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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY


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NO. . 46575-2-II

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

MAURICE H. BAKER,

Appellant,

vs.

DAVID HAWKINS and CHRISTIE HAWKINS, husband and wife, and the marital
community composed thereof,

Respondents.

APPEAL FROM KITSAP COUNTY SUPERIOR COURT
Honorable Keith Harper, Visiting Judge

BRIEF OF RESPONDENTS

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This Court is asked to conclude that a contractor working at a defendant's house qualifies as a "then resident" for substitute service of process. A person who is working at defendant's house is not a resident. This Court should affirm the superior court's order dismissing plaintiff's complaint.

I. RESTATEMENT OF ISSUES

1. Should this Court affirm the superior court's order dismissing plaintiff's complaint because the summons and complaint were not served within the statute of limitations (CP 130)?

2. Should this Court affirm the superior court's order where service on a contractor working at defendants' house was not substitute service because the contract was not a "then resident" of the defendants' home?

II. STATEMENT OF FACTS AND PROCEDURE

Plaintiff Maurice Baker and defendants David and Christie Hawkins were in a motor vehicle accident on December 16, 2010. (CP 3-4) On December 16, 2013, plaintiff filed a lawsuit against defendants. (CP 3-5) On or about January 11, 2014, Gary Jellicoe was served with the summons and complaint. (CP 20-21) The Return of Service states that service was made "by delivery to . . . Gary Jellicoe, Cohabitant, W-M, late

50's, a person of suitable age and discretion residing at the respondent's usual abode." (CP 20-21)

Defendant Hawkins answered and denied the complaint. (CP 6-8) Defendants asserted lack of personal jurisdiction and lack of service. (CP 7) The Hawkinses moved to dismiss the complaint for lack of personal jurisdiction and lack of service. (CP 9-12)

The motion to dismiss was supported by a declaration from Christie Hawkins. (CP 23-24) Christie Hawkins' declaration stated that the Jellicoes did not reside at the Hawkinses' home. (CP 23-24)

Plaintiff opposed the motions submitting portions of the depositions of Gary Jellicoe and Winoma Jellicoe. (CP 25-58) Defendants Hawkins filed a reply in support of their motion to dismiss. (CP 59-63) The reply included the complete transcripts of the Jellicoes' depositions. (CP 64-129)

The record established that Gary Jellicoe was a contractor working at the Hawkinses' house. He did not reside at the Hawkinses' house. (CP 23) The Court granted the defendants Hawkinses' motion and dismissed the plaintiff's case. (CP 130-131).

The Hawkinses were on vacation in Mexico in January 2014. (CP 77, 81) The Hawkinses had hired general contractors, Gary and Winoma Jellicoe, to perform work at their Bainbridge Island house. (CP 23, 71-72)

The work was done in two phases. During January 2014, while the Hawkinses were on vacation, the Jellicoes worked to complete the second phase. (CP 71-72, 81)

The Jellicoes also live on Bainbridge Island, about four miles from the Hawkinses' house. (CP 67, 86) They stayed at their own home. (CP 86, 112) The Jellicoes never spent a night at the Hawkinses' house. (CP 54, 86, 112, 114) They did not cook food at the Hawkinses' house in January 2014. (CP 53, 113)

The Jellicoes did not collect the mail for the Hawkinses. (CP 78) They did not pick up the newspapers. (CP 78) Some packages were delivered during January 2014, mostly for the construction project. (CP 78-79) If a package was left for the Hawkinses on the porch, Winoma Jellicoe would put the package inside the house. (CP 118) The Jellicoes never signed for any packages delivered to the Hawkinses. (CP 79, 125)

Before the Hawkinses returned, Winoma Jellicoe did clean the dust from the construction project as she does for any construction job. (CP 117, 123-124)

The Jellicoes did have complete access to the Hawkinses' house in January 2014 so they could perform the construction work. (CP 41, 77) The Jellicoes had the code for the key pad to the house. (CP 46) And the Jellicoes worked fulltime on the Hawkinses' house. (CP 43)

