

5

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

RECEIVED
JUL 17 2018
SC Court of Appeals

Appellate Case No.: 2018-000260

Seabrook Island Property Owners Association,.....Respondent,

v.

Charles Kelley a/k/a Charles E. Kelley; Deborah Kelley
a/k/a Deborah L. Kelley; Mortgage Electronic Registration
Systems, Inc., its successors and assigns as nominee for
Chase Mortgage Company, its successors and assigns, a
Delaware Corporation; and Spinnaker Beach House Owners Association,.....Defendants,

Of whom Charles Kelley a/k/a Charles E. Kelley and
Deborah Kelley a/k/a Deborah L. Kelley are the.....Appellants,

And of which Mortgage Electronic Registration Systems, Inc.,
its successors and assigns as nominee for Chase Mortgage Company,
its successors and assigns, a Delaware Corporation; and Spinnaker
Beach House Owners Association are also.....Respondents.

And of which 749 Spinnaker, LLC Intervening Party is also Respondent.

FINAL BRIEF OF APPELLANTS

Jonathan S. Altman, Esq.
Derfner & Altman, LLC
575 King Street, Suite B
Charleston, SC 29403
Telephone: (843) 723-9804

Attorney for Appellants

TABLE OF CONTENTS

Table of Authoritiesi
Statement of Issues on Appeal1
Statement of the Case1
Standard of Review3
Facts3
Arguments

1. BECAUSE THE RECORD INCLUDES AFFIDAVITS REFLECTING THAT APPELLANTS WERE NOT SERVED WITH THE COMPLAINT, THE COURT ERRED IN FINDING THAT IT WAS UNDISPUTED THAT APPELLANTS WERE PROPERLY SERVED5

2. BECAUSE THE ABSENCE OF THE COMPLAINT FROM TWO (2) HANDWRITTEN AFFIDAVITS OF PROCESS SERVER WAS NOT A SCRIVENER’S ERROR, THE COURT ERRED IN DENYING APPELLANTS’ MOTION TO SET ASIDE ENTRY OF DEFAULT AND VACATE JUDGMENT OF FORECLOSURE AND SALE AND MASTER’S DEED7

Conclusion8

|

TABLE OF AUTHORITIES

CASES

<i>Bage, LLC v. S.C. Roofing Co. of Spartanburg, Inc.</i> , 373 S.C. 457, 471, 646 S.C.2d 153, 160 (Ct. App. 2007)	3
<i>Belle Hall Plantation Homeowner’s Association, Inc. v. David Conor Keys & Karen Keys</i> , 419 S.C. 605, 799 S.E.2d 310, Op. No. 5467 (Ct. App. 2017)	7
<i>Jamie Ciampa v. Bank of America, et al.</i> , 88 Mass. App. Ct. 28, 69 Mass. App. Ct. 566, 572 (2007)	8
<i>McDaniel v. U.S. Fid. & Guar. Co.</i> , 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App.1996).....	7
<i>Thomas & Howard Co. v. T.W. Graham & Co.</i> , 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995)	6
<i>United States of America v. James R. Gibson</i> , 356 F.3 rd 761 (2004)	7
<i>Universal Benefits, Inc. v. McKinney</i> , 349 S.C. at 183, 561 S.E.2d 661 (Ct. App. 2002)	6

OTHER AUTHORITY

Black’s Law Dictionary, 563 (7 th ed. 1999)	7
Rule 60, SCRCP	6
Rule 4, SCRCP	5

STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT ERR IN FINDING THAT IT WAS UNDISPUTED THAT APPELLANTS WERE SERVED WITH THE COMPLAINT?
2. DID THE COURT ERR IN FINDING THE ABSENCE OF THE COMPLAINT FROM THE TWO HANDWRITTEN AFFIDAVITS OF PROCESS SERVER TO BE A SCRIVENER'S ERROR?

STATEMENT OF CASE

December 19, 2016, Respondent Seabrook Island Property Owners Association (hereinafter "Respondent SIPOA") filed a Lis Pendens, Summons, and Complaint seeking the foreclosure of Appellants' home on Seabrook Island (R.pp.26-34).

