STATE OF NORTH CAROLINA GUILFORD COUNTY STEVEN MCRAE, Plaintiff, v. KYLE RUSSELL CURTIS, Defendant.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 19 CVS 8163 **REPLY BRIEF IN SUPPORT OF KYLE CURTIS'S AMENDED MOTION TO SET ASIDE ENTRY OF DEFAULT AND PARTIAL DEFAULT JUDGMENT**

Pursuant to Rule 7.7 of the North Carolina Business Court Rules, defendant Kyle Russell Curtis submits this reply brief in support of his motion to set aside the entry of default and the partial default judgment entered against him in this case.

INTRODUCTION

Mr. McRae's response confirms the key point in Mr. Curtis's amended motion to set aside: that Mr. Curtis has not been properly served with the summons and complaint in this lawsuit.

First, Mr. McRae does not seriously contest that Mr. Curtis was not served at a proper address under Rule 4(j)(1), such as Mr. Curtis's dwelling house or usual place of abode. Rather, he argues that the address at which Mr. Curtis was served is irrelevant because Mr. Curtis's mother was authorized to accept service on her son's behalf. The affidavit accompanying this brief makes clear that Mr. Curtis's mother is not—and never was—an agent authorized to accept service on Mr. Curtis's behalf. Moreover, the complaint served on Mr. Curtis's mother was not delivered to Mr. Curtis as required by Rule 4(j)(1)(c).

Second, Mr. McRae tries to sidestep proper service by arguing that Mr. Curtis received actual notice of the complaint. Actual notice of a lawsuit, however, does not remedy defective service.

As shown below and in Mr. Curtis's opening brief, Mr. Curtis has rebutted the presumption of proper service. As a result, the partial default judgment entered against him is void and must be set aside.

ARGUMENT

I. Mr. Curtis Has Rebutted the Presumption that Service Was Proper.

In his opening brief, Mr. Curtis showed that the partial default judgment entered against him is void under Rule 60(b)(4) because Mr. Curtis was not properly served with the summons and complaint. (ECF No. 31 at 4–5.) Specifically, Mr. McRae attempted to serve Mr. Curtis by certified mail at an old address. (ECF No. 31 at 4–5; ECF No. 31.1 ¶¶ 5–6.)

In his response, Mr. McRae does not dispute that the complaint was mailed to an old address. Instead, Mr. McRae argues that Mr. Curtis's mother was an agent authorized to accept service on Mr. Curtis's behalf, and that Mr. Curtis had actual notice of the lawsuit. As shown below and in the affidavit accompanying this brief, Mr. Curtis's mother is not, and never was, an agent authorized to accept service on her son's behalf. Moreover, actual notice does not cure improper service.

A. Mr. Curtis's mother is not an agent authorized to accept service on Mr. Curtis's behalf.

In his response, Mr. McRae argues that even if Mr. Curtis did not live with his mother on August 30, 2019, service was proper because Mr. Curtis's mother was authorized to accept service on his behalf. (ECF No. 32 at 3–4.) That argument misses the mark.

Osman v. Reese, No. COA09-950, 2010 WL 1315595 (Ct. App. Apr. 6, 2010), is instructive on this point. In *Osman*, the plaintiff served the defendant with a summons and complaint by certified mail at his place of business. *Id.* at *2. A co-worker signed the certified-mail slip for the defendant. *Id.* The defendant received notice of the complaint, but never received a copy of the complaint from his co-worker. *Id.* To rebut the presumption of service, the defendant submitted affidavits stating that the co-worker was not his agent, and that the summons and complaint were never "delivered" to him. *Id.* The trial court dismissed the plaintiff's complaint for insufficient service of process, and the plaintiff appealed. *Id.*

The Court of Appeals affirmed the trial court's conclusion that service was insufficient. *Id.* at *4. The court held that under Rule 4(j)(1)(c), service by certified mail is achieved "by mailing a copy of the summons and of the complaint . . . addressed to the party to be served, *and delivering to the addressee*." *Id.* at *2 (quoting N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(c)). Although the plaintiff produced evidence, through an affidavit of service with return receipt, that the summons and complaint were delivered to the defendant's place of business,

addressed to the defendant, the defendant successfully rebutted that presumption with two affidavits. *Id.* at *3.

