Supreme Court No. 99714-4

Court of Appeals No. 53763-0-II

SUPREME COURT OF THE STATE OF WASHINGTON

KENNETH AND VICTORIA ZIMMERMAN

Petitioners,

v.

WILMINGTON SAVINGS FUND SOCIETY FSB, AS TRUSTEE FOR STANWICH MORTGAGE LOAN TRUST A,

Respondent.

ANSWER OF RESPONDENT WILMINGTON TO ZIMMERMANS' PETITION FOR REVIEW

Submitted by:
Steven K. Linkon, WSBA #34896
Wright Finlay & Zak, LLP
612 S. Lucile St., Suite 300
Seattle, WA 98108
Phone: (425) 354-4050
Fax: (949) 608-9142
Email: slinkon@wrightlegal.net

Attorneys for Respondent Wilmington Savings Fund Society FSB, as trustee for Stanwich Mortgage Loan Trust A

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Statutes

Rules

I. INTRODUCTION AND SUMMARY OF ANSWER

In 2008, the petitioners Kenneth P. Zimmerman, Jr., and Victoria L. Zimmerman (collectively, "the Zimmermans") obtained a mortgage loan of $623,000, and made their last monthly payment in July of 2010. Six years later they filed an action seeking to quiet title against the lender's deed of trust (securing the loan against the Zimmermans' property) alleging foreclosure would be barred by the six-year statute of limitations. The Zimmermans served respondent Wilmington Savings Fund Society FSB, as trustee for Stanwich Mortgage Loan Trust A ("Wilmington") in Delaware, but they failed to file a declaration stating why Wilmington could not be served in Washington as required by RCW 4.28.185(4), Washington's long arm statute.

Wilmington did not timely appear in the action and the trial court granted a default order and judgment against Wilmington extinguishing the deed of trust. Wilmington moved to vacate the default order and judgment, arguing that the court lacked personal jurisdiction based on the Zimmermans' failure to comply with RCW 4.28.185(4). In response, the Zimmermans asserted that they had substantially complied with the long arm statute because they filed an affidavit from a process server from which they claimed the court could have logically concluded that service could not be had in Washington. No authority allowing such an inference was provided and, as the trial court, and the Court of Appeals both recognized, Wilmington was entitled to have the default orders vacated and for the matter to be decided instead on the merits. On the merits, the trial court found, and the Court of Appeals affirmed, that Wilmington was entitled to enforce the loan as to those payments which were not time-barred. Having been deprived of their anticipated windfall, the Zimmermans have now petitioned this Court in the hope that it will reinstate the default and, thus, allow them to avoid their obligations under their Loan. The Supreme Court should deny the Zimmermans' petition for review for at least the following reasons:

First, there is no constitutional issue that the Supreme Court needs to decide. The Zimmermans arguments about the proper interpretation of Washington's long arm statute does not give rise to a constitutional issue.

Second, the Court of Appeals decision does not conflict with prior Court of Appeals decisions in other cases.

Third, the Court of Appeals decision does not conflict with any Supreme Court precedents.

Fourth, there are no public policy or other reasons which would warrant the Supreme Court accepting review. The Zimmermans disappointment that their default judgment was set aside, depriving them of that windfall is not a genuine grievance, much less one affecting the public interest.

II. IDENTITY OF ANSWERING PARTY

Wilmington Savings Fund Society FSB, as trustee for Stanwich Mortgage Loan Trust A ("Wilmington") is the respondent in this appeal, and was a defendant and counterclaimant in the underlying action.

III. STATEMENT OF THE CASE

Wilmington held a promissory note secured by a deed of trust on the Zimmermans' home. Clerk's Papers ("CP) 2, ¶¶ 7 and 8, CP 3, ¶¶ 9 and 10. The note required monthly installment payments until 2038. CP 2. It is undisputed that the Zimmermans stopped making their monthly payments and that they were in default as of July 1, 2010. CP 3, ¶ 12. Wilmington did not accelerate the debt, and the Zimmermans never resumed payments. [1]

RCW 7.28.300 allows the owner of real estate to quiet title against a deed of trust where an action to foreclose would be barred by the statute of limitations. In 2016, Zimmerman sued to quiet title over the Wilmington deed of trust based on RCW 7.28.300 seeking to have the deed of trust declared null and void. CP 1.

