NO. 96402-5

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON
(Court of Appeals Division I, Case No. 76646-5-1)

OPTION ONE MORTGAGE CORPORATION,

Plaintiff/Respondent,

v.

STAR HOVANDER, a/k/a/ STARLARE HOVANDER and STEVEN HOVANDER, wife and husband in their marital community,

Appellants.

RESPONDENT'S ANSWER TO APPELLANTS PETITION FOR REVIEW

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I. INTRODUCTION

Appellant's petition arises from her decade-old challenge to a completed judicial foreclosure. The borrower, Appellant Hovander, unsuccessfully sought relief under CR 60 long after her appeal deadline had passed. Hovander had actively participated in the trial court case prior to judgment: in the face of Option One's summary judgment motion and its affidavit of prima facie evidence of proper service, she failed to offer evidence in support of her affirmative defense of improper service, losing the defense, as the court of appeals recognized.

Her petition for review does not establish any of the criteria for review under RAP 13.4(b). Moreover, it would be contrary to the public interest, and inequitable to the non-party successor of the purchaser of the property at the sheriff's execution sale (Syncretic Financial), to vacate the foreclosure judgment and sale.

II. ISSUES PRESENTED

A. Does Appellant Hovander establish a basis for review under RAP 13.4 (b) (1) when her petition does not identify a conflict between the court of appeals decision and a decision of the Supreme Court?

B. Does Appellant Hovander establish a basis for review in the public interest under RAP 13.4 (b) (4) when she seeks to vacate a foreclosure judgment and the resulting property title of the sheriffs sale purchaser without service of notice to it years after her appeal deadline had passed, and where she had participated in the trial court litigation but failed to offer evidence in support of her affirmative defense in the face of lender's summary judgment motion?

III. STATEMENT OF FACTS

On December 17, 2007, Plaintiff-Respondent Option One Mortgage filed a Complaint to foreclose a deed of trust encumbering Real Property commonly known as 5268 Olson Rd, Ferndale WA 98248 9the "Property"). On or about December 21, 2007 Plaintiff filed an amended Summons. On January 14, 2008 following service to the Property of the Amended Summons and Complaint, Defendant Star filed a "Response to Amended Summons Demand to File Lawsuit". ("Response to Amended Summons").

Well after the judgment was entered, on December 30, 2016, An Order To Appear And Show Cause Why The Judgment Entered Against Star and Steve Hovander Should Not Be Vacated As Void ("December 30, 2016 Order"); after hearing, the Superior Court found in favor of Plaintiff-Respondent and declined to vacate the foreclosure judgment and sales.

As background, earlier in the Superior Court case, following Appellant-Defendant's appearance, Plaintiff moved for summary judgment, mailing all required pleadings and notices to Defendant Star at 5268 Olson Road Ferndale, WA 98248. See Certificate of Service, Dkt #26 (CP-#231-234). Appellant Star filed a response to Plaintiff's Motion for Summary Judgment on January 22, 2009. As part of Star's response to Plaintiffs Motion for Summary Judgment is a document marked, "Exhibit A," a Loan Modification Trial Plan, listing 5268 Olson Rd Ferndale, WA 98248 as Defendant Star's address. (CP-#237-240).

Defendant Star's response and provided this exhibit serve as an admission that 5268 Olson Rd. Ferndale, Washington 98248 is the address provided in the

relevant loan documents and the only property address consistently held by Defendant Star as accurate. In addition to the admission within Defendant Star's response to Plaintiff's motion for summary judgment includes a "Repayment Plan Coupon," identifying Defendant Star's address as 5268 Olson Rd, Ferndale, WA 98248. See Dkt. #35, Response of Star Hovander to Complaint for Summary Judgment. (CP-#241).[1]

On January 23, 2009, following Defendant's appearance and defense and after review of the entire court file, including required Certificates of Service, the Court entered an Order Granting Plaintiff's Motion for Summary Judgment. On February 13, 2009, the Court entered a Judgment of Foreclosure against Starlare ("Star") Hovander ("Judgment"). (CP-#245). The Judgment provided that the property be sold at a foreclosure auction. The property was sold via foreclosure sale on July 12, 2013. An Order Granting Plaintiff's Motion to Confirm Sheriff's Sale was entered June 18, 2014. A Sheriff's Deed to Real Property was filed in the Superior Court on November 16, 2016 as Submission No.99, which stated that an Assignment of Certificate of Sale was filed with the Whatcom County Auditor's Office, transferring ownership of the property to Syncretic Financial,

1 Bookending the commencement of this litigation, December 17, 2007, are two notable dates: July 12, 2007, which is the date Appellant Star signed a petition for Chapter 13 Bankruptcy protection and June 4, 2009, which is the date Appellant Star signed a petition for Chapter 12 Bankruptcy protection. In each of those voluntary petitions, the "Street Address of Debtor" was indicated as 5268 Olson Rd Ferndale, WA. Again, 5268 Olson Rd Ferndale, WA is address where Plaintiff originally served Appellant Star and one of the addresses where Plaintiff continued to mail pleadings associated with this litigation. (CP #1069-1075).

