

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Master-in-Equity

Joseph M. Strickland, Master in Equity

Appellate Case No. 2021-001219

First Citizens Bank and Trust
Company, Inc,

Respondent,

v.

Justin K. Spires, Timothy J.
Spires, Sr. South Carolina
Department of Probation,
Parole and Pardon Services
and Warren B. Giese as
Solicitor,

Of who, Justin K. Spires and
Timothy J. Spires are the

Appellants.

INITIAL BRIEF OF APPELLANT

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MAY 02 2022

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

DID THE COURT ABUSE ITS DISCRETION BY FINDING JUSTIN SPIRES WAS PROPERLY SERVED WHEN THE SUMMONS AND COMPLAINT WERE DELIVERED TO AN INDIVIDUAL WHO DID NOT RESIDE IN HIS HOME?

DID THE COURT ABUSE ITS DISCRETION BY FINDING THAT TIMOTHY SPIRES, SR. WAS PROPERLY SERVED WHEN THE SUMMONS AND COMPLAINT WERE DELIVERED TO AN ADDRESS WHERE HE DID NOT RESIDE?

DID THE COURT ERR BY FINDING THAT IT HAD PERSONAL JURISDICITON OVER JUSTIN SPIRES AND TIMOTHY SPIRES, SR.?

DID THE MASTER IN EQUITY ERR BY DENYING THE MOTION TO VACATE BY FINDING THAT JUSTIN SPIRES AND TIMOTHY SPIRES, SR HAD ADEQUATE NOTICE OF THE PROCEEDINGS?

DID THE MASTER IN EQUITY ABUSE HIS DISCRETION IN APPLYING THE FACTORS FOUND IN MICROTRONICS, INC IN DENYING THE APPELLANTS MOTIONS?

STATEMENT OF THE CASE

This is an appeal from the Master in Equity's Order Denying the Appellants' Motions to Vacate the Sale, Set Aside the Default Judgment, Set Aside the Entry of Default and to Dismiss the Action and the Master in Equity's Motion to Reconsider.

This appeal arises out of the foreclosure of a mortgage on property commonly known as 30 Cardington Ct, the home of Justin Spires. The Mortgage was originated in 2006 between First Citizens, Justin Spires and Timothy Spires. Timothy Spires is Justin's father and was a co-signer. He never resided at the property. After 13 years, First Citizens filed an action to foreclose on the interests of Justin Spires and Timothy Spires in October of 2019 claiming \$57,355.96 was due. There were affidavits of service filed against both of them claiming they were served October 12, 2019 by delivery of the Summons and Complaint by private process server to Mitch Smith at 30 Cardington Court.

Mitch Smith was the boyfriend of Justin's mother and Timothy's ex-wife. He was visiting his girlfriend and did not reside at 30 Cardington Court.

There was a hearing on February 12, 2020 when a judgment was entered against the appellants in the amount of \$66,710.96. A deficiency being demanded, the foreclosure sale completed on January 6, 2022 where the Respondent was the successful bidder with a 'full debt bid' of \$69,407.20. A Deficiency Judgment was then entered against the Appellants in the amount of \$2,693.96.

After this, an eviction hearing was scheduled and the notice for the Rule to Show Cause was posted at the property. Justin Spires saw this notice posted. He did attend that hearing, but he thought it was for the foreclosure. He did not understand the bank was seeking to evict him and the sale had already happened. Timothy Spires did not attend that hearing because he did not

receive any notice of it. On May 17, 2021, Timothy Spires and Justin Spires each filed a motion seeking to void the sale and vacate the judgment on the basis that they were never served with the Summons and Complaint. This motion and the subsequent Motion to Reconsider were denied. Justin Spires is still living in the property with his minor daughter.

The Notice of Appeal was filed by the Appellant on March 17, 2021.

STANDARD OF REVIEW

“Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). Our standard of review, therefore, is limited to determining whether there was an abuse of discretion. An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support.” Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990).” Bb & T v. Taylor, 633 S.E.2d 501, 369 S.C. 548 (S.C. 2006)

ARGUMENTS

I. THE COURT HAS NO PERSONAL JURISDICITON OVER EITHER JUSTIN SPIRES OR TIMOTHY SPIRES, SR. SO THE JUDGMENT AND SUBSEQUENT SALE ARE VOID.

a. The Court abused its discretion finding Service of Process on Justin Spires and Timothy Spires was effective.

Personal jurisdiction is obtained over a defendant by the service of the summons pursuant to Rule 4(d)(1), SCRPC which says:

(d)(1) Individuals. Upon an individual other than a minor under the age of 14 years or an incompetent person, by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy to an agent authorized by appointment or by law to receive service of process.

