

STATE OF SOUTH CAROLINA

COUNTY OF ALLENDALE

Louise Fishburne,

Plaintiff,

vs.

Lutheran Services for the Aging, Inc., Lutheran
Family Services in the Carolinas, and Lutheran
Services for the Aging, Inc. and Lutheran
Family Services in the Carolinas d/b/a Lutheran
Services Carolinas,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL
CIRCUIT

RECEIVED

MAY 20 2019

SC Court of Appeals

CASE NO.: 2017CP0300120

ORDER DENYING MOTION TO SET
ASIDE DEFAULT PURSUANT TO RULE
55(d) AND 60(b)

THIS MATTER came before the Court on January 30, 2019 on Defendants' Notice of Motion and Motion to Set Aside Default Under Rule 55(d)¹ and Rule 60(b) of the SCRPC. The matter was heard during the Allendale County Motions term of Court which was held at the Hampton County Courthouse. Patrick T. Morrissey appeared on behalf of Defendant Lutheran Family Services in the Carolinas. Steven D. Murdaugh appeared on behalf of the Plaintiff. Present and not participating in the hearing was Herbert W. Louthian, legal counsel for Defendant Lutheran Services for the Aging, Inc. and Lutheran Family Services in the Carolinas d/b/a Lutheran Services Carolinas. Based on the oral arguments of counsel, the Memorandum in Support of the Motion submitted by Defendant Lutheran Family Services in the Carolinas, affidavits of the parties, exhibits submitted by the parties during the hearing as well as the statutory law and case law as cited by counsel for the parties, the Defendants' Motion to Set Aside Default Under Rule 55(d)² and Rule 60(b) is respectfully **DENIED**.

¹ Defendants' incorrectly motion to set aside default under Rule 55(d) SCRPC. This Court notes that this was made presumably under a scrivener's error, and the Defendants argue this Motion under Rule 55(c) SCRPC.

² see Footnote 1.

PROCEDURAL HISTORY

Plaintiff filed a Summons and Complaint on May 16, 2017 with the Allendale County Clerk of Court's office naming Lutheran Services for the Aging, Inc. (a North Carolina Non-Profit Corporation) (hereinafter "Defendant LSA") and Lutheran Family Services in the Carolinas (a North Carolina Non-Profit Corporation authorized by the South Carolina Secretary to conduct business in South Carolina) (hereinafter "Defendant LFSC") and both Corporations doing business as Lutheran Services Carolinas.

Plaintiff served the Summons and Complaint on Defendant LSA by Certified Mail Return Receipt to Registered Agent Ted Goings at P.O. Box 947 Salisbury, North Carolina 28145.³ The Summons and Complaint were delivered on June 27, 2017. Plaintiff served the Summons and Complaint on Defendant LFSC by Personal Service on the Registered Agent listed with the South Carolina Secretary of State on June 22, 2018. Plaintiff received an Affidavit of Service dated June 22, 2017 signed by Process Server Angela Adams with John Adams & Associates certifying that she personally served the Registered Agent. Neither Defendant filed an Answer, Demurrer or Notice of Appearance within thirty (30) days from the date of service thereon.

On May 21, 2018 Plaintiff filed a Notice of Motion and Motion for Default Judgment. Attached to the Motion was the Affidavit of Steven D. Murdaugh, Attorney for the Plaintiff, stating that Defendant LFSC was served on April 24, 2017 and Defendant LSA was served on June 27, 2017.⁴ Plaintiff also filed a Certificate of Service on July 11, 2018 as proof of the service on Defendant LSA.

³ Ted Goings is the Registered Agent for Defendant LSA listed with the North Carolina Secretary of State.

⁴ The date of service referenced in the Notice of Motion and Motion for Default Judgment and the Affidavit of Steven D. Murdaugh was inadvertently referenced as April 24, 2017. Pursuant to the Affidavit of Service received from Process Server Angela Adams, the correct date of service was June 20, 2017.

On July 16, 2018 the Allendale County Clerk of Court, Elaine Sabb, electronically signed the Entry of Default and Order of Reference ordering that the Defendants were in Default and referring the matter to J. Morgan Kears, Esquire as Special Referee to take testimony and determine the amount of damages. The Entry of Default was electronically filed by the Allendale County Clerk of Court on July 18, 2018.

