

72146-1

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NO. 72146-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ALBERTA ACOSTA,

Plaintiff/Appellant,

vs.

PARC ENCHANTED PARKS, LLC,

Defendant/Respondent,

BRIEF OF APPELLANT ALBERTA ACOSTA

Martin M. Rall, WSB No. 14094
Flavio A. Ortiz, WSB No. 42547
Attorneys for Appellant Alberta Acosta

LACHENMEIER ENLOE RALL & ORTIZ
9600 SW Capitol Highway, Ste. 200
Portland, OR 97219
Telephone: (503) 768-9600
Facsimile: (503) 768-9133

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A. INTRODUCTION

Plaintiff-Appellant Alberta Acosta (“Acosta”) appeals the trial court’s May 30, 2014 order dismissing all her claims and granting summary judgment to Defendant-Respondent Parc Enchanted Parks, LLC (“Park Enchanted Parks”).

Acosta’s claim against Parc Enchanted Parks was based on injuries she sustained at the Wild Waves water park in Federal Way, Washington. Acosta filed a lawsuit within the three year statute of limitations. Parc Enchanted Parks moved to dismiss the action on the basis that service was not timely and that the summons was defective.

At a hearing on Parc Enchanted Parks’ motion, Acosta requested additional time to file a response memorandum to address the issues in the motion. Acosta notified the trial court that she intended to prove that she had timely served a registered agent of Parc Enchanted Parks, i.e. CorpDirect Agents, Inc. (“CorpDirect”). The court granted Acosta’s motion for additional time. The court also ordered that a hearing would be held if Acosta produced documentation indicating that the entity she served, CorpDirect, was a registered agent of Parc Enchanted Parks at the time of service. Subsequently, Acosta provided compelling documentary evidence indicating that CorpDirect was a registered agent at the time of service, but the court did not hold a hearing. Instead, after receiving a

reply memorandum from Parc Enchanted Parks (which was supported, in large part, by inadmissible hearsay evidence), the trial court requested a form of order from Parc Enchanted Parks. Parc Enchanted Parks did so, but without providing Acosta with five days' notice of presentation, required under CR 54 (f)(2).

Because Acosta produced compelling evidence that she had timely served a registered agent of Parc Enchanted Parks, the court should not have dismissed her claim, and Acosta was certainly entitled to a hearing to address the deficiencies in Parc Enchanted Parks' positions.

B. ASSIGNMENT OF ERROR

Assignment:

The trial court erred in entering its order dated May 30, 2014, entering summary judgment against Acosta and dismissing her claims on the basis that the action was not timely or properly commenced.

Issues Pertaining to Assignment of Error

No. 1. Should the court have entered summary judgment against Acosta based on failure to timely serve the summons and complaint when Acosta presented compelling evidence that she served a registered agent of Parc Enchanted Parks within 90 days of the timely filing of the complaint?

No. 2 Should the court have entered summary judgment against Acosta without providing a hearing, when the court had indicated that a hearing would be held if Acosta provided evidence that she had timely served a registered agent of Parc Enchanted Parks?

No. 3 Should the court have entered summary judgment against Acosta when Parc Enchanted Parks submitted a form of order and judgment without providing Acosta with five days required notice under CR 54 (f)(2)?

No. 4 Should the court have entered summary judgment against Acosta on the basis that the summons provided for a 20 day response period, rather than a 60 day response period?

C. STATEMENT OF THE CASE

Plaintiff-Appellant Acosta was injured at a water park of Defendant-Respondent Parc Enchanted Parks, LLC on July 19, 2010. On July 18, 2013, Acosta filed a complaint in the King County Superior Court against Parc Enchanted Parks for damages for her personal injuries. CP 1-2.

