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I. INTRODUCTION

A defendant waives the right to assert the affirmative defense of insufficient service of process when he engages in discovery directed toward the merits of the case without filing a responsive pleading raising the defense.

In this matter, Respondent Michael Thomas (“Thomas”) propounded written discovery on Appellant Charity Meade (“Meade”) four months prior to filing an answer. After Meade answered discovery, and a mere five days before the statute of limitations expired, Thomas finally answered Meade’s complaint. Thomas asserted insufficient service of process and the statute of limitations in his answer. Then, after the statute of limitations ran, Thomas moved for the dismissal of Meade’s claims.

For four months, Thomas acted as though he was going to litigate the case, seeking discovery from Meade without raising any procedural defenses. Only after Meade answered discovery, and shortly before the statute was set to expire, did Thomas answer and assert the defense of insufficient service of process. Thomas’ assertion of the defense of insufficient service of process was not only inconsistent with his prior behavior, but was also dilatory. Thomas waived the defense, and the trial

court's ruling dismissing Meade's claims against Thomas should be reversed.

II. ASSIGNMENT OF ERROR

Meade assigns error to the Order Granting Summary Judgment and Dismissing Case With Prejudice and Without Costs entered by the trial court on April 7, 2008.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Did the trial court erroneously grant summary judgment dismissing Meade's claims against Thomas by failing to find that Thomas waived the affirmative defense of insufficient service of process when he engaged in inconsistent and dilatory conduct by (a) propounding discovery directed toward the merits of Meade's claim, and (b) five days before the statute of limitations ran, filed his answer asserting the affirmative defense of insufficient service of process.

IV. STATEMENT OF THE CASE

The facts surrounding this case are straightforward. On August 4, 2004, Meade was rear-ended by Samantha Gross, who was driving a car owned by her boyfriend, Thomas. Meade filed a Complaint for Personal Injuries against Thomas on March 12, 2007.¹ (CP 003-005.)

¹ Meade alleged that Thomas was driving the vehicle.

Nine days later, on March 21, 2007, Thomas appeared by and through his attorney. (CP 006.) On that same day, Thomas served standard motor vehicle accident discovery requests upon Meade. (CP 013.) These discovery requests asked for information pertaining to the facts and circumstance surrounding the accident, as well as Meade's claimed injuries.

None of the discovery requests sought information pertaining to service of process. (*Id.*)

Almost three months later, on June 7, 2007, Thomas' attorney emailed Meade's attorney, asking for overdue discovery responses and requesting possible dates for Meade's deposition. (CP 017.) He followed the email with a letter on June 13, 2007. (CP 019.)

On July 24, 2007, Meade served her discovery responses on Thomas, advising that the signature page was forthcoming. (CP 022.)

On July 30, 2007, five days before the statute of limitations ran, Thomas finally served an answer. (CP 013.) Thomas alleged insufficient service of process and the statute of limitations in the answer. (CP 008-009.)

The statute of limitations ran on August 4, 2007.² Meade never served Thomas because Thomas was acting as though he was going to litigate the claim. (CP 042.)

On October 16, 2007, after the statute expired, Thomas served requests for admission on Meade. (CP 033-035.) The requests for admission were directed toward the issue of service of process. (*Id.*) After receiving an extension, Meade answered the requests for admission on December 14, 2007, admitting that Thomas had not been served. (CP 037-039.)

On March 18, 2008, Thomas moved for the dismissal of Meade's lawsuit under CR 12(c), and in the alternative, under CR 56. (CP 012-039.) He argued that improper service of process within the statute of limitations barred Meade's claims. In response, Meade argued that Thomas was estopped from arguing the defense, and had waived it by his conduct. (CP 040-042.)

² The timing of Thomas' answer was not coincidental. On or about August 8, 2007, counsel for Thomas and counsel for Nelson discussed that the statute of limitations had expired. (CP 014.) The attorneys agreed that neither party would argue that the other party had a duty to take immediate action on the issue. (*Id.*) Thomas' summary judgment motion was not filed until March 18, 2008. (CP 012.)