Here, like in *Osman*, Mr. McRae attempted to serve Mr. Curtis by certified mail, and the certified mail slip was signed by someone who is not "an agent authorized by appointment or by law to be served or to accept service of process" on Mr. Curtis's behalf. N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(b); (Ex. A, Kyle Russell Curtis Aff. ¶ 4.)[1] Moreover, like in *Osman*, a copy of the complaint was not delivered to Mr. Curtis (in this case, until several months after the attempted delivery by certified mail). (Ex. A, Kyle Russell Curtis Aff. ¶ 5.) Indeed, here, Mr. Curtis's argument for overcoming the presumption of proper service is even stronger than in *Osman* because, unlike the defendant in *Osman*, Mr. Curtis was not even served at a proper address, such as his place of business, dwelling house, or usual place of abode.[2]

In sum, Mr. Curtis has overcome the presumption of proper service by showing that (1) he was served at an old address, (2) the certified mail slip was

---

[1] Mr. Curtis submits this affidavit in reply to Mr. McRae's opposition. *See, e.g.*, *Artistic S. Inc. v. Lund*, No. 12 CVS 11789, 2015 WL 8476587, at *16 (N.C. Super. Ct. Dec. 9, 2015) (allowing a reply affidavit to address points raised in the non-movant's response brief); *Glob. Textile All., Inc. v. TDI Worldwide, LLC*, No. 17 CVS 7304, 2017 WL 5641185, at *5 (N.C. Super. Ct. Nov. 21, 2017) (same).

[2] In his response, Mr. McRae alludes to the fact that a defendant can have multiple places at which he or she can be served. (ECF No. 32 at 4.) While that may be true, there is no evidence that Mr. Curtis has multiple dwelling homes or places of abode at which service would be proper under Rule 4(j)(1), and there has been no allegation that Mr. Curtis was served at his place of business.

signed by someone who was not Mr. Curtis's authorized agent, and (3) the complaint was not delivered to Mr. Curtis.

B. Notice is insufficient to overcome defective service.

In his opening brief, Mr. Curtis showed that actual notice of a lawsuit is insufficient to overcome defective service. (ECF No. 31 at 4–5.) Mr. McRae relies on *Granville Medical Center v. Tipton*, 160 N.C. App. 484, 586 S.E.2d 791 (2003), and *Fender v. Deaton*, 130 N.C. App. 657, 503 S.E.2d 707 (1998), to try and sidestep that principle. That reliance is misplaced.

In *Granville* and *Fender*, the Court of Appeals considered actual notice only in determining that a *presumption* of proper service had been established. *See Granville Med. Ctr.*, 160 N.C. App. at 492–92, 586 S.E.2d at 796–97; *Fender*, 130 N.C. App. at 663, 503 S.E.2d at 710.

Osman is instructive on the role that actual notice plays in determining the sufficiency of service. There, the plaintiff tried to overcome defective service by arguing that the defendant had actual notice of the lawsuit and therefore could not rebut the presumption of service. 2010 WL 1315595, at *3. In fact, the plaintiff cited *Granville* and *Fender*, just like Mr. McRae does in his response. *Id.*; (ECF No. 32 at 5–6.) The Court of Appeals distilled *Granville* and *Fender* as follows: "Neither *Granville* nor *Fender* stands for the proposition that, as long as [the defendant] had actual notice, improper service on [the defendant] would vest the trial court with personal jurisdiction." *Osman*, 2010 WL 1315595, at *3. Indeed, "[w]hile a defective service of process may give the defending party sufficient and

actual notice of the proceedings, such 'actual notice does not give the court jurisdiction over the party.'" *Id.* (quoting *Thomas & Howard Co. v. Trimark Catastrophe Servs.*,151 N.C. App. 88, 91, 564 S.E.2d 569, 572 (2002)).