Acosta received information from the Secretary of State indicating that CorpDirect Agents, Inc. (“CorpDirect”) was the registered agent for Parc Enchanted Parks. CP 36. Acosta hired the Thurston County Sheriff’s Department to serve the summons and complaint on CorpDirect within 90

days of the filing of the complaint. CP 36. Deputy Sheriff Mike Hazlett delivered the summons and complaint to CorpDirect at its address in Tumwater on or before September 10, 2013 (within 90 days of the date the complaint was filed). CP 39. CorpDirect instructed Deputy Hazlett that it was not Parc Enchanted Parks' registered agent and did not accept the summons and complaint. CP 39.

In January 2014, after Parc Enchanted Parks filed its November 2013 annual report with the Washington Corporations Division indicating that National Registered Agents, Inc. ("NRAI") in Olympia was its registered agent, Acosta served the Summons and Complaint on NRAI in Olympia. CP 8-9, 52-54.

Parc Enchanted Parks filed a notice of appearance on January 14, 2014 and then filed a motion to dismiss / motion for summary judgment on March 21, 2014. CP 3-4, 7-28. The motion was based on the argument that Acosta failed to timely accomplish service and that the summons was deficient, in that it required a response in 20 days, rather than 60 days. CP 7-8. In support of its motion, Parc Enchanted Parks submitted a declaration of its CEO, Randal Drew. CP 16-17. In his declaration, Mr. Drew indicates that the "first time [Acosta] apparently attempted service" was on January 14, 2014, when Parc Enchanted Parks received a Summons at its Florida headquarters. CP 16. Mr. Drew then indicates that Parc Enchanted Parks received a copy of the summons and complaint on January 21, 2014 and references those documents as his Exhibit B. CP

22-28. Exhibit B included a copy of an envelope from Acosta, which is clearly addressed to *NRAI* in Olympia, with a postage mark dated January 17, 2014. CP 24. However, this envelope was transmitted by *CorpDirect* to Parc Enchanted Parks. This is evident from the “Service of Process Summons Transmittal Form” in Exhibit B. CP 23. The transmittal document is clearly a CorpDirect form. It states “CorpDirect Agents, Inc.” in large, bold letters across the top. The form indicates that there are enclosed “legal documents received on behalf of the above-captioned entity by CorpDirect Agents, Inc. or its affiliates.” This correspondence demonstrates that CorpDirect was acting in a representative capacity for Parc Enchanted Parks as recently as January 21, 2014. It also demonstrates that CorpDirect and NRAI are so closely related that one could provide documents to one entity, and have the documents processed by the other.

On April 18, 2014, Acosta filed a motion for extension of time to file a response memorandum, as Acosta’s counsel was dealing with his daughter's serious illness, which caused her to be in and out of the hospital. CP 34, 36. RP 3 lines 17-21. Acosta submitted evidence that Deputy Hazlett of the Thurston County Sheriff’s Department delivered the summons and complaint to the CorpDirect office by September 10, 2013. CP 39. During a hearing on that same date, the trial court granted Acosta’s motion for extension of time. The trial court explained that if Acosta were to produce documentation indicating that CorpDirect was a

registered agent for Parc Enchanted Parks at the time of service in September 2013:

“I think we need to have the hearing, because I think both parties need to be heard with regard to the document and the other issues that [Parc Enchanted Parks’ counsel] wants the Court to consider....” RP 10-12.

In both a minute entry and a formal order, the trial court indicated that if Acosta were to produce documentation indicating that CorpDirect was a registered agent of Parc Enchanted Parks in September 2013, a hearing on the issue would be set. CP 43-44.

As asked, Acosta provided documentation indicating that CorpDirect was a registered agent for Parc Enchanted Parks at the time of service, so a briefing schedule was entered and Acosta filed a response memorandum on May 12, 2014. CP 45-57. Acosta’s response included certified copies of documents obtained from the Washington Secretary of State. This included an Initial Report signed by an authorized representative of Parc Enchanted Parks on March 29, 2013. CP 50-51. The form stated that the company’s “Current Registered Agent/Office” was “CorpDirect Agents, Inc., 1780 Barnes Blvd. SW, Tumwater, WA 98512.” Although the form included a section for describing any changes of registered agent or registered office, Parc Enchanted Parks did not complete that section of the form. The form was filed with the Secretary of State on May 1, 2013. CP 51. There was also a certified copy of an annual report filed by Parc Enchanted Parks on November 14, 2013,

indicating that its registered agent as NRAI. CP 52-54. Acosta argued that based on these public documents, there was no question that from March 29, 2013 to November 14, 2013, CorpDirect was Parc Enchanted Parks' registered agent. Therefore, the service on CorpDirect in September 2013 was proper.

