THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Master in Equity

The Honorable Mikell Scarborough

Case No. 2010-CP-10-7992

BANK OF AMERICA f/k/a/ COUNTRYWIDE HOME LOANS, d/b/a AMERICA'S WHOLESALE LENDING . . . . . Plaintiff/Respondent

v.

CORNELL L. WILLIAMS, DEBORAH P. WILLIAMS, GEORGE RODNEY DERRICK and MARY SCARBOROUGH, as Delinquent Tax Collector for Charleston County . . . . . Defendants

Of Whom

GEORGE RODNEY DERRICK is . . . . . Appellant.

FINAL BRIEF OF APPELLANT GEORGE RODNEY DERRICK

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I. PROCEDURAL HISTORY

On November 3, 2008, Appellant George Rodney Derrick purchased, at tax sale, a parcel of real property located in Charleston County. At the time the tax sale was conducted, Respondent Bank of America, through an entity formerly known as Countrywide Home Loans, had a mortgage on the property. Respondent subsequently filed its complaint seeking to have the tax sale set aside on the grounds that it had not received proper notice of the pendency of that action. On September 30, 2013, the Master in Equity for Charleston County determined that the initial tax sale had itself been void *ab initio*, as the County had failed to comply with S.C. Code § 12-51-120.

Respondent appears to have attempted to serve Appellant with the Summons and Complaint at a number of different addresses. Although the comments on several of the Affidavits of Non-Service filed with the Court show that Appellant does not reside at the addresses provided, two – one of which is his residence – merely state that the building in which service would have been attempted is secured and the process server could not gain access. On January 20, 2011, Dean Hayes, as attorney for Bank of America, filed a Petition for Order of Publication. Mr. Hayes asserted in his Affidavit that "after diligent and reasonable search, the following Defendant George Rodney Derrick could not be found in this State, although his last address was 86 Seaside Cottage Lane, Isle of Palms, SC 29451…" The specific Affidavit of Non-Service for that address does not in any way indicate that Appellant does not reside at the address, that he has moved, or that he is known to have left the state, temporarily or permanently. It specifically states that the address is in a gated community and that the process server could not gain access.

Also on January 20, 2011, at the same time as the Petition for Order of Publication was filed, Counsel for Bank of America secured and filed an Order of Publication, signed by the Clerk of Court of Charleston County. Despite the specific, and standard, language in the Order requiring publication in the Post and Courier for three consecutive weeks, no Affidavit of Publication appears in the record of the Court. In fact, following the filing of the Order of Publication, there was no activity of any nature until January 22, 2013. On that date, R. David Chard, representing Mr. Derrick, wrote a letter to Mr. Hayes, indicating that his client had never been served and that, as there had been no action in the matter, he would like to enter an appearance on behalf of Mr. Derrick.

No response to that letter was ever received. Instead, on April 24, 2014, the Master in Equity for Charleston County declared the tax deed issued to Appellant to be void. The property was conveyed back to Cornell and Deborah Williams, the owners at the time the tax sale had occurred. Appellant herein was not provided with any opportunity to contest this action, nor was he ever advised that it might occur.

Immediately upon learning of the Order voiding his interest in real property he had purchased, Appellant sought reconsideration of the Master's decision, on the grounds that he had never received notice or been properly served, and questioning Respondent's standing to bring this action in the first instance. Appellant's Motion was filed on May 8, 2014; it was denied, without hearing, on May 9.

II. ARGUMENT

A. Respondent Failed to Comply with the Statutory Requirements of Service by Publication.

1) The Affidavit in Support of the Petition for Leave to Serve by Publication Contains Material Misrepresentations.

Service of the summons and complaint, and notice of the pendency of an action, has not only a statutory basis but constitutional implications. Both the United States and the South Carolina Constitutions mandate that persons who may lose their rights be informed of the risk. Under the United States Constitution, the various States may not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The South Carolina Constitution specifically states that "[n]o person shall be finally bound by a judicial or quasi judicial decision . . . affecting private rights except on due notice and an opportunity to be heard." S.C. Const. art. I, § 22.

