THE STATE OF SOUTH CAROLINA
In The Court of Appeals

State of South Carolina ex rel. Robert M. Ariail, Solicitor, Thirteenth Judicial Circuit, Respondent,

v.

Eighty-Eight One Hundred Forty-Eight Dollars and 45/100th ($88,148.45), Three Hundred Twenty-Two ($322.00) Dollars and Eighty Dollars ($80.00) and Contents of Safe Deposit Box 22031, Moon Magruder at Wachovia Bank contents Defendant Property and Moon Cha Magruder, Interested Party, Defendants,

Of Whom Moon Cha Magruder is the Appellant.

Appellate Case No. 2010-169267

Appeal From Greenville County
Robin B. Stilwell, Circuit Court Judge

Unpublished Opinion No. 2012-UP-388
Heard May 9, 2012 – Filed June 27, 2012

AFFIRMED

Kenneth P. Shabel and John R. Holland, both of Spartanburg, for Appellant.

Sylvia Paris Harrison, Thirteenth Judicial Circuit
Solicitor's Office, of Greenville, for Respondent.

PER CURIAM: Moon Cha Magruder appeals the circuit court's order refusing to vacate a default judgment entered against her and her property in the State's civil forfeiture action. She argues the circuit court erred in failing to find the solicitor's Affidavit for Service by Publication (Affidavit) was fraudulent. We affirm.

"Motions for relief under Rule 60(b) are within the [circuit] court's discretion, and this court will not reverse the [circuit] court absent an abuse of discretion." *Hillman v. Pinion*, 347 S.C. 253, 255, 554 S.E.2d 427, 429 (Ct. App. 2001). "An abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *Roberson v. S. Fin. of S.C., Inc.*, 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005) (quoting *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997)).

The circuit court may relieve a party from a final judgment upon a showing of "fraud, misrepresentation, or other misconduct of an adverse party" or a showing that the judgment is void. Rule 60(b)(3), (4), SCRCP. Moreover, Rule 60(b) requires that such a motion for relief "shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken."

A circuit court considering a motion for relief under Rule 60(b) should consider four factors: "(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 parties." *McClurg v. Deaton*, 380 S.C. 563, 573, 671 S.E.2d 87, 93 (Ct. App. 2008), *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011). In addition, a party seeking relief from a default judgment under subsection (3) "must also make a prima facie showing of a meritorious defense." *Id.* at 574, 671 S.E.2d at 93.

> A meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to

> essential facts arising from conflicting or doubtful evidence.

Graham v. Town of Loris, 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978) (citing 46 Am. Jur. 2d *Judgments* § 741 (1969)).

A party asserting the fraudulent nature of a statement must demonstrate:

> (1) a representation; (2) the falsity of the representation; (3) the materiality of the representation; (4) knowledge of its falsity, or reckless disregard for its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of the falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

First Union Mortg. Corp. v. Thomas, 317 S.C. 63, 71, 451 S.E.2d 907, 912 (Ct. App. 1994).

We affirm,[1] finding Magruder failed to demonstrate fraud.[2] Even if the statements she identified in the Affidavit were inaccurate, Magruder failed to establish

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[1] In reaching the merits of this issue, we find meritless the State's argument that a two-year statute of limitations barred Magruder's motion to reopen the case. An aggrieved party must commence a civil action "upon a statute for a forfeiture or penalty to the State" within two years. S.C. Code Ann. §§ 15-3-20, -510, -550 (2005). "A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing." § 15-3-20(B). To the extent a civil action was commenced in this matter, the State commenced it on November 11, 2008, with the filing of its summons and complaint. Magruder's June 11, 2010 filing was a motion in an existing case, not pleadings commencing an independent civil action, as in *Hackworth v. Greenville County*, 371 S.C. 99, 102, 637 S.E.2d 320, 322 (Ct. App. 2006). Accordingly, the statute of limitations did not bar Magruder's motion.

[2] We note South Carolina requires a movant seeking relief under Rule 60(b)(3) to establish extrinsic fraud. *See Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 20, 594 S.E.2d 478, 483 (2004) ("South Carolina maintains the distinction between extrinsic and intrinsic fraud, even when the allegations are raised through a Rule 60(b)(3) motion filed within one year of the entry of judgment."); *see also Chewning v. Ford Motor Co.*, 354 S.C. 72, 80, 579 S.E.2d 605, 610 (2003)

attorney Harrison's "knowledge of [the Affidavit's] falsity, or reckless disregard for its truth or falsity." *See id.* Attorney Harrison alleged in the Affidavit that she had "exhausted all known avenues" to locate Magruder. In challenging the Affidavit, Magruder established that she was represented by counsel in her criminal cases for the duration of this civil action and that the criminal division of the Solicitor's office not only knew about but communicated with her counsel regarding the criminal actions. However, the printouts attached to the Affidavit do not indicate attorney Harrison, who practiced in the civil division, had access to information concerning Magruder's criminal counsel. Magruder failed to offer other evidence that attorney Harrison at least recklessly disregarded any known avenue by which she might have been located.

While we heartily disagree with the State's characterization of Magruder's argument on appeal as "frivolous,"[3] Magruder failed to demonstrate attorney Harrison acted either recklessly or knowingly in making the inaccurate statements in the Affidavit. Accordingly, Magruder failed to establish fraud in the Affidavit, and we must affirm the circuit court's decision.

AFFIRMED.

PIEPER and GEATHERS, JJ., and CURETON, A.J., concur.

(requiring extrinsic fraud as a basis for vacating a judgment (citing *Bryan v. Bryan*, 220 S.C. 164, 167-68, 66 S.E.2d 609, 610 (1951))). Although at oral argument Magruder's counsel opined the fraud alleged in this case was intrinsic, we need not reach this distinction because (1) fraud is Magruder's sole theory for seeking relief and (2) we see no fraud of either sort. Nonetheless, we are cognizant that Rule 60(b) provides for relief on grounds other than fraud. *See Mr. T v. Ms. T*, 378 S.C. 127, 134-35, 662 S.E.2d 413, 417 (Ct. App. 2008) (observing Rule 60(b) not only lists grounds for relief other than fraud but also does not prevent courts from granting equitable relief from judgment when exceptional circumstances exist).

[3] Our supreme court has made it clear that the question of precisely what diligence is "due" turns not on the letter of our procedural rules concerning service but, rather, on what action is reasonable in view of the facts at hand. A plaintiff is duly diligent in seeking to locate a defendant if he makes "some attempt to find the party, in the county of his alleged residence, which the court or judge shall be satisfied is *reasonable under the circumstances*." *Collins v. Collins*, 237 S.C. 230, 236, 116 S.E.2d 839, 842 (1960) (emphasis added).