

CSV

68179-6

68179-6

No. 68179-6

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MICHELLE L. MALKIN
Appellant,

v.

VERBENA HEALTH,
Respondent

2012 JUN 28 AM 9:30
COURT OF APPEALS DIV I
STATE OF WASHINGTON

APPELLANT'S REPLY BRIEF

Charles S. Hamilton, III, WSBA #5648
Attorney for Appellant
500 Union Street, Suite 500
Seattle, WA 98101-4047
206-623-6619

TABLE OF CONTENTS

I. Restatement of the facts of the case.....3

II Argument.....6

A. The trial court’s findings and conclusions were immaterial to de novo review of the summary judgment.....6

B. The record of the case does not support the conclusion that the Ms. Malkin was either dilatory or inconsistent in her litigation.....6

C. There is no record of inconsistent behavior in the lawsuit by defendant which could be construed as a waiver of her defense.....7

D. There Was No Sufficient Evidence on Standing of the Vebena Health to Prosecute the Lawsuit.....9

E. The Trial Court improvidently granted summary judgment to Verbena Health on the issue of service.....10

III

Conclusion.....14

TABLE OF AUTHORITIES

Table of Cases

Ballard Square Condominium Owners Ass’n v. Dynasty Const. Co.
158 Wn. 2d 603, 146 P 3d 914 (2006).....9

Farmer v. Davis
161 Wn. App. 420, 428-430, 250 P. 3d 138 (2011)..... 11

Ikeda v. Curtis
43 Wn. 2d 449, 261 P. 2d 684 (1953)..... 10

King v. Snohomish County
146 Wn 2d 420, 424, 47 P. 3d 563 (2002)..... 6,8

Woodruff v. Spence
76 Wn. App.207, 883 P. 2d 936 (1994)..... 11,12

Regulations and Rules

CR 56(e)10

RCW 23B.14.210.....10

RCW 24.03.300.....4,10

RCW 24.03.465.....9

Federal Cases

In Re Edmond
934 Fed. 2nd 1304 (4th Cir. 1991) 13

Nat’l Life Ins Co. v Hartford Accident and Indemnity Co.
615 F. 2d 595 (3rd Cir. 1980).....13

United States v. Parcels of Land
903 Fed 2nd 36 (1st Cir. 1990) 13

I. RESTATEMENT OF THE FACTS OF THE CASE

Respondent, Verbena Health, has presented a lengthy narrative outlining claims that Michelle Malkin committed a multiplicity of fraudulent and criminal acts while she was an employee of Verbena Health, respondent's brief pp 3-10. Appellant Malkin has not responded to the substance of the allegations, and has throughout the lawsuit interposed her constitutional Fifth Amendment right to be free from compulsory self-incrimination. She has offered no evidence relating to the merits of the case. However, it is Appellant's submission that the Court should not address the substantive merits of the claims of Verbena Health because procedurally Verbena Health has failed to prove the nonexistence of material disputed facts at summary judgment regarding either personal jurisdiction of Ms. Malkin or the standing of the moribund respondent to prosecute this lawsuit in the first place. Ms. Malkin submits that these jurisdictional hurdles must be negotiated before entry into the nimbus of argument over the substantive merits of the claims of Verbena Health.

At summary judgment and upon the issue of attempted substitute service, the declaration of Alice Lundquist was presented. CP 354-385. Ms. Lundquist, was not a party to this proceeding. She invoked no Fifth Amendment right. She has been identified for Verbena Health by name and address since the commencement of the lawsuit. Ms. Malkin contends that Ms. Lundquist's declaration has raised a material issue of disputed

fact relating to the question of personal service. This dispute seems to be admitted by the respondent as well as the trial court. Respondent's Brief, 99 17-18.

Ms. Lundquist stated in her declaration that on the two days of attempted service on Ms. Malkin, the person later identified as a process server was told by her that Ms. Malkin was not living at the address, that she would not be in the neighborhood for at least several months and that she had changed her mailing address. CP 384-385. Ms. Lundquist stated that she was never handed a copy of the Summons and Complaint during this confrontation *Id.* She stated that the server left the papers at the closed door of the residence *Id.*

Ms. Malkin continues additionally to challenge the question of the standing of the Respondent to bring the lawsuit. The complaint repeatedly identifies plaintiff "Verbena Health," which appears to be kind of enlarged nickname for the legal name, "Verbena." Because Verbena Health is not the legal name of plaintiff and respondent, this lawsuit has not been commenced pursuant to the statutory proviso that a corporation though dissolved, may initiate a lawsuit under its "corporate name". RCW 24.03.300, CP 1. The misnomer in the unamended complaint, generates questions about the corporation's history, and knowledge of its history, and identity as a legal entity.