---

[1] *Kenneth P. Zimmerman, et al., v. Wilmington Savings Fund Society FSB, as Trustee, etc*. No.53763-0-II, slip. op. at 2 (Wash. Ct. App. March 30, 2021) (unpublished),

The Zimmermans filed two affidavits related to their service of the complaint on Wilmington. First, a process server attempted to serve Wilmington at 500 Delaware Avenue in Wilmington, Delaware. The process server's first affidavit explained that service was rejected and a "[l]egal [a]dministrator" told them that "[a]ll documents related to a trust must be served on their trust division at 501 Carr Road" in Wilmington, Delaware. CP 15. The second affidavit established service of the summons and complaint at the Carr Road address. CP 16. Neither affidavit mentioned any attempt or inability to serve Wilmington in Washington. Nor is there any admissible information in the record explaining why Wilmington could not be served in Washington.

Wilmington did not appear, and the trial court entered an order of default in February 2017. CP 36-37. The trial court also entered an order concluding that the underlying debt secured by the deed of trust would be barred by the statute of limitations, quieting title, and requiring that the deed of trust be removed from the county auditor's record. CP 63-64.

In December 2018, Wilmington filed a CR 60 motion to show cause why default should not be set aside and vacated. CP 65-75. Wilmington argued that under RCW 4.28.185(4), for service to have been valid for purposes of seeking to enter a default, the Zimmermans were required to first have filed an affidavit establishing that Wilmington could not be served in Washington, but they failed to do so. As a result, the trial court lacked personal jurisdiction over Wilmington, so that the default judgment was void and therefore had to be vacated.

The trial court entered an order requiring the Zimmermans to show cause why the default orders should not be vacated. CP 76-77. In response, the Zimmermans argued that they had substantially complied with the long arm affidavit requirement because they had submitted an affidavit explaining that their process server had been told, while attempting to make personal service at one address in Delaware, that all documents related to a trust had to be served at Wilmington's Carr Road address, also in Delaware. They claimed that the *inference* from this affidavit was that Wilmington could not be served in Washington. CP 89-99.

The trial court initially declined to vacate the default order, presuming that there had been substantial compliance with the long arm statute. Wilmington moved for reconsideration. Because a substantial compliance finding requires consideration of harm or injury, Wilmington argued on reconsideration that the entire amount owed under the note should not have been excused as a matter of law and the default judgment gave the Zimmermans relief vastly greater than that to which they were legally entitled. CP 115-132. The note required monthly installment payments, and the statute of limitations accrued for each missed payment when that payment became due. *See Edmundson v. Bank of Am. N.A.*, 194 Wn. App. 920, 927-28, 378 P.3d 272 (2016). Thus, when Wilmington moved for reconsideration in 2019, only two to three years of payments due for over six years were barred. Payments less than six years delinquent, and payments that had not yet become due on the 30-year note, were not barred by the statute of limitations. The default judgment extinguishing the loan deprived Wilmington the right and ability to enforce payment obligations not yet barred by the statute of limitations.

Upon reconsideration, the trial court analyzed the harm or injury prong of the substantial compliance defense, and found the default judgment harmed Wilmington by extinguishing payments not barred by the statute of limitations because they were not in default more than six years, and payments not yet due on the 30-year note. Thus, the default judgment afforded the Zimmermans relief greater than which they were legally entitled, and Wilmington was harmed or injured by the default judgment. The trial court then entered an order that effectively granted the relief Wilmington requested. CP 204-207. The final order on reconsideration stated: "The [d]efault and [d]efault [j]udgment entered against Wilmington are vacated only with respect to installment payments not barred by the statute of limitations related to [p]laintiffs' complaint." CP at 206. The trial court also included language stating that it "hereby finds" "[t]he [p]laintiffs substantially complied with RCW 4.28.185 and service was valid on the [d]efendants in Delaware.

