

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
Ascension Forensic, LLC,)
Plaintiff,)
-vs-)
Patricia B. Clark,)
Defendant.)

IN THE COURT OF COMMON PLEAS

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SC Court of Appeals

ORDER

Case No.: 2016-CP-23-06314

This matter comes before the Court upon Defendant's Motion to Vacate Default Judgment. The matter was heard on November 27, 2018 and M. Lee Daniels, Jr. was present on behalf of the Defendant and K. Jay Anthony was present for the Plaintiff.

This matter arises out of a claim for breach of contract allegedly entered into between the parties in 2013. Default Judgment was entered against Defendant on August 17, 2017 for \$41,074.93 and following the enrollment of the judgment, Plaintiff proceeded with execution and supplemental proceedings, without success. On October 17, 2018, the Defendant filed this Motion under Rule 60(b)(4) asserting that the Defendant had not been served with the Summons and Complaint, thus the judgment was void.

Based on the Affidavit of Personal Service filed on November 11, 2016, the Summons and Complaint were served on the Defendant by Jesse Jones, process server, who stated in his affidavit that it was served on November 10, 2016 "[b]y leaving a copy at the said Defendant's dwelling house or usual place of abode, located at 519 Cliffview Court, Greer, SC 29650 with Michael, a person of suitable age and discretion residing therein. Michael identified himself as Defendant's boyfriend and affirmed that he resides with Defendant at that address."

In her Motion to Vacate, along with supporting affidavits, Defendant asserted that she had no notice of the lawsuit and that at the time of service, she lived at this address with her minor daughter. She also indicated that a "Michael" Thorstad had previously been her boyfriend and had picked up something at her house on the day of attempted service and Mr. Thorstad had only told her recently that he had been given an envelope and thrown it away without giving it to her. She also stated in her affidavit that Mr. Thorstad "did not reside at my residence... on or about November 10, 2016." Defendant also submitted an affidavit of Michael Thorstad who admitted being at the Defendant's residence on November 10, 2016 and receiving an envelope from a gentlemen in a pick-up truck but threw the envelope away and never mentioned it to the Defendant until shortly before this Motion was filed. He further stated in his affidavit that he was "not living at 519 Cliffview Court.... on or about the date the process server's affidavit of November 10, 2016."

First, the Court must look at the standard for a Motion under Rule 60 (b). The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief. *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991). "Exacting compliance with the rules is not required to effect service of process." *See Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995). "Rather, [the Court must] inquire 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." *Id.* at 210, 456 S.E.2d at 899. "Whether to grant or deny a motion for relief from a judgment lies within the sound discretion of the trial court, and the standard of review on appeal is limited to determining whether there was an abuse of discretion." *Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 670 S.E.2d 680 (Ct. App. 2008).

First, the Court must determine whether the Defendant had been properly served. Under Rule 4 (d) (1), service of the summons may be accomplished by "by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein....". Based on review of affidavits of all parties, it is clear that the summons and complaint were delivered to a person at the Defendant's "dwelling house" and to a person of "suitable age and discretion." The sole issue is whether the individual, "Michael" was "residing therein" at the time. By way of the Affidavit of Personal Service, the Plaintiff established that the Summons and Complaint were properly served on a person, of suitable age and discretion, who resided at the dwelling house of the defendant based on "Michael's" representations to the process server. Now the Defendant must establish that the person who received the service of process was not residing at the Defendant's residence at the time of service.

In addition to the affidavits, the Defendant provided testimony from Michael Thorstad at the hearing. In considering Mr. Thorstad's testimony, the Court did not find it credible in several respects. Details in his statement were not consistent throughout his testimony and varied from his Affidavits in several respects. At the hearing, Mr. Thorstad testified that he had never resided at Defendant's house, but in his affidavit, he specifically stated that he was "not living at 519 Cliffview Court.... on or about the date the process server's affidavit of November 10, 2016" but doesn't state that he never resided there. His reason for throwing the paper in the trash did not seem credible and his whole demeanor did not lend credibility to his testimony, especially when cross-examined by Plaintiff's counsel about his prior relationship with the Defendant. On cross examination, Mr. Thorstad contradicted himself on the details about his conversation with the process server. Other than what the Plaintiff's counsel described as "self-serving" affidavits

and testimony, the Defendant presented no independent evidence to establish that Michael Thorstad was not residing there at the time (such as photographs, affidavits of friends or neighbors, phone records, etc.):

The court has also consider the timing of this Motion which comes after the Plaintiff has spent a year attempting to collect on its judgment and the history of the Defendant's clear efforts to evade service and notice of any proceedings filed by the Plaintiff.

In considering all of the evidence presented, the Court, does not find that the Defendant has met its burden in refuting that service was proper on November 10, 2016.

The Court, in exercising its discretion, would respectfully deny the Defendant's Motion to Vacate the Default Judgment on the grounds set forth above:

It is so Ordered.

November 30, 2018.
Greenville, S.C.

Perry H. Gravely
Presiding Judge, Thirteenth Circuit

Electronic Signature of Judge Gravely on following page



Greenville Common Pleas

Case Caption: Ascension Forensic LLC vs. Patricia B Clark

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So Ordered

s/ Honorable Perry H. Gravely, #2755