Don DeMers was the process server. (CP 34) Mr. DeMers declared that he went to the Hawkinses' house, knocked on the door, and no one answered. (CP 35) He returned to his vehicle in the driveway. A man and woman drove to the front door. He stated that the man and woman carried bags of groceries from the vehicle and unlocked the front door. (CP 35) The man identified himself as Gary Jellicoe. According to Mr. DeMers, Mr. Jellicoe explained that "he and his wife were in the process of remodeling the home and were living there while the work was being performed." (CP 35) Mr. DeMer handed the summons and complaint to Mr. Jellicoe. (CP 35, 85) Mr. DeMer said that he contacted Mr. Jellicoe after the lawsuit and Mr. Jellicoe denied saying that he and his wife were occupying the house. (CP 35)

The Jellicoes testified that on the day the process server arrived, they had returned to the Hawkinses' house after dinner to drop off some supplies. (CP 83) They told the process server that the Hawkinses were gone. (CP 85-86) Gary Jellicoe did not tell Mr. DeMer that they were living at the Hawkinses' house. (CP 86) The Jellicoes told the process server that they did not live at the house. (CP 111-112) The Jellicoes were not carrying groceries. (CP 83-84) Mr. Jellicoe testified that his wife, Mrs. Jellicoe, spoke to Mr. DeMer and Mr. DeMer handed the subpoena to Mr. Jellicoe. (CP 45)

III. ARGUMENT

A. STANDARD OF REVIEW.

The superior court's order was decided on a motion to dismiss with supporting declarations, therefore it was a summary judgment subject to de novo review. CR 12(c); *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 737, 844 P.2d 1006 (1993), *cert. denied*, 510 U.S. 1047 (1994). Summary judgment is appropriate where the pleadings and materials shows that there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. *Reynolds v. Hicks*, 134 Wn.2d 491, 495, 951 P.2d 761 (1998). Here the record established that the Jellicoes did not reside at the Hawkinses' house and therefore service on the Jellicoes was not effective substitute service.¹ This Court should affirm.

B. THE COMPLAINT WAS PROPERLY DISMISSED BECAUSE A CONTRACTOR WORKING AT A HOUSE IS NOT A "RESIDENT THEREIN."

An action may be commenced by filing a complaint and serving the summons and complaint on the defendant within 90 days. RCW

¹ Mr. DeMer's declaration states that the Jellicoes said they were living at the Hawkinses' house. (CP 35) The Jellicoes told Mr. DeMer that they were not living at the Hawkinses' house. (CP 86, 111-112) Mr. DeMer's hearsay statement about what the Jellicoes said does not create a genuine issue of material fact. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 128, 141, 331 P.3d 40 (2014) (hearsay is not admissible and will not be considered on summary judgment).

4.16.170; CR 3(a). Proper service of the summons and complaint is a prerequisite to the court obtaining personal jurisdiction over a party. *Streeter-Dybdahl v. Nguyet Huynh*, 157 Wn. App. 408, 412, 236 P.3d 986 (2010), *rev. denied*, 170 Wn.2d 1026 (2011). "[P]roper service of process must not only comply with constitutional standards but must also satisfy the requirements for service established by the legislature." *Farmer v. Davis*, 161 Wn. App. 420, 432, 250 P.3d 138, *rev. denied*, 172 Wn.2d 1019 (2011).

Pursuant to RCW 4.28.080(15), service of process is accomplished by delivering the summons "to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion **then resident** therein." (Emphasis added.) Any service other than personal delivery to the defendant is substitute service. *Salts v. Estes*, 133 Wn.2d 160, 164, 943 P.2d 275 (1997). Substitute service of process can be broken into a three-part test: to accomplish service of process, plaintiff must (1) leave a copy of the summons and complaint at the house of defendant's usual abode, (2) with some person of suitable age and discretion, (3) then resident therein. *Id.*

This case involves the third part of the test: whether Gary Jellicoe was a resident of the Hawkinses' house. The superior court correctly concluded that Mr. Jellicoe was not a resident of the Hawkinses' house. As the Washington Supreme Court has held, a resident is a person actually living at the house. "Even those unlearned in the law would most likely conclude . . . "then resident therein" means a person who is actually living

in that house at the time of the service of process.” *Salts v. Estes*, 133 Wn. 2d 160, 164, 943 P.2d 275 (1997).