Wilmington filed a counter claim for judicial foreclosure. The trial court later granted summary judgment to Wilmington and entered a judgment for money (for sums due that were

not barred by the statute of limitations) and a decree of foreclosure in Wilmington's favor under the same cause number. In part, this later order granted summary judgment to Wilmington on the Zimmermans' quiet title claim. [2]

The Zimmermans appealed the order on reconsideration vacating the default order and judgment against Wilmington. Notably, they *did not* appeal the summary judgment order nor the money judgment and decree of foreclosure.

i. The Court of Appeals affirms the trial court.

The Court of Appeals affirmed the trial court in this case. As an initial matter, the Court noted that: "Default judgments are generally disfavored because we prefer to determine cases on their merits. *Ha v. Signal Elec., Inc.*, 182 Wn. App. 436, 446, 332 P.3d 991 (2014)." The Court then went on to find that the process server's affidavit did not identify any attempt or inability to serve Wilmington in Washington and instead only addressed service attempts made in Delaware. There was no other evidence in the record that service in Washington was attempted. The affidavit also did not include any discussion with Wilmington's legal administrator about whether or how service in Washington could be accomplished. The facts do not support a logical conclusion that service could not be had in Washington. The Court of Appeals also disagreed with the trial court concluding there was no substantial compliance with the statute; the Zimmermans failed to satisfy RCW 4.28.185(4).[3] The Court of Appeals did not address Wilmington's argument about the no harm or injury prong of the substantial compliance test, nor Zimmermans' argument that the trial court should not have considered the underlying statute of limitations argument, because the Zimmermans failed to establish that service could not be had in Washington as required by RCW 4.28.185(4).

---

[2] *Kenneth P. Zimmerman, et al., v. Wilmington Savings Fund Society FSB, as Trustee, etc*. No.53763-0-II, slip. op. at 4 (Wash. Ct. App. March 30, 2021) (unpublished),

[3] *Kenneth P. Zimmerman, et al., v. Wilmington Savings Fund Society FSB, as Trustee, etc*. No.53763-0-II, slip. op. at 8 (Wash. Ct. App. March 30, 2021) (unpublished).

The Court of Appeals concluded: "While we disagree with the trial court's reasoning in part, we affirm the trial court's order to vacate the default order and judgment." [4]

IV. ARGUMENT

i. This case does not involve a significant question of law under the Constitution of the State of Washington or of the United States.

The Court of Appeals decision in this case does not involve a significant—or even debatable—constitutional issue. RAP 13.4(b)(3) provides that the Supreme Court will accept a petition for review if the case involves a "significant question of law" under the Washington or U.S. constitutions. This case is about the effect of failing to comply with the requirements of RCW 4.28.185(4), Washington's long arm statute, not about any constitutional rights or issues.

Instead, the Zimmermans contend that the trial court erred when it granted Wilmington's CR 60 motion to vacate the default order and judgment. They nonetheless assert that the portion of the trial court order finding substantial compliance with the affidavit requirement in RCW 4.28.185(4), cannot be revisited because Wilmington did not appeal. Alternatively, the Zimmermans argue that service was proper because they substantially complied by filing an affidavit explaining that their process server was orally told, while trying to effect personal service at a different Delaware address, that service should be made instead at the Carr Road address in Delaware. The Zimmermans assert that if service was proper, then Wilmington raised no valid basis under CR 60 to vacate the default order and judgment, and they contend that the trial court improperly modified a final order. Finally, the Zimmermans argue there was no basis for the trial court to consider the merits of the underlying statute of limitations issue when addressing the motion to vacate.

As held by the Court of Appeals. default judgments are generally disfavored because Washington prefers to determine cases on their merits. *Ha v. Signal Elec., Inc*., 182 Wn. App. 436, 446, 332 P.3d 991 (2014). Under CR 55(c)(1), a default order may be set aside "[f]or good cause shown and upon such terms as the court deems just," and a default judgment may be set

[4] *Kenneth P. Zimmerman, et al., v. Wilmington Savings Fund Society FSB, as Trustee, etc*. No.53763-0-II, slip. op. at 9 (Wash. Ct. App. March 30, 2021) (unpublished),

aside under CR 60(b). CR 60(b), provides that a court may relieve a party from a final order or judgment for several enumerated reasons, including that the judgment is void. CR 60(b)(5). A default judgment is void when entered without personal jurisdiction. *Ha*, 182 Wn. App. at 446.