Parc Enchanted Parks filed a reply memorandum on May 23, 2014. CP 62-75. It argued, for the first time, that NRAI became its registered agent beginning in January 2013, due to what it called a "bulk change of registered agent" filed by NRAI. CP 63, 72-75. The actual form which was submitted, a "Statement of Change for Registered Agent/Office," deserves special scrutiny. CP 72-75. This is a form that can be used to change either a registered agent or registered office address. In order to change the registered agent, however, the signature block in Section 4 must be signed by the new registered agent, so that the new registered agent can confirm that it consents to serve as a registered agent and acknowledges its associated responsibilities. NRAI did not sign that signature block. NRAI only signed the signature block in Section 5. Notably, Section 5 should be signed by the registered agent only for a change of office address (and not for a change of registered agent). Otherwise, Section 5 should be signed by a representative of the LLC, corporation, or partnership that is changing its registered agent. Section 5 of the form was not signed by Parc Enchanted Parks. CP 72-75.

Michelle Rowe, a representative of NRAI, submitted a supporting declaration in support of Parc Enchanted Parks's reply memorandum. In her declaration, she admits that "NRAI has done business as both NRAI and as CorpDirect." CP 69. Her declaration contains includes inadmissible hearsay from communications with unidentified sources from the Secretary of State's office. CP 69-70.

After Parc Enchanted Parks submitted its reply brief, the trial court decided the matter without a hearing. An order was requested by the trial court and counsel for Parc Enchanted Parks submitted a form of order without providing five days' notice to Acosta. CP 76-77. On May 30, 2014, the Order was signed in basically the same form that defendant had submitted. Acosta appeals from that ruling.

D. ARGUMENT

1. THE COURT SHOULD NOT HAVE ENTERED SUMMARY JUDGMENT AGAINST ACOSTA AS THE RECORD INCLUDED COMPELLING EVIDENCE THAT SHE TIMELY COMMENCED THE ACTION AND TIMELY SERVED PARC ENCHANTED PARK'S REGISTERED AGENT

The primary issue before the trial court was whether Acosta timely commenced her action against Parc Enchanted Parks. Acosta produced evidence that she timely filed the complaint, that she timely served CorpDirect, and that CorpDirect was a registered agent of Parc Enchanted Parks at the time of service. Parc Enchanted Parks argued that CorpDirect

was not a registered agent at the time of service. At the very least, there were issues of material fact regarding whether CorpDirect was a registered agent at the time of service, so the trial court erred in granting Parc Enchanted Parks' motion for summary judgment.

Summary judgment orders are reviewed *de novo*. This Court should consider the facts and all reasonable inferences in the light most favorable to Acosta, as she is the nonmoving party. Parks v. Fink, 173 Wn. App. 366, 374, 293 P.3d 1275, 1279 (2013). Summary judgment is proper only if no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. CR 56(c). A genuine issue of material fact exists where reasonable minds could differ regarding the facts controlling the outcome of the litigation. Parks v. Fink, 173 Wn. App. 366, 374, 293 P.3d 1275, 1279 (2013).

As stated above, the complaint in this matter was filed on July 18, 2013, which was within the applicable three-year statute of limitations for personal injury actions. RCW 4.16.080. Pursuant to RCW 4.16.170, the action will be deemed timely so long as service occurs within 90 days of the date of the filing of the complaint. Acosta had the summons and complaint delivered to CorpDirect within 90 days. *See also* RCW 4.28.080 (9) (service may be made upon the registered agent of a company).

