

71338-8

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No. 71338-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SNOWDON ASSOCIATES, LLC

Plaintiff/Respondent,

vs.

STEPHANIE DRUXMAN and JOHN DOE

Defendant/Appellant.

BRIEF OF RESPONDENT

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A. STATEMENT OF THE CASE

Appellant Druxman incorrectly states throughout her brief that Respondent Snowden obtained a default against Druxman and that Druxman did not respond to the 375 Notice. It is clear that the Order For Writ of Restitution was not an order of default. The order did recognize that Druxman had failed to comply with the requirements of RCW 59.18.375 and that Snowden was entitled to issuance of a writ of restitution. CP 27.

Snowden did respond to the 375 Notice with a short note that is attached to Snowden's motion for a writ of restitution. CP 24. Druxman stated therein that she had financial difficulty, but would like to work out a payment and extended move-out plan.

B. ARGUMENT

1. THE DEFENDANT WAS PROPERLY SERVED WITH EVICTION SUMMONS, COMPLAINT FOR UNLAWFUL DETAINER, AND NOTICE AS ALLOWED FOR BY RCW 59.18.375.

The landlord (hereafter referred to as Snowden) obtained an order allowing service of process by posting and mailing. CP 10-11. The defendant, Ms. Druxman (hereafter referred to as Druxman) does not argue that the order was improper, only that the notice set forth in RCW 59.18.375 (hereafter referred to as "375 Notice) may not be served by

posting and mailing.

RCW 59.18.375(7) states in relevant part that the plaintiff must “deliver notice to the defendant of the payment requirements of this section.”

Subsection (8) states that the notice “may be served pursuant to applicable civil rules with a filed eviction summons and complaint or at any time after an eviction summons and complaint have been filed with the court.”

The statute thus requires that the 375 Notice be “delivered” to the defendant, and that it “may be served. . . with a filed eviction summons and complaint.” Druxman does not deny that she received the 375 Notice, and it is thus clear that it was delivered to her. It is only common sense that the statute be interpreted to allow delivery by posting and mailing when such a form of delivery is allowed for the summons and complaint. It is contrary to logic that the law requires a more rigorous method of service for the 375 Notice than is required for service of the summons and complaint. In any case it was served with the summons and complaint as authorized by the statute.

CR 5 provides guidance on this issue. CR 5(b)(2) states that “if service is made by mail, the papers shall be deposited in the post office addressed to the person on whom they are being served, with postage prepaid.” Snowdon complied with these requirements as well as the requirements of RCW 59.18.055.

The court considered the adequacy of service by mail in **Collins v. Lomas & Nettleton**, 29 WashApp. 415, 628 P.2nd 855(1981). The defendant in **Collins** filed a motion for dismissal and delivered notice thereof to the plaintiff's attorney by certified mail. The plaintiff's attorney failed to pick up the certified mail despite having been given notice to do so by the Post Office. The court granted the dismissal when the plaintiff failed to defend. The plaintiff appealed on the ground that service by mail was insufficient and deprived them of due process. The court rejected this argument noting that the defendant had complied with CR 5(b)(2)(A): "The law firm complied with this rule. We find no justification for precluding the use of certified mail absent express language to that effect. The use of certified or registered mail may be superior, in fact, to service by first-class mail since certification assures that the postmark, which determines the time of mailing, is accurate. . . The test for legal sufficiency of notice is whether it is "reasonably calculated to reach the intended parties." 29 Wash.App at 417-18; 628 P,2nd at 856-857.

Druxman quotes the definition of "delivery" as set forth in CR 5 in order to show that the 375 Notice was improperly delivered. However, the sentence preceding the portion of CR 5 quoted by Druxman supports the position that Druxman was properly served: "Service upon the attorney or upon a party shall be made by delivering copy to him or by mailing it to

him at his last known address. . .”

Since Druxman actually received the 375 Notice, she is in a poor position to argue that the method used to deliver the 375 notice to her was not reasonably calculated to reach her.

2. THE COURT ACQUIRED JURISDICTION TO GRANT THE RELIEF OBTAINED BY SNOWDON.

In several places in her brief Druxman incorrectly states that Snowdon “defaulted” Druxman. This is not the case. Snowdon filed a Motion for Order For Issuance of Writ of Restituion Per RCW 59.18.375. (CP 21-26). Snowdon did not seek Druxman’s default since Druxman had responded in writing. Her response was in the form of a Notice of Appearance and a short note in which she affirmed that she was occupying the unit and wanted to work out a move-out and payment plan. She also stated that she was in financial difficulty. CP 24.

Druxman’s responses were attached to the motion and were considered by the court. RCW 59.18.375 (2) states that the defendant, upon service of the 375 Notice, is to either pay funds into the registry of the court or to submit a written statement under penalty of perjury setting forth the reasons why the rent is not owed. Failure to do either of these things “shall be grounds for the immediate issuance of a writ of restitution without further notice to the defendant.” RCW 59.18.375(4).

