72131-3

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No. 72131-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

FORD SERVICES, LLC, a Washington limited liability company,
Appellant,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee on behalf of Certificate-holders of the Morgan Stanley ABS Capital 1 Inc. Trust 2006-HE6, Mortgage Pass-Through Certificates, Series 2005-HE6,
Respondent.

RESPONDENT DEUTSCHE BANK'S APPELLATE BRIEF

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A. Summary of the Argument

Ford[1] and the City[2] rely upon a theory of in rem jurisdiction that was rejected in *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977), and rely upon case law that pre-dates *Shaffer*. A lien foreclosure action is not an in rem action but rather a quasi in rem action. The City's action is not in rem, and even if it were, personal service outside the state requires that the affidavit be filed pursuant to RCW 4.28.185(4). After *Shaffer*, the differences between in rem and in personam for purposes of jurisdiction were abandoned. After 1977, all proceedings are against persons and the theory that jurisdiction over an out-of-state party could properly be based the fact that no "personal" relief against the defendant is sought is no longer valid. Therefore, all out-of-state service must comply with Washington's long-arm statute, and the required affidavit demonstrating a basis to make personal service outside the state must be filed. RCW 4.28.185(4).

B. The Basic Facts Are Not in Dispute

The basic facts are not disputed. Plaintiff served Deutsche Bank in California, and then took a default judgment against Deutsche Bank. Washington's long-arm statute authorizes personal service out of state but

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[1] Appellant Ford Services, LLC.

[2] The City of Sedro-Woolley.

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). The required affidavit was not filed. If a plaintiff does not file the required affidavit, there is no personal jurisdiction over the named defendant. *Sharebuilder Sec. Corp. v. Hoang,* 137 Wn. App. 330, 335, 153 P.3d 222 (2007). Under well-established Washington law, a judgment against that defendant is void. *See Morris v. Palouse River & Coulee City R.R. Inc.*, 149 Wn. App. 366, 371-72, 203 P.3d 1069 (2009).

C. Appellants' Arguments Are Based upon an Outdated Theory of Out-of-State Jurisdiction

Both Ford and the City make similar arguments. They assert that the City's lien foreclosure was an in rem action that did not require in personam jurisdiction against Deutsche Bank. They assert that RCW 4.28.185 applies only to in personam jurisdiction and that RCW 4.28.185(6) preserved the in rem designation as a basis for out-of-state jurisdiction and thereby excused the City from filing the affidavit required under RCW 4.28.185(4).

As explained herein, the distinction between in rem and in personam out-of-state jurisdiction upon which the City and Ford rely was rejected by the U.S. Supreme Court in *Shaffer*, 433 U.S. 186, where the

Supreme Court abandoned the property-based jurisdiction theory represented by *Pennoyer v. Neff*, 95 U. S. 714 (1878). *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 312, 70 S. Ct. 652, 94 L. Ed. 865 (1950); *Int'l Shoe Co. v. State of Wash.*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)), and their progeny. *Shaffer* held that even in rem actions are against persons, not property, for the purposes of jurisdiction. As such, Ford's purported in rem distinction will not support the argument that out-of-state service is permitted without the filing of the required affidavit.

D. A Lien Foreclosure Action Is Not In Rem

The City and Ford are incorrect in asserting that this foreclosure action is an in rem action. An "action in rem" is defined as "[a]n action determining the title to property and the rights of the parties, not merely among themselves, but also against all persons at any time." *Black's Law Dictionary* 36 (10th ed. 2014). An "action quasi in rem" is defined as "[a]n action brought against the defendant personally, with jurisdiction based on an interest in property, the objective being to deal with the particular property or to subject the property to the discharge of the claims asserted." *Id.*

Because the City's lien foreclosure action only determines the rights of certain defendants to a thing, in contrast to determining the interests of

all persons in a thing, it is a quasi in rem proceeding. Washington follows this standard definition.

