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No. 63708-8-I

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

DAVID STREETER-DYBDAHL,

Respondent,

vs.

NGUYET HUYNH and "JOHN DOE" HUYNH, wife and husband and their
marital community,

Appellants.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Timothy A. Bradshaw, Judge

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

Respondent attempts to shift the focus from the legal issue on appeal to a perceived factual dispute that was neither raised below nor is relevant to the disposition of this case. On the key issue – whether Ms. Huynh was served with process at her “usual abode” – the record and relevant case law demonstrate that the trial court erred when it denied Ms. Huynh’s motion to dismiss.

II. ARGUMENT

A. RESPONDENT’S ARGUMENTS ABOUT DISCOVERY SHOULD BE REJECTED.

Respondent’s recitation of the facts focuses on Ms. Huynh’s purported failure to answer interrogatories and respondent’s desire “to conduct discovery.” (Respondent’s Brief at 2-3) Ms. Huynh did not avoid discovery or attempt to “hide the ball.” Respondent moved for discovery which the court granted in part. The court directed Ms. Huynh to respond to the written discovery requests “related to insufficiency of process claims.” (CP 42) The court specifically denied respondent’s request to depose Ms. Huynh. (CP 43) Ms. Huynh provided the responses through her declaration. (CP 15-16, 73) And respondent never moved for reconsideration or otherwise appealed the trial court’s order. Respondent’s complaints about the lack of discovery below and his request to “find out” additional information are not before this Court.

(Respondent's Brief at 3) RAP 2.5(a). This Court should not consider respondent's discovery arguments.

Should this Court chose to consider respondent's arguments for additional discovery, the arguments should be rejected. Respondent has failed to demonstrate any legal error. The trial court's ruling on discovery was discretionary. Respondent has not argued, let alone demonstrated, that the trial court abused its discretion. *See Nakata v. Blue Bird, Inc.*, 146 Wn. App. 267, 277, 191 P.3d 900 (2008) (a trial court has broad discretion to manage the discovery process, and a decision to limit discovery will only be reviewed for an abuse of discretion), *rev. denied*, 165 Wn.2d 1033 (2009). The trial court's ruling on the scope of discovery was proper and reasonable.

The salient facts are undisputed. The process server attempted to serve Ms. Huynh at the "MLK address." Ms. Huynh had not lived at the MLK address for several years. The statute of limitations expired without respondent ever effectuating service of process on her. The factual record established below – consisting of several declarations with exhibits and one deposition – is more than sufficient for the Court to rule on the sufficiency of process as a matter of law.

B. RESPONDENT CONCEDES THERE WAS NO PERSONAL SERVICE.

It is undeniable that Ms. Huynh was not personally served. She has averred she was not served. (CP 16) The certificate of service identifies that a male accepted service. (CP 4) By arguing for substitute service of process only, respondent concedes there was no personal service of process. (Respondent's Brief at 3-4)

Ignoring the fact that the declaration states that personal service was made, respondent attempts to unilaterally convert the declaration to one of substitute service pursuant to RCW 4.28.080(15). (Respondent's Brief at 4) Technically, the analysis of whether service was proper should end here. Respondent cannot even meet his initial burden of producing an affidavit of service showing service was accomplished. *Witt v. Port of Olympia*, 126 Wn. App. 752, 757, 109 P.3d 489 (2005). Respondent did not obtain substitute service of process. The trial court erred in denying Ms. Huynh's motion to dismiss.

C. THERE WAS NO SUBSTITUTE SERVICE OF PROCESS BECAUSE THE MLK ADDRESS IS NOT MS. HUYNH'S ABODE.

Respondent acknowledges that the key question on appeal is whether the MLK address constituted Ms. Huynh's abode for purposes of service of process. (Respondent's Brief at 7) Substitute service of process is effective only when (1) a copy of the summons is left at defendant's house of usual abode, (2) with some person of suitable age and discretion,

(3) who is a resident therein. *Sheldon v. Fettig*, 129 Wn.2d 601, 607, 919 P.2d 1209 (1996) (citing RCW 4.28.080(15)). There was no substitute service here because the record clearly and convincingly demonstrates that the MLK address was not Ms. Huynh's abode.

