THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge
Trial Court Case No. 2016-CP-23-06314

Appellate Case No. 2019--000190

Ascension Forensic, LLC, Respondent,

v.

Patricia B. Clark, Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Respondent filed an action in the Court of Common Pleas for Greenville County against Appellant on November 1, 2016, alleging a cause of action for breach of contract due to Appellant's alleged failure to pay Respondent according to the terms of the contract. An Affidavit of Personal Service of the Summons and Complaint on Appellant was filed on November 11, 2016. Respondent's counsel filed an Affidavit of Default and a Motion for Default Judgment on March 8, 2017. Because the amount of the alleged debt was liquidated in a Verified Complaint, the Court entered a Default Judgment without a damages hearing. This judgment was filed on August 2, 2017 for $41,074.93.

Appellant filed a Motion to Vacate Default Judgment on October 17, 2018, pursuant to S.C Rule of Civ. Pro. 60(b)(4), contending that the Affidavit of Personal Service did not comply with S.C. Rule of Civ. Pro. 4(d)(1), and thus the Default Judgment should be vacated because of a lack of personal jurisdiction.

A hearing on Appellant's motion was held before the Honorable Perry H. Gravely on November 27, 2018. Following the hearing, Judge Gravely issued the Order now being appealed on Friday, November 30, 2018, denying Appellant's Motion to Vacate Default Judgment. Appellant filed a Motion to Reconsider pursuant to S.C. Rule of Civ. Pro. 59(a) on December 10, 2018 asking the Court to reconsider its earlier order. This motion was denied by Judge Gravely on January 7, 2019. Notice of Appeal was then filed on February 4, 2019.

APPELLANT'S STATEMENT OF FACTS

The legal issues on this appeal arise from the circumstances surrounding an attempt to serve Appellant with the Summons and Complaint in this matter at or around 2:30 pm on November 10, 2016 at her home address of 519 Cliffview Court, Greer, South Carolina. [Affidavit of Jesse Jones

dated November 11, 2016] Appellant, Ms. Patricia B. Clark, was not at her residence at this time. Mr. Jesse Jones, the process server, was sitting in his truck in the short driveway of the condominium when Michael Thorstad approached the home in his car. [Affidavit of Jesse Jones dated October 21, 2018 at Para. 5] Mr. Thorstad had come to the home in order to pick up some furniture that was in the garage and deliver it to a client of Ms. Clark. He had already been paid for this work. Mr. Jones' truck was blocking the driveway so he parked his vehicle and approached the drivers' side of Jones' vehicle. Jones rolled down his window and asked if Mr. Thorstad knew Patricia Clark. Thorstad responded yes. [Tr. at p. 6, l. 11- p. 7, l. 11] Jones then asked Thorstad if he lived there and Throrstad told him no. [Tr. at p. 7, l.18-19 & p. 19, l. 12.] Jones then handed Thorstad a white envelope that had Ms. Clark's name on it and started to back out of the driveway. Thorstad told him he did not want the envelope but Jones never stopped. Jones never identified himself as a process server. [Tr. at p. 7, l. 16-25] Jones not only never identified himself as a process server, but he never even told Thorstad his name. Thorstad thought he might be a contractor, since Ms. Clark was having some work done on her house, and that the envelope might be an estimate. Upset that Jones had not stopped when he said he did not want the envelope and not wanting to get mixed up in whatever the unidentified driver had wanted with Ms. Clark, he threw the envelope in the trash can, entered the garage, retrieved the furniture, and completed the delivery. He never looked in the envelope. [Tr. at p. 8, ll. 1-2 & 13- p.9, l.1] He admitted this was an impulsive decision which he now regrets based upon knowing what has been alleged as being in the envelope. [Tr. at p.21, l.8 – p.22, l.11]

Thorstad admitted that he and Ms. Clark had at one time been girlfriend and boyfriend, but maintained they had broken up in September of 2016. He was still doing odd jobs for her because he loved her.[1] [Tr. at p. 6, l. 7-10 & p. 15, l.18-22]

Jones filed an Affidavit of Service that he had served Clark by leaving a copy of the Summons and Complaint at her "dwelling house or usual place of abode" with Michael[2], "a person of suitable age and discretion residing therein." The affidavit further avers that "Michael identified himself as Defendant's boyfriend and affirmed that he resides with Defendant at that address." [Affidavit of Jesse Jones filed November 11, 2016] Jones did not testify at the hearing.