The Court of Appeals decision involves a straightforward analysis of personal jurisdiction and RCW 4.28.185(4). To invoke personal jurisdiction over an out-of-state defendant, the plaintiff must comply with Washington's long arm statute. The statute provides that "[p]ersonal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state." RCW 4.28.185(4). Personal service on the out-of-state defendant ordinarily does not become valid until the affidavit is filed, making a judgment entered absent the required affidavit void for lack of personal jurisdiction. *Hatch v. Princess Louise Corp*., 13 Wn. App. 378, 380, 534 P.2d 1036 (1975). The party seeking to show proper jurisdiction has the burden to show compliance. *See John Does v. CompCare, Inc*., 52 Wn. App. 688, 693, 763 P.2d 1237 (1988). The Court also observed that the statute is applied narrowly because jurisdiction obtained through service out of state "is in derogation of the common law." *Hatch*, 13 Wn. App. at 380.

Although substantial compliance with the affidavit requirement can sometimes be enough, the cases so holding make this a narrow exception. Thus, in *Haberman v. Washington Public Power Supply System*, 109 Wn. 2d 107, 177 (1987), this Court observed:

> mere receipt of process and actual notice alone do not establish valid service of process. See Spokane v. Department of Labor Indus., 34 Wn. App. 581, 584, 663 P.2d 843, review denied, 100 Wn.2d 1007 (1983). Moreover, substantial compliance with out-of-state service requirements has been recognized only where the defect in service involved a late filing of nonresidency affidavits as required by RCW 4.28.185 (4). [citations omitted]
>
> Here, the service was more than technically defective; the statutory procedures to ensure proper notice to nonresident defendants were not followed. As statutes authorizing service on out-of-state parties are in derogation of common law personal service requirements, they must be strictly pursued.

The defect here *did not* involve a later-filed non-residency affidavit. In *Sharebuilder Secs., Corp. v. Hoang*, 137 Wn. App. 330, 334, 153 P.3d 222 (2007), the court also declined to find substantial compliance with the statute. First, the court stated that substantial compliance

requires that when "viewing all affidavits filed prior to judgment, the logical conclusion must be that service could not be had within the state." *Id*. at 334-35. Second, it noted that there must have been no injury to the defendant from the noncompliance. *See also, Barr v. Interbay Citizens Bank,* 96 Wn.2d 692, 696, 649 P.2d 827 (1982). In *Sharebuilder*, the mere fact that the defendant was served in another state was not enough to support a logical conclusion that they could not be served in Washington. 137 Wn. App. at 335. In contrast, affidavits establishing a business was not licensed in Washington, did no business of any sort in Washington, and had no employees or agents in Washington, have been held to be enough to support a logical conclusion that service in Washington was impossible. *Barr*, 96 Wn.2d at 696. No such affidavits were provided by the Zimmermans here.

All the Zimmermans relied on was a single sentence in an affidavit of attempted service claiming that a Wilmington "[l]egal [a]dministrator" told the process server: "All documents related to a trust must be served on their trust division at 501 Carr Road" in Wilmington, Delaware. CP at 15. The Zimmermans contend this slender reed is enough to support the logical conclusion that service in Washington was impossible. They are mistaken. See *Sharebuilder*, 137 Wn. App. at 334-35. The quoted portion of Wilmington's "legal notices" referenced in the Brief as being found at CP at 8, does nothing to bolster that slender reed as, on its face, it merely states that the Delaware address provided is for purposes of mailing (other than payments) and makes no reference to being a proper, let alone the only, address for service of process.

The affidavit on which the Zimmermans seek to rely makes no mention of any attempt or impossibility to serve Wilmington in Washington and instead only addressed the results of the service attempts made in Delaware, nor is there any other evidence in this record that service in Washington was ever attempted.