Verbena Health's evidence at its motion for summary judgment indicated that the lawsuit was brought some 9 months after the entity was administratively dissolved, CP 1; 362-367. The individual claiming the authority of the defunct corporation to prosecute the lawsuit was David Haack, self-identified in his declaration as chairman of the board of directors. CP 117-118. Ms. Malkin's argument, rebutted modestly by Respondent, continues to be that Verbena Health, almost a year after its dissolution has not satisfactorily proved that it was authorized by the its board of directors to commence the lawsuit and that the lawsuit itself does not fall within the statutory constraint that it may conduct only those activities necessary for the "winding up" of the business.

Although the Respondent has set out a lengthy indictment of Ms. Malkin's criminal malfections, Ms. Malkin did not address those issues at summary judgment. She did, however, attack the manner of presentation of the substantive issues by attacking the admissibility for summary judgment purposes of much of Verbena Health's evidentiary materials. CP 371-385.

II. ARGUMENT

A. The trial court's findings and conclusions were immaterial to de novo review of the summary judgment.

Although Verbena Health argues that the Court should accord substantial weight to what is characterized as the trial court's findings, Ms. Malkin reiterates her argument that because findings are unnecessary at summary judgment, and because this Court reviews the hearing materials de novo, there are no trial court findings which need to be reviewed. In this case, those findings were not entered as a pleading but were broadly adopted in the form of the oral record of the summary judgment hearing, CP 434-435. Ms. Malkin as appellant would have been required to pay for a transcript in order to parse whatever finding and conclusions that record contains. As defendant below, she noted objection to this at least somewhat unusual tack, CP 431-433.

B. The record of the case does not support the conclusion that the Ms. Malkin was either dilatory or inconsistent in her litigation.

The record of this case shows no evidence of a dilatory assertion of the defense of lack of personal jurisdiction. The argument of a dilatory defense relates to the raising of the defense of lack of personal jurisdiction in a defendant's answer. King v. Snohomish County, 146 Wn 2d 420, 424, 47 P. 3d 563 (2002). If the defense is pled in the answer to the complaint, it is not dilatory. Additionally, the chronology of the case does not support the hypothesis that Ms. Malkin was dilatory in answering the complaint.

The lawsuit was not filed until June 17, 2010, CP 1. The notice of appearance of defense of counsel was August 17, 2010. Ms. Malkin's answer, which included the defense of lack of personal jurisdiction, was filed on September 7, 2010, CP 17-21. The time period between the date of the notice of appearance and the date of the answer was 21 days. Unless respondent's legal team suggests that the pace of this litigation should be measured against contemporary standards of "speed dating", there seems to be little basis for the argument that the defense was raised in a dilatory manner .

C. There is no record of inconsistent behavior in the lawsuit by defendant which could be construed as a waiver of her defense.

Respondent attempts to cull evidence of inconsistency in the Ms. Malkin's conduct of the litigation,. However, a thorough review of the record in this case would indicate that that throughout this complete proceeding, Ms. Malkin has been consistent, and persistent, in insisting upon application of the defense of lack of personal service, as well as her reliance on the constitutional protections of the Fifth Amendment. Aside from raising the defense in her answer to the complaint, she repeatedly and expressly stated in each answer to an interrogatory, that she was pursuing her defense of lack of personal service, CP 98-105. With regard to each of Verbena Health's requests for admissions, she reminded the plaintiff that she was asserting that defense, CP 111-116. Her repeated

interposition of her 5th Amendment rights should have fooled none of plaintiff's legal team into believing that she intended to litigate the merits of the criminal charges which leavened the complaint. She did propound interrogatories relating to the issue of plaintiff's legal standing to prosecute the lawsuit. However, the issue of standing was simply another jurisdictional issue brought to the attention of the Plaintiff. The argument of inconsistency is not supported by the record. Review of the King case upon which respondent relies as a model of inconsistency of position reveals a pageant of discovery in the form of 16 depositions, an interval between filing of the complaint and trial of 45 months, summary judgment hearings on motions by each party which were unrelated to the pivotal and affirmative defense of non-compliance with the County's claims filing ordinance. King v. Snohomish County, 146 Wn. 2d 420, 423, 47 P. 3d 563 (202). The comparative scenarios in King and in this case, produce no useful analytical metric.

D. There was no sufficient evidence of standing of Verbena Health to prosecute the lawsuit.

Verbena Health relied exclusively on the declaration of David Haack to support its claim that the corporation had corporate authority to prosecute a lawsuit, CP 117-118. However, the respondent presented evidence also that a Chris Hannsman”” as president and chairman of Verbena, CP 362-367. There must be some written record of significant action taken by all board members entitled to vote upon the action. RCW 24.03.465. Neither the Board’s replacement of Mr. Hannssman with Mr. Haack as Chairman nor its authorization of the entity to commence the lawsuit were presented as part of its motion by Verbena Health.