What constitutes proper service is governed by statute, and by the South Carolina Rules of Civil Procedure. Rule 4(d)(1) specifically requires that in those instances in which the defendant in an action is an individual, service shall be made 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..." Both the Rule and Chapter 9 of Title 15 of the South Carolina Code of Laws provide for alternative means of service in the event personal service cannot be had on an individual. First, Rule 4(d)(8) allows for service to be made by certified mail, return receipt requested. In addition, S.C. Code § 15-9-710 et seq. allows for service to be made by publication, providing certain criteria have been met.

Under the statute, service of the summons and complaint may be had by publication "[w]hen the person on whom the service of the summons cannot, after due diligence, be found within the State..." S.C. Code § 15-9-710. The Petition for Publication filed by Respondent contains what is essentially the "magic language" required for a valid affidavit requesting such service. South Carolina law, in turn, is clear that once the Clerk of Court has found such an affidavit to be sufficient, the trial court "is without authority to overrule [that] finding..." *Montgomery v. Mullins,* 325 S.C. 500, 505 – 06, 480 S.E.2d 467, 470 (Ct. App. 1997). This blanket rule is not, however, applicable in cases where the affidavit itself is facially deficient, *see Caldwell v. Wiquist*, 402 S.C. 565, 741 S.E.2d 583 (Ct. App. 2013). The South Carolina Supreme Court has also indicated that it will review the affidavit asserting that the moving party has been unable to locate the defendant not merely as it exists and standing alone, but in conjunction with the affidavits of non-service themselves, *Wachovia Bank of S.C., N.A. v. Player*, 341 S.C. 424, 535 S.E.2d 128 (2000), and that one of the reasons upon which even a facially satisfactory affidavit may be set aside is a finding of fraud. The relevant question is whether the documents, taken together, demonstrate some facts upon which the Clerk of Court, and the Court itself, can determine that the defendant cannot be found within the State.

There is absolutely no question but that the documents of record in this matter clearly demonstrate that Appellant was not personally served not because he is not a resident of South Carolina but merely because Appellant's process server ran into a gated community to which he could not gain access. Respondent attempted service at a number of what appear to be rental units owned by Appellant, at which Appellant could not be found. The record also contains an affidavit of service for what appears to be the single occasion on which Respondent attempted personal service at Appellant's long-time residence; that affidavit does not say Appellant could

not be found, but instead states that the process server could not get in the gate. There is not only no evidence to substantiate the claim that Appellant is not a South Carolina resident, there is affirmative evidence, amply supported by the record, to demonstrate the obvious conclusion that he was at all relevant times present here.

This is not a case in which the determination of the Clerk of Court to permit service by publication is or should be conclusive. The Clerk's decision was made without reference to the documents contained in the Court's own files. Furthermore, the affidavit, while not facially defective, is substantially and significantly untruthful. At no time did the affiant have evidence that Appellant "may reside outside of said State or be temporarily absent from said State." In fact, the affiant had actual knowledge that his process server had been unable to gain access to the gated community in which the address affiant states to be that of Appellant is located. While neither the statute nor the cases discussing it specifically define "fraud" in the context of affidavits in support of petitions to allow service by publication, the deliberate omission of highly relevant facts should not be tolerated.

It is also significant, and was also ignored by the Clerk when granting the Petition for Publication, that it is facially impossible to determine how Respondent came to the conclusion that the address it used – 86 Seaside Cottage Lane, Isle of Palms – is or ever was Appellant's actual address. Had Appellant been granted a hearing on the matter (*see discussion infra)*, he would have had the opportunity to explain that his true address is 18 Broad Street, Charleston. Appellant has, in fact, resided at this address for some years. Also contained in the record, and filed with the Clerk prior to the filing of the Petition for Publication, is an Affidavit of Non-Service at this address. Like the Seaside Cottage location, the difficulty the process server had was not that he could not find Appellant; the building was locked and he could not gain access.