> Actions to foreclose construction liens are "quasi in rem proceedings, i.e., they determine the interests of certain defendants in a thing in contrast to a proceeding in rem, which determines the interests of all persons in the thing." *Hasek v. Terrene Excavators, Inc.*, 44 Wn. App. 554, 557, 723 P.2d 1153 (1986) (emphasis omitted); *see also Freeman v. Navarre*, 47 Wn.2d 760, 776, 289 P.2d 1015 (1955).

Diversified Wood Recycling, Inc. v. Johnson, 161 Wn. App. 891, 902, 251 P.3d 908 (2011) (emphasis added).[3]

Consistent with the quasi in rem definition, Washington courts have long held that if a party is not joined in a mortgage foreclosure action, her interest is not affected. *See Spokane Sav. & Loan Soc'y v. Liliopoulos*, 160 Wash. 71, 73-74, 294 P. 561 (1930) (a decree of foreclosure does not affect the interest of a junior who was not joined in the foreclosure action).[4]

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[3] "Actions to foreclose mechanics' liens are quasi in rem proceedings, *i.e.*, they determine the interests of certain defendants in a thing in contrast to a proceeding in rem, which determines the interests of all persons in the thing. 2 L. Orland, Wash. Prac., *Trial Practice* § 31, at 51-52 (1972); *Neukirch v. Wong*, 195 Wash. 451, 455, 81 P.2d 499 (1938)." *Hasek v. Terrene Excavators, Inc.*, 44 Wn. App. 554, 557, 723 P.2d 1153 (1986) (emphasis added and omitted).

[4] Accordingly, Washington follows the omitted junior lien principle, which allows "re-foreclosure" of the omitted lien. *See U.S. Bank v. Hursey*, 116 Wn.2d 522, 806 P.2d 245 (1991). If the City and Ford were correct in asserting that foreclosure were in rem, there would be no need to "re-foreclose" an omitted lienor who was not served and made a party to the foreclosure action.

The cases cited by the City and Ford – tax foreclosures, eminent domain – are in rem because they resolve all interests of all parties. But a mortgage foreclosure, like the City's action in this case, is a quasi in rem proceeding. More to the point, and as discussed below, the 19th century concept of in rem out-of-state jurisdiction was rejected and abandoned by the U.S. Supreme Court in 1977.

E. In Rem as a Basis for Jurisdiction Was Abandoned in *Shaffer*

Both the City and Ford argue that because they were only seeking to foreclose a lien, and were not seeking damages or "personal" relief against Deutsche Bank, they are excused from filing an affidavit under RCW 4.28.185(4). According to the City and Ford's argument, while the trial court may need the required affidavit to determine whether Deutsche Bank could be served in state if they were seeking "personal relief," the trial court doesn't need such an affidavit to determine if Deutsche Bank could be served in state if the City was seeking to foreclose a lien.

The City and Ford rely upon a 19th century theory of out-of-state jurisdiction represented by *Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565 (1878), that was discredited and rejected by the U.S. Supreme Court in 1977. "Indeed, since a State's process could not reach beyond its borders, this Court held after *Pennoyer* that due process did not require any effort to give a property owner personal notice that his property was involved in

an *in rem* proceeding." *Shaffer*, 433 U.S. at 200. As the Court in *Shaffer* explained in several footnotes, the in rem designation is no longer a permissible device to assess due process jurisdictional considerations.

> 22 "All proceedings, like all rights, are really against persons. Whether they are proceedings or rights in rem depends on the number of persons affected." *Tyler v. Court of Registration*, 175 Mass. 71, 76, 55 N. E. 812, 814 (Holmes, C.J.), appeal dismissed, 179 U. S. 405 (1900).
>
> 23 It is true that the potential liability of a defendant in an *in rem* action is limited by the value of the property, but that limitation does not affect the argument. The fairness of subjecting a defendant to state-court jurisdiction does not depend on the size of the claim being litigated. Cf. *Fuentes v. Shevin*, 407 U. S., at 88-90; n. 32, *infra*.

