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SC Court of Appeals

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 Scarbrough,
as Delinquent Tax Collector for Charleston County

Defendants

Of Whom

George Rodney Derrick is

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. DID RESPONDENT COMPLY WITH THE STATUTORY REQUIREMENTS OF SERVICE BY PUBLICATION?
 - A. Does the Affidavit in Support of the Petition for Leave to Serve by Publication Contain Material Misrepresentations When Respondent's Affidavit Fully Relied on the Representations of their Process Server?
 - B. Did Respondent Execute the Order of Publication Properly by Placing an Advertisement in the Post and Courier and Mailing the Summons and Complaint to Appellant's Last Known Address?
2. DID THE MASTER-IN-EQUITY DEPRIVE APPELLANT OF HIS RIGHT TO A HEARING WHEN APPELLANT WAS NOT ENTITLED TO A HEARING ON THIS MOTION FOR RECONSIDERATION?
3. HAS THE ISSUE OF WHETHER THE ORDER OF PUBLICATION WAS PROPERLY OBTAINED OR EXECUTED BY RESPONDENT BEEN PRESERVED FOR APPELLATE REVIEW?

STATEMENT OF THE CASE

On January 17, 2007, Cornell Williams took ownership of the property located at 111 Drake Street, Charleston, SC 29403 by executing a note and mortgage granting Bank of America, N.A. ("Respondent") a lien on the subject property. (R. pp. 23-25). That Mortgage was recorded in Book Z618 at Page 880 on March 19, 2007 in the Office of the Register of Deeds for Charleston County. (R. pp. 23-25).

Cornell Williams then failed to pay the 2007 Taxes due on the subject property. On November 3, 2008, the Charleston County Delinquent Tax Department conducted a tax sale of the property. (R. pp. 23-25). George Rodney Derrick ("Appellant") bid \$45,000 for the subject property, resulting in an overage of \$40,000 which is presently held by the Delinquent Tax Department for the County of Charleston. (R. pp. 23-25). The tax deed conveying real property to George Rodney Derrick was recorded on May 10, 2010 in the Office of Register of Deeds for Charleston County in Book 0121 at Page 414. (R. pp. 23-25).

However, it was found that the tax sale was invalid because the Delinquent Tax Office did not comply with the requirements of S.C. Code Ann. § 12-51-120. (R. pp. 23-25). As a result, on September 24, 2010, Respondent and Korn Law Firm ("Respondent's Counsel") filed an action to set aside the tax sale. (R. pp. 1-7). In order to serve Appellant with the summons and complaint, Respondent's Counsel attempted to serve Appellant at the following locations:

1. On October 2, 2010 service was attempted at 161 N Plaza Court Charleston, SC 29464. (R. p. 10).
2. On October 12, 2010 service was attempted at 18 Francis St, Charleston, SC 29406. (R. p. 11).
3. On October 14, 2010 service was attempted at 18 Broad St 602, Charleston 29401. (R. p. 9).
4. On October 19, 2010 service was attempted at 257 South Plaza Court, Mount Pleasant, SC 29464. (R. p. 12).
5. On October 27, 2010 service was attempted at 121 Calhoun Street, Charleston, SC 29401. That Affidavit of Non-Service, "The defendant does