Prior to asking for leave to serve Appellant by publication, a petition filed on the basis of an affidavit asserting that, "upon information and belief," Appellant was no longer resident in this State, Respondent attempted service at multiple addresses, each of them locations it had by some unexplained method associated with Appellant. It was not able to serve him at any of the addresses it somehow found. In some instances, the Affidavits of Non-Service state that the identified address was vacant, or that it was a rented building at which Appellant did not reside. In several instances, the Affidavits show that the process server could not verify whether or not Appellant was a resident, because the building or community was secured. This is the case with both the address claimed, incorrectly, to be his last known residence, and that at which he could actually have been found.

In *Wachovia Bank v. Player, supra*, the South Carolina Supreme Court held that, in normal cases, an affidavit sufficient to satisfy the issuing officer may not be reviewed. In *Player*, the defendant seeking to have service by publication set aside contended that 1) a mere allegation of the exercise of due diligence in searching for him was insufficient; and 2) that stating in the affidavit that service had been attempted by the Georgetown Sheriff's Department, rather than the actual private process server employed, was a sufficient "untruth" to create a factual issue regarding the sufficiency of the material misrepresentation alleged. The Court first reiterated its position that it does not review the extent to which the diligence claimed in the affidavit is enough. It further found that there was no evidence presented that would have shown that the misrepresentation regarding the identity of the individual attempting personal service rose to the level of constituting fraud.

The Court noted, however, in Footnote 5 of its opinion, that what it termed "material misrepresentations" might constitute an adequate showing of fraud to require that the trial judge

look beyond the mere approval of the official who granted the petition for publication. As noted, there was no evidence presented in *Player* that would have justified such an examination, and the Court engaged in no discussion as regards what misrepresentation would rise to the level of fraud. It is clear, however, that had Appellant herein been afforded an opportunity to present his evidence, the material misrepresentations underlying the Petition for Publication do, as a matter of fact, rise to that level. Respondent affirmatively stated that it had exercised due diligence in attempting to serve Appellant, but that it had been unable to do so as it had discovered that he was not a resident of South Carolina at the time. Respondent had in its possession clear and unequivocal evidence, evidence that had actually been filed with the Court and made a part of the record in this case, that demonstrated that its attempt at service had failed because it had not been able to gain access to the gated community in which Appellant resided.

Additionally, the existence of the multiple Affidavits of Non-Service, already part of the Clerk's own files but clearly never referenced, highlight the extent to which the misstatement regarding Appellant's residence is material. Respondent failed to point out that it had attempted to serve Appellant at a number of addresses, and never explained how it determined that the Seaside Cottage location was either accurate or, in fact, Appellant's "last known address." As noted above, it is neither. Many of the Affidavits underscore the simple fact that Respondent's difficulties in making personal service stemmed not from Appellant's departure from this State, but merely from Respondent's inability to gain access to the property at which Appellant lived. The recitation that Appellant had moved away is blatantly false, and clearly made solely in order to mislead the Court Officer granting the Petition.

There is no indication in the file that Respondent ever attempted to serve Appellant by the alternative means allowed by statute, that of certified mail delivery, return receipt requested.

Respondent had no reason to believe that Appellant had moved from his long-time residence. That Respondent's private process server could not find a way to enter into the gated community where that residence is located obviously does not mean that the United States Postal Service would have the same difficulty; mail is delivered to gated communities in the same manner in which it is delivered to easily accessible residences.