On August 9, 2018, Plaintiff mailed Defendants a copy of the Notice of Hearing and Certificate of Service to the address where each Defendant was served⁵ notifying the Defendants that a hearing had been scheduled for August 13, 2018 at 10:00 a.m. at the office of J. Morgan Kears in Allendale, South Carolina. On the day of the hearing, Mr. Kears had a medical emergency and was unable to conduct the hearing. On August 16, 2018, Plaintiff mailed Defendants a copy of the Notice of Hearing and Certificate of Service for the rescheduled hearing to the address where each Defendant was served⁶ notifying the Defendants that a hearing had been scheduled for August 20, 2018 at 2:00 p.m. at the office of J. Morgan Kears in Allendale, South Carolina. Neither Plaintiff nor the Special Referee were contacted by the Defendants prior to the hearing and neither appeared at the hearing on August 20, 2018. On September 4, 2018 Special Referee J. Morgan Kears issued a Damages Order awarding Plaintiff a Judgment against Defendants in the amount of \$188,400.00. The Judgment was filed with the Allendale County Clerk of Court on September 12, 2018.

⁵ Defendant LSA was sent a Notice of Hearing and Certificate of Service to: Ted Goings, CEO Post Office Box 947 Salisbury, North Carolina 28145. This is the same address registered with the North Carolina Secretary of State for Defendant LSA. Defendant LFSC was sent a Notice of Hearing and Certificate of Service to: Lutheran Services 1118 Union Street Columbia, South Carolina 29201. This is the same address registered with the South Carolina Secretary of State for Defendant LFSC.

⁶ The Plaintiff sent the Notice of Hearing and Certificate of Service to the same addresses listed in Footnote 3 for each Defendant.

On November 27, 2018, the Defendants filed this Notice of Motion and Motion to Set Aside Default Under Rule 55(d)⁷ and Rule 60(b) for good cause seeking to set aside the Order of Default dated September 12, 2018.

ANALYSIS

As an initial matter, the “good cause” standard under Rule 55(c) of the SCRCP applies where a party seeks to be relieved from an entry of default. Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681, S.E.2d 885, 888 (2009). Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b) of the SCRCP. Id. at 608, 681 S.E.2d at 888. The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the “good cause” standard established in Rule 55(c). Id. at 608, 681 S.E.2d at 888. Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party. Rouvet v. Rouvet, 388 S.C. 301, 696 S.E.2d 204, 208 (Ct. App. 2010). The party requesting relief in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief. BB&T v. Taylor, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006). The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgement. Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 608, 681, S.E.2d 885, 888 (2009).

I. Defendant LFSC was properly served with Plaintiff's Summons and Complaint in this case.

Defendant LFSC asserts that it should be relieved from default judgment because they were never served with the Summons and Complaint. Pursuant to Rule 4(d)(1), SCRCP, mandates service shall be made upon a Corporation

⁷ see Footnote 1.

...by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

The South Carolina Supreme Court has held that “[a]n affidavit of service is Prima facie evidence of service which may be impeached by extrinsic evidence.” Richardson v. Construction Co. v. Meek Engineering and Construction Inc., 274 S.C. 307, 311, 262 S.E.2d 913, 915 (1980). The Court then highlighted the North Carolina case of Harrington v. Rice, 245 N.C. 640, 97 S.E.2d 239 (1957) and the Virginia case of Lamb v. Smith, 175 Va. 1053, 81 S.E.2d 768 (1954), where “those jurisdictions recognize the rule that an officer’s return of process establishes the legal presumption of service, and such presumption cannot be impeached by the mere denial of service by the defendant.” Id. at 311, 262 S.E.2d at 916. “South Carolina is in accord with this principle, and we find nothing in it to obviate the result herein reached.” Id.; *see also* Fassett v. Ecans, 364 S.C. 42, 610 S.E.2d 841 (Ct. App. 2005).

Defendant LFSC submitted the affidavit of Myra N. Griffie, which states that she is the Chief Operating Officer of Defendant LFSC. Myra N. Griffith's affidavit further states that LFSC has never been served with a Summons and Complaint in this case. Plaintiff presented to the Court an Affidavit of Service dated June 22, 2017, signed by Process Server Angela Adams, certifying that she personally served Bethany Vause, who identified herself as the South Carolina Executive Director and who is also listed as the Registered Agent for LFSC with the South Carolina Secretary of State. Pursuant to Rule 4(d) of the SCRCPP, the Affidavit of Service upon Bethany Vause, the Registered Agent for LFSC, by Process Server Angela Adams is proper notice.