Shaffer, 433 U.S. at 207 nn. 22, 23 (emphasis added). In *Shaffer*, the Supreme Court rejected the property-based jurisdiction theory represented by *Pennoyer*.

> It is clear, therefore, that the law of state-court jurisdiction no longer stands securely on the foundation established in *Pennoyer*. We think that the time is ripe to consider whether the standard of fairness and substantial justice set forth in *International Shoe* should be held to govern actions *in rem* as well as *in personam*.

Id. at 206 (footnote omitted). The Court concluded that the distinction between in rem and in personam was no longer viable for jurisdiction

purposes; all actions were required to meet the minimum contacts and "fair play and substantial justice" standard of *International Shoe.*

> The case for applying to jurisdiction *in rem* the same test of "fair play and substantial justice" as governs assertions of jurisdiction *in personam* is simple and straightforward. It is premised on recognition that "[t]he phrase, 'judicial jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing." Restatement (Second) of Conflict of Laws § 56, Introductory Note (1971) (hereafter Restatement). This recognition leads to the conclusion that in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising "jurisdiction over the interests of persons in a thing." The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts standard elucidated in *International Shoe*.

Id. at 207 (footnotes omitted). "The decision in *Mullane* rejected one of the premises underlying this Court's previous decisions concerning the requirements of notice in judicial proceedings: that due process rights may vary depending on whether actions are *in rem* or *in personam*." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 796 n.3, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983). "We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Shaffer* at 433 U.S at 212.

> Prior to *Mullane*, due process rights tended to vary depending on whether an action was in rem or in personam. Personal service was considered essential when a state court based its jurisdiction upon its authority over a defendant's person; constructive notice to nonresidents satisfied the requirements of due process when jurisdiction was based upon the court's authority over property within its territory. *See generally Shaffer v. Heitner*, 433 U.S. 186, 196-205, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977). The *Mullane* Court, however, rejected this distinction between in rem and in personam actions for purposes of determining the sufficiency of notice, stating "we think that the requirements of the Fourteenth Amendment . . . do not depend upon a classification for which the standards are so elusive . . ." 339 U.S. at 312.
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> . . . Recently, in *Mennonite Bd. of Missions v. Adams*, ___ U.S. ___, 77 L. Ed. 2d 180, 103 S. Ct. 2706 (1983), the Court held that notice by publication and posting does not provide a mortgagee of real property adequate notice of a proceeding to sell the mortgaged property for nonpayment of property taxes. The Court reasoned that, since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale. Constructive notice to a mortgagee who is identified in the public record does not satisfy *Mullane*. Personal service or mailed notice is required. *Mennonite*, 103 S. Ct. at 2711-12."

Wenatchee Reclamation Dist. v. Mustell, 102 Wn.2d 721, 725-26, 684 P.2d 1275 (1984) (first and second ellipsis in original).

The City's and Ford's arguments incorrectly assert that the in rem label permits something less than personal service for out-of-state jurisdiction. In rem still refers to a *type* of state court proceeding – one that determines all interests in a thing or property – and the presence of

property within a state is a *factor* in determining whether "minimum contacts" exist for *International Shoe* purposes. But in rem jurisdiction in the *Pennoyer* sense of providing a basis for out-of-state jurisdiction without personal service, as the City and Ford use it, has not been a viable argument for establishing such personal jurisdiction since *Shaffer* was decided. Whether an action is in rem or in personam, when jurisdiction is based upon personal service out-of-state, Washington requires a plaintiff to provide the trial court with an affidavit explaining why service cannot be accomplished in state, in compliance with RCW 4.28.185(4).

Cases pre-dating *Shaffer* that are based upon in rem jurisdiction are outdated and discredited. The theory offered by the City and Ford – that an in rem action only affecting property permits a different kind of "jurisdiction" and a different type of service – is contrary to *Shaffer*, *International Shoe*, and their progeny. Even if such a theory existed at some time in the past, after *Shaffer* was decided in 1977 courts could no longer simply rely upon the nature of the relief sought as a basis to justify something less than personal service.