The Order denying Appellants' Motions to Vacate misapplied the law and ignored the facts in the record. The Summons and Complaint in this matter were not delivered to Justin or Timothy personally. The Affidavits of Service say the documents were delivered to Mitch Smith at 30 Cardington. Neither Mitch Smith nor Timothy resided at the address. Both the process server and the Respondent knew this. (Affidavit of Thomas Mitchell Smith and Affidavit of Timothy Spires, Sr.) This is a critical failure to follow the rules governing service of process. Therefore, this is not effective service and the Court does not have personal jurisdiction over the Appellants.

The Order says, "South Carolina has never required exacting compliance with the rules to effect service of process." (Order June 21, 2021). This is taken from Roche v. Young Bros. Inc. of Florence (1994). The Roche Court, however, continued, saying,

"Rather, we 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." Roche v. Young Bros., Inc. of Florence, 456 S.E.2d 897, 899, 318 S.C. 207 (S.C. 1994). The fact that our courts do not require exacting compliance with rules of service is designed to prevent abuse by defendants seeking to game the system, not encourage due process violations. If the Court in this matter had inquired whether the Plaintiff has sufficiently complied with the rules, it would have found that it did not. If it had made such a finding, that finding would have been without any factual support.

b. The Plaintiff did not sufficiently comply with the rules such that the court has personal jurisdiction.

The Order said "Service of Process was obtained on October 12, 2019 by leaving a copy at the dwelling house *or of the mortgage property* with some person of suitable age and discretion then residing therein." (Order June 21, 2021 p2)(emphasis added). This is a gross misstatement of the law and the facts. The Court cannot obtain jurisdiction over a defendant by delivering the Summons and Complaint to the "mortgage property." Substitute service can only be achieved by delivering the documents to a **person who resides in the same residence with the defendant at the defendant's residence**. That did not happen here for either defendant. The rule used by the court is nowhere in the law and does not grant personal jurisdiction over a party. The use of this rule is an abuse of discretion.

The Order says, "When the civil rules on service are followed, there is a presumption of proper service." (Order June 21, 2021 p2) In this case, however, the

rules were not followed. The person the documents were delivered to did not reside at the house and the house was not the dwelling of Timothy Spires, Sr.

If there is a presumption that service was proper based on the affidavits of the process server, that presumption has been rebutted by the three affidavits filed by Justin Spires, Timothy Spires, Sr. and Thomas Mitchell Smith.

Mr. Smith said 1) he did not live at 30 Cardington, 2) he told the process server Tim did not live at the house, and 3) that he was not asked if he lived at the house. Timothy Spires, Sr. said 1) he lives at 3822 Screaming Eagle Road and has for 30 years, 2) still receives correspondence from First Citizens there, and 3) received no notices of this action until May 2021. Justin Spires confirmed neither Mitch Smith nor his father resided at 30 Cardington. (Affidavit of Thomas Mitchell Smith, Affidavit of Timothy Spires, Sr., Affidavit of Justin Spires)

The presumption of proper service was rebutted. No counter evidence was presented by the Respondent. These facts were ignored by the Court.

This matter is very similar to the case of Bb & T v. Taylor, where “there are no facts in the record to indicate [Appellants] [were] even aware of the process server and his attempts to serve [them]. [Appellants] [were] not properly served under these facts because [he] never saw or spoke to anyone who resided in Petitioner's residence nor did anyone refuse acceptance...” Bb & T v. Taylor, 633 S.E.2d 501, 504, 369 S.C. 548 (S.C. 2006).

The Appellants were not hiding or playing games. The Plaintiff did not do any investigation on who they were trying to serve and completely failed to follow Rule 4 SCRPC. "Rule 4, SCRPC, serves at least two purposes. It confers personal jurisdiction

on the court and assures the defendant of reasonable notice of the action.' ” Id. (S.C. 2006) *Citing Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1994). Without compliance with this rule, the Appellants were deprived of notice and the court did not have jurisdiction.

c. The Defendants did not have adequate notice of the Proceedings.

The Respondent argues around the fact that service was improper by saying they sent multiple notices of hearing to Justin Spires, that Mr. Spires filed bankruptcy at one point and notified First Citizens of this bankruptcy, and that the sale was published in the paper. None of this grants the court jurisdiction over the Defendants and their property rights. In order to argue that the Appellant had notice, the Respondent must first show it substantially complied with the rules concerning service of process. To allow a multitude of letters to confer jurisdiction is not in the law. Furthermore, there is no evidence those letters were even received by Justin Spires and ample evidence they were not even sent to Timothy.