LFSC has failed to present any extrinsic evidence other than a mere denial that they were never served with the Summons and Complaint which would refute the Affidavit of Service presented by the Plaintiff. Therefore, Defendant LFSC has failed to provide any evidence of mistake,

inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party.

II. The lack of a filed Certificate of Service on Defendant LFSC does no negate the validity of service

Defendant LFSC argues that it should be relieved from default judgment because Plaintiff failed to file a Certificate of Service with the Court. Rule 4(g) SCRPC requires in part that “[t]he person serving the process shall make proof of service thereof promptly and deliver it to the officer or person who issued same.” SCRPC 4 (g). The rule further requires that if service is made by “any other person, he shall make affidavit thereof.” SCRPC 4(g). “The proof of service shall state the date, time and place of such service and, if known, the name and address of the person actually served at the address.” SCRPC 4(g). “Failure to make proof of service does not affect the validity of the service.” SCRPC 4(g).

Plaintiff presented to the Court an Affidavit of Service dated June 22, 2017 signed by Process Server Angela Adams, certifying that she personally served Bethany Vause, who identified herself as the South Carolina Executive Director and who is also listed as the Registered Agent for LFSC with the South Carolina Secretary of State. While this affidavit provides proof that Defendant LFSC was served, the Plaintiff failed to file the affidavit along with a certificate of service with the Court.

Although Plaintiff failed to file the Affidavit of Service with the Court, pursuant to rule 4(g) the failure to make proof of service does not affect the validity of the service. The Process Server prepared an Affidavit of Service for Plaintiff’s counsel that included the date, time, place of such service and the name and address of the person actually served. As a result, Defendant LFSC has failed to provide any evidence of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party.

III. The Scrivener's error in the Affidavit filed with the Motion for Default does not render the service improper

Defendant LFSC argues that it should be relieved from default judgment because the affidavit filed by Plaintiff's counsel along with the Motion for Default claims a service date one month before suit was filed and that there is no supporting documentation for the service. On May 21, 2018 Plaintiff filed a Notice of Motion and Motion for Default Judgment. Attached to the Motion was the Affidavit of Steven D. Murdaugh, Attorney for the Plaintiff, also dated May 21, 2018 stating that Defendant LFSC was served on April 24, 2017. Defendant LFSC was actually served on June 22, 2017 as evidenced by the Affidavit of Service dated June 22, 2017 signed by Process Server Angela Adams, certifying that she personally served Registered Agent for Defendant LFSC Bethany Vause. Based on Plaintiff's Motion for Default and the Affidavit filed by Plaintiff's counsel, the Clerk of Court filed an Order entering Default on July 16, 2018 and filed an Order of Reference referring the matter to a Special Referee. Rule 55 SCRCF regarding entry of default and default judgment reads in part as follows:

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default upon the calendar (file book).

(b) Judgment. Judgment by default may be entered as follows:

(2) All Other Cases. In all other cases, the party entitled to a judgment by default shall apply to the court therefor... If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the motion or application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties if a proper demand therefor has been made pursuant to Rule 38 and not withdrawn, or when and as required by any statute. Pursuant to Rule 5(a), notice of any trial or hearing on unliquidated damages shall also be given to parties in default by first class mail to

the last known address of such party whether or not such party has appeared in the action.

The mere fact that the affidavit filed by Plaintiff's counsel along with the Motion for Default contained the incorrect date of service does not affect the validity of the service nor does it preclude the fact that Defendant LFSC was in default. Defendant LFSC had not appeared in the action as of the date of the filing of the Motion for Default and the Affidavit of Plaintiff's counsel, there was no requirement that they be served with the Affidavit and Motion for Default, therefore the Defendant could not have been prejudiced by such error.