Inc., the "owner of the property." Included in the record as is a copy of the Sheriff's Deed to Real Property. (CP-#975-977).

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Appellant Hovander does not establish a basis for review under RAP 13.4 (b) (1) because her petition does not identify a conflict between the court of appeals decision and a decision of the Supreme Court

RAP 13.4 (b) provides:

> "A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court."

Appellant fails to establish any of these criteria in her petition for review. Appellant cites to subparagraphs (1) and (4) as bases for this Court to accept review. Petition for Review (Pet) 1.

The Judgment of Foreclosure entered in Superior Court matter on February 13, 2009 isvalid and the Superior Court properly concluded that the Judgment should not be vacated as void. The court of appeals properly concluded that Appellant lost her affirmative defense of insufficient service.

Appellant fails to identify a conflict between the court of appeals decision and any Supreme Court decision as required by RAP 13.4(b)(1). As the court of appeals recognized, Hovander had lost her right to challenge personal jurisdiction when she did not include any evidence supporting her affirmative defenses in her

response to Option One's summary judgment motion--Hovander had the burden to prove by clear and convincing evidence that service was improper after Option One satisfied its initial burden that service was properly carried out. *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 672, 292 P. 3d 128 (2012). Hovander's CR 60 motion was not a substitute for a direct appeal. *Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000).

Alternatively, should the petition for review be accepted, the court should consider the issue that service was proper, even though the court of appeals declined to address it. RCW 4.28.080 governs the service of summons in Washington State. Here, service of process of, inter alia, the Amended Summons and Complaint for Judicial Foreclosure was accomplished via substitute service on "Clark (Doe)", on December 28, 2007. (CP -#101-102). On April 2, 2008, Plaintiff-Respondent filed an Affidavit of Service with the Whatcom County Superior Court indicating that service had been accomplished at the address of 5268 Olson Road, Ferndale, WA 98248. (CP-#101-102) The party served is described in the affidavit of service as a 30-year old male, a "person of suitable age" living on the property, and the service was accomplished at Defendant Star's "usual abode." (CP -#101).

Persons exceeding the age of 18 are widely regarded as being persons of "suitable age" for the purposes of RCW 4.28.080 analysis. *See, e.g., Gross v. Evert-Rosenberg*, 85 Wn. App.539, 933 P.2d 439, 1997 Wash. App. LEXIS 442 (Wash. Ct. App. 1997). Further, Washington State courts have thoroughly examined that which constitutes one's "usual abode," finding that one can have multiple abodes. In *Sheldon v. Fettig*, 129 Wn.2d 601, 919 P.2d 1209, 1996 Wash. LEXIS 421 (Wash. 1996), the Court held the following concerning usual abodes:

> We hold the term "house of (defendant's] usual abode" in RCW 4.28.080(15) may be liberally construed to effectuate service and uphold jurisdiction. We also hold that in appropriate circumstances a defendant may maintain more than one house of usual abode if each is a center of domestic activity where it would be most likely that defendant would promptly receive notice if the summons were left there. We conclude Ms. Fettig's family home in Seattle constituted such a center of domestic activity, **where she in fact received actual notice**. Accordingly, service of process was sufficient and the case will be heard on the merits."

(Emphasis added.)

In citing *Martin v. Triol*, the Court in *Sheldon* went on to note that the finding of adequate personal service via substitute service can be applied liberally:

"However, the court, mindful that the civil rules are meant to minimize miscarriages of justice on procedural grounds, stated "'we do not apply a strict construction ...rather, we so construe the statute as to give meaning to its spirit and purpose, guided by the principles of due process ....'" *Triol*, 121 Wn.2d at 145 (quoting *Wichert*, 117 Wn.2d at 156). The court defined the three- year period in which service could be made as three years plus the 90-day tolling period, and found service sufficient."

(Emphasis added). The *Sheldon* Court concluded:

"We therefore conclude "house of [defendant's] usual abode" in RCW 4.28.080(15) is to be liberally construed to effectuate service and uphold jurisdiction of the court. This is consistent with our procedural rules in (1) RCW 1.12.010, which mandates that "(t]he provisions of this code shall be liberally construed, and shall not be limited by any rule of strict construction"; and (2) CR l, which states the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action," which promotes a policy to decide cases on their merits. Indeed, "'modem rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties.'" *Carle v. Earth Stove, Inc*., 35 Wn. App. 904, 908,670 P.2d 1086 (1983) (*quoting Fox v. Sackman*, 22 Wn. App. 707, 709, 591 P.2d 855 (1979)).