The primary issue addressed by the trial court was whether CorpDirect was a registered agent at the time of service in September 2013. The trial court recognized this at the April 18, 2014 hearing, at which time it granted Acosta's request for additional time to file a response and directed Acosta to come up with documentary evidence that CorpDirect, "the agent that was served back in September was actually a – an active registered agent for this corporation...." RP 10 lines 23-25.

Acosta did exactly what the court requested. She produced a document certified by the Washington Secretary of State which clearly described CorpDirect in Tumwater as Parc Enchanted Parks' "**Current Registered Agent**." CP 50-51 (emphasis added). This document, entitled "Initial Report", was executed by Parc Enchanted Parks on March 29, 2013 and was filed with the Secretary of State on May 1, 2013.

The Initial Report document even included an area that should be filled in to indicate any change to its registered agent. Parc Enchanted Parks did not complete that section, leaving absolutely no question that it was holding out CorpDirect as its registered agent. CP 51. Parc Enchanted Parks had a statutory obligation, under RCW 25.15.105, to make certain that the registered agent information in the Initial Report was current at the time the document was executed.

This evidence produced to the trial court clearly demonstrated that CorpDirect was a registered agent of Parc Enchanted Parks in March 2013. There was no subsequent change of registered agent until Parc Enchanted Parks filed an “Annual Report” on November 14, 2013, in which Parc Enchanted Parks stated that NRAI was its registered agent. CP 52-54. Obviously, this means that when service was made upon CorpDirect in September 2013, it was Parc Enchanted Parks’ registered agent.

Despite the fact that Parc Enchanted Parks had clearly represented to the public and to the State of Washington that CorpDirect was its registered agent as of March 2013, Parc Enchanted Parks took the position in its reply memorandum that CorpDirect was not its registered agent in March 2013 or at the time of service in September 2013. However, the documentation that Parc Enchanted Parks relied on does not actually support its position. The additional evidence relied on by Parc Enchanted Parks was inadmissible hearsay, which was inappropriate for the trial court to rely on.

Parc Enchanted Parks admits that CorpDirect was its registered agent before it changed its registered agent to NRAI. Parc Enchanted Parks argues, however, that it changed its registered agent from CorpDirect to NRAI by filing a “Statement Of Change For Registered

Agent/Office” form filed with the Secretary of State in January 2013. CP

73. There are numerous problems with that argument, however.

The Statement Of Change For Registered Agent/Office form can be used to change the registered agent or change the registered office address. The form was filled out in such a way that would indicate that only the registered office address was changing. For example, if there is a change to the registered agent, Section 4 of the form must be signed by the new registered agent to reflect that the new agent “consent[s] to serve as the Registered Agent in the State of Washington for the above named entity.” CP 73. This is consistent with the requirement in RCW 25.15.325 (3)(c) which states any newly appointed registered agent must provide its written consent. NRAI did not sign the document to indicate that it was consenting to serve as the new registered agent of Parc Enchanted Parks. CP 73.

Furthermore, Section 5 of the Statement Of Change For Registered Agent/Office form indicates that the section should be signed by the registered agent “only if change is to registered office address.” (emphasis in original). CP 73. Otherwise, if the registered agent was changing, the section should have been signed by Parc Enchanted Parks’ member or manager. Section 5 of the form was signed by a representative of the registered agent, rather than a representative of Parc Enchanted Parks,

indicating that there was only an office location change, not a change to the registered agent. CP 73.

Finally, the Statement Of Change For Registered Agent/Office submitted to the trial court was not certified by the Secretary of State's office, nor is there any confirmation that the document provided to the trial court included the entire correspondence to the Secretary of State. This is not a trivial point, as the entire correspondence could (and, in fact, would) clarify that the purpose of filing the form was to change an office address only, rather than change the registered agent.

In summary, the documentary evidence provided by Parc Enchanted Parks in support of its position that CorpDirect was no longer its registered agent at the time of service, does not actually support that position, was not certified by the Secretary of State, nor does it purport to be a complete correspondence.

