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

BOUCHRA AGOUR,

Appellant,

vs.

IAN M. DALRYMPLE and JANE DOE DALRYMPLE, husband and
wife and the marital community thereof,

Respondents.

APPEAL FROM KING COUNTY SUPERIOR COURT

REPLY BRIEF OF APPELLANT

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I. SUMMARY OF ARGUMENT

The denial of the motion to consolidate was highly prejudicial to Bouchra Agour since it closed the door on three avenues of perfecting service via residency, publication and the secretary of state.

The granting of the summary judgment ignores multiple issues of material facts that could allow the trier of fact to rule in Bouchra Agour's favor.

The denial of the motion to continuance was highly prejudicial to Bouchra Agour since it did not allow an evidentiary hearing to determine the truth behind a sketchy declaration produced by an individual residing in New Zealand.

II. ARGUMENT

A. Motion to Consolidate should have been granted.

The denial of the motion to consolidate herein was highly prejudicial to Bouchra Agour. It was nuclear. The decision denying consolidation closed the door on three avenues of perfecting service by residency, by publication and the secretary of state.

Respondent argues on page 10 of his brief that the motion to consolidate was not timely. Respondent cites no authority to show that there is any sort of time limit for filing a motion to consolidate.

Respondent argues on page 11 of his brief that “consolidation of these two actions would not have had any substantial impact on these cases”. Nothing could be farther from the truth. Consolidation of the two actions would have allowed all issues of service to be presented to the court. Additionally, all of the issues of res judicata raised by the Respondent would then become moot.

If Respondent believes that “consolidation of these two actions would not have had any substantial impact on these cases” then Respondent should concede the issue of consolidation.

As a point of clarity, Respondent states on page 12 of his brief that one of the two lawsuits was dismissed “on the same day consolidation was denied.” This is incorrect. The motion to consolidate was denied before the summary judgment decision. This is important for if this court rules that consolidation should have been granted , then it renders any argument of res judicata moot and preserves the other three avenues of service.

By means of consolidation, Bouchra Agour is only seeking to have her day in court on the issues of perfecting service by residency, by publication and by secretary of state.

B. Material facts are hotly disputed.

The standard of review for summary judgments is clear. It is also clear that the existing case law favors the non-moving party. Summary judgment is properly granted when the pleading, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn. 2d 217, 220, 802 P.2d 1360 (1991). The burden is on the party moving for summary judgment to demonstrate there is no genuine dispute as to any material fact and reasonable inferences from the evidence must be resolved against the moving party. *Lamon v. McDonnell Douglas Corp.*, 91 Wn. 2d 325, 349, 588 P.2d 1346 (1979). An appellate court engages in the same inquiry as the trial court when reviewing an order for summary judgment. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn. 2d 337, 883 P.2d 1383 (1994). The de novo standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party,

Lamon, 91 Wn. 2d at 349, 588 P.2d 1346, and the de novo standard of review is consistent with the requirement that the appellate court conduct the same inquiry as the trial court. *Mountain Park Homeowners Ass'n*, 125 Wn. 2d at 341, 883 P.2d 1383.

Given this rule of law, the non-moving party must only show that they could win on the merits..... not that they must so.

Respondent's brief has a long list of denials:

1. "Mr. Dalrymple was not personally served in this matter."

Respondent's brief - P.16.

Counterpoint 1. Mr. James, a professional process server, filed an affidavit of service with a physical description that matches the Respondent almost exactly....age, weight and hair. CP171-177.

The Respondent admits to be 42 years of age, weighing around 172 pounds, with dark brown hair. CP 76-78. Mr. James describes the person served as being 40ish of age, weighing about 180 pounds with blonde/ light brown hair. CP171-177.

2. "Failed to confirm identity of the person." Respondent's brief - P. 16.

Counterpoint 2. After Mr. James identifies the paperwork the person at the residence accepted the service. The inference is that

once the Respondent knew what the paperwork was that he accepted the paperwork. CP171-177 /CP 388-389.

3. "Process server denied Mr. Winsor's offer to produce identification." Respondent's brief - P.16.

Counterpoint 3. Mr. James disputes any offer of identification. CP171-177/CP388-389.

4. "Mr. James vague description does not create an issue of material fact." Respondent's brief – P. 17.

Counterpoint 4. Mr. James affidavit and declarations are consistent with the admitted physical description of the Respondent. If anything is vague it is the sketchy declaration of Henry Winsor. CP46-48. All we know from this declaration is that Henry Winsor is over 18 years of age and that he had blonde hair which was trimmed short in a "crew cut" style. It is telling that we have no other physical description of himself from Henry Winsor. Is it possible that he is 20 or 60 years of age? Or that he is quite shorter or taller than six feet? Or that he is quite lighter or heavier than 180 pounds? The assertion from the Respondent is that we served the wrong person. However, there is no physical description from Henry Winsor that he is the same age, height or weight as the Respondent. Given this glaring omission of physical description, it

seems reasonable to conclude that we served the Respondent who admits that he matches the description in the affidavit of service as it relates to age, weight and hair color. The only dispute is to the exact hair color and hair style. I point out to the court that the service was made outside during the summer months during the daylight hours. The court may wish to take judicial notice that brown hair may lighten during the summer months and brown hair may appear lighter than normal in the sunlight. CP171-177.

