THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Judge James B. Jackson, Jr., Master-In-Equity
Trial Court Case No.: 2019-CP-38-00190

Appellate Case No. 2020-000433

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SC Court of Appeals

Shanika Monique Void ……. Respondent

v.

Pine Hill Apartments, L.P. and JDC Management, LLC …….. Defendants
Of whom, Pine Hill Apartments, L.P. is Appellant

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

In her initial brief, Respondent fails to raise arguments sufficient to effectively counter Appellant's initial brief. The Court should over turn the decisions of the Trial Court and set aside the entry of default, default judgment and damages order based solely on the arguments presented in Appellant's initial brief. However, Appellant offers this reply brief to address arguments presented by Respondent.

As made even more evident by Respondent's Initial Brief, there is not a single fact in the record sufficient to find that Brandon Wages, a maintenance technician employed by a separate company, was authorized to accept service of process on behalf of Appellant. Rather, Respondent relying on erroneous legal theories attempts to interject unverified facts not in the record and which were never presented to the Trial Court. However, even these fact allegations – that are outside of this Court's proper scope of consideration – do not change the ultimate and necessary determination in this case. The undisputed fact remains, Brandon Wages was not a managing or general agent or an agent authorized by appointment or by law to receive service of process on behalf of Appellant as required by Rule 4, SCRCP. Therefore, the Respondent's attempts at service of process were ineffective and the entry of default, default judgment, and the damages order should all be set aside as a result.

I. Brandon Wages was not an officer or managing or general agent or an agent authorized by appointment or by law to receive service of process as required by Rule 4, SCRCP.

Respondent's initial brief does nothing to cure her fatal fact; that Brandon Wages was not a managing or general agent or an agent authorized by appointment or by law to receive service of process as required by the South Carolina Rules of Civil Procedure. Rule 4, SCRCP (R., p. 48, Affidavit of Cheryl Ferraro) ("Brandon Wages is not an employee, property manager, officer,

managing or general agent, or an agent authorized or appointed by law to receive service of process for Pine Hill Apartments."); (R., p. 52, Affidavit of Brandon Wages) ("I have never been employed by or an officer, managing or general agent of Pine Hill Apartments, LP … I have never been authorized to accept service of process on behalf of Pine Hill Apartments, L.P."). Against this established record, Respondent, who had the burden of proving personal jurisdiction and compliance with the Rules of Civil Procedure at the Trial Court, did not present any additional affidavits or evidence of any kind.

Perhaps acknowledging the impact of this evidentiary dearth, Respondent attempts to establish agency to accept service on process on the mere existence of a relationship between Appellant and JDC Management – Brandon Wage's employer. For the reasons presented herein, Respondent's arguments fail as a matter of law.

A. The mere act of a property owner hiring a property manager cannot and does not endow the property manager with authority to accept service of process on behalf of the property owner.

Respondent asserts, without citation, that "By employing JDC Management as its property manager, Pine hill placed JDC Management's employees acting on Pine Hill's behalf in the management office of an apartment complex in a position of authority to accept service of process." (Respondent's Initial Brief, p. 13-4). Later, Respondent asserts "Pine Hill should realize its conduct of employing a management company with employees on site without open disclosure of their employer is likely to create the belief that such an employee working in the management office is authorized to accept service for Pine Hill." (Respondent's Initial Brief, p. 14-5)

Respondent's assertions are contrary to the law of the State of South Carolina and the mere act of hiring a property manager does not endow such a property manager with authority to

accept service of process on behalf of the property owner. *Hamilton v. Davis*, 300 S.C. 411, 389 S.E.2d 297 (Ct. App. 1990). In *Hamilton*, a property owner hired a property manager to manage several properties including the residential property where the personal injury in question occurred. *Id*., at 412-13, 389 S.E.2d at 297-98. Plaintiff sued both the property owner and the property manager. *Id*. Plaintiff asserted that service of process was effective against the property owner because he served the property manager as agent for the property owner. *Id*. at 414, 389 S.E.2d at 298. The court disagreed and found that service on the property manager was not sufficient to effectuate service of process on the property owner. *Id*. The Court stated,

> Federal cases dealing with agency by appointment indicate an actual appointment for the specific purpose of receiving process normally is expected and the mere fact a person may be considered to act as defendant's agent for some purpose does not necessarily mean that the person has authority to receive process. The courts must look to the circumstances surrounding the relationship and find authority which is either express or implied from the type of relationship between the defendant and the alleged agent. Claims by one to possess authority to receive process or actual acceptance of process by an alleged agent will not necessarily bind the defendant. There must be evidence the defendant intended to confer such authority.

