

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2017-002220

LM Insurance Corporation,

v. Plaintiff,

Josh Steele,

v. Defendant, Third-Party Plaintiff,
Appellant,

Ernie Yarborough d/b/a Yarborough
Insurance Agency,

Third-Party Defendant,
Respondent.

FINAL BRIEF OF APPELLANT

May 9, 2018

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE LOWER COURT ERR IN DISMISSING APPELLANT'S THIRD-PARTY ACTION AGAINST RESPONDENT FOR INSUFFICIENT SERVICE OF PROCESS WHEN RESPONDENT WAS PERSONALLY SERVED IN EXACT ACCORDANCE WITH THE RULES OF CIVIL PROCEDURE?**

STATEMENT OF CASE

This appeal arises out of the lower court's Order dismissing a Third-Party action for insufficient service of process. Record on Appeal (Hereinafter R.) 1-4. The lower court issued this Order even though it is undisputed that the Third-Party Defendant was timely and properly served by personal service in exact accordance with the South Carolina Rules of Civil Procedure.

In the underlying case, LM Insurance Corporation (herein after Plaintiff) sued Appellant claiming he owed them \$345,064.00 in additional premiums on a workers' compensation policy. R. 7-12. Appellant timely Answered the Complaint, asserted counterclaims against Plaintiff and brought a Third-Party Complaint against Respondent. R. 15-32. In connection with the Third-Party Complaint, Appellant's Counsel issued a Third-Party Summons to Respondent. R. 13-14. The Third-Party Summons and Third-Party Complaint were dated April 19, 2017 and were clocked in by the Clerk of Court the following day, April 20, 2017. R. 13-32.

On April 21, 2017 Respondent was served via certified mail with the Third-Party Summons and Defendant and Third-Party Plaintiff's Answer to Plaintiff's Complaint, Counterclaims and Third-Party Complaint in accordance with Rule 4(d)(8), SCRPC. R. 88-90. More specifically, these documents were mailed to Respondent certified mail, restricted delivery. R. 88-90. The return green card shows they were signed by Sandra L. Pike, despite the restricted delivery notation on the green card. R. 88-90.

Respondent did not timely answer the Third-Party Summons and Third-Party Complaint against him. Instead, he filed a Motion to Dismiss for insufficiency of process but this Motion was not filed until after 30-days from when he was originally served by certified mail. R. 63-67. More specifically, Respondent claimed that Pike did not have authority to sign for the Third-Party Summons and Third-Party Complaint. R. 66-67 and 79-80.

In response to the Motion to Dismiss, Appellant had Respondent personally served by a process server on July 28, 2017, well within the 120-day time frame provided for in Rule 3(a)(2), SCRCPP. R. 91. At no point did Appellant file default documents or seek any declaration from the lower court as to whether the original service by certified mail was effective service. Nonetheless, Respondent insisted on having his Motion to Dismiss heard. R. 33-62. At the hearing on August 2, 2017, the lower refused to consider the second Affidavit of Service from July 28, 2017 stating, *inter alia*, “Neither is it before me whether or not the service of law Friday was effective. That’s the point I’m making...” R. 57.

On September 19, 2017 the lower court issued an Order Granting Defendant Ernie Yarborough d/b/a Yarborough Insurance Agency’s Motion to Dismiss. R. 1-5. The lower court’s Order makes no mention of the Affidavit of Service from July 28, 2017. R. 1-5. In fact, the lower court wrote: “Yarborough has not been personally served or any other manner contemplated by the Rules of Civil Procedure” even though Appellant’s Counsel handed the lower court a clocked-in copy of the July 28, 2017 Affidavit of Service and argued it at the hearing on August 2, 2017. R. 2. By ignoring the July 28, 2017 Affidavit of Service, the lower court erred in concluding and ruling that: “Therefore, based upon the applicable law and facts before me, I grant Yarborough’s motion to dismiss for insufficient service of process. **AND IT IS SO ORDERED.**” R. 4.