5. “Nothing in his (Mr. James) declaration is inconsistent with the declarations of Ian Dalrymple and Henry Winsor.” Respondent’s brief – P.18.

Counterpoint 5. To state that “nothing” is inconsistent with the declarations of the Respondent and Henry Winsor is quite the overstatement. The three declarations of Mr. James are replete with factual disputes as to how the service was made and what was said. The dueling declarations seem to describe different realities that June day of 2012. CP171-177/CP388-389/CP470-471/CP46-48/CP76-78. There are inconsistencies between the declarations that include the following:

- a. Shoving the papers
- b. Leaving the papers on the doorstep

- c. Claiming to “Henry”
 - d. Offering to show identification
 - e. Saying you have “been served”
 - f. Claiming that he fit the description of the defendant
6. “There was no evidence regarding the accent of the individuals at issue in this lawsuit.” Respondent’s brief - P. 20.

Counterpoint 6. Quite the contrary, the declaration of Mr. James (CP 388-389) stated the person served “spoke in an American accent similar to the one I noted upon speaking with Ian Dalrymple in late May, 2012, prior to this service”. Clearly, the issue of the American accent was before the court. We have a resident of New Zealand claiming receipt of service, yet we have a professional process server declaring under oath that the person served spoke in an American accent similar to the American accent when he spoke directly to Ian Dalrymple on the phone a few days earlier. This on its face is a genuine issue of material fact.

The long list of denials from Respondent’s own lips supports the position this case should not have been subject to summary judgment as a matter of law.

C. An Evidentiary Hearing is needed.

Contrary to Respondent's contention that an evidentiary hearing herein would only serve to delay the proceedings, Bouchra Agour believes that an evidentiary hearing would serve the purpose of ascertaining the truth.

As pointed out earlier in this brief, the physical description contained within Mr. James affidavit matches the physical description of the Respondent. CP171-177/CP76-78. The person served by Mr. James spoke in an American accent similar to that of the Respondent per contact via phone with Mr. James a few days prior to service. CP388-389. On the other hand, Henry Winsor is a resident of New Zealand and he quite conveniently gives no description of his age (other than being over 18), nor his height or weight. CP46-48. All we get is a brief description of his hair color and hair style. This is in contrast to the almost identical description of age, weight and hair color found in the affidavit of service and the Respondent's own declaration. CP171-177/CP76-78.

A number of issues need to be sharpened by the process of an evidentiary hearing. Bouchra Agour should be given the opportunity to ascertain the veracity of the person (residing in New Zealand) who is claiming receipt of the service of process. Why did Henry Winsor refuse

to disclose his age, height or weight? These are all normal parameters when someone is attempting to prove their identity.

When factual determinations turn on the credibility of witnesses, a court may abuse its discretion by failing to hold an evidentiary hearing. *Harvey v. Obermeit*, 163 Wn. App. 311, 327, 261 P.3d 671 (2011) (citing *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994)). In *Harvey*, the motions submitted by the parties raised the issue of whether the trial court had jurisdiction over the defendant based on substituted service. *Id.* at 327, 261 P.3d 671. The main disputed fact was whether the plaintiff made two or four attempts to serve the defendant before effecting substitute service under the nonresident motorist statute. *Id.* at 314, 320, 261 P.3d 671. While the defendant claimed that only two attempts were made, the plaintiff maintained that the process server made four attempts. *Id.* at 320, 261 P.3d 671. The Court of Appeals ruled that the trial court appropriately held a fact-finding hearing when the court found there was a need for a factual determination as to the plaintiff's efforts to locate the defendant. *Id.* at 316, 327-28, 261 P.3d 671.

Similarly, in this case the declarations submitted by the parties are replete with factual disputes surrounding the service. While the Respondent claims that he was not at the residence at the time of service, the process server's affidavit and declarations state that Respondent was

the individual who accepted service. Because of the factual disputes, the Court should set the matter for evidentiary hearing to determine whether the Respondent was personally served. In the alternative, this Court should remand the case in order to allow Boucha Agour to depose the New Zealand resident claiming only by declaration to be the one that received the process of service.

III. CONCLUSION

The record is clear that the trial court failed to recognize that there were several genuine issues of material facts that should have been resolved by the trier of fact. The most hotly disputed issue at hand is whether the professional process server served a man with an American accent at the Respondent's verified address fitting the age, weight and height description of the Respondent.

If this trial court ruling stands, then any personal service issue could be thrown out if a defendant secures an out of country declaration (containing no age, height or weight description) denying service.

Additionally, Bouchra Agour requests in the interest of justice and to avoid unnecessary costs, that the two cases be consolidated. Thereby, allowing all of the service issues (personal, residency, publication and secretary of state) to be combined into one action.

DATED this 17th Day of March, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I sent by messenger a complete copy of the Reply Brief, including this Certificate of Service, to the following address on 17th day of March, 2014.

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Dated this 17th Day of March, 2014.



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