Id. Thus, the fact that Appellant hired a property manager does not provide the property manager with authority to accept service of process. Therefore, Respondent's implication that the relationship between Appellant and JDC Management establishes that JDC Management is authorized to accept service of process on behalf of Appellant is without any basis in the law of this state. South Carolina law requires more.

Further, Respondent's position implies that when a person is the agent of another for some or any purpose, then the agent is imbued with agency for acceptance of service of process. This too is contrary to South Carolina law - a fact made manifest by the rule itself. Rule 4 does not permit service of process on any agent of a company but rather only "an officer, a managing

or general agent, or to any other agent authorized by appointment or by law to receive service of process." Rule 4, SCRCP. In fact, our Courts have held on numerous occasions that even actual on-site ***employees*** of the company do not necessarily have authority to accept service of process. *Moore v. Simpson*, 322 S.C. 518, 523–24, 473 S.E.2d 64, 67 (Ct. App. 1996) ("Without specific authorization to receive process, service is not effective when made upon an employee of the defendant, such as a secretary"); *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 295, 721 S.E.2d 430, 433 (2012) ("actual appointment for the specific purpose of receiving process normally is expected and the mere fact that a person may be considered to act as defendant's agent for some purpose does not necessarily mean that the person has authority to receive process.").

Respondent also introduces a concept that because letters were previously mailed to an address, service of process on an individual physically present at that address suffices for service of process. This is incorrect and wholly without any support in the law. In fact, the Supreme Court is very clear in this regard:

> A rule permitting certain persons to receive service of process on behalf of others does not imply that "anyone who happens to pick up the mail" can stand in for the defendant. As with corporations, the class of persons who may receive service of process on behalf of an individual is limited.

Makawi, 396 S.C. at 297, 721 S.E.2d 430, 434. Respondent also fails to establish how this argument possibly links with the conduct of Brandon Wages. There is nothing in the record to indicate he received the letters allegedly previously sent and received – to the extent even that would matter.

Finally, Respondent argues that persons being on site provides them authority to accept service of process on behalf of the property owner. This too is without legal support in South

Carolina. In fact, the persons purportedly accepting service of process in *Hamilton*, *Makawi*, *Roberson* and *Moore* were all on-site personnel and yet the Court found no authorization to accept service of process on behalf of their respective principals.

In *Brown*, the Plaintiff filed a medical malpractice suit against, among other parties, Carolina Emergency Medicine, P.A. ("CEM"). *Brown v. Carolina Emergency Physicians, P.A.*, 348 S.C. 569, 574, 560 S.E.2d 624, 626 (Ct. App. 2001). CEM's only physical presence was at the hospital at which it conducted its emergency medicine. *Id*. at 583, 560 S.E.2d at 631. Plaintiff's process server went to the hospital to serve CEM where she was directed to an individual who represented herself as "the manager" of CEM. *Id*. Based on that claim, the process server served the individual as an agent for CEM. *Id*. The individual served and the president of CEM filed affidavits establishing that the individual served "was an employee of the hospital and was not authorized to accept service on behalf of [CEM]." *Id*.

Despite the process server's testimony that the individual represented herself as the manager of the Defendant, the Court found the attempt at service of process in this manner was insufficient. *Id*. at 584, 560 S.E.2d at 632.

> In order to be effective, service must be made on an actual agent. In determining whether an alleged agent has authority to receive process for a defendant, this court concluded: "[t]he courts must look to the circumstances surrounding the relationship and find authority which is either express or implied from the type of relationship between the defendant and the alleged agent. Claims by one to possess authority to receive process or actual acceptance of process by an alleged agent will not necessarily bind the defendant. Rather, there must be evidence the defendant intended to confer such authority. "Without specific authorization to receive process, service is not effective when made upon an employee of the defendant, such as a secretary.

Id. at 583–84, 560 S.E.2d at 631–32. The Court found that "Appellants failed to show sufficient compliance with Rule 4(d), SCRCP, to effect service on [CEM]." *Id*. at 584, 560 S.E.2d at 632 (citing, *Jensen v. Doe*, 292 S.C. 592, 594, 358 S.E.2d 148, 148–49 (Ct.App.1987) (plaintiff has the burden of showing the court has personal jurisdiction over defendant)).