Thorstad filed an affidavit contemporaneously with Clark's motion denying that he resided at 519 Cliffview Court on or about the date of the encounter with Jones. [Affidavit of Michael Thorstad filed Octboer 17, 2018] Thorstad maintained that denial during his live testimony. [Tr. at p. 5, l. 25- p. 6- l.1] He maintained that he resided at 205 Mason Road, Boiling Springs, South Carolina since 2005. [Tr. at p. 5, l. 16-24] While he admitted he had spent the night at Clerk's residence at times, he had no personal items that were kept in her house, and had no key to her house. He did have the code for the garage. [Tr. at p. 13, l. 4-19 & p. 15, l. 9-17] Thorstad offered several documents to corroborate his residence at 205 Mason Road, but an objection to the documents by Respondent's attorney was sustained by the trial judge. [Tr. at p. 9, l. 21- p. 10, l. 12][See documents attached to Affidavit of M. Lee Daniels, Jr. filed December 10, 2018]

[1] Thorstad's testimony about his relationship with Clark was often confusing, however, he never wavered from his denial that he never resided at her house. At most, he admitted to spending the night there on occasion, but stated that most of the time they stayed at his house in Boiling Springs.

[2] Thorstad denied he ever told Jones his name, however, Respondent's attorney was apparently aware of Thorstad's name from Clark's divorce proceedings.

Jones' affidavit was the sole basis for the issuance of the entry of default. [Affidavit of Jay Anthony filed March 8, 2017] Since the damages were liquidated in the complaint, no damages hearing was held. [Motion for Default Judgment filed March 8, 2017]

ARGUMENTS

I. THE PROCESS SERVER'S AFFIDAVIT DID NOT ESTABLISH A PRESUMPTION OF COMPLIANCE WITH RULE 4(D)(1).

In this case, the affidavit filed by Mr. Jones does nothing but parrot the language of the statute when it avers that he left the Summons and Complaint at the Appellant's residence with "a person of suitable age and discretion who resides therein." The central issue of this case is whether Mr. Thorstad actually resided at Ms. Clark's residence. The affidavit contains no facts of which Mr. Jones actually had personal knowledge regarding whether Thorstad resided at Clark's residence at the time of service. Jones' sole basis of information on this issue is his averment that Thorstad "affirmed" that he resided at the residence with Ms. Clark. However, this unsworn statement by Thorstad to Jones, even if made[3], would not be sufficient to establish compliance with Rule 4(d)(1), which requires that Thorstad have actually resided there in order for the service to comply with Rule 4(d)(1). Under South Carolina law, affidavits are required to be based upon personal knowledge. S.C. Rule of Civ. Pro. 4(g) requires that, if the process server knows the information, they must list the name and address of the person actually served at the address of the person to whom the process is directed. Mr. Jones' affidavit provides no independent evidence that Throstad resided at Clark's address. Mr. Jones did not testify at the hearing and no independent evidence besides the affidavit was presented by Respondent that even suggested that Thorstad lived there. He was not at the residence when Jones arrived. Jones never asked him why he was there. Thorstad did not enter the residence while Jones was there. The encounter was very brief.

[3] Thorstad denied in court that he resided there. [Tr. at p. 7, l.18-19 & p. 19, l. 12.]

The central issue in this case is not whether Thorstad "affirmed" to Jones that he resided at Clark's address, but whether he actually resided there at the time of service. Respondent has some initial burden to offer some evidence, which if believed by the Court, would have been sufficient to prove such fact, in order to show personal jurisdiction over the Appellant.

In Richardson Construction v. Meek Engineering & Constr. Inc., 274 S.C. 307, 309, 262 SE2d 913, 915 (1980), the Court held that a motion for relief from a default judgment based upon a lack of jurisdiction over the appellant (by reason of the failure to serve a summons) was relief, which if warranted, was not discretionary but a matter of right. Without some affirmative proof of Thorstad's residence, Respondent cannot show compliance with Rule 4(d)(1). If Respondent cannot establish personal jurisdiction over Clark, the Court was without power to issue the default judgment in this case in the first place. It is only if Respondent first shows compliance with S.C. Rule of Civ. Pro. 4(d)(1) that any presumption of proper service exists.[4] This issue is analogous to the issue in BB&T v. Taylor, 369 S.C. 548, 552 633 SE2d 501, 503 (2006), where the question was whether a process server's actions in posting documents on the front door was compliant personal service under Rule 4. The Taylor Court held that the process server did not comply with Rule 4 because he was "merely speculating" whether the appellant or a person of suitable age and discretion was inside the house, and without proof of who was inside, Rule 4 could not be complied with. The Court vacated the default judgment. Id. at 554, 633 SE2d at 504.