Respondent mistakenly relies on *Sheldon v. Fettig*, 129 Wn.2d 601, 919 P.2d 1209 (1996), to support his argument that the MLK address was a second abode. Respondent fails to acknowledge that *Sheldon* marks the outer boundaries of RCW 4.28.080(15). *Salts v. Estes*, 133 Wn.2d 160, 166, 943 P.2d 275 (1997). Moreover, the circumstances here are far less compelling than those in *Sheldon*.

The unusual facts of *Sheldon* lent themselves to a finding that the defendant had a second abode for purposes of service because she "used the family home for so many of the indicia of one's center of domestic activity. . . ." 129 Wn.2d at 610. Defendant lived with her parents before moving to Chicago for flight attendant training. *Id.* at 604-05. As a flight attendant, she led a "highly mobile" lifestyle. *Id.* at 612. After her training, she leased an apartment in Chicago, but went "home" to Seattle whenever she could. *Id.* at 605. Indeed, she spent 4-5 days at her parents' house in the month service was attempted and spent 5-6 days there in the previous month. *Id.* at 605. The fact that the defendant actually lived

(albeit intermittently) at the address where service was made distinguishes *Sheldon* from Ms. Huynh's situation.¹

In our case, none of the indicia of a "center of domestic activity" were present at the MLK address. Ms. Huynh did not sleep at the MLK address. She did not eat at the MLK address. She did not store her possessions at the MLK address. She did not otherwise use or spend significant recreational time at the MLK address. Ms. Huynh merely stopped by the MLK address from time to time to visit her brother and pick up any stray mail that might have arrived. (CP 77) The MLK address was not remotely close to constituting a "center" of Ms. Huynh's domestic life. Ms. Huynh's situation is vastly different from the *Sheldon* defendant who was the "quintessential example of a highly mobile person splitting her time between two places." *Id.* at 612.

Two Washington cases reveal it was error for the trial court to conclude the MLK address was Ms. Huynh's abode. *Gross v. Evert-Rosenberg*, 85 Wn. App. 539, 933 P.2d 439 (1997), *rev. denied*, 133 Wn.2d 1004 (1997); *Vukich v. Anderson*, 97 Wn. App. 684, 985 P.2d 952 (1999). The facts here are much more in line with those presented in *Gross* and *Vukich* than they are with those in *Sheldon*.

¹ Moreover in *Sheldon*, a resident of the abode (defendant's brother) was served. 129 Wn.2d at 604. Here there is no proof establishing a resident of the MLK address accepted service.

Faced with unsupportive case law, respondent desperately points to what he describes as Ms. Huynh’s “carelessness and violation of the law.”² (Respondent’s Brief at 9) An address in DOL’s file is one factor that courts have considered in determining what constitutes an alternate abode, but it has never been dispositive. Indeed, in *Vukich* the license showed the driver’s old address, yet the court declined to find that it was an alternate abode. 97 Wn. App. at 690-91. Respondent’s desire to punish Ms. Huynh for allegedly “disregard[ing] her mandatory duties under the motor vehicle licensing laws” has no place in this appeal and does not place this Court in any sort of “legal conundrum.” (Respondent’s Brief at 10)

Ms. Huynh does not necessarily dispute respondent’s assertion that this case presents “unique facts.” (Respondent’s Brief at 9) However, respondent’s attempt to wholly distinguish *Gross* and *Vukich* is unpersuasive. Respondent focuses on the fact that the process servers in *Gross* and *Vukich* were told that the defendants did not live there. (Respondent’s Brief at 9-12) This fact is largely irrelevant to the issue of

