"

Even assuming for sake of argument that the cited address was "the last known residence of the defendant," there is no evidence that any mailing, in compliance with this directive, was undertaken by Plaintiff's counsel. The Order of Publication, which was filed on May 13, 2016, expressly acknowledges a mailing allegedly made on May 9, 2016, so this earlier mailing cannot be accepted as compliance with the directive, which was expressly included in the Order, that the Summons, Complaint, etc. "be mailed" (being a directive to perform a future act).

III. MR. BRADY NEVER RESIDED AT 1816 HAVILAND CIRCLE, AND PLAINTIFF AND ITS COUNSEL KNEW NOT ONLY MR. BRADY'S LAST KNOWN RESIDENCE (3240 DREHER SHOALS ROAD) BUT ALSO THE MAILING ADDRESS ROUTINELY USED BY PLAINTIFF'S SERVICER TO COMMUNICATE WITH MR. BRADY (P.O. BOX 727).

Actual Last Known Residence: 3240 Dreher Shoals Road

The one address used by Plaintiff's counsel (1816 Haviland Circle, Columbia, SC 29210)

is not, and never has been, Mr. Brady's address (residence or otherwise) (R.p. 48).

Mr. Brady has not concealed his whereabouts, and his addresses are clearly reflected on a report of search engine TLO (R.p. 51). This report does not mention 1816 Haviland Circle as a current or a previous address of Mr. Brady.

Plaintiff's process server informed Plaintiff's counsel in May 2016: "LAST KNOWN ADDRESS OF SUBJECT: 3240 Dreher Shoals Road, Irmo, SC 29063" (R.p. 65).

In May 2016, Plaintiff's counsel knew (through Plaintiff's process server) that Mr. Brady had vacated 3240 Dreher Shoals Road and that said former residence was being marketed for sale by Exit Realty (R.p. 62).

Plaintiff's counsel admitted knowing that Mr. Brady's "place of residence" or "last known residence" was 3240 Dreher Shoals Road, Irmo, SC, 29063 (at least in October 2014) (R.p. 55).

Instead of utilizing this knowledge/information, Plaintiff's counsel proceeded on the incorrect assumption that the mortgaged property (1816 Haviland Circle) was Mr. Brady's last known residence, when there is no evidence that Mr. Brady ever resided at said property, which at all relevant times was rental property (R.pp. 48-49); and Plaintiff's counsel prepared the Order of Publication to require that the Summons, Complaint, etc. be mailed to Mr. Brady, addressed to 1816 Haviland Circle, instead of to either P.O. Box 727 or 3240 Dreher Shoals Road, which were known to be current, or last known residence, addresses of Mr. Brady.

Court Finding Regarding Last Known Residence

In the first appealed Order (drafted by Plaintiff's counsel – without a word changed by the lower court), the Master in Equity concluded that, "[t]he property at 3240 Dreher Shoals Road

was the Defendant's last known residence" (emphasis added) (R.p. 18).² This conclusion was based upon the following finding:

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. (R.p. 15).

The Order of Publication states (in two places) that 1816 Haviland Circle is Mr. Brady's "last known address" (R.p. 2). There is no evidence that this address was ever Mr. Brady's residence or last known address. Likewise, there is no mention whatsoever in the said Order of 3240 Dreher Shoals Road, which was known by Plaintiff's counsel to be Mr. Brady's "last known residence."

The Master's said first Order seems to lay to rest that the "last known residence" of Mr. Brady was 3240 Dreher Shoals Road. This conclusion of fact (as proposed by Plaintiff's counsel, who prepared the Order) makes it abundantly clear that the Order of Publication is "facially defective."

Failure to Use Mr. Brady's Post Office Box Constitutes a Lack of Due Diligence

Plaintiff knew Mr. Brady's best address was P.O. Box 727, Irmo, SC 29063-0727; and, in fact, Plaintiff, through its servicing company, Midland Mortgage, communicated with Mr. Brady regarding this mortgage loan (but without any mention of the foreclosure suit) using said address

² In the second appealed Order (also drafted by Plaintiff's counsel – without a word changed by the lower court), the aforesaid finding/conclusion was omitted, although Plaintiff did not seek a revision of the prior Order; and the second appealed Order stated, contrary to the prior Order, that "Plaintiff was not aware of the Defendant's residence" (R.p. 25).

as late as September 16, 2016 (two weeks prior to the foreclosure sale) (R.p. 50); but Plaintiff's counsel failed to make any effort to contact Mr. Brady using this address. This failure (alone) constitutes a lack of due diligence in trying to locate, and provide notice of these proceedings to, Mr. Brady.

IV. A SHOWING OF FRAUD OR COLLUSION IS NOT REQUIRED WHEN PLAINTIFF'S AFFIDAVIT IS "FACIALLY DEFECTIVE" AND ATTEMPTS TO SERVE MR. BRADY WERE GROSSLY NEGLIGENT.

Fraud or Collusion

Historically (at least prior to 2013), when the issuing officer is satisfied by the affidavit, his decision to order service by publication is final absent fraud or collusion. *Yarborough v. Collins*, 293 S.C. 290, 293-94, 360 S.E.2d 300, 301 (1987). However, at least since 2013, when the affidavit submitted is "facially defective" and not in compliance with the publication statutes, a court may overturn the order of publication even in the absence of fraud or collusion. See *Belle Hall Plantation Homeowner's Ass'n v. Murray*, 419 S.C. 605, 799 S.E.2d 310 (Ct.App. 2017); *Caldwell v. Wiquist*, 402 S.C. 565, 741 S.E.2d 583 (Ct.App. 2013).

This Court in *Caldwell* found that, "[i]t is the existence of this factual basis that our appellate courts have found make the order for service by publication unreviewable, absent fraud or collusion."