On September 25, 2017 Appellant filed a Motion for Reconsideration “which either (1) vacates the September 19th Order as moot since there is no dispute that Yarborough was personally served pursuant to Rule 4(d)(1) or (2) clarifies and addresses the issue of personal service of the pleadings that occurred on July 28, 2017.” R. 84-85. On October 12, 2017 the lower court issued an Order that modified one sentence in the Order Granting Third-Party Defendant Ernie Yarborough d/b/a Yarborough Insurance Agency’s Motion to Dismiss but the October 12, 2017 Order did not address how the lower court could dismiss Appellant’s Third-Party action when the undisputed facts were that Respondent was timely and properly served in exact accordance with the South Carolina Rules of Civil Procedure. R. 6.

This appeal followed.

ARGUMENTS

I. THE LOWER COURT ERRED IN DISMISSING THE THIRD-PARTY ACTION PURSUANT TO RULE 12(B)(5) BECAUSE IT WAS UNDISPUTED RESPONDENT WAS TIMELY AND PROPERLY SERVED PERSONALLY IN EXACT ACCORDANCE WITH THE RULES OF CIVIL PROCEDURE.

The lower court erred in dismissing Appellant's Third-Party Action against Respondent pursuant to Rule 12(b)(5), SCRCF. Respondent was personally served in exact accordance with the applicable Rules of Civil Procedure. R. 91. Even Respondent's counsel acknowledged at the hearing before the lower court that "My belief is that he [Respondent] has now been effectively served..." R. 48. The lower court simply disregarded the July 28, 2017 Affidavit stating: "That's not really before me. The second part's not before me." R. 49. Later in the hearing, the lower court again ignored July 28, 2017 Affidavit of Service stating: "Neither is it before me whether or not the service of last Friday was effective." R. 57. The lower court's written orders memorialize these misstatements that should be corrected by this Court. The facts in this matter are simple and straight forward: Respondent was personally served within 120 days of filing in exact accordance with the Rules of Civil Procedure. R. 91.

As this Court is aware: "The appellate court applies the same standard of review as the trial court in reviewing dismissal of an action..." Cole Vision Corp. v. Hobbs, 384 S.C. 283, 285, 680 S.E.2d 923, 925 (Ct. App. 2009). The specific legal standard is found in Rule 4(d), SCRCF and Rule 3(a), SCRCF. Rule 3(a) address how an action (including a third-party action) is commenced and provides that the action must be filed and served within the applicable statute of limitations (Rule 3(a)(1)) or filed within the statute of limitations and served within 120 days of filing (Rule 3(a)(2)). Rule 4(d) addresses proper service of process. Rule 4(d)(1) provides that service may be accomplished on an individual by "delivering a copy of the summons and complaint to him personally..."

In this case, that is exactly what was done. R. 91. The July 28, 2017 Affidavit of Service specifically states that the process server, Tonya Reep, “**PERSONALLY** served by delivering a true copy of the **Third-Party Summons, Defendant and Third-Party Plaintiff’s Answer to Plaintiff’s Complaint, Counterclaims and Third-Party Complaint and Certificate of Service to: Ernie Yarborough** [Respondent]...” R. 91 (Emphasis in original). There has never been any dispute that this was effective and timely service under the Rules of Civil Procedure. R. 48 and 91. In fact, Respondent’s Counsel specifically acknowledged this at the hearing on the Motion to Dismiss. R. 48.

Another point I’d like to make, Your Honor, is that on this past Friday, Mr. Dodson had a legal process server come out and serve Mr. Yarborough individually. She sat in the office and waited until he was off the phone and served him with the third party complaint. My belief is that **he has now been effectively served** on that for terms of the time running from Friday when he got the summons and the third party complaint served on him this past Friday...

R. 48-49 (emphasis added). It is noteworthy and significant that service was effectuated within 120 days of when the Third-Party Complaint was filed. *See* SCRCRCP, Rule 3(a)(2) and R. 91.