² In fact, respondent was the one who demonstrated the “carelessness” that resulted in this appeal. He failed to follow the statute and properly serve Ms. Huynh. He waited until the second-to-last day to file his complaint and then waited over two more months to attempt service. He failed to appreciate that the return of service described the wrong person and was defective on its face. He failed to conduct any investigation to determine Ms. Huynh’s home address until after she filed a motion to dismiss.

whether the defendant had a center of domestic activity at the address, and it was not central to either court's analysis or ruling. *Gross*, 85 Wn. App. at 543; *Vukich*, 97 Wn. App. at 690-91.³ Respondent's argument implies that his process server's actions were reasonable because he was never told that Ms. Huynh did not live there. However, the reasonableness of the process server's actions is not relevant to the issue of whether a particular location qualifies as an abode under the law. Service of process is not accomplished by a good faith belief that it has been accomplished. Service must be both constitutionally adequate and comply with statutory requirements. *Woodruff v. Spence*, 88 Wn. App. 565, 571, 945 P.2d 745 (1997), *rev. denied*, 135 Wn.2d 1010 (1998).

Respondent also contends that there are additional "key questions that should be answered." (Respondent's Brief at 14-15) There are not. Whether a location qualifies as an abode for service of process is a legal decision for the court. *See Sheldon v. Fettig*, 77 Wn. App. 775, 779, 893 P.2d 1136 (1995), *aff'd*, 129 Wn.2d 601, 919 P.2d 1209 (1996). As in *Vukich*, why Ms. Huynh had an old address on file with the DOL has no bearing on the outcome of this legal question.

³ Further in *Gross*, the process server's declaration did not indicate he was told the defendant did not live at the address. 85 Wn. App. at 541-42. Plaintiff attempted to establish substitute service of process by the process server's declaration. Later when service was challenged, defendant's son-in-law submitted a declaration that he had told the process server that defendant did not live there.

Contrary to respondent's argument, there is no need to determine the nature and degree of Ms. Huynh's use of the address. (Respondent's Brief at 14-15) Ms. Huynh has already established by clear and convincing evidence that the MLK address was not her address. *See Witt*, 126 Wn. App. at 757 (if a plaintiff produces an affidavit showing on its face that service was proper, then defendant can prove by clear and convincing evidence that service was not proper). Ms. Huynh did not live there. (CP 15-16) She moved out several years prior and only visited her brother who lived there once or twice a month. (CP 95-96) Respondent's efforts to convert the legal question before this Court into an ongoing factual inquiry should be rejected. Dismissal is proper.

D. THERE WAS NO SUBSTITUTE SERVICE BECAUSE THE SUMMONS WAS NOT LEFT WITH A RESIDENT OF THE MLK ADDRESS.

Assuming for the sake of argument that the MLK address could be Ms. Huynh's usual abode, dismissal is still proper because respondent failed to fulfill the third requirement of substitute service. There is no evidence to establish that the person identified in the declaration of service was a resident at the MLK address. Respondent admits the declaration is flawed. (Respondent's Brief at 5) It lists Ms. Huynh's name and then describes a male. The male is not Tu Huynh. (CP 96-98) There is no

indication who the male is. There certainly is no evidence the male resided at the MLK address.

Respondent's insistence that Ms. Huynh's brother resided at the MLK address and fits the description in the declaration is immaterial. (Respondent's Brief at 6) Tu Huynh did not receive the summons and complaint. (CP 96-98) Respondent also argues that there "would likely have [been] communication difficulties," and that it was likely that Ms. Huynh's brother responded affirmatively to his sister's name. (Respondent's Brief at 5-6) There is no evidence to support such unfounded inferences. Respondent has failed to establish a prima facie case that a resident of the MLK address was served.