Whether there was fraud by Plaintiff's counsel or collusion between the said counsel and the Clerk of Court for Richland County, with regard to the issuance of the Order of Publication, is not known; but this Court should take judicial notice of the fact that the Clerk of Court for Richland County does not routinely consider, or actually issue, orders of publication, except through

members of her staff and that, practically speaking, no evaluation of the affidavit accompanying a proposed order of publication is ever made by members of the staff, who routinely (automatically) sign such orders on behalf of the Clerk of Court. In other words, no decision to issue an order of publication is ever made by the Clerk of Court (personally) except possibly in extraordinary circumstances; and no such decision was made by the Clerk of Court (personally) in this case, as reflected by the signature on the Order of Publication (R.p. 2).

Notwithstanding that there is no evidence of fraud or collusion, Mr. Brady submits that, based on the facially defective Affidavit (requesting the Order of Publication), Plaintiff's counsel may have intentionally, but more likely mistakenly, misled the court as to the due diligence made to locate Mr. Brady, when no effort whatsoever was made to contact him through his post office box address, which was, at all relevant times, known by Plaintiff to be an active, current address for Mr. Brady, and when Plaintiff's counsel failed to disclose the known circumstances (such as Mr. Brady's last known residence) when seeking the Order of Publication. In addition, Plaintiff's counsel failed to mail the Summons, Complaint, etc. to either of Mr. Brady's known addresses.

Gross Negligence

Although fraud or collusion cannot be known, Mr. Brady submits that Plaintiff's counsel was grossly negligent in failing to provide actual notice of the mortgage foreclosure suit to Mr. Brady. "Gross negligence is a relative term, and means the *absence of care that is necessary under the circumstances.*" *Hollins v. Richland County School Dist. One*, 310 S.C. 486, 490, 427 S.E.2d 654, 656 (1993).

Plaintiff's counsel was grossly negligent in attempting (or more correctly, in failing to properly attempt) to locate Mr. Brady for service, in the following particulars:

1. Plaintiff's counsel made no attempt to communicate with Mr. Brady by mail directed to 3240 Dreher Shoals Road, which was known by Plaintiff's counsel to be Mr. Brady's "last known residence."

2. Plaintiff's counsel made no attempt to communicate with Mr. Brady by mail in care of Exit Realty, which was known by Plaintiff's counsel to be the listing broker marketing 3240 Dreher Shoals Road for sale.

3. Plaintiff's counsel made no attempt to communicate with Mr. Brady by mail directed to him at P.O. Box 727, Irmo, South Carolina 29063, which address was known, and regularly utilized, by Plaintiff's mortgage servicer to communicate with Mr. Brady.

"A [party] is guilty of gross negligence if he is so indifferent as to the consequences of his conduct as not to give slight care to what he is doing." *Hamilton v. Charleston County Sheriff's Department*, 399 S.C. 252, 255, 731 S.E.2d 727, 728 (Ct.App. 2012).

Service only by publication, accompanied by mailing to an incorrect address, was statutorily insufficient. This was not harmless error, especially when a good (current) mailing address was known by Plaintiff and/or its counsel. It was defective service as a consequence of gross negligence, where Plaintiff and its counsel could have used, but neglected to use, information, which was readily available to them, to locate Mr. Brady.

This Court, in *Belle Hall Plantation*, declared void the judgment of foreclosure because the court lacked personal jurisdiction over the defendant, who was served by publication when the attempts by the plaintiff to serve him were grossly negligent, notwithstanding that fraud or collusion was not established. This Court found that "the master had the authority to overrule the Clerk of Court's order of publication because [the plaintiff] failed to comply with the publication statute" . . . and that, [g]enerally, a person against whom a judgment or order is taken without notice may rightly ignore it and may assume that no court will enforce it against his person or property.'" (419 S.C. at 616-18) Because the service of Mr. Brady was defective, the court lacked personal jurisdiction over him, and therefore the Order and Judgment of Foreclosure and Sale and

the resulting foreclosure sale were void.

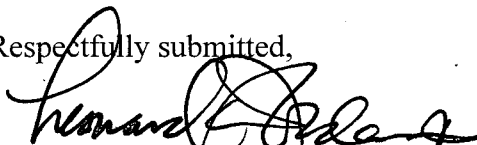
In summary, the Order of Publication, which was prepared by Plaintiff's counsel, is the result of gross negligence and is facially defective, as it orders Plaintiff to mail a copy of the pleadings "to said defendant at the last known address: 1816 Haviland Cir., Columbia, SC 29210" (R.p. 2), which was known to be a bad address for Mr. Brady and when other addresses for Mr. Brady (P.O. Box 727 and 3240 Dreher Shoals Road) were known by Plaintiff and/or its counsel to be current, or last known residence, addresses.

CONCLUSION

The Affidavit and the Order of Publication were incorrect and misleading to the court with regard to Mr. Brady's last known addresses and were therefore facially defective. In addition, the said Order was not complied with, as the Summons, Complaint, etc. were not mailed to Mr. Brady as required.

For the reasons stated, this Court should declare void the Order and Judgment of Foreclosure and Sale along with the resulting foreclosure sale, which were issued/conducted by the court, which lacked personal jurisdiction over Mr. Brady.

Respectfully submitted,



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April 30, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master in Equity

Case No. 2016-CP-40-02457

Appellate Case No. 2017-002410

RECEIVED
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SC Court of Appeals

MidFirst Bank, Respondent,

v.

Richard Brady; State of South Carolina; and Richland County Clerk of Court, Defendants, of
whom Richard Brady is..... Appellant.

SCACR RULE 211(b) CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellant hereby certifies that the Brief of Appellant complies
with SCACR Rule 211(b).



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May 4, 2018