The ‘adequate notice’ question from Roche cannot even be reached if the Plaintiff has not followed the rules. "A judgment is void if a court acts without personal jurisdiction." Id. Leaving the documents with an individual who is not a resident of the dwelling is not adequate service and is not sufficient to confer personal jurisdiction over the Justin Spires who does live at the address. Even more so, leaving documents at a house where Timothy Spires, Sr. does not reside is an even more egregious failure to follow the rules.

In this matter, the Plaintiff argues that Justin Spires must have had knowledge of the suit because of the notices mailed to him, the fact that he filed bankruptcy on the eve

of the foreclosure sale, and the fact that he was communicating directly with First Citizens. Justin Spires does not deny that he knew he was behind on his mortgage, but this is different than knowing he was a party to a suit to take his home. There is no evidence Mr. Spires received the mail or that First Citizens told him there was a suit. More than that, knowledge of the filing of a suit by a defendant does not grant the court Personal Jurisdiction over that person.

Regarding Timothy, there is no evidence on the record that he had any knowledge of the foreclosure action in any way. The Court's Order provides no reasoning for finding that it had jurisdiction over Timothy Spires.

d. Timothy Spires, Sr. was never served with the Summons and Complaint in this matter.

As already stated, Rule 4 SCRPC governs the service of process of a Complaint and Personal Jurisdiction. The arguments for Timothy Spires, Sr. are even more compelling than those for Justin Spires. He never lived at 30 Cardington Ct. The person who the documents were delivered to was the boyfriend of his ex-wife. First Citizens knew his address and where to find him because he's a customer of First Citizens and still is. (Affidavit Timothy Spires). Furthermore, there is absolutely no record of him receiving any notice of this action in any manner. He did not know about it until right before the motion to vacate was filed. To maintain that the Courts of South Carolina have jurisdiction over Timothy would be a gross injustice should be corrected by vacating the sale and judgment.

II. THE COURT ERRED IN FAILING TO GRANT THE APPELLANT'S MOTION FOR RELIEF UNDER RULE 60(B).

a. The Court erred in considering the factors found in *Microtronics, Inc.* when the Appellants are arguing the Judgment is Void.

The Master in Equity considered the wrong standard in considering the Appellant's 60(b) argument. In Bb & T v. Taylor, the South Carolina Supreme Court said in Note 1 that those factors are not relevant when an argument is being made that a judgment is void. 633 S.E.2d 501, Note 1, 369 S.C. 548 (S.C. 2006). As the Appellant has shown, there never was proper service of the Appellants in this matter. "The court never had personal jurisdiction over Justin Spires [and Timothy Spires, Sr.]. "A judgment is void if a court acts without personal jurisdiction. *Id.* " " (Appellants' Motions to Vacate the Sale, Set Aside the Default Judgment and the Entry of Default, and Dismiss for lack of Personal Jurisdiction under Rule 12(b)(2))' " The consideration of the Microtronics Inc. factors is a misapplication of the law and should not be done. A Void Judgment is void and there is no need to consider any factors beyond this. .

b. The Court erred in finding that the Appellants are not entitled to relief under 60(b) under the Microtronics Factors.

Even if the court finds that the judgment was not void, the appellants are entitled to relief on other grounds under Rule 60(b) SCRPC.

Rule 55(c) SCRPC states "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Rule 60(b) South Carolina Rules of Civil Procedure states that "...the court may relieve a party . . . from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud, misrepresentation, or other misconduct of an adverse party. . ."

The Appellants did not answer the complaint because they never received the Summons and Complaint. The Process server left the documents with someone who did not reside at 30 Cardington and was not authorized to accept service on either Appellants' behalf. Furthermore, Timothy Spires, Sr. did not even live at that address. The notices that the Respondent claims were sent, were claimed to have been mailed to 30 Cardington, even though First Citizens has the address of Timothy Spires. (Affidavit of Timothy Spires, Sr.)

“In determining whether to grant a motion under Rule 60(b), the trial judge should consider: (1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other party...”
Micronics v. SOUTH CAROLINA DEPT. OF REV., 345 S.C. 506, 548 S.E.2d 223 (S.C. App. 2001)

Tim Spires acted as soon as he knew anything was going on in May, 2021. He was completely unaware of the foreclosure or the judgment against him until Justin told him in May. There is no argument against this by the Respondent in the record.

While Justin was aware that he was behind on his mortgage, he was not aware that the bank had tried to serve him. He was communicating directly with First Citizens and they were talking with him. No one ever informed him that he was in foreclosure. When the notice of the hearing for the motion to vacate was posted on his door, he appeared at that hearing, despite being unaware of what was going on. At that point he began to look for an attorney to help him, but it took two months to locate one. He acted as promptly as he could in the circumstances.