E. INSUFFICIENCY OF SERVICE OF PROCESS WAS NOT WAIVED.

Respondent contends that Ms. Huynh waived her insufficient service of process defense. Respondent's argument lacks legal and factual support. The defense of insufficient service of process is not waived if it is asserted in a responsive pleading. *Gerean v. Martin-Joven*, 108 Wn. App. 963, 972-73, 33 P.3d 427 (2001), *rev. denied*, 146 Wn.2d 1013 (2002). Ms. Huynh's answer clearly asserts defenses based on insufficient service of process and lack of jurisdiction. (CP 5-6)

Generally, waiver of the defense of insufficiency of process requires "the intentional abandonment or relinquishment of a known

right. It must be shown by unequivocal acts or conduct showing an intent to waive, and the conduct must also be inconsistent with any intention other than to waive.” *Clark v. Falling*, 92 Wn. App. 805, 812-13, 965 P.2d 644 (1998) quoting *Mid-Town Ltd. Partnership v. Preston*, 69 Wn. App. 227, 233, 848 P.2d 1268, review denied, 122 Wn.2d 1006 (1993). The defense of insufficiency of process may be waived by dilatory conduct or conduct inconsistent with asserting the defense. *Lybbert v. Grant County*, 141 Wn.2d 29, 38-39, 1 P.3d 1124 (2000). Ms. Huynh did not take any action inconsistent with the defense nor was she dilatory in asserting the defense.

The facts and procedure here are distinctly different from *Lybbert*. In *Lybbert*, the defendant did not plead insufficient service. The defendant engaged in several months of discovery unrelated to a defense of insufficient service. Defendant discussed mediation. Defendant failed to respond to interrogatories inquiring about a possible insufficient service defense. Several months later after the statute of limitations had run, defendant first asserted it insufficient service defense. 141 Wn.2d at 32-34.

In contrast here, attempted service of process occurred less than a month before the expiration of the suit perfection deadline. (CP 4) Ms. Huynh asserted her affirmative defenses of failure to serve process and

insufficient process to obtain jurisdiction in her answer. (CP 5-6) The answer was filed and served in December 2008, within one month of plaintiff's attempt at substitute service. (CP 4, 5-6)

Ms. Huynh did nothing to lead plaintiff to believe that service of process was appropriate. In fact, Ms. Huynh's counsel took affirmative steps by sending an e-mail and telephoning plaintiff's counsel to discuss the service issue (before expiration of the suit perfection deadline) but received no response. (CP 84, 88) The declaration of service was filed the day before plaintiff's last day to serve Ms. Huynh. (CP 4) Mere notice of the lawsuit is insufficient for service of process. "[A]ctual knowledge of pending litigation . . . standing alone is insufficient to impart the statutory notice required to invoke the court's in personam jurisdiction." *Thayer v. Edmonds*, 8 Wn. App. 36, 40, 503 P.2d 1110 (1972), *rev. denied*, 82 Wn.2d 1001 (1973). Further, a defendant has no duty to assist plaintiff serve the pleadings. *Id.* at 41.

The case of *King v. Snohomish County*, 146 Wn.2d 420, 47 P.3d 563 (2002), fails to support respondent's position. In *King*, the defendant included an insufficient claim filing defense in its answer, but it did nothing to pursue that defense until three days before trial and nearly four years after the complaint was filed. *Id.* at 425. In ruling that defendant had waived the defense, the *King* Court noted that it would have been

improper to dismiss the case on procedural grounds after both parties engaged in extensive and costly discovery and litigation. *Id.* at 426.

The case of *O'Neill v. Farmers Ins. Co. of Washington*, 124 Wn. App. 516, 125 P.3d 134 (2004), is similarly unresponsive of respondent's position. The *O'Neill* Court held that the defendant had not waived the defense of insufficient service of process. *Id.* at 529. In *O'Neill*, as in the case before this Court, the defendant properly pled the defense of insufficiency of process, it promptly notified the opposing party, and the plaintiff failed to investigate that defense before the statute of limitations expired. *Id.* at 529.