In *Caldwell v. Wiquist, supra*, the South Carolina Supreme Court reaffirmed its long-standing position that the validity of an order allowing service by publication may only be challenged by a showing of fraud or collusion. The Court also emphasized, however, that the statutory criteria for such service must be strictly followed. Specifically, the Court noted that service by publication is an effective tool to be used where the defendant is unknown or cannot be found. However, "[s]ervice by publication is constitutionally insufficient where actual notice by mail is feasible." *Caldwell*, 402 S.C. at 576, 741 S.E.2d at 589 (*quoting United States v. Borromeo*, 945 F.2d 750, 752 (4th Cir. 1991)). The Court went on to say that "[i]f the name and address of an individual is reasonably ascertainable, then notice by publication is insufficient to satisfy due process." *Id., quoting Montgomery v. Scott*, 802 F. Supp. 930, 935 (W.D.N.Y. 1992).

As noted, Respondent had no reason to believe that Appellant could not have been served by mail. Respondent was fully aware, and had filed with this Court, Affidavits of Non-Service making it clear that its process server could not gain access to the residence believed to be Appellant's. Despite the language in its Petition stating that "upon information and belief" Appellant had departed from the State, Respondent actually knew that it had no factual basis for such a statement. It never attempted to serve Appellant by mail.

This material misrepresentation in the Petition rises to the level of the type of fraud contemplated by the *Player* Court. Although the Affidavit submitted with the Petition was

facially valid and facially sufficient to satisfy the Clerk of Court, the facts contained therein constitute a fraud, and Respondent clearly failed to comply with the strict requirements of S.C. Code § 15-9-710 in seeking leave to serve Appellant by publication.

2) No Affidavit of Publication Has Ever Been Filed, and Respondent Has Further Failed to Comply with the Statutory Requirements As No Evidence Exists that Publication Was Had.

In addition to failure to comply with certain statutory and constitutional prerequisites necessary for valid service by publication, Respondent has also failed to follow the requirements of Rule 4(g) of the South Carolina Rules of Civil Procedure. The Rule provides, in pertinent part, that "[i]f served by publication, the printer or publisher shall make an affidavit thereof..." Furthermore, although the Order granting leave to serve by publication contains the statutorily mandated requirement that Respondent also mail a copy of the summons and complaint to the last known address of Appellant, there is no evidence that Respondent ever did so.

Merely requesting leave to serve by publication is insufficient; the record must also contain affirmative proof that publication was made as required by the statutory scheme. The Courts of this State have routinely noted that service by publication is in derogation of the common law and the statutes allowing it must consequently be strictly construed. *See, e.g., Brown v. Malloy*, 345 S.C. 113, 546 S.E.2d 195 (Ct. App. 2001); *Tenney v. Am. Pipe Mfg. Co.*, 96 F. 919 (D.S.C. 1899).

Respondent's failure to comply with the service provisions of the statutory scheme invalidate any claim that service was properly made by publication. There is no evidence in the record that any notice was published, and no evidence in the record that Respondent actually mailed a copy of the summons and complaint to Appellant's address, an address of which Respondent was clearly aware.

B. The Trial Court's Failure to Conduct a Hearing on the Validity of Service Constitutes a Violation of Appellant's Rights to Due Process.

In his Motion to Reconsider, filed pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure, Appellant raised the service issues. As is standard in such Motions, Appellant indicated in his Notice of Motion that he would be asking that a hearing on his motion be scheduled not less than ten days from the date of filing. Instead of setting a hearing date, however, the Motion to Reconsider was immediately denied.

As has been noted in detail *supra*, the statutes under which service by publication is made permissible are always strictly construed, as the practical effect of these statutes is to permit a plaintiff to commence an action, and to obtain a judgment against the defendant, without ensuring that the defendant is actually given notice of the pendency of the action. As such, cases in which the only service is made by publication potentially deprive a defendant of his property without affording him his constitutionally guaranteed right of notice and an opportunity to be heard. U.S. Const., amend. XIV ("...nor shall any State deprive any person of life, liberty, or property, without due process of law..."). Due process requires notice, the opportunity to be heard in a meaningful way, and judicial review. *Grannis v. Ordean*, 234 U.S. 385 (1914); *Cameron & Barkley Co. v. South Carolina Procurement Review Panel*, 317 S.C. 437, 454 S.E.2d 892 (1995); *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 561 S.E.2d 659 (Ct. App. 2002).