On January 5, 2017, Respondent SIPOA filed a handwritten Affidavit of Process Server attesting that Appellant Deborah Kelley had been served with the Certificate of Exemption from ADR, Certificate of Compliance, Lis Pendens, and Summons by Nelson Stoner (hereinafter "Stoner") leaving copies with Respondent Charles Kelley (R.p.39). Respondent SIPOA also filed a handwritten Affidavit of Process Server attesting that Appellant Charles Kelley was personally served by Stoner with the Certificate of Exemption from ADR, Certificate of Compliance, Lis Pendens, and Summons (R.p.40). Both Affidavits of Process Server stated that Stoner did not serve the Complaint on Appellants.

On March 9, 2017, Respondent SIPOA filed an Affidavit of Default attesting that the Summons, Lis Pendens, and Complaint had been served upon Appellants (R.p.41). An Order of Reference was filed on March 9, 2017 referring the case to the Honorable Mikell R. Scarborough, Master-in-Equity for Charleston County (R.p.2).

On April 19, 2017, a foreclosure hearing was held and a Judgment of Foreclosure and Sale issued (R.pp.11-17). The Judgment of Foreclosure and Sale found that the Proof of Service showed that service of the Summons and Complaint was properly made upon the Appellants

(R.p.11). The judgment debt owed by Appellants to Respondent SIPOA was determined to total \$9,920.90 (R.p.4).

On July 20, 2017, a foreclosure sale was held at which Appellants' home was sold for the sum of \$80,000.00. The bidder at the sale was Respondent 749 Spinnaker, LLC (hereinafter "Respondent 749 Spinnaker") (R.p.49).

On September 18, 2017, Appellants filed a Motion to Set Aside Entry of Default and Vacate Judgment of Foreclosure and Sale and Master's Deed (hereinafter "Motion to Set Aside") in which Appellants stated that they were not served with the Complaint and that service had been defective pursuant to Rule 4 (R.pp.45-47).

On October 13, 2017, Respondent 749 Spinnaker filed a Motion to Intervene and Memorandum in Opposition to Appellants' Motion to Set Aside (R.pp.48-58).

On October 17, 2017, Respondent SIPOA filed Amended Affidavits of Process Server and attested that the Complaint had been served on Appellants (R.pp.74-75). With regard to Appellant Deborah Kelley, the Amended Affidavit of Process Server contains no statement regarding her being present at the time of service, in contrast to the original Affidavit of Process Server (R.p.74).

On November 21, 2017, Appellants filed Affidavits in which they attested that the Complaint was not included in the documents served upon them (R.pp.81-84).

Respondent SIPOA filed a Reply to Appellants' Motion to Set Aside on or about November 20, 2017 (R.pp.261-264). On November 27, 2017, Appellants filed a Memorandum in Support of Motion to Set Aside (R.pp.85-259). On November 29, 2017, a Consent Order was filed granting Respondent 749 Spinnaker's Motion to Intervene (R.pp.3-4).

On December 15, 2017, the lower court issued an Order denying Appellants' Motion to Set Aside (R.pp.5-8).

On January 8, 2018, Appellants filed a Motion for Reconsideration (R.pp.260-261).

On January 22, 2018, Respondent SIPOA filed a Reply in Opposition to Appellants' Motion for Reconsideration (R.pp.262-263).

On January 25, 2018, Respondent 749 Spinnaker filed a Memorandum in Opposition to Appellants' Motion for Reconsideration (R.pp.265-268).

On February 12, 2018, the lower court issued an order denying Appellants' Motion for Reconsideration (R.pp.9-10).

On February 20, 2018, Appellants' Notice of Appeal was filed (R.pp.271-276).

STANDARD OF REVIEW

“While the decision of whether to grant relief from an entry of default is a matter within the sound discretion of the trial court, an abuse of discretion arises if the lower court’s decision is controlled by an error of law or is without evidentiary support”, Bage, LLC v. S.C. Roofing Co. of Spartanburg, Inc., 373 S.C. 457, 471, 646 S.C.2d 153, 160 (Ct. App. 2007).

FACTS

Appellants reside in Punxsutawney, Pennsylvania and owned their home on Seabrook Island for over thirty years. In 2016, Appellant Charles Kelley became ill and was diagnosed with Leukemia (R.p.83). He subsequently received treatment in Pittsburgh, Pennsylvania including chemotherapy and hospitalization (R.p.83).