Oral argument was held before the Honorable James E. Warne on April 7, 2008. The trial court dismissed Meade's claims on summary judgment,³ and this appeal follows. (CP 043-044.)

V. ARGUMENT

A. Summary Judgment Standard on Appeal

The appellate court reviews orders of summary judgment *de novo* and engages in the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). All facts and reasonable inferences are to be viewed most favorably to the nonmoving party. Summary judgment is only appropriate where "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.*; CR 56(c).

Here, the parties agree on the facts. The sole issue is the legal effect of Thomas engaging in written discovery before answering and asserting the affirmative defense of service of process; acting as though he was going to litigate the case for four months; and then filing his answer asserting service of process as a defense shortly before the statute of limitations expired. The trial court erroneously ruled that Thomas was entitled to the dismissal of Meade's claims, and the Order Granting Summary Judgment should be reversed.

³ The court considered documents outside the pleadings.

B. Thomas Waived the Affirmative Defense of Insufficient Service of Process.

1. Waiver Occurs Where the Defendant Acts Inconsistently With Prior Behavior or Is Dilatory in Asserting the Defense.

A defendant can waive insufficient service of process as a matter of law if (1) the defendant's assertion of the defense is inconsistent with his previous behavior, or (2) the defendant's counsel has been dilatory in asserting the defense. *Lybbert*, 141 Wn.2d at 39 (citations omitted). The doctrine of waiver is "sensible and consistent with the policy and spirit behind our modern day procedural rules, which exist to foster and promote the 'just, speedy, and inexpensive determination of every action.'" *Id.* (citing CR 1(1)). Otherwise, litigators are at liberty to act in an inconsistent fashion or employ delaying tactics, compromising the procedural rules. *Id.* Applying the doctrine of waiver to the affirmative defense of insufficient service of process, where appropriate, lessens the ability of a litigant to engage in "trial by ambush." *Id.* at 40.

Washington courts have repeatedly found that the defense of service of process is waived where the defendant engages in written discovery before asserting the defense, unless the discovery is used to determine whether the defense is available to him. *Id.* at 41; *Romjue v. Fairchild*, 60 Wn. App. 278, 281, 803 P.2d 57 (1991). *Compare French v. Gabriel*, 116 Wn.2d 584, 594, 806 P.2d 1234 (1991) (holding that the

defendant preserved the defense when he answered and asserted the defense *before* conducting discovery on the merits). It is necessarily inconsistent to assert the defense of insufficient service of process after engaging in costly and time-consuming discovery unrelated to the defense. *King v. Snohomish County*, 146 Wn.2d 420, 426, 47 P.3d 563 (2002).

Lybbert is directly on point. In that case, the defendant County conducted discovery that was not directed toward insufficient service of process. It then proceeded to act as if it were going to litigate the case over the next nine months. After the plaintiffs answered discovery requests, the County answered, alleging insufficient service of process. *Lybbert*, 141 Wn.2d at 32-33; *see also Blankenship v. Kaldor*, 114 Wn. App. 312, 319, 57 P.3d 295 (2002) (holding that the defendant waived the defense of insufficient service of process where he propounded interrogatories and requests for production not aimed at determining whether facts supported the defense before answering).

Here, Thomas engaged in written discovery that did not address the issue of insufficient service of process. Rather, the discovery was solely aimed toward the merits of the case—the facts surrounding the car accident and Meade’s claimed damages. Several months after Thomas propounded discovery, he reminded Meade that her discovery responses

were overdue.⁴ He also requested dates for Meade's deposition. (CP 017.) It was inconsistent, then, to allege the defense of insufficient service of process a mere five days before the statute ran and to conduct discovery of issues related to service of process only after the statute of limitations ran.