- not reside at the above address, it is an apartment building he owns but does not reside there.” (R. p. 13).
6. On October 30, 2010 service was attempted 8930 Selah Street, Charleston SC 29406. (R. p. 14).
 7. On November 3, 2010 service was attempted at 86 Seaside Cottage LN, Isle of Palms, SC 29451. (R. p. 8).
 8. On January 11, 2011 service was attempted at 86 Seaside Cottage Lane, Isle of Palms, SC 29451. That Proof of Service by Deputy C. Hampton of the Charleston County Sherriff’s Department states, **“Respondent’s mother advised that respondent no longer lives in SC and she will try to get message to him.”** (R. p. __) (emphasis added).
 9. On January 18, 2011 service was attempted on 1776 Sacramento Street Apt 709, San Francisco, CA 94109. (R. p. 17).
 10. On January 19, 2011 service was attempted on 1776 Sacramento Street Apt 709, San Francisco, CA 94109. (R. p. 17).
 11. On January 20, 2011 service was attempted on 1776 Sacramento Street Apt 709, San Francisco, CA 94109. (R. p. 17).
 12. On January 21, 2011 service was attempted on 1776 Sacramento Street Apt 709, San Francisco, CA 94109. (R. p. 17).
 13. On January 22, 2011 service was attempted on 1776 Sacramento Street Apt 709, San Francisco, CA 94109. (R. p. 17).
 14. On January 23, 2011 service was attempted on 1776 Sacramento Street Apt 709, San Francisco, CA 94109. (R. p. 17).
 15. On January 24, 2011 service was attempted on 1776 Sacramento Street Apt 709, San Francisco, CA 94109. (R. p. 17).

On January 20, 2011, Julia J. Armstrong as the Clerk of Court for Charleston County issued an Order of Publication stating “that a cause of action exists and that Defendant George Rodney Derrick could not be located within the State of South Carolina after a diligence search.” (R. p. 20). In that Order, Julia J. Armstrong ordered that a notice be placed in the Post and Courier in Charleston County, as well as for the Summons and Complaint to be mailed to Respondent’s last known address. (R. p. 20).

Respondent complied with the order of publication by placing a notice in the Post and Courier, as well as mailing the summons and complaint to 86 Seaside Cottage LN, Isle of Palms, SC 29451, Respondent’s last known address. (R. p. __)

On March 30, 2011, Respondent filed a motion and order of reference, referring

the matter to the Honorable Judge Scarborough as Master-In-Equity for Charleston County (“Judge Scarborough”). On March 30, 2011, Respondent’s Counsel also filed a affidavit of default, stating that Appellant had not answered the complaint and was in default.

On January 23, 2012 Respondent filed a motion for summary judgment as to the counterclaims of Defendants Cornell Williams and Deborah P. Williams. On March 6, 2012, Judge Scarborough signed an order granting Respondent summary judgment as to the counterclaims of Cornell Williams and Deborah P. Williams.

On October 2, 2013, Judge Scarborough signed an order requiring the transfer of property, and in the alternative, vacating tax sale. (R. pp. 23-25). On that order, Judge Scarborough wrote in handwriting, “C. Rod Derrick was properly served by publication in this matter,” and signed his initials. (R. p. 24). That order required Respondent to convey the subject property back to Cornell Williams within 90 days or Appellant’s tax deed would be declared void. (R. p. 25).

On April 24, 2014, Judge Scarborough issued an order of conveyance of property. (R. p. 26-27). In that order, Judge Scarborough found that Respondent had not deeded the property back to Cornell Williams, and then ordered that Appellant’s tax deed was void, and that the mortgage held by Respondent reattach to the subject property. (R. p. 27).

On May 5, 2014, Appellant filed a notice of motion and motion to reconsider. His motion, in its entirety, states:

“YOU WILL PLEASE TAKE NOTICE, that the undersigned, as attorney for the Defendant, George Rodney Derrick, will move before Mikell R. Scarborough within ten (10) days from the service of this Motion or as soon thereafter as Counsel may be heard, for a Motion to Reconsider the Order filed April 24, 2014. The basis of this Motion to Reconsider is that the Defendant, George Rodney Derrick, was never properly served and

that the Plaintiff does not have standing to bring this action.” (R. p. ___).

On May 8, 2014, Appellant filed a motion to alter or amend order pursuant to Rule 60(b). His motion, in its entirety, states:

“YOU WILL PLEASE TAKE NOTICE, that the undersigned, as attorney for the Defendant, George Rodney Derrick, will move before Mikell R. Scarborough within ten (10) days from the service of this Motion or as soon thereafter as Counsel may be heard, for a Motion to Alter or Amend Order Pursuant to Rule 60(b) filed on October 13, 2013. The basis of this Motion to [sic] Alter to Amend Order Pursuant to Rule 60(b) is that the Defendant, George Rodney derrick, was never properly served and that the Plaintiff does not have standing to bring this action.”