In sum, even if Mr. Curtis had actual notice of this lawsuit, that notice is insufficient to confer jurisdiction over Mr. Curtis.

II. Mr. McRae's "Objection and Motion to Strike" Should Be Disregarded.

In his response, Mr. McRae also argues that Mr. Curtis's amended motion to set aside the entry of default and default judgment is procedurally improper on the ground that the Business Court Rules do not contemplate amended motions. (ECF No. 32 at 1.) That argument is misplaced.

The fact that the Business Court Rules do not reference amended motions does not mean that amended motions are not allowed. To the contrary, there is no rule in the Business Court Rules nor the Federal or North Carolina Rules of Civil Procedure that prevents a party from amending her motion before the motion has been ruled on. *See, e.g.*, *E. Maint. & Serv., Inc. v. Lady Deborah's, Inc.*, No. 5:05-cv-832-F2, 2007 WL 9710804, at *2 (E.D.N.C. Mar. 21, 2007) (overruling arguments about the alleged impropriety of an amended motion to dismiss and electing to consider the amended motion "in the interest of justice").

In any event, the Business Court Rules do address the form in which motions must be presented. Business Court Rule 7.2 makes clear that "[a]ll motions must be accompanied by a brief" and "must be set out in a separate document." BCR 7.2.

Mr. McRae's attempt to include a motion to strike in his response to Mr. Curtis's motion to set aside violates Rule 7.2 and should be summarily denied. *See id.* (stating that the Court may summarily deny a motion that is unaccompanied by a brief).

CONCLUSION

As Mr. Curtis noted in his opening brief, the provisions for setting aside default judgments are to be "liberally construed so as to give litigants an opportunity to have a case disposed of on the merits." *Estate of Teel v. Darby*, 129 N.C. App. 604, 607, 500 S.E.2d 759, 762 (1998). Thus, "any doubt should be resolved in favor of setting aside an entry of default." *John Henry Spainhour & Sons Grading Co. v. Carolina E.E. Homes, Inc.*, 109 N.C. App. 174, 183, 426 S.E.2d 728, 733 (1993) (quoting *Beard v. Pembaur*, 68 N.C. App. 52, 56, 313 S.E.2d 853, 855 (1984)).

For the reasons stated in this brief and in Mr. Curtis's opening brief, defendant Kyle Russell Curtis respectfully moves the Court to set aside the entry of default under North Carolina Rule of Civil Procedure Rule 55(d), to set aside the partial default judgment under North Carolina Rule of Civil Procedure Rule 60(b), and to grant all other relief that it deems necessary.

This 24th day of August, 2020.

ELLIS & WINTERS LLP

/s/ Scottie Forbes Lee
Scottie Forbes Lee

N.C. State Bar No. 50833
P. O. Box 2752
Greensboro, NC 27402
Telephone: (336) 217-4085
Facsimile: (336) 217-4198
scottie.lee@elliswinters.com

Counsel for Kyle Russell Curtis

CERTIFICATE OF COMPLIANCE WITH BUSINESS COURT RULE 7.8

The undersigned, in accordance with Business Court Rule 7.8, certifies that the foregoing brief (exclusive of the case caption, signature blocks, and required certificates) contains fewer than 3,750 words, as reported by word-processing software.

This 24th day of August, 2020.

/s/ Scottie Forbes Lee
Scottie Forbes Lee

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing has been served on all counsel of record in accordance with Business Court Rule 3.9 through electronic filing with the North Carolina Business Court.

This the 24th day of August, 2020.

By: /s/ Scottie Forbes Lee
Scottie Forbes Lee