Washington courts have consistently held that where a party has not complied with the long arm statute prior to judgment, the judgment is void for lack of jurisdiction. *E.g., Morris v. Palouse River & Coulee City R.R.*, 149 Wn. App. 366, 372, 203 P.3d 1069 (2009) (judgment void where prejudgment affidavits did not substantially comply); see also *Sharebuilder*, 137 Wn.

App. at 335. Where the underlying default judgment is void for lack of jurisdiction, the trial court has a nondiscretionary duty to vacate. *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997). Thus, the trial court was correct to vacate the default order and judgment under CR 60(b)(5).

Neither the Court of Appeals nor the trial court had any reason to consider any provision of the Constitutions of the State of Washington or the United States. There are simply no constitutional issues in this case. Notably, the Supreme Court reviewed the application of RCW 4.28.185(4), in *Barr v. Interbay Citizens Bank,* 96 Wn.2d at 692, and neither party in that case, nor the Court raised a constitutional issue.

Nor did the Court of Appeals advance an extraordinary interpretation of the law in its decision. The affidavit must show that service by plaintiff within the state was not possible. *Sharebuilder, Id.*; *See*, § 4:20. Long-arm jurisdiction—Affidavit of nonresidence, 14 Wash. Prac., Civil Procedure § 4:20 (3d ed.).

In *Sharebuilder,* the court vacated a default judgment as the affidavit filed did not describe the circumstances that prevented in-state service, and noting the requirements of an affidavit:

> In addition to incorporating the language of RCW 4.28.185(4), **the affidavit should describe the circumstances that prevent in-state service**.[5] Substantial, rather than strict, compliance with RCW 4.28.185(4) is permitted. However, **substantial compliance means that, viewing all affidavits filed prior to judgment, the logical conclusion must be that service could not be had within the state.** [6]

Sharebuilder Sec., Id. at 137 Wash. App. 334-335. (emphasis added). The same defect exists here in the Zimmermans' petition.

If the defendant is an out-of-state business and the normal statutory procedure would be to serve a registered agent in Washington, the plaintiff should first attempt service upon the agent in Washington. If the plaintiff cannot accomplish service in Washington, the plaintiff's affidavit

---

[5] citing, 27 Marjorie Dick Rombauer, Washington Practice: Creditors' Remedies—Debtors' Relief § 5.4 at 484 (1998).

[6] citing, *Barr v. Interbay Citizens Bank*, 96 Wash.2d 692, 696, 635 P.2d 441, 649 P.2d 827 (1981), discussed, *infra*.

would explain why the plaintiff's efforts to serve in Washington were unsuccessful before resorting to service outside the state. See, 14 Wash. Prac., Civil Procedure § 4:20 (3d ed.) (*citing Morris v. Palouse River and Coulee City R.R., Inc*., 149 Wash. App. 366, 203 P.3d 1069 (Div. 3 2009).

As *Barr* explained; the affidavit must provide facts in the language of the statute, "to the effect that service cannot be made within the state." 96 Wash. 2d at 696.

Finally, in *Meeker Court Condo Owners Ass'n v. Gonzalez*, No. 77735-1-I, 2018 WL 1907812, at *1 (Wash. Ct. App. Apr. 23, 2018), the only prejudgment affidavit states that Meeker Court effected personal service on the manager of a Deutsche Bank branch in Santa Ana, California. This Court found:

> The affidavit does not address whether the Deutsche Bank National Trust Company could be served within the state and thus does not substantially comply with RCW 4.28.185(4).

Meeker Court, Id.

The Zimmermans' process server declaration failed to address service in Washington, at all, and in that respect was like the affidavits in *Sharebuilder* and *Meeker Court,* where no substantial compliance was found because the affidavits failed to address the requirement of RCW 4.28.185(4), to explain why service could not be made within the state, or mention the impossibility of service within Washington.

ii. The Court of Appeals decision does not conflict with any of the Appellate Cases cited by the Zimmermans.