The only requirement placed upon the Plaintiff when a party has not appeared in the action falls within Rule 55(b)(2), SCRPC. The Plaintiff is required to provide a party in default notice of the hearing on unliquidated damages by first class mail to the last known address of such party at least three days prior to the hearing. *see* Rule 55(b)(2), SCRPC. On August 9, 2018, Plaintiff mailed Defendants a copy of the Notice of Hearing and Certificate of Service to the address where each Defendant⁸ was served notifying the Defendants that a hearing had been scheduled for August 13, 2018 at 10:00 a.m. at the office of J. Morgan Kearse in Allendale, South Carolina. Due to a medical emergency the Special Referee was unable to conduct the hearing. On August the 16, 2018, Plaintiff mailed Defendants a copy of the Notice of Hearing and Certificate of Service for the rescheduled hearing to the address where each Defendant⁹ was served notifying the Defendants that a hearing had been scheduled for August 20, 2018 at 2:00 p.m. at the office of J. Morgan Kearse in Allendale, South Carolina. Defendant LFSC failed to contact the Plaintiff or the Special Referee prior to the hearing nor did Defendant appear at the hearing on August 20, 2018.

⁸ The Plaintiff sent the Notice of Hearing and Certificate of Service to the same addresses listed in Footnote 3 for each Defendant.

⁹ The Plaintiff sent the Notice of Hearing and Certificate of Service to the same addresses listed in Footnote 3 for each Defendant.

Based on the foregoing, Defendant LFSC has failed to provide any evidence of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party as it relates to the service date included in the Affidavit and the Motion for Default.

IV. The Certificate of Service on file with the clerk, is in compliance with Rule 4(d)(8), SCRPC

Defendant LSA argues that although a Certificate of Service was filed purporting service upon the Corporation, that service was not in accordance with Rule 4(d)(8). Rule 4(d)(8) provides as follows:

(d)(8) Service by Certified Mail. Service of a summons and complaint upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule may be made by the plaintiff or by any person authorized to serve process pursuant to Rule 4(c), including a sheriff or his deputy, by registered or certified mail, return receipt requested and delivery restricted to the addressee. Service is effective upon the date of delivery as shown on the return receipt. Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing the acceptance by the defendant. Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the return receipt was signed by an unauthorized person. If delivery of the process is refused or is returned undelivered, service shall be made as otherwise provided by these rules.

Plaintiff served the Summons and Complaint on Defendant LSA by Certified Mail Return Receipt to the address and Registered Agent listed with the North Carolina Secretary of State. The Summons and Complaint were delivered and signed for on June 27, 2017. Plaintiff mailed the Summons and Complaint to the Registered Agent listed with the North Carolina Secretary of State, Ted Goings, addressed to the P.O. Box listed with the North Carolina Secretary of State on June 20, 2017. Plaintiff did receive the endorsed signature portion of the green card from the United States Postal Service and had to get an Intranet copy of the signature. The Intranet receipt signature

from the United State Postal Service from June 27, 2017 appears to be signed by Keith Sprinkle at the same P.O. Box listed with the North Carolina Secretary of State's Office.

Rule 4(d)(3), SCRC, regarding service of process on Corporations provides as follows:

(d)(3) Corporations and Partnerships. Upon a corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

While it is undisputed that the Certified Return Receipt was not signed by Ted Goings who is the Registered Agent listed with the North Carolina Secretary of State, the Defendant failed to provide any evidence that Keith Sprinkle who signed the receipt was not an Officer, Managing or General Agent or any other agent authorized to accept service. In effecting service of process, exacting compliance with the rules is not required. BB&T, 369 S.C. at 552, 633 S.E.2d at 503. "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. (quoting Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 210, 456, S.E.2d 897, 899 (1995)).

Based on the foregoing, Defendant LSA has failed to provide any evidence of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party as it relates to service of the Summons and Complaint.

CONCLUSION

WHEREFORE IT IS HEREBY ORDERED that based on the foregoing finding of facts and analysis of law, Defendants' Motion to Set Aside Default under Rule 55(d) and Rule 60(b) are respectfully **DENIED**.

IT IS SO ORDERED.

Walterboro, South Carolina

Dated: _____

Honorable Perry M. Buckner, III



Allendale Common Pleas

Case Caption: Louise Fishburne VS Lutheran Services For The Aging Et Al ,
defendant, et al
Case Number: 2017CP0300120
Type: Order/Other

It is so Ordered

s/ Perry M Buckner III 2122

Electronically signed on 2019-02-28 15:36:38 page 12 of 12