As a matter of fact and as a matter law, effective service within 120 days should have ended the lower’s court inquiry into the Motion to Dismiss because it was uncontested Respondent was properly and timely served. R. 48-49. Instead, however, Respondent’s Counsel sought and improperly received an advisory opinion from the lower court as to whether Appellant’s first attempt at service of process by certified mail and pursuant to Rule 4(d)(8) was effective service.

What I am seeking is a ruling from you that the service on April 21st was ineffective service of process. That’s what I’m asking the Court to rule on.

R. 51-52. However, that issue was not before the lower the court. The reason that issue was not before the lower court is because Appellant never sought to hold Respondent in default based on Respondent's failure to respond to the third-party Complaint against him based on service pursuant to Rule 4(d)(8). At no point did Appellant or his Counsel file an Affidavit of Default, Motion for Default, proposed Order of Default or other default documents.

Procedurally, the matter is simple. When Respondent filed a Motion to Dismiss claiming the original service was defective, Appellant corrected any alleged defects by having Respondent personally reserved. That was accomplished on July 28, 2017 and it should have resulted in a denial of Respondent's Motion to Dismiss. Instead, the lower court issued an Order Granting Third-Party Defendant Ernie Yarborough d/b/a Yarborough Insurance Agency's Motion to Dismiss. R. 1-4. This Order was in legal error for multiple reasons that should now be reversed by this Court.

First, the lower court's Order concludes: "I grant Yarborough's motion to dismiss for insufficient service of process. AND IT IS SO ORDERED." R. 1-4. The legal error in this ruling is obvious and apparent: Yarborough was properly and timely served. R. 91. His own lawyer fully acknowledged this at the hearing. R. 48-49. By Counsel's own admission what she sought was a finding that the original service by certified mail was ineffective service. R. 51-52. However, the lower court's Order not only gives that improper advisory opinion, it also dismisses the third-party action entirely. R. 1-4.

In doing so, the lower court's initial Order Granting Third-Party Defendant Ernie Yarborough d/b/a Yarborough Insurance Agency's Motion to Dismiss simply disregard's entirely the July 28, 2017 Affidavit of Service. In fact, the lower court's Order Granting Third-Party Defendant Ernie Yarborough d/b/a Yarborough Insurance Agency's Motion to Dismiss

erroneously and incorrectly concludes: “Yarborough has not been personally served or any other manner contemplated by the Rules of Civil Procedure.” R. 2. While the lower court issued a subsequent Order clarifying this specific sentence the overriding problem remains the same: The lower court dismissed an action for improper service of process when Respondent was timely and properly served and his own attorney acknowledged he was timely and properly served.

The lower court committed this legal error because it simply refused to address the issue of proper service on July 28, 2017. As demonstrated above, the lower court’s original Order Granting Third-Party Defendant Ernie Yarborough d/b/a Yarborough Insurance Agency’s Motion to Dismiss ignored this altogether. But even at the hearing on this matter, the lower court repeatedly stated: “That’s not really before me. The second part’s not before me.” R. 49. And, “Neither is it before me whether or not service of last Friday was effective.” R. 57. With all due respect to the lower court and His Honor, that was exactly the issue before the lower court because Respondent’s motion was a Motion to Dismiss for improper service. Once proper and timely service is established, as it was here and as Respondent’s Counsel fully acknowledged, the Motion to Dismiss should have been denied.

Instead, the thrust of the lower court’s Order Granting Third-Party Defendant Ernie Yarborough d/b/a Yarborough Insurance Agency’s Motion to Dismiss is on the original service by certified mail, pursuant to Rule 4(d)(8), SCRPC. However, in addressing that issue the lower court simply gave an improper advisory opinion as to whether service by certified mail was proper service. The reason the lower court’s order is an advisory opinion is because Appellant never attempted to rely on the original service by certified mail as a basis for default against Respondent. In fact, Appellant never relied upon service by certified mail for any purpose. Simply put, once proper and timely service was established, any issue of whether service

pursuant to Rule 4(d)(8) was a moot issue, unless and until raised by Appellant by filing some type of default based on that service. To be clear, Appellant never did that – At no point did Appellant seek to hold Respondent in default.