The Supreme Court should not accept Zimmermans petition for review because the decision of the Court of Appeals in this case does not conflict with other Court of Appeals decisions. RAP 13.4(b)(2) says the Supreme Court will accept a petition for review if "the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals." Although Zimmerman tried to distinguish the cases cited by Wilmington, they failed to identify any case that actually conflicts with this decision. The Court of Appeals decision in this case properly applied Washington law—including prior Court of Appeals decisions—and does not conflict with either *Sharebuilder Secs., supra, Morris, supra,* or *Meeker Court, supra.*

iii. The Court of Appeals decision does not conflict with—and properly applies—the Supreme Court's prior holding in a case concerning RCW 4.28.185(4).

The Court of Appeals decision properly applied, and does not conflict with, the Supreme Court's prior decisions concerning declarations complying with the long arm statute. See RAP 13.4(b)(1).

In *Barr v. Interbay Citizens Bank of Tampa, Fla*., 96 Wash. 2d 692, 696, 649 P.2d 827, 827 (1982), this Court recognized a two-part test for substantial compliance; one, the affidavits must provide facts in the language of the statute, "to the effect that service cannot be made within the state; and two, no injury occurred to defendant." *Id*. The "injury" prong is also mentioned in *Schell v. Tri-State Irrigation*, 22 Wash. App. 788, 791,591 P.2d 1222 (1979) ("The Schells contend that the required showing of injury to the defendant 'must, common sense tells us, be something other than the taking of the judgment.' We disagree."). Zimmermans argue the injury prong applies only in cases where the affidavit was filed late. But *Barr* involved no late filed affidavit, and the injury prong was considered. Unlike, the defendants in *Barr*, who obtained a trial on the merits, Wilmington suffered a default judgment that extinguished its entire loan, despite the complete lack of a legal basis for this result.

Barr also explained the affidavit must provide facts in the language of the statute, "to the effect that service cannot be made within the state." *Barr*, 96 Wash. 2d at 696. Zimmermans' process server declaration failed to discuss service in Washington. [7]

iv. There are no other reasons for the Supreme Court to accept Zimmermans petition for review.

There is no public policy or other reason why the Supreme Court should accept the Zimmermans' petition for review. RAP 13.4(b)(4) says the Supreme Court will accept a petition for review if the petition "involves an issue of substantial public interest that should be

[7] *Kenneth P. Zimmerman, et al., v. Wilmington Savings Fund Society FSB, as Trustee, etc*. No.53763-0-II, slip. op. at 8 (Wash. Ct. App. March 30, 2021) (unpublished).

determined by the Supreme Court." The Zimmermans have no genuine grievance affecting the public interest because they do not deny borrowing money, and do not deny they stopped paying their loan in 2010. Their real complaint is they did not receive the windfall of a free loan, via a default judgment. [8] Failing to obtain a windfall is not an injury, much less an injury implicating a substantial public interest.

V. CONCLUSION

For the reasons stated, the Court should reject the Zimmermans' petition for review.

RESPECTFULLY SUBMITTED this 1st day of September, 2021.

WRIGHT FINLAY & ZAK LLP

_/S/ Steven K. Linkon____
Steven K. Linkon, WSBA# 34896

Attorneys for Respondent Wilmington Savings Fund Society FSB, as trustee for Stanwich Mortgage Loan Trust A

[8] The underlying judgment on Wilmington's counterclaim did reflect forgiveness of 28 monthly payments whose recovery was barred by the statute of limitations, a significant sum.

WRIGHT, FINLAY & ZAK, LLP

September 01, 2021 - 8:54 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	53763-0
Appellate Court Case Title:	Kenneth Zimmerman, Jr., et al, v. Wilmington Savings Fund Society FSB, Respondent
Superior Court Case Number:	16-2-13145-5

The following documents have been uploaded:

- 537630_Answer_Reply_to_Motion_20210901085117D2394632_8526.pdf
  This File Contains:
  Answer/Reply to Motion - Answer
  The Original File Name was Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- 2weenies@comcast.net
- drewteams@harborappeals.com
- kstephan@rcolegal.com
- office@harborappeals.com

Comments:

Sender Name: Steven Linkon - Email: SteveLinkon@msn.com
Address:
1100 BELLEVUE WAY NE
#474
BELLEVUE, WA, 98004
Phone: 949-697-8889

Note: The Filing Id is 20210901085117D2394632