Moreover, the substitute service of process statute is designed to allow injured parties a reasonable means to serve defendants. *Wichert*, 117 Wn.2d at 151-52. Our holding here is consistent with this purpose. Finally, our holding well exceeds the constitutional due process requirements set out in *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 315, 70S. Ct. 652, 94 L. Ed. 865 (1950) ("The

means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.").

Applying our holding here, we note that there is no hard and fast definition of the term "house of usual abode." *See Korpela*, Annotation, 32 A.L.R.3d at 127. The underlying purpose of RCW 4.28.080(15) is to provide a means to serve defendants in a fashion reasonably calculated to accomplish notice. *Wichert*, 117 Wn.2d at 151-52. With this purpose in mind, we approve the reasoning of the Court of Appeals, which stated:

The term "usual place of abode" is used in the statute because it is the place at which the defendant is most likely to receive notice of the pendency of a suit.…
…"[U]sual place of abode" must be taken to mean such center of one's domestic activity that service left with a family member is reasonably calculated to come to one's attention within the statutory period for defendant to appear.

Sheldon, 129 Wnd.2d at 610.

As in *Sheldon*, Appellant Hovander was sufficiently served. While not specifically addressed by the court of appeals, the Supreme Court should consider the argument that Appellant was sufficiently served. There is no dispute that Appellant received actual notice of the pendency of this action--Defendant Star promptly filed a response to the complaint with the Whatcom County Superior Court. Defendant Star subsequently received notice of Plaintiff's motion for summary judgment and, on January 22, 2009, also filed a response to that pleading in which she did not offer evidence to support her defense insufficient service.

B. Appellant Hovander does not establish a basis for review in the public interest under RAP 13.4 (b) (4) because she seeks to vacate a foreclosure judgment and the resulting property title of the sheriffs sale purchaser without service of notice to it years after her appeal deadline had passed, where she had participated in the trial court litigation but failed to offer evidence in support of her affirmative defense in the face of lender's summary judgment motion?

While not specially addressed by the court of appeals, should the Supreme Court accept review, it should consider the issue of whether Appellant's CR 60 motion was void for lack of service to interested parties because neither Syncretic Financial, Inc. nor FV-1, Inc., the purchasers of each of the foreclosed subject properties, were served with the motion to Vacate the Judgment.

As evidenced by the Sheriff's Deed to Real Property filed as Submission No. 99, an Assignment of Certificate of Sale was filed with the Whatcom County Auditor's Office, transferring ownership of the property to Syncretic Financial, Inc.[2]

Failing to provide the owner of the property, Syncretic Financial, Inc., notice of her CR 60 motion serves to deprive it of its due process rights under the United States Constitution, U.S. Const. amend. XIV, § 1. As such, Defendant Star's motion to vacate the judgment was be void for lack of notice. Further, under CR 60(e)(3), to vacate a judgment, "The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner ...." Since Syncretic Financial, Inc. and FV-1, Inc. are certainly affected in this matter, Syncretic Financial, Inc. should have received copies of the motion, affidavit and the order to show cause under CR 60(e)(3), but did not. In this regard, her

2 Nor did Appellant serve FV-1, Inc., the purchaser of the other foreclosed 5249 Imhoff Rd., Ferndale, WA 98248. (CP-#926-930,929). Yet, presumably, she seeks to vacate the judgment foreclosing both properties and the resulting sheriff's sales to separate purchasers of each property, Syncretic Financial, Inc. (Olson Rd. property) and FV-1, Inc. (Imhoff Rd. property). (CP- #926-930,929). Indeed, FV-1, Inc., Inc. does not even appear to be aware of this appeal. (CP- #977).

petition is not in the public interest because it would de-stabilize land titles in this state and countenance her untimely appeal via a CR 60 motion, especially where she was involved in the trial court litigation before judgment was entered and, at the time, failed to offer evidence in support of her insufficient service defense

CONCLUSION

The petition for review should be denied because Appellant does not identify any Supreme Court case in conflict with the court of appeals decision nor does she set forth how this issue would be in the public interest. While not specifically addressed by the court of appeals, the Supreme Court should consider the additional arguments, in the event that it accepts review, that (1) Appellant was sufficiently served with the summons and (2) that she failed to serve her motion to vacate on a necessary party as required by CR 60 (e)(3), solely as alternate bases to affirm.

DATED: November 9, 2018. MCCARTHY & HOLTHUS LLP

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I filed the foregoing RESPONDENT'S ANSWER TO APPELLANTS PETITION FOR REVIEW via The State of Washington Supreme Court's CM/ECF Electronic Filing System and by first class mail.

I further certify that my office mailed to said individuals below a true copy thereof, addressed to their last known regular address and deposited in the Post Office at Portland, Oregon as on the following parties on November 9, 2018:

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