The legislature in formulating RCW 59.18.375 set forth a procedure whereby the court would obtain in rem jurisdiction to decide the issue of possession. “Courts may have jurisdiction to enter judgment with respect to property or things located within the boundaries of the state, even if personal jurisdiction has not been obtained over the persons affected by the judgment.” **In re City of Lynnwood v. Video Only, Inc.**, 118, Wash.App 674, 679; 77 P.3d 378, 381 (2003).

3. THE COURT HAS PREVIOUSLY AFFIRMED JURISDICTION IN CASES WHERE SERVICE WAS ACCOMPLISHED BY ALTERNATE MEANS.

The legislature has enacted other provisions which allow service of process by other than personal service in cases where the defendant cannot be served after “reasonable diligence.” RCW4.28.080(16) allows service of summons in such a situation “by leaving a copy at his or her usual mailing address with a person of suitable age and discretion.” “Usual mailing address” is different than “usual abode.” The statute also requires mailing of the summons.

This statute was utilized by the plaintiff in the case of **Wright v. B& L Properties, Inc.**, 113 Wash.App. 450; 53 P.3d 1041 (2002). The plaintiff served the defendant by leaving the summons and complaint with a suitable person at the defendant’s private mail box address, and by mailing a copy to

that address. The plaintiff obtained a default judgment against the defendant, and the defendant appealed on the basis that he had not received actual notice. The trial court was upheld on appeal with the court holding that “A constitutionally proper method of effecting substitute service need not guarantee that in all cases the defendant will in fact receive actual notice; what is essential is that the method of attempted service be reasonably calculated to provide notice to the defendant.” 113 Wash.App. 462-63; 53 P.3d. 1047. The court stated that the defendant’s “failure to receive actual notice of the lawsuit against him in this case does not establish a violation of his constitutional rights.” At 463.

In the present case the plaintiff demonstrated to the court that the defendant complied with the due diligence requirements of RCW 59.18.055 by demonstrating to the court that the defendant could not be found for purposes of personal service. CP 7-9. The trial court granted the plaintiff’s motion and specifically allowed service of Eviction Summons, Complaint for Unlawful Detainer and the 375 Notice by regular and certified mail. CP 10.

It is also the case that “the court has inherent power to waive its rules” for purposes of formulating a method of alternative service of process. **Ashley v. Superior Court for Pierce County**, 83 Wash.2d 630, 636-37; 521 P.2d 711, 715 (1974). The issue before the court in **Ashley** was whether indigent

spouses in divorce cases could be allowed to serve their missing spouse by mailing copies of summons and complaint to the missing spouse's parents. Alternate methods, such as publication, were deemed too expensive given the limited means of the indigent spouse, and the court was unwilling to direct the county to pay for such expensive alternate means.

“The power to waive the requirements of a rule necessarily includes the power to impose conditions upon the waiver. Of course, this power does not extend to the waiving of a defendant's constitutional right to notice, but we think it is within the power and the discretion of the Superior Court to waive the particular provisions of a rule provided that another method, more reasonably calculated to effectively give notice, is utilized.”

The trial court's order allowing service of the 375 Notice by posting and mailing was the exercise of the court's proper power and discretion.

4. THE DEFENDANT FAILED TO AVAIL HERSELF OF THE OPPORTUNITY TO SHOW THE COURT THAT SHE WAS NOT GUILTY OF UNLAWFUL DETAINER.

“If the defendant fails to comply with this section and a writ of restitution is issued, the defendant may seek a hearing on the merits and an immediate stay of the writ of restitution. To obtain a stay of the writ of restitution, the defendant must make an offer of proof to the court that the plaintiff is not entitled to possession of the property based on a legal or equitable defense arising out of the tenancy.” RCW 59.18.375(4).

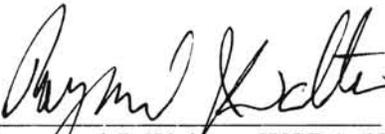
Druxman did not seek to invoke this remedy because it was clear that she was guilty of unlawful detainer and that Snowdon was entitled to possession. Druxman instead evaded a hearing on the merits by pursuing the course of action that has led this case to the Court of Appeals.

C. CONCLUSION

Druxman concedes that she received the Eviction Summons, Complaint for Unlawful Detainer and the 375 Notice. She failed to deny that she owed rent to Snowdon and she failed to pay money into the registry of the court. Under those facts the trial court was authorized to order the issuance of a writ of restitution.

The fundamental question asked by the court in cases where notification is done by methods other than by personal service is whether the means of notifying the defendant are reasonably calculated to reach the defendant. There is abundant authority that the means used in the present case have been validated and approved in the past, and they should be approved in the present case.

Respectfully submitted this 18th day of April, 2014.



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