Because all out-of-state jurisdiction requires personal service, the fact that a case may be labeled in rem cannot provide a basis for evading the requirements of RCW 4.28, including the affidavit requirement of

RCW 4.28.185(4). Proper personal service must be made. RCW 4.28 establishes the requirements for proper service out of state in Washington.

Tegland agrees:

> **Actual Notice.** If the defendant receives *actual* notice of the proceeding, does such notice sweep away all objections to notice? Does such notice give the court in rem jurisdiction even if the plaintiff did not rigorously adhere to the procedures specified by the statutes governing service by publication, or service outside the state?
>
> In the context of *personal* jurisdiction, the answer is clearly no—actual notice does not sweep away all objections to notice. The plaintiff must also rigorously adhere to the procedures specified by the statutes governing service of process, or risk a dismissal for lack of jurisdiction even if the defendant received actual notice.
>
> From all indications, the same rule applies to in rem jurisdiction. The plaintiff must rigorously adhere to the procedures specified by the statutes governing service by publication, service outside the state, or other methods of notice. One Washington case seems to the contrary, but the court's reasoning is questionable.

14 Karl B. Tegland, *Washington Practice, Civil Procedure* § 5:9, at 173-74 (2d ed. 2009) (emphasis added; footnotes omitted).[5] In sum, the City's lawsuit is not an in rem proceeding. But even if it were, the City was required to comply with RCW 4.28.185(4).

[5] Tegland notes that the condemnation case mentioned relied upon the notion that an in rem proceeding required less notice, a line of reasoning contrary to *Mullane* (and *Shaffer* and its progeny).

F. Personal Service Under the Long-Arm Statute Requires That an Affidavit Be Filed

Washington has long held that service outside of the state is in derogation of common law and therefore the statutes permitting service must be strictly followed to make that service effective.[6] Indeed, "[f]irst and basic to personal jurisdiction is service of process." *Pascua v. Heil*, 126 Wn. App. 520, 526, 108 P.3d 1253 (2005). "Proper service of process is basic to personal jurisdiction. 'Mere receipt of process and actual notice alone do not establish valid service of process.'" *Ralph's Concrete Pumping, Inc. v. Concord Concrete Pumps, Inc.*, 154 Wn. App. 581, 585, 225 P.3d 1035 (2010) (footnotes and citations omitted).

Whenever a plaintiff seeks to use an alternative method of service rather than personal service within the state, such as service by publication, or personal service outside the state, an affidavit must be provided to the court to show that the defendant cannot be served in state to provide a basis to authorize the alternative form of service. *See* RCW 4.28.100, .185(4); *e.g., Parkash v. Perry*, 40 Wn. App. 849, 700 P.2d 1201 (1985).

> "Substantial, rather than strict, compliance with RCW 4.28.185(4) is permitted." "[S]ubstantial

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[6] *See Boyd v. Kulczyk*, 115 Wn. App. 411, 415, 63 P.3d 156 (2003); *RCL Nw., Inc. v. Colo. Res., Inc.*, 72 Wn. App. 265, 270, 864 P.2d 12 (1993); *Hatch v. Princess Louise Corp.*, 13 Wn. App. 378, 379, 534 P.2d 1036 (1975).

> compliance means that, viewing all affidavits filed prior to judgment, the logical conclusion must be that service could not be had within the state." If there is no compliance with the affidavit requirement of RCW 4.28.185(4), personal jurisdiction does not attach to the defendant and the judgment is void.

Ralph's Concrete, 154 Wn. App. at 590-91 (emphasis added; brackets in original; footnotes omitted). In the case before the Court, as noted in *Ralph's Concrete*, if there are no "affidavits filed before judgment" for the Court to determine that service could not be had within the state, there is no personal jurisdiction and the judgment is void.[7]

The legislature enacted RCW 4.28.180 and 4.28.185 (in substantially its current form) in 1959 as part of the same act. An act is construed as a whole, giving effect to all the language used, with related statutory provisions interpreted in relation to one another. *See C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 708-09, 985 P.2d 262 (1999); *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993) ("Statutory provisions must be read in their entirety and construed together, not piecemeal.").