The other evidence relied on by Parc Enchanted Parks, namely a declaration by Michelle Rowe, is not based on personal knowledge and contains inadmissible hearsay. Ms. Rowe claims that the above-described Statement of Change of Registered Agent/Office "changed the registered information" for Parc Enchanted Parks in the Secretary of State's records to NRAI. CP 69. There is no explanation of what that means or her basis for making that statement. For the reasons stated above, Acosta disputes

this conclusory statement. Ms. Rowe also states that she “contacted the Washington Secretary of State regarding their processing of the Initial Report” (which was filed on May 1, 2013) and was told that the Secretary of State did not change the registered agent information to reflect the Tumwater address. CP 70. This statement does not support Parc Enchanted Parks’ position for two reasons. First, Ms. Rowe’s statement did not indicate whether the processing of the Initial Report had the effect of changing registered agent information to indicate that CorpDirect was the registered agent. Second, Ms. Rowe’s statement about what she was told by the Secretary of State is inadmissible hearsay. ER 801, 802. Inadmissible hearsay evidence should not be considered in determining a summary judgment motion. Warner v. Regent Assisted Living, 132 Wn. App. 126, 136, 130 P.3d 865, 871 (2006) (court cannot consider inadmissible evidence, including inadmissible hearsay evidence, when deciding summary judgment motion).

Based on the above, Acosta’s position is that the evidence that was properly before the trial court strongly indicated that CorpDirect was the registered agent at the time of service. However, even if Parc Enchanted Parks’ position that NRAI was its registered agent is correct, the evidence also indicates that the CorpDirect and NRAI were basically operating as one and the same entity, such that service on CorpDirect would be

sufficient for service on NRAI. As noted above, when Acosta sent a summons and complaint to *NRAI* in January 2014, it was handled and forwarded to Parc Enchanted Parks by *CorpDirect*. CP 23-24. Ms. Rowe admits in her declaration that “NRAI has done business as both NRAI and CorpDirect.” CP 69. So, the record reflects that NRAI does business as CorpDirect and *vice versa*. Accordingly, there is a question of fact regarding whether the companies are essentially one and the same, such that service on CorpDirect should be sufficient, even if NRAI was the registered agent.

In short, the primary issue before the trial court was whether CorpDirect was the registered agent for Parc Enchanted Parks at the time of service in September 2013. Acosta provided documentary evidence that Parc Enchanted Parks represented to the public and Secretary of State that CorpDirect was its registered agent in March 2013 and that no subsequent changes were made until November 2013. Parc Enchanted Parks responded by providing documentation of form filed in January 2013. However, that form was completed to effectuate a change in a registered office address only, rather than to change the registered agent. Furthermore, Parc Enchanted Parks did not address the effect of the Initial Report it executed in March 2013, except through inadmissible hearsay testimony. And, even if Parc Enchanted Parks proved that NRAI was its

registered agent at the time of service, there is a legitimate question whether CorpDirect and NRAI were so closely related that service on one entity constitutes service on the other entity.

At a very minimum, there was an issue of material fact whether CorpDirect was a registered agent of Parc Enchanted Parks at the time of service. Accordingly, the trial court should not have entered summary judgment against Acosta.

2. THE TRIAL COURT SHOULD NOT HAVE ENTERED SUMMARY JUDGMENT AGAINST ACOSTA WITHOUT A HEARING AND WITHOUT ACOSTA BEING PROVIDED WITH THE NOTICE REQUIRED UNDER CR 54 (f)(2)

As described above, the trial court ordered that if Acosta were to provide documentary evidence that CorpDirect was a registered agent for Parc Enchanted Parks at the time of service, a hearing should be held on the matter. CP 43, 44. Acosta provided that information, as described above, but the trial court decided the matter without a hearing.

Given the importance of this issue to her claim, Acosta clearly should have had the opportunity to fully present her arguments at a hearing on the merits, just as the trial court had planned. A hearing would have given Acosta the opportunity to address the shortcomings in Parc Enchanted Parks' factual and legal arguments presented in its reply memorandum, which are outlined above. The trial court erred in entering

summary judgment against Acosta without providing her the opportunity to present her argument at a hearing as it said it would.