On May 6, 2014, Judge Scarborough signed an Order—which was filed on May 9, 2014—denying Appellant’s motion to reconsider without a hearing. Judge Scarborough stated, “The Court finds that Defendant Derrick was served by publication, and therefore, the motion to reconsider is respectfully denied.” This Order contained a checked box stating this Order ends the case.

On May 23, 2014, Appellant filed a notice of appeal on the denial of his motion for reconsideration rendered by Judge Scarborough on May 6, 2014.

On June 19, 2014, a hearing was held for Appellant’s 60(b) motion. Neither Appellant nor Appellant’s counsel appeared at that hearing. On June 20, 2014 Judge Scarborough issued an Order denying Appellant’s 60(b) motion stating, “The Court is Advised this case is on appeal after Notice filed May 23, 2014. Defendant Derrick’s 60(b) Motion was set for today at 2pm and no one appeared. Motion dismissed.” (R. p. ___).

Appellant now asserts on Appeal, for the first time in this case, that Respondent obtained the order of publication through fraud or collusion and that Respondent did not

execute the order of publication properly. Appellant also asserts that he was deprived of a hearing on his motion for reconsideration.

ARGUMENT

An action to set aside a tax sale lies in equity. *Smith v. Barr*, 375 S.C. 157, 160, 650 S.E.2d 486, 488 (Ct.App.2007). Accordingly, this Court may take its own view of the preponderance of the evidence. *Folk v. Thomas*, 344 S.C. 77, 80, 543 S.E.2d 556, 557 (2001); *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989); *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). If the Court finds facts in accordance with its own view of the evidence, the Court must state those findings of fact and the reasons for those findings. *Dearybury v. Dearybury*, 351 S.C. 278, 283, 569 S.E.2d 367, 369 (2002).

1. RESPONDENT COMPLIED WITH THE STATUTORY REQUIREMENTS OF SERVICE BY PUBLICATION.

A. The Affidavit in Support of the Petition for Leave to Serve by Publication does not Contain Material Misrepresentations because Respondent's Affidavit Fully Relied on the Representations of their Process Server.

Rule 4(d)(1) of the SCRCPP requires that a plaintiff bringing an action against an individual to deliver a copy of the summons and complaint to him personally or by leaving copies at his dwelling. S.C.R.C.P. 4(d)(1). Rule 4(g) of the SCRCPP requires anyone serving the summons and complaint to make proofs of service for any attempts made to serve the summons and complaint. S.C.R.C.P. 4(g). Service by publication is valid when an affidavit is submitted to the clerk of court stating that a cause of action is

brought against a person who, after due diligence, cannot be found within the state. See S.C. Code Ann. § 15-9-710. When the issuing officer is satisfied by the affidavit, his decision to order service by publication is final absent fraud or collusion. *Wachovia v. Player*, 341 S.C. 424, 428, 130, 535 S.E.2d 128, 130 (2000); see also *Caldwell v. Wiquist*, 402 S.C. 565, 577, 741 S.E.2d 583, 589 (Ct. App. 2013). Intent to commit fraud is a necessary element in proving that an affidavit for an Order of Publication contains fraudulent statements. See *Brown v. Malloy*, 345 S.C. 113, 119, 546 S.E.2d 195, 198 (Ct. App. 2001),

In *Brown*, the Court of Appeals applied *Wachovia v. Player* in determining whether an order of publication was based on fraud or collusion in a termination of parental rights case. *Id.* In *Brown*, Brown alleged that Malloy made fraudulent statements in her affidavit by specifying that Malloy lived in Los Angeles County. *Id.* at 118, 546 S.E.2d at 197. The court found that Brown lived in Seal Beach, Orange County, which is adjacent to Los Angeles County. *Id.* In looking at Malloy's intent, the Court of Appeals deferred heavily to the lower court's findings and held that Malloy's mistaken belief that Brown lived in a specific location was not enough to support a finding of fraud. *Id.* at 119, 546 S.E.2d at 198.