This foreclosure action was commenced relative to a property owners' association lien in the amount of \$2,755.89 which included assessments for attorneys' fees, costs, charges, late fees,

and interest¹(R.p.36). Respondent SIPOA filed Affidavits of Process Server reflecting that Appellants had not been served with the Complaint (R.pp.39-40). A Judgment of Foreclosure and Sale and Master's Deed was issued which included findings that the Proof of Service showed that Appellants had been served with the Complaint in contrast to the filed Affidavits of Process Server (R.pp.11-17). The Record of Hearing also errantly stated that the filed Affidavits of Process Server showed that service of the Complaint had been properly made upon Appellants (R.pp.66-67).

The high bidder at the foreclosure sale was Respondent 749 Spinnaker whose members are Philip and Cherie Squire, neighbors of Appellants (R.p.49). Philip Squire is a member of Respondent SIPOA's Board of Directors and also serves as President of Respondent 749 Spinnaker Beach Houses Owners Association (hereinafter "Respondent 749 Spinnaker Beach HOA") (R.pp.228-229).

On or about September 15, 2017, Appellants learned that the locks to their home had been changed, promptly engaged counsel and filed the Motion to Set Aside (R.pp.81-84). In their motion and supporting memorandum, Appellants maintained that service was defective rendering all proceedings in this action void (R.pp.45-47).

In denying Appellants' motion, the lower court found that:

"It is undisputed that the Affidavits of Service for the Kelley Defendants, which were filed on January 5, 2017, contained a scrivener's error and that the affiant failed to indicate that the Complaint was served, along with the Certificate of Exemption from ADR, Lis Pendens, and Summons." (R.p.7)

The lower court further found that:

"the Kelley Defendants failed to provide any evidence contradicting the service of process other than affidavits where they admit being served with all documents..." (R.p.8)

¹ S1145 would prohibit Homeowner's Associations from foreclosing on a lien solely for non-payment of fees, fines, assessments, and other charges.

On January 8, 2018, Appellants filed a Motion for Reconsideration seeking redress of the following errors:

1. That it was undisputed that the Complaint was served upon Appellants;
2. That Appellants admitted being served with all documents in their affidavits; and
3. That Respondent SIPOA's Affidavits of Process Server contained scriveners' errors (R.pp.260-261).

Appellants' Motion for Reconsideration was denied on February 12, 2018 (R.pp.9-10).

ARGUMENTS

I. DID THE LOWER COURT ERR IN FINDING THAT IT WAS UNDISPUTED THAT APPELLANTS WERE SERVED WITH THE COMPLAINT?

In their Motion to Set Aside, Appellants stated that they were not served with the Complaint and cited Rule 4's requirement that, "*the summons and complaint must be served together*" to constitute effective service (R.p.46). In support of their motion, Appellants filed Affidavits attesting that the Complaint was absent from the documents served upon them (R.pp.81-84). Despite these filings, the lower court found that it was "*undisputed*" that the Complaint was served upon Appellants (R.p.7). The lower court also found that Appellants admitted to being served with all documents in their affidavits (R.p.8). These findings are contrary to the record in this case².

In its order, the lower court suggests that this "*scrivener's error*" was corrected soon after Respondent SIPOA filed the Affidavits of Process Server (R.pp.7-8). In fact, the Amended Affidavits of Process Server were not filed until October 17, 2017, more than nine (9) months

² In her affidavit, Appellant Deborah Kelley attests to "*the absence of the Complaint from the documents provided*,"(R.p.82). Appellant Charles Kelley states that he located the papers provided to him by Stoner which did not include the Complaint (R.p.84).

after the filing of the original Affidavits of Process Server and approximately one (1) month after the filing of Appellants' Motion to Set Aside (R.pp.74-75).

The lower court did not address the material differences in the Affidavits of Process Server as to Appellant Deborah Kelley. In Stoner's original handwritten Affidavit of Process Server, she was noted as being physically present at the time of service (R.p.39). In Stoner's Amended Affidavit of Process Server, Appellant Deborah Kelley's presence is not addressed and she is purported to have been served through her husband (R.p.74).