Furthermore, the order and judgment that was entered against Acosta on May 30, 2013 was prepared by Parc Enchanted Parks without providing five days' notice of presentation to Acosta along with a copy of the proposed order and judgment. This is required under CR 54 (f)(2) and the failure to provide the required notice affected Acosta's ability to notify and remind the trial court that there was to be a hearing on the issues, pursuant to the trial court's prior order

3. THE COURT SHOULD NOT HAVE ENTERED SUMMARY JUDGMENT AGAINST ACOSTA ON THE BASIS THAT THE SUMMONS CONTAINED A 20 DAY RESPONSE PERIOD, RATHER THAN A 60 DAY RESPONSE PERIOD

As part of Parc Enchanted Parks' motion for summary judgment, it argued that the summons was deficient because it described a 20 day response period, rather than a 60 day response period. There is no indication that the trial court based its decision on this argument, which does not withstand scrutiny.

CR 4(b)(2) states that a summons for service "in the state" should describe a response period of "within 20 days after the service of this summons." There is an exception for cases that fall within CR 4.1, which relates only to "personal service out of the state." Since the summons was

served on a registered agent within the state of the Washington, CR 4.1 does not apply and the summons properly described a 20 day response period.

Even if Parc Enchanted Parks should have been issued a summons with a 60 day response period, there is no indication that this caused Parc Enchanted Parks to suffer any sort of prejudice. *See Sammamish Pointe Homeowners Assoc. v. Sammamish Pointe LLC*, 116 Wn. App. 117, 64 P.3d 656 (2003) (noting that summons with 20 day period instead of 60 day period may be corrected by amendment unless the movant makes a showing of prejudice).

E. CONCLUSION

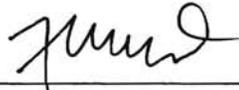
The trial court should not have dismissed Acosta's claims after she introduced compelling evidence that she timely served CorpDirect, a registered agent of Parc Enchanted Parks, within 90 of the date she filed her complaint. Parc Enchanted Parks' argument that CorpDirect was not its registered agent at the time of service is not consistent with documentation that it signed in March 2013 and filed with the state in May 2013. Parc Enchanted Parks supported its argument based on less recent documentation from January 2013, but that documentation is incomplete and does not actually reflect an intent to change its registered agent. Parc Enchanted Parks also impermissibly supported its motion through

inadmissible hearsay testimony, which the trial court should not have considered.

Based on the record before the trial court, there was, at the very least, an issue of material fact whether Acosta timely served a registered agent of Parc Enchanted Parks in September 2013. For that reason, and for the reasons stated above, the trial court erred in entering summary judgment against Acosta and dismissing all of her claims.

Respectfully submitted, this 24th day of December, 2014.

LACHENMEIER ENLOE RALL & ORTIZ



Martin M. Rall, WSB No. 14094
Flavio A. Ortiz, WSB No. 42547
Of Attorneys for Appellant Acosta

DECLARATION OF FILING AND SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

I arranged for filing and service of the foregoing Appellant's Brief to the court (one original and one copy) and to appellant's counsel (one copy) as follows:

Office of the Clerk
Court of Appeals, Div. I
600 University Street
One Union Square
Seattle, WA 98101-1176

PARC Enchanted Parks, LLC
c/o PARC Management, LLC
Attn: Deborah Drew
7892 Baymeadows Way
Jacksonville, FL 32256

By depositing the foregoing Appellant's Brief, postage pre-paid, for mailing with the U.S. Post Office on this 24th day of December, 2014. An email copy is also being served on Parc Enchanted Parks, per agreement.

LACHENMEIER ENLOE RALL & ORTIZ



Martin M. Rall, WSB No. 14094
Flavio A. Ortiz, WSB No. 42547
Of Attorneys for Appellant