In the instant case, Respondent made the following attempts to serve the Appellant:

1. On October 2, 2010 service was attempted at 161 N Plaza Court Charleston, SC 29464. (R. p. 10).
2. On October 12, 2010 service was attempted at 18 Francis St, Charleston, SC 29406. (R. p. 11).
3. On October 14, 2010 service was attempted at 18 Broad St 602, Charleston 29401. (R. p. 9).
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- Pleasant, SC 29464. (R. p. 12).
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These fifteen attempts, at eight different locations, by Respondent to serve Appellant more than qualify as due diligence to serve the Appellant. Furthermore, Appellant states in his Initial Brief, “Had appellant been granted a hearing on the matter, he would have had the opportunity to explain that his true address is 18 Broad Street, Charleston.” Final Brief of Appellant at 5. The Affidavit of Non-Service filed on October 15, 2010 shows that service was attempted at this location. (R. p. 9). Pursuant to S.C. Code Ann. § 15-9-710, the statement by the process server on January 11, 2011 that “Respondent’s mother advised that respondent no longer lives in SC and she will try to get message to him”

alone satisfies the requirement that a person “cannot be found within the state.” (R. p. ___). Respondent, in filing its petition for order of publication, relied fully on the process server’s statements. Therefore, pursuant to *Brown, Wachovia v. Player*, and S.C. Code Ann. § 15-9-710, Respondent did not make fraudulent statements in filing an affidavit stating that after due diligence Appellant could not be found within the state and the Order of Publication was proper.

B. The Respondent Executed the Order of Publication Properly by Placing an Advertisement in the Post and Courier and Mailing the Summons and Complaint to Appellant’s Last Known Address.

In his order of publication, Judge Scarbrough stated,

“IT IS ORDERED that service of Summons and Complaint in this action be made upon the Defendant George Rodney Derrick by publication of the said Summons, together with the Notice, once a week for three (3) consecutive weeks in The Post and Courier, a newspaper printed and published in the County of the State aforesaid; and that a copy of Summons and Complaint be mailed to the Defendant George Rodeny Derrick, at his last known address.” (R. pp. 20-21).

Respondent fully complied with Judge Scarbrough’s order of publication. Respondent’s affidavit of publication demonstrates that Respondent placed an order with the Post and Courier in the County of Charleston for a summons of complaint against Appellant. (R. p. 24). That publication appeared in the Post and Courier for three consecutive weeks on January 27, 2011, February 3, 2011, and February 10, 2011. Furthermore, Respondent’s affidavit and certified mail receipts show that Respondent sent a copy of the summons and complaint to Appellant’s last known addresses: 86 Seaside Cottage Lane, Island of Palms, SC 29451 and PO Box 804 Charleston, SC 29402. (R. pp. 36-37). Therefore, Respondent fully complied with the order of publication.

2. THE MASTER-IN-EQUITY DID NOT DEPRIVE APPELLANT OF HIS RIGHT TO A HEARING BECAUSE APPELLANT WAS NOT ENTITLED TO A HEARING ON THIS MOTION FOR RECONSIDERATION.

The Master-In-Equity did not deprive the Appellant of a hearing on his Motion for reconsideration because Appellant was not entitled to a hearing on his motion for reconsideration.