Finally, the case of *Blankenship v. Kaldor*, 114 Wn. App. 312, 57 P.3d 295 (2002), *rev. denied*, 149 Wn.2d 1021 (2003), is unresponsive of respondent's waiver argument.⁴ Instead of answering the complaint, the defendant served written discovery (without inquiring about service), photographed plaintiff's residence, and deposed plaintiff. *Id.* at 315. Defendant did not file an answer (which included the insufficiency of service defense) until nine months later. The *Blankenship* Court held that

⁴ If anything, *Blankenship* is yet another opinion that refutes respondent's attempt to categorize the MLK address as a second abode. The *Blankenship* defendant moved all of her belongings, moved herself, signed a new lease, and started a new job out of state. 114 Wn. App. at 317. The fact that she still used her father's address on her checking account was "insufficient domestic activity" to render that address a usual abode, and the court deemed that service was defective. *Id.*

the defense was “dilatory within the spirit of *Lybbert*” because it was tardy in asserting the insufficient service defense when it could have acted earlier. In this case, Ms. Huynh promptly notified respondent of service problems in the weeks surrounding the attempted service, both informally and in her answer. The facts of this case bear little resemblance to the nine-month delay and extensive discovery conducted in *Blankenship* that resulted in waiver. Ms. Huynh's actions were not dilatory either in fact or in spirit.

Respondent's own handling of the case left insufficient time to remedy his fatal errors. Respondent waited until two days before the expiration of the statute of limitation to file the lawsuit. Then, respondent allowed more than 60 days of his 90-day window to pass before attempting to serve Ms. Huynh. Last, the return of service was filed the day before the tolling period of the statute of limitations expired. Even if Ms. Huynh had some obligation to help respondent fix his errors, there simply was not adequate time.

The fact that Ms. Huynh served pattern interrogatories on respondent along with her answer is not dilatory or inconsistent with her defense. (Respondent's Brief at 17-18) It bears no resemblance to the protracted discovery in the *Lybbert*, *King*, and *Blankenship* cases. *See supra*. Respondent's accusation that Ms. Huynh anticipated that

respondent would attempt to serve her at the MLK address and planned to capitalize on the address on file with the DOL is patently absurd. (Respondent's Brief at 17-18) There is no evidence from which a reasonable inference could be drawn that Ms Huynh authorized her brother to accept legal papers for her at the MLK address as part of a scheme to avoid service. (Respondent's Brief at 17-18) Ms Huynh lived openly in Lynnwood and could have been located through the most basic investigation. (CP 18-19) The convoluted plan respondent has concocted is not reasonably based on the record and by no means establishes that Ms. Huynh waived her defense.

F. THERE ARE NO ISSUES OF MATERIAL FACT.

Respondent fundamentally misapprehends the nature of the court's ruling on a motion to dismiss based on insufficient service of process. It is a legal issue for the court to determine – there can be no issue of fact to preclude summary judgment. (Respondent's Brief at 1) *See Sheldon v. Fetting*, 77 Wn. App. at 779. The only sworn statement made by the process server is invalid. He attests that he served Ms. Huynh – clearly he did not. The issue of credibility to which respondent points (whether or not Ms. Huynh's brother received the summons and complaint) has no impact on the dispositive legal issue in this case – whether the MLK address was Ms. Huynh's abode. There are no issues of material fact.

This Court should reverse and remand for entry of an order dismissing respondent's case with prejudice. Should this Court conclude that the record raises factual disputes, the proper remedy is to remand for an evidentiary hearing to resolve the issue.

III. CONCLUSION

The Court should not credit respondent's desperate attempt to reframe the issue on appeal into the need for a factual fishing expedition. Respondent backed himself into a corner by waiting until the last possible moment to file the suit and attempt service. His process server made a glaring blunder in serving a person of the wrong gender, and respondent failed to confirm whether the service was proper. Ms. Huynh's counsel even raised questions about the service before the statute of limitations ran and included the defense in her answer.

However, all of these facts to which respondent devotes so much of his brief are not germane to the dispositive issue on this appeal – whether the MLK address fits the legal standard in Washington as an alternate abode for substitute service of process. Clear and convincing evidence establishes that it is not Ms. Huynh's abode. As a matter of law, service was not proper. The case should be remanded to the trial court for entry of an order of dismissal with prejudice.

DATED this 3rd day of February, 2010.

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