Ms. Malkin has tried to make clear that an endorsement by a non-existent board of directors would have been itself non-existent at the time of the commencement of the lawsuit. A corporation such as Verbena Health is a creature of statute and an artificial entity. Dutch Village Mall v. Pelletti, 162 Wn. App. 531, 256 P.3d 1251 (2011). It cannot exist without displaying these requisite statutory characteristics. Statutory requirements relating to dissolved corporations provide a breathing period beyond the common law prosecution that a corporation ceases to exist for any purpose at the time of its dissolution. Ballard Square Condominium Owners Ass’n v. Dynasty Const. Co., 158 Wn. 2d 603, 146 P 3d 914 (2006). Verbena Health failed to produce evidence of its legal existence at

the time of commencement of the lawsuit; and without that proof, it existed as an artificial, and actual, nullity. It has not provided any evidence other than animus toward Michelle Malkin and the allegations of David Haack, self-appointed chairman of the defunct entity, that the compendious pursuit of this lawsuit satisfied its obligation to pursue only those acts necessary to wind up the business of Verbena Health. RCW 24.03.300; RCW 23B.14.210.

E. The trial court improvidently granted summary judgment to Verbena Health on the issue of service.

Ms. Malkin declined to contradict the lengthy indictment of her criminal behavior when she was employed by Verbena Health. She insisted upon her Fifth Amendment Rights. The question then arises as to how one should weigh the exercise of the Fifth Amendment privilege in the context of the case. The Ikeda case, noted by respondent indicates that the weight to be assigned the exercise of the 5th Amendment privilege should be resolved by the trier of fact. Ikeda v. Curtis, 43 Wn. 2d 449, 261 P. 2d 684 (1953). A court at summary judgment is not the trier of fact

As noted above, the person traversing the issue of service, was not Ms. Malkin but was Alice Lundquist. Ms. Lundquist never exercised her Fifth Amendment rights. Verbena Health never bothered to depose Ms. Lundquist or to undertake any inquiry regarding her description of the attempted service despite its knowledge of her identity and location.

Because Ms. Lundquist did not exercise her Fifth Amendment rights, there was no basis at summary judgment for drawing any adverse inference from the substance of her declaration. Additionally, the issues addressed by Ms. Lundquist, and even Ms. Malkin with her procedural defenses, did not relate to the substantive merits of the claims in this case.

Where there is a factual dispute regarding the issue of personal service the trial court is required to hold an evidentiary hearing, Woodruff v. Spence, 7c Wn. App. 833 P. 2d 936 (1994). The standard of proof at the hearing should be a preponderance of the evidence. Farmer v. Davis, 161 Wn. App. 420, 428-430, 250 P. 3d 138 (2011), noting that a higher standard of clean proof is appropriate in the context of a motion to vacate an existing judgment is relating to the attempted substitute service on Ms. Lundquist (respondent's brief, pp 16-17). .

Respondent discloses the trial court's observation that factual issues were evident relating to the attempted substitute service on Ms. Lundquist.. (Respondent's) Brief, pp.16,17). Because of the factual, and material dispute, over service in the case, and even in circumstances where a prior judgment has been entered in the case, a trial court may abuse its discretion in failing to hold an evidentiary hearing to assess witness credibility where there is a material dispute of fact relating to the efficacy of service., Woodruff v. Spence, 76 Wn. App.207, 883 P. 2d 936 (1994)

The trial court erred in drawing dispositive adverse inferences from the exercise of appellant's Fifth Amendment rights where the exercise was not employed to obtain a benefit and did not extend to third party testimony.

The case law produced by Verbena Health relating to Fifth Amendment issues focuses upon whether or not a party in a civil case may use the Fifth Amendment to evade its responsibilities to address the merits of a given case. It is Ms. Malkin's position that the court should not address the merits of the case because of the procedural deficiencies of lack of personal service and lack of standing.

At summary judgment, Ms. Malkin did object at length to the manner of presentation of the evidence through scores of hearsay evidence relating to records of third parties, CP 371-385. Mr. Haack's "knowledge" of Ms. Malkin's malfeasance did not meet the requirement of personal knowledge. CR 56(e). It remains Ms. Malkin's position that the movant at summary judgment could not address the merits of the case with inadmissible evidence. Because of this fact, Ms. Malkin, respondent's Fifth Amendment rights aside, was not required to address the merits of the case at all.

Review of Fifth Amendment cases for this purpose focuses upon the condemned use of the Fifth Amendment, protection of silence, as an affirmative benefit in a civil case. This is not what Ms. Malkin tried to do.