The burden of proving personal jurisdiction always stays with the Respondent. Only if the presumption arises does Appellant bear any burden of going forward and providing evidence, which if believed by the Court, would overcome the presumption and show that it was entitled to relief from the default judgment. Fassett v.Evans, 364 S.C. 42, 44, 610 SE2d 841, 844 (Ct. App.

[4] S.C Rule of Evid. 301 defines a presumption as not shifting the burden of proof in the sense of the risk of non-persuasion.

2005). *See also* Roche v. Young Bros., 318 S.C. 207, 209-10, 456 SE2d 897, 899 (1995)(Court inquires whether compliance with Rule 4 is sufficient to confer personal jurisdiction over defendants and give defendant notice of proceedings).

Appellant argued before the Court that Jones' affidavit was insufficient to show compliance with Rule 4(d)(1) because it contained no independent facts that showed Thorstad resided at Appellant's residence. [Tr. at p. 24, l. 1-20] This was especially important given Thorstad's denial under oath that he resided there. The Court rejected this argument and found that the affidavit created a presumption of compliance with Rule 4(d)(1) and determined that Appellant's evidence did not overcome the presumption. [Order filed 11/30/2018 at p. 3] This was error.

II. THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION WAS BASED ON FACTUAL CONCLUSIONS WITHOUT EVIDENTIARY SUPPORT.

An affidavit of service is *prima facie* evidence of service which may be impeached by extrinsic evidence. Richardson, 274 S.C. at 311, 262 SE2d at 916. While South Carolina law does recognize that an affidavit of service can establish a presumption of proper service which cannot be impeached by a mere denial of the service, in this case, the fact of the delivery of the Summons and Complaint to Thorstad averred in Jones affidavit is not denied, but the averments of Jones that Thorstad resided at Clark's residence at the time of service and that he "affirmed" it was his residence are impeached by the cumulative extrinsic evidence offered by Appellant on this issue, consisting of Thorstad's and Clark's affidavits which denied that Throstad resided at Clerk's residence, as well as Thorstad's live testimony to that effect, and the exhibits proffered during his testimony which corroborated that his residence was instead in Boiling Springs, South Carolina.

The Court's order in this matter states that whether to grant a Rule 60(b) motion lies within the sound discretion of the Court, citing Southeastern Housing Foundation v. Smith. To the extent that personal jurisdiction is established by compliance with Rule 4(d)(1), which Appellant argues

did not occur in this case, the decision whether to grant or deny relief from a default judgment is discretionary with the Court, but an abuse of discretion can be shown if the Court's factual conclusions are without evidentiary support. BB&T v. Taylor, 369 S.C. at 551, 633 SE2d at 503. In this case, there was no evidentiary support for the Court's factual conclusion that Thorstad was residing at Clark's residence at the time Jones gave him the Summons and Complaint. The only support for the conclusion was the statement in Jones' affidavit that Thorstad "affirmed" he was residing at Clark's residence. This was a hearsay statement. Thorstad is not a party opponent, therefore it cannot be an admission under S.C Rule of Evid. 801(d)(2). Thorstad denied the statement in his live testimony. Jones never testified. While the Court does point out inconsistencies between Thorstad's affidavit and his live testimony, none of these inconsistencies are probative one way or another as to whether Thorstad resided at Clark's residence[5]. These inconsistencies therefore, while they could support the Court's finding that Thorstad was not credible, could not constitute evidence of proper service by Jones. The Court's factual conclusion that Appellant did not meet its burden was fatally linked to its factual conclusion that Jones' affidavit created a legal presumption of proper service. Yet that affidavit does not provide any evidence that Jones had personal knowledge of Throstad's residence. Since that affidavit was the only affirmative evidence relied upon by the Court to show proper service, even if the Court had discretion, its conclusion Appellant had a burden she did not meet would be an abuse of its discretion.

[5] Order at 3-4. The Court concluded there was an inconsistency between Thorstad's testimony that he never resided at Clark's residence and the averment in his affidavit [Affidavit of Michael Thorstad filed October 17, 2018 at Para. 8] that he was not living there on or about the date of the encounter with the process server. Thorstad had admitted at the hearing that he had spent the night there before, but only on occasion because Clark could not have him overnight when her daughter was there pursuant to a Family Court Order. [Tr. at p. 13, l. 2-23] Of course, if he never lived there, he could not have lived there when he encountered the process server.

III. THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION WAS CONTROLLED BY ERROR OF LAW.

The Court committed three errors of law in its consideration of Appellant's Motion to Vacate Default Judgment. The Court should not have excluded certain exhibits proffered by Appellant to corroborate Michael Thorstad's testimony that he resided in Boiling Springs, and not at Clark's residence. The Court should not have considered several hearsay statements in Respondent's papers in opposition to the Motion to Vacate Default Judgment, and the Court should not have found that Respondent's affidavit evidence established a history of evading service. Each of these arguments is detailed below in turn.

A. THE COURT SHOULD NOT HAVE EXCLUDED APPELLANT'S CORROBORATING EXHIBITS.

During Mr. Thorstad's direct examination, Appellant proffered certain exhibits designed to corroborate his testimony that he had lived at 205 Mason Road in Boiling Springs, South Carolina since buying a home there in 2005. Respondent's attorney objected to the exhibits because they had not been attached to Thorstad's earlier affidavit. The Court sustained the objection, stating, "Still, we've got to go by the rules." [Tr. at p.10, l.2-12]

The proffered exhibits [See attachments to Affidavit of M. Lee Daniels, Jr. filed December 10, 2018 in Support of Motion to Reconsider] included a copy of Thorstad's driver's license showing his address as 205 Mason Road, Duke Energy statements showing his address as 205 Mason Road, and his 2016 federal and state tax returns showing his address as 205 Mason Road. These documents all make it more probable that Thorstad's residence is 205 Mason Road. S.C Rule of Evid. 401. This affected Appellant's ability to prove both that no personal jurisdiction existed, and that it ws entitled to relief. Appellant is unaware of any Rule of Court that would

prohibit the introduction of such documents to establish Thorstad residence address. S.C Rule of Civ. Pro. 6(d) provides that affidavits, opposing affidavits and reply affidavits may be served on a motion. Appellant served affidavits with the filing of the motion in compliance with this rule. Respondent served opposing affidavits with its memorandum in opposition at least two days before the hearing, in compliance with this Rule. Appellant could have served a reply affidavit at any time before the hearing, but instead chose to offer live testimony. It is within the Court's inherent powers to hold an evidentiary hearing when there is a question as to jurisdiction.

B. THE COURT SHOULD NOT HAVE CONSIDERED CERTAIN STATEMENTS OFFERED BY RESPONDENT.

Appellant had reviewed the memorandum and several affidavits that Respondent had filed on November 21, 2018 in response to Appellants Motion to Vacate Default Judgment. There were many out of court statements in both the memorandum and the affidavits supposedly made by person who were not present at the hearing to testify. Appellant asked the Court not to consider any hearsay in Respondent's opposition papers, which included a memorandum with 17 exhibits, as well as three independent affidavits in response. [Tr. at p. 23, l. 10-22] The affidavit of Jay Anthony contained a hearsay conversation with a realtor who had a client interested in buying one of Clark's properties. Supposedly, a lien from this lawsuit was preventing the sale. [Affidavit of Jay Anthony filed November 21, 2018 at para. 3] This conversation also appears on page 3 of the Respondent's Memorandum. [Memorandum in Opposition to Motion to Vacate Default Judgment at p. 3] The Affidavit of Jesse Jones contains a statement not based on personal knowledge that he believes cameras were installed at Ms. Clark's residence for the purpose of evading service. [Affidavit of Jesse Jones at Para. 3, filed November 21, 2018] The affidavit of Ben Dodd contains a statement not based on personal knowledge that he believes Ms. Clark was intentionally evading service. [Affidavit of Ben Dodd at Para. 3, filed November 21, 2018]. Finally Exhibit 15 to the

memorandum contains an unsworn report by a private investigator, Kevin Walters. This exhibit contains Mr. Walters' affidavit of non-service on Ms. Clark, but the affidavit does not authenticate the pictures, captions, or text of his private investigator's report. [Exhibit 15 to Memorandum in Opposition to Motion to Vacate Default Judgment filed November 21, 2108] The Court should not have relied on any of these documents in determining whether or not Ms. Clark was evading service, but the Order does not specify what was reviewed and what was not reviewed. The conversation with the realtor and the private investigator's report are clearly hearsay under S.C Rule of Evid. 801(c), and the statements in the affidavits as to belief are not based on personal knowledge.