In this case, as in *Brown*, Respondent attempts to establish service of process and thus personal jurisdiction over Appellant by and through the service of process on an individual physically present at the apartment complex in question. At best and as in *Brown*, the only evidence in the record supporting service and personal jurisdiction is an affidavit from the process server that Mr. Wages was a property manager. This scant, unsupported evidence fails to satisfy the Respondent's burden to establish personal jurisdiction at the Trial Court. There is not one shred of evidence in the record, as is required by law, that Appellant intended to confer such authority to receive and accept service of process. As noted in *Brown*, this is fatal to Respondent's case.

The law of the State of South Carolina and the facts presented in the record of this case simply give no credence to Respondent's argument that the relationship between JDC Management and Appellant as Property Manager and Property Owner endow JDC Management, let alone Brandon Wages, authority to accept service of process on behalf of Appellant.

B. Even if service of process on JDC Management as Appellant's property manager is sufficient as Respondent argues – which it is not – there is no evidence that service on Brandon Wages can accomplish even that.

It is also vital to note that Brandon Wages was not even authorized to accept service on behalf of his own employer – JDC Management. (R., p. 52, Affidavit Brandon Wages ("In fact, to the best of my knowledge, I am not authorized to accept service of process on behalf of my own employer, JDC Management, LLC.")). Therefore, even if JDC Management could accept

service of process on behalf of Appellant, which it cannot, Respondent must present evidence that Brandon Wages is authorized by JDC Management to accept service on its behalf. *Roberson v. Southern Finance of South Carolina, Inc.*, 365 S.C. 6, 615 S.E.2d 112 (2005) (Holding that service of process on a clerical employee of the defendant's registered agent for service of process was not sufficient service of process.). Respondent has failed to do so and thus, Respondent's argument and attempt to serve Appellant by and through Brandon Wages fails as a matter of law.

In *Roberson*, the plaintiff attempted to effectuate service of process by certified mail sent to defendant's registered agent for service of process. *Roberson*, 365 S.C. at 8, 615 S.E.2d at 114. The certified receipt was signed for by a clerical employee of the registered agent. *Id*. An entry of default and default judgment ensued against the Defendant. *Id*. at 9, 615 S.E.2d at 114. The Court found that there is no evidence that Defendant manifested the clerical employee was its apparent agent in any way." *Id*. at 11, 615 S.E.2d at 115. Thus, the court found that service of process was insufficient and set aside the default judgment. *Id*.

Even adopting Respondent's theory, Respondent has merely served a clerical employee of an entity authorized to accept service on behalf of Appellant. The only evidence in the record indicates that Brandon Wages is not authorized to accept service. Therefore, even if the Court finds that JDC Management was authorized to accept service of process on Appellant's behalf the record is wholly deplete of any evidence establishing that service on Brandon Wages is sufficient even to accomplish even that.

C. The factual record presented at the Trial Court supports only one conclusion, that service of process was not properly effectuated.

Respondent includes in her Initial Brief numerous factual assertions for the first time and which have no support or basis in the record. The South Carolina Appellate Court Rules state

"the appellate court will not consider any fact which does not appear in the Record on Appeal." Rule 210(h), SCACR. As a result, facts not appearing in the record should be disregarded by the Court. These new and unsupported factual assertions include:

- "Pine Hill represented Wages as an on-site employee in the management office by consciously allowing him to interact with the public on its behalf." (Respondent's Initial Brief, p. 12). Rather, there is no evidence in the record that Brandon Wages was "in the management office" or the Pine Hill "consciously" allowed him to do anything – let alone interact with the public on its behalf;
- "Void's process server believed, based on his knowledge of business usages and customs in a career serving legal process, that Wages had authority to accept service for Pine Hill." (Respondent's Initial Brief, p. 13). Rather, there is no evidence in the record regarding Respondent's process server's experience, career, knowledge or beliefs;
- "Pine Hill placed JDC Management's employees acting on Pine Hill's behalf in the management office of an apartment complex in a position of authority to accept service of process." (Respondent's Initial Brief, p. 14). Rather, there is no evidence in the record regarding Pine Hill exercising any control over JDC Management employees, let alone placing them anywhere. Further, and as directly contradicted by the evidence in the record, JDC Management was specifically ***unauthorized*** to accept service of process;
- "Rather, when [the process server] went to Pine Hill apartments to serve a summons and complaint on Pine Hill and Wages was present on the property working on behalf of Pine Hill to manage the property, this led to the process server's reasonable belief that Wages could accept service for Pine Hill, and the process server dealt with Wages based upon that assumption." (Respondent's Initial Brief, p. 14). Rather, there is no evidence in the

record regarding the interaction between the process server and Brandon Wages or the process server's beliefs. Further, there is no evidence in the record regarding or supporting the assertion that Brandon Wages was "working on behalf of Pine Hill;" and

- Wages was "an employee working in the management office" (Respondent's Initial Brief, p. 15). Again, there is no evidence in the record regarding the location of service or Brandon Wages location.