There are defenses available to the Appellants. The record brings the amount of the debt into question. As stated by the Defendants, they have disputed the debt and been given inconsistent pay off numbers by the Respondent with no explanation. They are entitled to

dispute the debt and it would make a difference if the Plaintiff was demanding the proper amounts from the Defendants. Even the Affidavit of the Respondent's witness provided with its Memorandum in Opposition to the Motion to Vacate indicates there is an issue in the amount due.

Justin received multiple conflicting payoff and reinstatement amounts from the plaintiff. He was trying to pay the arrearage but was constantly being told different number and was unable to get the correct amount from the bank. (Affidavit of Justin Spires). The Plaintiff had a duty to provide a correct amount due and failed in that duty. To this day he has not received a proper accounting of the amounts due. Finally, Mr. Spires was not properly represented at the closing and was denied his right to choose an attorney. This is a proper defense under the South Carolina Attorney Preference statute.

At the hearing on the motions on June 21, 2021, the Respondent submitted an affidavit for the Records Custodian for the Plaintiff. (Hinnant Affidavit) In that, the records custodian mentioned that there had been a loan modification. This was the first mention of the loan modification by the Plaintiff in the record and a copy was never produced. This modification was an extension of the maturity date of the Note and Mortgage, but it also reduced the interest rate from 6.875% to 4.6%. An affidavit of Justin Spires is attached to the Motion to Reconsider with bank statements showing this interest rate. (Affidavit of Justin Spires) Despite this, the Plaintiff is still claiming the interest rate is 6.875% in all of its affidavits and in the final judgment. This would make a substantial difference in the amount that was due and in the deficiency judgment entered against the Appellants.

The Respondent argues that it would be prejudiced if the motion were granted. The only grounds it has given are the passage of time, but that is doe not put the Respondent in any worse

position. The property has equity in it, and the reason for the delay was largely due to Covid-19, not the actions of the Appellants. They are not in a substantially worse position now than they would have been if the motion had been granted other than having to actually serve the Appellants and prove its case.

III. THE FORECLOSURE SALE SHOULD BE VACATED AND DEEMED VOID

Because the Court was acting without personal jurisdiction, any action taken is void. The Sale that was held pursuant to the Judgment of Foreclosure is void. “A judicial sale will be set aside when either (1) the sale price ‘is so gross as to shock the conscience [;]’ or (2) the sale ‘is accompanied by other circumstances warranting the interference of the court’” Wells Fargo Bank, NA v. Turner, 378 S.C. 147, 662 S.E2d 424 (S.C.App 2008) *quoting* Poole v. Jefferson Standard Life Ins. Co., 174 S.C. 150, 157, 177 S.E. 24, 27 (1934). The fact that the court never had personal jurisdiction over the Defendants is a circumstance that warrants the interference of the court.

The South Carolina Supreme Court said in Poole “As said in Farr v. Gilreath 23 S.C. 502 ‘It is the policy of the law to sustain judicial sales when it can be done *without violating principle or doing injustice.*” [italics in original] Id. at 26. A judicial sale cannot stand when sustaining the sale results in injustice and a failure of equity. In this case, there was a complete and total lack of due process for the Appellants. The only remedy is to void the sale.

IV. CONCLUSION

The Master in Equity has abused his discretion by denying the Appellants’ Motions to Vacate the Sale, Set Aside the Default Judgment and Entry of Default. The Court never had personal

jurisdiction over the Appellants so all action is void. The Order states the law incorrectly and ignored facts before it regarding the matter. The lower court's order should be reversed.

/s/Shawn M. French, Sr.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Master-in-Equity

Joseph M. Strickland, Master in Equity

Case No. 2019-CP-40-5698

First Citizens Bank and Trust
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v.

Justin K. Spires, Timothy J.
Spires, Sr. South Carolina
Department of Probation,
Parole and Pardon Services
and Warren B. Giese as
Solicitor,

Of who, Justin K. Spires and
Timothy J. Spires are the

Appellants.

Proof of Service

I certify that I have served the Initial Brief, Designation of Matter, and Motion to file outside of Deadline by depositing a copy of it in the United States Mail, postage prepaid, addressed to its attorneys of record listed below.

Theodore von Keller
PO Box 4216
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May 2, 2022

/s/Shawn M. French, Sr.
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MAY 2, 2021

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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Columbia, South Carolina 29211

RE: First Citizens Bank and Trust, Inc. v. Justin K. Spires, et al.
Case No.: 2019-CP-40-5698

To Whom It May Concern,

Please find enclosed the Initial Brief of Appellant, Designation of Matter, and Motion to File Outside of Deadline with \$50.00 motion filing fee.

If you have any questions, you can contact me at the above number.

Sincerely,

Shawn M. French
Cc: File
Justin Spires
Timothy Spires
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