She submits that a Fifth Amendment inquiry had nothing to do with the question of whether or not substitute personal service was obtained on her or whether or not Verbena Health had standing to prosecute this lawsuit.

Respondents relied primarily upon federal cases, that fact itself not impounded, Nat'l Life Ins Co. v Hartford Accident and Indemnity Co. 615 F. 2d 595 (3rd Cir. 1980) In the case of In Re Edmond, 934 F. 2nd 1304 (4th Cir. 1991) an affidavit was struck from the non-movant's evidence at summary judgment when that individual refused to participate at all in a deposition. That distinction between blanket refusal to appear at a deposition and exercising the Fifth Amendment rights as a participant in deposition is a meaningful distinction. In the cases of Nat'l Life Ins Co. v Hartford Accident and Indemnity Co., 615 F. 2d 595 (3rd Cir. 1980) and United States v. Parcels of Land, 903 Fed 2nd 36 (1st Cir. 1990), which was a forfeiture and in rem proceeding, the court's concerns lay with of affirmative use with the Fifth Amendment as a benefit as well as a protection. Ms. Malkin has not attempted to use the Fifth Amendment as a metaphorical sword as well as a shield. Ms. Malkin did not exercise the protection of the Fifth Amendment in order to prove a claim; her proof, or her generation of a material dispute of fact, came from the sworn testimony of Ms Lundquist, who had not exercised Fifth Amendment rights, and whose testimony as the person claimed to have been served with extra-territorial process has furnished the material disputed evidence

in the case. Ms. Malkin, nor Ms. Lundquist have never tried to exercise Ms. Lindquist's Fifth Amendment rights.

III. CONCLUSION

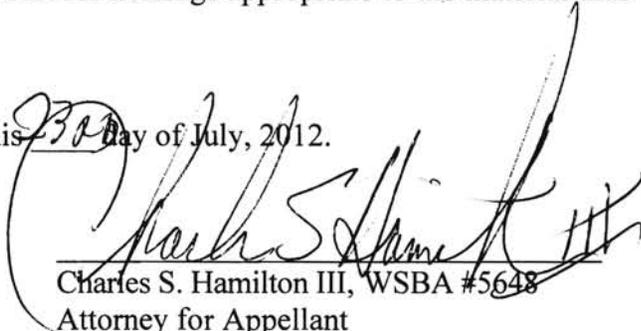
The critical issues in the case are whether or not the plaintiff at summary judgment satisfied its burden of establishing that personal jurisdiction was acquired and that Verbena Health had the authority and legal standing to bring the lawsuit in its corporate name. These are issues which stand outside of the merits of the case and should be considered de novo before the merits of the case become a matter of legal concern. No matter how distasteful the substantive allegations in this case may be, their character should not color review of the procedural issues which have been the subject of material dispute. The case comes to the Court as a review of a summary judgment. Ms. Malkin remains entitled procedurally to the benefit of those inferences which can be drawn from the evidence.

The legal team of Verbena Health in their brief, and the trial court in her observations, seem to agree that factual issues were raised by Ms.

Lundquist on the question of what occurred regarding the assigned event of service. It is submitted that it was error to overlook that dispute and to focus instead on what is urged was an erroneous interpretation of the concept of waiver.

Because there existed a material factual dispute on the issue of personal jurisdiction, and, severally, because there was insufficient proof of standing to commence the lawsuit, it is submitted that the order granting summary judgment should be reversed and that this matter should be remanded to the trial court for hearings appropriate to the material thus far presented.

Respectfully submitted this 23rd day of July, 2012.



Charles S. Hamilton III, WSBA #5648
Attorney for Appellant
Law Office of Charles S. Hamilton III
500 Union Street, Suite 500
Seattle, Washington 98101-4047

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

VERBENA HEALTH,

Respondent,

vs.

MICHELLE L. MALKIN,

Appellant.

NO. 68179-6

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I served a copy of Appellant's Reply Brief to be filed with the Washington Court of Appeals, Division I, by United States Post, first class postage paid, at the following address:

Richard D. Johnson
Court Administrator/Clerk
The Court of Appeals, State of Washington
DIVISION I
One Union Square,
600 University
Seattle, WA 98101-4170

2012 JUL 24 AM 8:30

COURT OF APPEALS DIV I
STATE OF WASHINGTON

And I arranged a copy of same to be sent via United States Post, first class postage paid to:

James Williams
Karen Brunton
Perkins Coie
Attorney at law
1201 Third Ave., Suite 4800
Seattle, WA 98101-3099

DATED this 23rd day of July, 2012.


Ileen Ma, Legal Assistant