Contrary to these unsupported factual assertions, the ***only*** competent evidence in the record indicates that Brandon Wages is not an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. (See, R., pp. 48, 52, Affidavits of Cheryl Ferraro and Brandon Wages). The only evidence presented by Respondent, who carried the burden at the Trial Court is the affidavit of service which simply states,

> Personally appeared before me, Jerry W. Frick, Jr., the undersigned deponent, who first being duly sworn says: That he personally served one copy of the following documents Filed in the Office of the Clerk of Court for Orangeburg County South Carolina: Summons, Complaint, in the foregoing action upon Defendant: Pine hill Apartments, LP by Service on the Property Manager (Brandon Wages) on 02/28/2019 at 12:45 p.m. at his POE located at 117 Yellow Jasmine Road, Orangeburg, S.C. 29115…

(R., p. 28, Affidavit of Service). There is no evidence in the record regarding Wage's physical location at the time of service or whether he was "working in the management office" or as stated elsewhere, "present on the property working on behalf of Pine Hill to manage the property." Rather, there is only a bald, hearsay assertion by the process server that Brandon Wages was the "Property Manager."

However, even if Brandon Wages told the process server that he was *the* property manager (as opposed to working for property manager, for instance) such cannot support service

of process. "Claims by one to possess authority to receive process or actual acceptance of process by an alleged agent will not necessarily bind the defendant. Rather, there must be evidence the defendant intended to confer such authority." *Brown*, 348 S.C. at 583–84, 560 S.E.2d at 631–32. In *Brown*, the Plaintiff attempted to serve process by serving a person located at the physical location of the medical practice who represented herself as the manager for the practice but was, in fact, employed by a different entity. *Brown*, at 584, 560 S.E.2d at 632. The Court determined that service of process was not effectuated by such an attempt. At best, Respondent presents the same set of facts here and, as in *Brown*, Respondent is destined to fail.

The record on appeal supports only one conclusion – Brandon Wages was not authorized to accept service of process.

II. Respondent's amendment of her Complaint moots the default judgment.

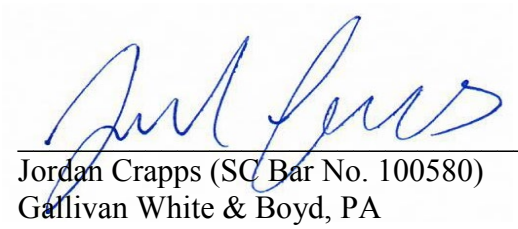
Respondent argues that an Amended Complaint does not nullify a default judgment as opposed to an entry of default. However, Respondent fails to cite any authority as to why this distinction is worth noting. As the case law is manifestly clear, amending a complaint renders the previous complaint of no import and renders entries of default thereon null and void. (See, Appellant's Initial Brief, p. 21-22). Respondent offers no case law contending that a default can stand when the Complaint upon which it is entered is of no legal effect (*Young v. City of Mt. Ranier*, 283 F.3d 567, 572 (4th Cir., 2001)) and the entry of default upon which it is entered is mooted (*Allstate Ins. Co. v. Yadgarov*, 2014 WL 860019, *8, 2014 U.S. Dist. LEXIS 30068, *21 (E.D.N.Y., 2014)).

Regardless, case law instructs that an amended complaint sets aside default judgments as much as entry of defaults. See, e.g., *Greater St. Louis Construction Laborers Welfare Fund v. A.G. Mack Contracting Co., Inc.*, No. 4:08-CV-1947 CAS, 2009 WL 2916841, at *1 (E.D. Mo.

Sept. 4, 2009) (Setting aside entry of default and default order upon amendment of Complaint); *Freilich v. Green Energy Res., Inc.*, 297 F.R.D. 277, 283 (W.D. Tex. 2014) (Holding that amending plaintiff's complaint would require the Court to *sua sponte* set aside a previously awarded default damages order of approximately $500,000 because "an amended complaint supersedes the original complaint in its entirety, district courts routinely set aside entries of defaults when plaintiffs file amended complaints.").

CONCLUSION

For the reasons set forth herein and in its Initial Brief, the Trial Court's Orders should be reversed and this Court should enter an Order setting aside entry of default, the default judgment, and the Damages Order.



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