Accordingly, RCW 4.28.180 and 4.28.185 explain the effect of personal service of process outside Washington. When the person

[7] The courts do not require that the affidavit be filed upon commencement of the action, but do require that the affidavit be filed before judgment is entered. *See Sharebuilder Sec. Corp.*, 137 Wn. App. at 334.

personally served has submitted to the jurisdiction of the Washington courts, personal service out of state "shall have the force and effect of personal service within this state; otherwise it shall have the force and effect of service by publication." RCW 4.28.180. RCW 4.28.185 governs the method of service of process upon a defendant whose acts have submitted it to the jurisdiction of Washington's courts:

> Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state.

RCW 4.28.185(2).

But RCW 4.28.185(4) establishes a condition precedent to authorizing personal service outside the territorial jurisdiction of Washington courts. "Personal 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).

Accordingly, RCW 4.28.185(4) is part and parcel of the long-arm statute. The statute provides no in rem exception to the affidavit requirement as the City and Ford suggest. And as *Ralph's Concrete* shows ("viewing all affidavits filed prior to judgment, the logical conclusion must be that service could not be had within the state," 154

Wn. App. at 590-91 (internal quotation marks and citation omitted)), if the plaintiff fails to file the required affidavits, the court has no means of determining whether personal service could not be had within the state, a determination that is the prerequisite for authorizing personal service outside the state. Whether the case is an in rem or quasi in rem, the plaintiff must provide the trial court with a basis to permit service out of state. Simply claiming that the action is in rem, after *Shaffer,* is no longer sufficient. All personal service outside the state is valid only if the required affidavit is filed. The City's failure to file the affidavit before judgment renders the judgment void. *Ralph's Concrete*, 54 Wn. App. 581; *Morris*, 149 Wn. App. 366.

G. Subsequent Orders or Proceedings Based upon a Void Judgment Are Without Effect

The Washington courts have explained that when a judgment is declared void, all subsequent orders, such as an order for a sheriff's sale, are without effect. "A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars anyone." *Johnson v. Berg*, 147 Wn. 57, 66, 265 P. 473 (1928) (internal quotation marks and citation omitted). A vacated judgment "is of no force or effect and the rights of the parties are left as

though no such judgment had ever been entered." *In re Estate of Couch*, 45 Wn. App. 631, 634, 726 P.2d 1007 (1986). The trial court has the authority to make such orders as are necessary to address issues that result from holding the judgment void. For example, if a court vacates a judgment after a defendant has paid the judgment, the court can direct that restitution be made. *In re Marriage of Hardt*, 39 Wn. App. 493, 499, 693 P.2d 1386 (1985).

Here, because the judgment against Deutsche Bank is void, any subsequent proceedings upon that judgment, such as a sheriff's sale, are without force or effect. Deutsche Bank's deed of trust and lien priority against the property are unaffected by the void judgment and Deutsche Bank's rights thereunder "are left as though no such judgment had ever been entered." The trial court correctly vacated the default judgment, and the sheriff's sale based upon that judgment is also without effect upon Deutsche Bank's lien.

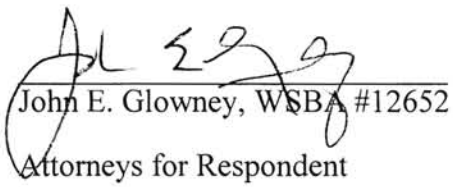
H. Conclusion

When a defendant is personally served out of state, an affidavit pursuant to RCW 4.28.185(4) must be filed, regardless whether the type of action is deemed to be in rem or in personam. No affidavit was filed in this case, and the trial court correctly determined that the default judgment

against Deutsche Bank is void. The Court is respectfully requested to affirm the trial court's ruling.

DATED: December 22, 2014.

STOEL RIVES LLP



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CERTIFICATE OF SERVICE

I certify that the foregoing pleading is being served on the parties as set forth below **via**

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