It is difficult to challenge the validity of an Order granting leave to effectuate service via publication; as noted, the affidavit in support of the petition is, under most circumstances, unassailable. As is also noted, however, it can be effectively challenged if the moving party can demonstrate that the order was procured through fraud or collusion. Neither fraud nor collusion can, however, be proven without having the opportunity to present evidence.

In this instance, the evidence would have consisted of the Affidavits of Non-Service, already filed with the Court and showing that Appellant resided in a gated community to which Respondent's process server was unable to gain access, and the testimony of the Clerk of Court to show that she relied on the material misrepresentations knowingly made in Respondent's Affidavit in granting leave to serve by publication. The South Carolina Supreme Court has specifically stated that such testimony can – and, in fact, should – be used to demonstrate that a misrepresentation rises to the level of fraud. *Wachovia Bank of South Carolina, N.A. v. Player*, 341 S.C. 424, 429, fn. 5, 535 S.E.2d 128, 130, fn. 5 (2000).

The trial court initially affirming service by publication in *Player* conducted a hearing on the challenge, and the Supreme Court clearly assumed that such a hearing was both appropriate and necessary. The decision focuses on the type of proof required to be presented; it presupposes that there will be an opportunity to present it.

The Constitution absolutely requires that a hearing be held before a citizen may be deprived of his property. In this case, the ultimate result of the failure of the Trial Court to conduct a hearing was that Appellant herein was ordered to cede to a third party the deed to real property he had legally purchased; there can be no clearer "deprivation of property." Appellant was never properly served with the summons and complaint, despite the fact that he was at all relevant times a resident of this State. Although the Rules of Civil Procedure expressly provide that service may be had by certified mail, and even though Respondent had a valid mailing address for Appellant, mail service was never attempted. Respondent fraudulently and materially misrepresented these facts in order to obtain an Order granting it leave to serve Appellant by publication; Respondent then failed to verify either that notice of the filing of the complaint was ever published, or that it had complied with the Order requiring it to mail the

documents to Appellant. Despite receiving correspondence from former counsel for Appellant in January, 2013, asking what was transpiring with this action, correspondence Respondent failed to answer or even acknowledge, Respondent apparently notified the Trial Court last fall that it had heard nothing and that the matter should be resolved by default – based on the fraudulently obtained service by publication. Following the Order of the Trial Court that deprived him of his ownership of his property, Appellant sought an opportunity to be heard regarding all of the fatal irregularities, an opportunity that was summarily denied, without hearing, by the Trial Court.

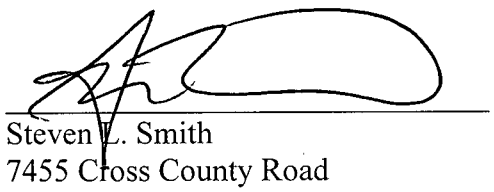
The failure to conduct a hearing on the issue of the legitimacy and validity of the process underlying the grant of Leave to Serve via Publication operated to deprive Appellant of his constitutionally guaranteed right to due process of law.

CONCLUSION

For the reasons set forth above, Appellant George Rodney Derrick would respectfully request that this Court find that he was not properly served in the underlying matter, that the decision of the Honorable Mikell Scarborough conveying the title to the subject property to co-Defendants Cornell and Deborah Williams should be set aside, and the property should remain in Appellant's name. In the alternative, Appellant would request that this Court remand this matter with instructions to conduct a hearing to determine whether or not proper service upon him was had.

Respectfully submitted,

SMITH | CLOSSER, P.A.



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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Appellants' Final Briefs are in compliance with Rule 211 (b) of the South Carolina Rules of Appellate Procedure.

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