C. RESPONDENT'S AFFIDAVIT EVIDENCE DID NOT ESTABLISH A HISTORY OF EVADING SERVICE.

The Court also conditioned its Order ruling Appellant was not entitled to relief from the Default Judgment upon "the history of the Defendant's clear efforts to evade service." [Order Denying Motion to Vacate Default Judgment, at p. 4, filed November 30, 2018] None of the affidavits filed by Respondent and referred to in the argument above show an effort to evade service by Appellant. They are all affidavits of non-service where no contact was ever made with Ms. Clark. In addition, Respondent submitted two certified letters sent to Ms. Clark, but both simply went unclaimed. [Exhibits 11-14 to Memorandum in Opposition to Motion to Vacate Default Judgment filed November 21, 2018] These documents were not refused, they just went unclaimed. The affidavits and letters do not prove an attempt to evade service. They "merely speculate" that she was evading service. *See* BB&T v. Taylor, 369 S.C. at 554, 633 SE2d at 503. The Court's finding with regard to other attempts to serve Ms. Clark have no bearing on whether

or not the particular service at issue was valid under Rule 4(d)(1), and it was error for the Court to consider these matters in concluding that Appellant had not met her burden.

CONCLUSION

For the foregoing reasons, the Court's order denying Appellant's Motion to Vacate Default Judgment should be reversed, and the Default Judgement should be vacated.

Respectfully submitted,

May 13, 2019

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PROOF OF SERVICE

I hereby certify that I did serve a copy of the forgoing Appellant's Initial Brief and Designation of Matter to be Include3d in the Record on Appeal upon the Counsel for Respondent, this 13th day of May, 2019 by United States mail, postage prepaid, properly addressed as follows:

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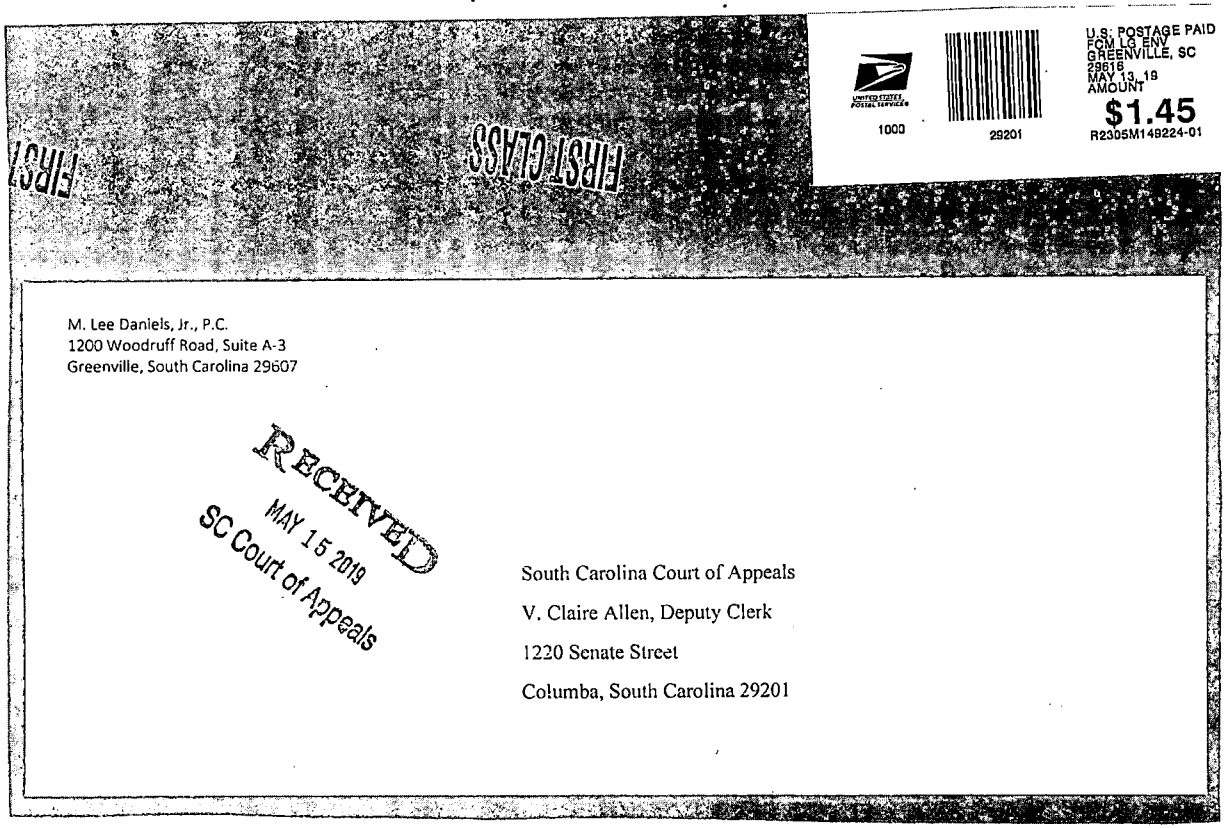
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