The denial of Appellants' Motion to Set Aside would have been proper if, in fact, it was undisputed that Appellants had been served with the Complaint. The record reflects the opposite. Appellants have consistently denied being served with the Complaint (R.pp.45-47, 81-84, 260-261). The Order of Default and Judgment of Foreclosure and Sale were issued despite the record at the time showing that service was defective (R.pp.39-40).

Under Rule 60(b), a court may relieve a party from a final judgment, order, or proceeding for the following reasons:

1. Mistake, inadvertence, surprise, or excusable neglect;
2. Newly discovered evidence which by due diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
3. Fraud, misrepresentation, or other misconduct of an adverse party;
4. The judgment is void; and
5. The judgment has been satisfied, released, or discharged or prior judgment upon which it is based has been reversed or otherwise vacated or it is no longer equitable that the judgment should have prospective application.

It is well settled that "*a void judgment is one that, from its inception, is a complete nullity and is without legal effect.*" Universal Benefits, Inc. v. McKinney, 349 S.C. at 183, 561 S.E.2d 661, (Ct.App.2002)(quoting Thomas & Howard Co. v. T.W. Graham & Co., 318 S.C.

286, 291, 457 S.E.2d 340, 343 (1995)). “The definition of void under the rule encompasses judgments from courts which fail to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction.” *Id.*(quoting McDaniel v. U.S. Fid. & Guar. Co., 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App.1996)). “Generally, a person against whom a judgment or order is taken without notice may rightly ignore it and may assume that no court will enforce it against his person or property.” *Id.*

In Belle Hall Plantation Homeowner’s Association, Inc. v. David Conor Keys & Karen Keys, 419 S.C. 605, 799 S.E.2d 310, Op. No. 5467 (Ct. App. 2017), the vacating of a foreclosure sale under Rule 60(b), SCRPC was affirmed when “there was an Affidavit of Service that was a misrepresentation to the Court.” In *Belle Hall*, the court affirmed the Master’s finding that in the interest of equity and good cause, the motion to vacate should be granted.

As the record in this case includes Stoner’s two (2) Affidavits of Process Server reflecting that he did not serve the Complaint on Appellants and Appellants’ two (2) Affidavits and motions attesting that they were not served with the Complaint, the lower court erred in denying Appellants’ Motion to Set Aside.

II. DID THE LOWER COURT ERR IN FINDING THE ABSENCE OF THE COMPLAINT FROM THE TWO HANDWRITTEN AFFIDAVITS OF PROCESS SERVER TO BE A SCRIVENER’S ERROR?

In denying Appellants’ Motion to Set Aside, the lower court found that the absence of the Complaint from the two (2) Affidavits of Process Server to be scrivener’s errors (R.p.7). Black’s Law Dictionary defines a “scrivener’s error” as “a clerical error resulting from minor mistake or inadvertence, especially in writing or copying something on the record,” Black’s Law Dictionary, 563 (7th ed. 1999). “Examples of scrivener’s errors include typing an incorrect number; mis-transcribing a word; and failing to log a call,” United States of America v. James

R. Gibson, 356 F.3rd 761(2004). “A drafting error may be grounds to reform ‘once the existence of a mistake is established by full, clear, and decisive proof,’” Jamie Ciampa v. Bank of America, et al. 88 Mass. App. Ct. 28, 69 Mass. App. Ct. 566, 572 (2007).

Throughout the pendency of this case, Appellants have disputed that they were served with the Complaint and maintained that the original Affidavits of Process Server are accurate (R.pp.45-47, 81-84, 260-261). The purported scrivener’s errors are contained in two (2) separate handwritten affidavits involving service upon different parties. As the absence of the Complaint from both of the at-issue Affidavits of Process Server is not a scrivener’s error, the lower court erred in denying Appellants’ Motion to Set Aside.

CONCLUSION

For the reasons set forth herein, this Court should reverse the orders of the lower court.

Respectfully submitted,



Jonathan S. Altman, Esq.
Derfner & Altman, LLC
575 King Street, Suite B
Charleston, SC 29403
Telephone: (843) 723-9804

Attorney for Appellants

Date: July 13, 2018