No person shall be bound by a judicial decision affecting private rights except on due notice and opportunity to be heard. S.C. Cons. Art. I, § 22. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *S. Carolina Nat. Bank v. Cent. Carolina Livestock Mkt., Inc.*, 289 S.C. 309, 313, 345 S.E.2d 485, 488 (1986). Under Rule 59(f), SCRPC, a Rule 59(e) motion may in the discretion of the court be determined on the briefs filed by the parties without oral argument. Rule 59, SCRPC; *See Pollard v. Cnty. Of Florence*, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct. App. 1994) (holding that the circuit court did not abuse its discretion in denying a Rule 59(e) motion by ruling on the briefs submitted by the parties without a hearing). A trial court is without the authority to overrule the clerk of court's finding that a person cannot be found in the County and State of their last known residence absent fraud or collusion. *Montgomery v. Mullins*, 325 S.C. 500, 505-06, 480 S.E.2d 467, 470 (Ct. App. 1997).

Appellant was not entitled to a hearing on his motion for reconsideration because Rule 59(e) allows for the Master-In-Equity to rule on his motion without a hearing. Pursuant to *Montgomery v. Mullins*, *Wachovia v. Player*, and *Brown v. Malloy*, Judge Scarborough was without the ability to overrule the Clerk of Court's finding that the Order of Publication was valid because Appellant's motion contained no allegations of

fraud or collusion. Because Appellant did not raise the issue of fraud or collusion in his motion under Rule 7(b) of the SCRCPP, there was nothing further for Judge Scarborough to hear and he was able to rule on the motion without a hearing. Therefore, Appellant was not entitled to a hearing on his motion for reconsideration.

3. THE ISSUE OF WHETHER THE ORDER OF PUBLICATION WAS PROPERLY OBTAINED OR EXECUTED BY RESPONDENT IS NOT PRESERVED FOR APPELLATE REVIEW.

Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. *Caldwell v. Wiquist*, 402 S.C. 565,577, 741 S.E.2d 583, 589 (Ct. App. 2013). Where an issue has not been ruled upon by the trial judge nor raised in a post-trial motion, such issue may not be considered on appeal. *Id.*

In *Caldwell*, a review of the record revealed that Wiquist did not raise the issue of fraud or collusion to the trial court. *Id.*, at 577, 741 S.E.2d at 589. In fact, the trial court specifically found in its orders denying Wiquist's motions to set aside the default judgments that Wiquist made no allegation of either fraud or collusion as grounds for invalidating the order of publication. *Id.*, at 577, 741 S.E.2d at 589. Furthermore, the Court found as a matter of fact that there was no fraud or collusion in obtaining the order of publication. *Id.* Wiquist failed to file Rule 59(e) motions. *Id.* As a result, the court found that the issue was unpreserved for our review. *Id.*

In the instant case, Appellant is attempting to have the Court of Appeals overturn its decision in *Caldwell*. Though Wiquist failed to make a motion for consideration under 59(e), Appellant's motion for reconsideration under Rule 59(e) fails to state that it was being made on the grounds that the order of publication was obtained through fraud or

collusion. Judge Scarborough writes in, his own handwriting, on the denial of Appellant's motion for reconsideration, that the order of publication is proper. The first time that Appellant asserts that the order of publication was obtained through fraud or collusion is in his appeal. Appellant was given an additional opportunity make this argument in the hearing he scheduled on his 60(b) motion. However, Appellant failed to attend the hearing. Therefore, Respondent requests that this court follow its decision in *Caldwell* and find that Appellant's assertion that the order of publication was obtained through fraud or collusion has not been preserved for appellate review.

CONCLUSION

For the reasons set forth above, this Court should affirm the May 9, 2014 order denying appellant's motion for reconsideration, the January 20, 2011 order of publication, the October 2, 2013 order requiring the transfer of property, and in the alternative, vacating tax sale, the April 24, 2014 order of conveyance of property. In the alternative, if this Court finds that the issues presented in Appellant's Brief have not been preserved for review, Respondent requests that his matter be remanded down for a hearing on Appellant's motion to reconsider.

Respectfully submitted,



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Cornell L. Williams, Deborah P. Williams,
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as Delinquent Tax Collector for Charleston County

Defendants


Of Whom

George Rodney Derrick is

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



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