2. Waiver Occurs Where the Defendant Knows That He Has Not Been Properly Served and Delays in Asserting the Defense.

It is undisputed that Meade never served Thomas. Where the facts show that the defendant knew or should have known of the defense, delaying raising the affirmative defense of insufficient service of process is dilatory. *Romjue*, 60 Wn. App. at 281. In *Romjue*, the defendant's attorney should have known that the defense was available when he received the affidavit of service showing that service was not made at the defendant's usual place of abode. The attorney had the necessary information to assert the defense three weeks before he served standard written discovery on the plaintiff and two months before the statute of limitations expired. *Id.* The court found that the defendant's silence, coupled with the knowledge of an adverse claim, resulted in waiver of the

⁴ The *Lybbert* court rejected the defendant's excuse that the plaintiffs' belated discovery responses were responsible for its delay in asserting the defense of insufficient service of process. 141 Wn.2d at 42-43.

defense of insufficient service of process. *Id.* at 282 (citing *Board of Regents v. Seattle*, 108 Wn.2d 545, 553, 741 P.2d 11 (1987)). *See also Blankenship*, 114 Wn. App. at 319 (holding that nine months before answering, the defendant knew or should have known that the defendant's father, not the defendant, had been served).

Here, Thomas knew he had not been personally served. He could have raised the defense in his answer at any time. Instead, he chose to conduct discovery on the merits of Meade's lawsuit. Like the defendants in *Romjue* and *Blankenship*, Thomas' silence, along with his knowledge of improper service, results in waiver of the defense of insufficient service of process.

3. Waiver Does Not Require That the Defendant Purposefully Mislead or Trick the Plaintiff.

Thomas' attorney asserts that he served general discovery on Meade assuming that she was going to serve Thomas. (CP 013.) He further claims that he did not expect the issue of insufficient service of process to arise. (CP 015.) Waiver, however, does not require that the defendant purposefully mislead the plaintiff or attempt to gain a tactical advantage. Rather, all that is required is that the defendant was tardy in asserting the defense when he has the necessary facts within his control and failed to act earlier. *Blankenship*, Wn. App. at 320. Any argument that Thomas was acting in "good faith" is not relevant to waiver of the

defense; it is enough that he delayed filing the answer until after conducting discovery of Meade and just a few days before the statute was set to expire.⁵

4. The Defense of Insufficient Service of Process Is Waived Where the Assertion Is Inconsistent With Prior Behavior, Even If the Answer Is Filed Within the Statute of Limitations.

Thomas answered five days before the statute of limitations was set to expire. However, a defendant can waive the defense even if he files the answer within the applicable statute of limitations. *King*, 146 Wn.2d at 426 (holding that the defendant County waived the right to dismissal, based on improper notice of claim, after litigating the matter for four years). Even if the defendant is not dilatory in filing an answer, inconsistent behavior alone is enough to invoke the doctrine of waiver. Any argument that Meade gave adequate notice of the defense fails, not only because the statute expired a mere five days later, but also because his answer and affirmative defenses were inconsistent with his prior discovery requests.

⁵ It appears that Thomas withheld raising the defect in service for tactical reasons until it was too late for Meade to respond. If “good faith” was relevant to Thomas’ motion to dismiss, the timing of his answer would create an issue of fact.

5. Thomas Did Not Preserve the Defense in His Notice of Appearance.

Thomas' March 21, 2007 notice of appearance stating that he was not waiving objections to improper service is of no effect. A notice of appearance is not a responsive pleading. *Lybbert*, 141 Wn.2d at 43 (citing CR 12(b) and CR 7(a)). Filing a notice of appearance cannot waive the defense of insufficient service of process, so it cannot preserve it, either. *Id.* Thomas' notice of appearance did not preserve the defense.

VI. CONCLUSION

The affirmative defense of insufficient service of process is waived if assertion of the defense is inconsistent with prior behavior or if it is the result of dilatory conduct. A prime example of inconsistent and dilatory behavior results when a defendant engages in discovery directed toward issues other than service of process before filing an answer raising the affirmative defense.

It is undisputed that Thomas engaged in standard written discovery with Meade regarding the merits of her case before answering. He then answered four months after appearing, and a mere five days before the statute expired. Thomas waived the defense of insufficient service of process, and the trial court's summary judgment ruling should be reversed.

DATED this 2nd day of October, 2008.

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