The Courts in this state have repeatedly and consistently noted that they will address only actual and real controversies but will not issue advisory opinions based on hypothetical or academic issues of law. *See e.g. Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006); *Slezak v. State, per curiam*, Opinion NO.: 2008-UP-005 (Ct. App. 2008). In *Sloan*, for example, Sloan sued Friends of Hunley, Inc. under the Freedom of Information Act seeking various documents. After the lawsuit was commenced, Friends produced the requested documents. In affirming the lower court's Order granting summary judgment to Friends, the Supreme Court noted:

Sloan concedes that Friends has provided all documents requested pursuant to FOIA...Because the information Sloan sought has been disclosed, there is no continuing violation of FOIA upon which the trial court could have issued a declaratory judgment.

Sloan, 630 S.E.2d at 478-479. In the case now before this Court, the issue giving rise to Respondent's Motion to Dismiss was resolved prior to the hearing. Specifically, Respondent was timely and properly served via personal service. R. 91. Just like the Plaintiffs in *Sloan* who resolved the issue by producing the requested documents voluntarily, Appellant in this case re-served Respondent in exact accordance with the Rules of Civil Procedure. R. 91. And, just like the Plaintiffs in *Sloan* acknowledged all the requested documents had been produced, Respondent's Counsel in this case specifically represented to the lower court that Respondent had "now been effectively served..." R. 48.

By way of another example, in *Slezak v. State, supra* a prisoner serving a life term argued the Department of Corrections should have granted him work credits earlier than they

did. The prisoner claimed that if the Department had given him the work credits earlier, he would have been eligible for parole earlier. However, in affirming dismissal of the action, this Court noted the date on which the prisoner claimed he should have been eligible for parole based on his claim to work credits had come and gone. Moreover, the prisoner had already applied for parole and been turned down. Thus, this Court concluded the issues raised by the prisoner were moot because his parole applications had already been heard and rejected. In essence, this Court concluded that since circumstances had changed before a ruling on the merits, any such ruling would be an advisory opinion. And to quote this Court: “We do not issue advisory opinions.”

In the case now before this Court, that is exactly what the lower court did. The lower court concluded service by certified mail was not effective service. R. 1-4. However, the lower court failed to acknowledge that the facts and circumstances before it had changed. Specifically, between the time Respondent filed his Motion to Dismiss and the time that Motion was heard by the lower court, Respondent was served timely and in exact accordance with the Rules of Civil Procedure. R. 91. Respondent’s own lawyer even acknowledged proper service upon him. R. 48.

Unfortunately, by effectively ignoring what Respondent’s own Counsel acknowledged was “effective[] service” the trial court focused only on the first attempt of service. R. 48. By focusing only on that attempt at service, the trial court dismissed a case for improper service of process even when Respondent’s own attorney acknowledge proper service of process. R. 1-4 and 48.

Respectfully, this Court should reverse the lower court’s Order Granting Third-Party Defendant Ernie Yarborough d/b/a Yarborough Insurance Agency’s Motion to Dismiss. Appellant served Respondent timely and in exact accordance with the applicable Rules of Civil

Procedure. R. 91. Respondent's counsel acknowledged proper service that was attested to in the Affidavit of Service dated July 28, 2017. R. 48-49. Accordingly, since this service was made within 120 days of Appellant filing his Third-Party Complaint against Respondent, Appellant's claims and causes of actions should be allowed to proceed forward against Respondent.

CONCLUSION

For the reasons argued above, this Court should issue an Order reversing and vacating the lower court's Order Granting Third-Party Defendant Ernie Yarborough d/b/a Yarborough Insurance Agency's Motion to Dismiss.

Respectfully submitted,

May 9, 2018



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR. The undersigned also certifies that this Final Brief of Appellant complies with the South Carolina Supreme Court's Order of April 15, 2014 RE: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in the Appellate Court Filings

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