This case is closest in facts to *Salts v. Estes*. In *Salts*, the Washington Supreme Court held that service of process on a person who was temporarily in the defendant's house to feed dogs and take in the mail was insufficient for substitute service of process. The *Salts* court refused to give the same broad interpretation of “resident” that appellant is urging here: that “mere presence in the defendant's home or ‘possession’ of the premises [would be] sufficient to satisfy the statutory residency requirement.” 133 Wn.2d at 169. The Supreme Court explained:

Under such a view, service on just about any person present at the defendant's home, regardless of the person's real connection with the defendant, will be proper. A housekeeper, a baby-sitter, a repair person or a visitor at the defendant's home could be served. Such a relaxed approach toward service of process renders the words of the statute a nullity and does not comport with the principles of due process that underlie service of process statutes.

133 Wn.2d at 170.

The term “resident” requires something more than being present in the defendant's usual abode. *Salts v. Estes*, 133 Wn. 2d 160, 168, 943 P.2d 275 (1997). To be a “then resident” in the defendant's usual abode, there must be something more than fleeting occupancy. *Id.* at 168. Service on employees and others who do not reside in the defendant's house is not proper substitute service of process. *Id.*

The *Salts* case was distinguished from the earlier case of *Wichert v. Cardwell*, 117 Wn.2d 148, 812 P.2d 858 (1991). In *Wichert*, the Supreme Court concluded that substitute service was proper on the adult daughter of the defendant who had slept at the house the previous night. Service on the adult daughter was sufficient service upon the defendant parents. The daughter not only slept at the house the night before the process server delivered the summons and complaint, she occasionally slept there. Also, the daughter was a relative of defendants. These facts were sufficient to consider her a “then resident” pursuant to RCW 4.28.080(15).

Like the *Salts* case, here the Hawkinses were away from their house on vacation. The Jellicoes were at the house performing contracting work while the Hawkinses were away on vacation. The Jellicoes’ situation is similar to the situation in *Salts*. The record is clear that the Jellicoes were not residing at the Hawkinses’ house. The record is clear that the Jellicoes were not living at the Hawkinses’ house. The superior court’s order should be affirmed.

C. WASHINGTON HAS NOT ADOPTED A LIBERAL CONSTRUCTION OF THE “RESIDENT THEREIN” TEST FOR SUBSTITUTE SERVICE.

Appellant urges a liberal construction of the service of process statutes. He argues that the test for service of process should be whether the service was reasonably calculated to give the defendant knowledge of

the lawsuit and an opportunity to be heard. (App. Br. at 13) Appellant cites to *Sheldon v. Fettig*, 129 Wn.2d 601, 919 P.2d 1209 (1996), as a basis for his liberal construction argument. (App. Br. at 12) This case is not like *Sheldon*.

In *Sheldon*, the Washington Supreme Court was deciding the first of the three-part test: the question of whether a house is a usual abode. The Court determined that a person could have a second usual abode for purposes of receiving service of process. *Sheldon* does not speak to the question of whether a person is a “resident therein.” Nothing in *Sheldon* establishes that the service of process on Gary Jellicoe was valid substitute service of process on the Hawkinses.

Appellant’s argument for a liberal construction of service of process is simply an effort to treat actual notice as valid service of process. Appellant cannot cite to any Washington case which finds that a contractor at a home is a “resident therein” for purposes of valid service of process. In fact, Washington has a long-standing rule that actual notice alone does not constitute valid service of process. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 177, 744 P.2d 1032, 750 P.2d 254 (1987). The Supreme Court recently reaffirmed the rule in *Scanlan v. Townsend*, 2014 Wash. LEXIS 963, at *22 n.6 (Wash. Nov. 6, 2014).

This Court should affirm the superior court because appellant failed to timely and properly obtain service of process.

D. THE NON-WASHINGTON CASES ARE DISTINGUISHABLE AND NOT APPLICABLE.

Appellant refers to several non-Washington cases; none apply here. None control here. Each case was decided under a different statutory scheme with different facts and some different legal tests.

O'Sell v. Peterson, 595 N.W.2d 870 (Minn. App. 1999) and *United States v. House*, 100 F. Supp. 2d 967 (D.Minn. 2000), were decided under Minnesota law. Minnesota applies a substantial nexus test to determine whether a person is a resident for service of process. *Peterson*, 595 N.W.2d at 872; *House*, 100 F. Supp. 2d at 973. Washington has not adopted the substantial nexus test.

Similarly in *Plushner v. Mills*, 429 A.2d 444 (R.I. 1981), the court considered the substantial nexus between the daughter and defendant father as a basis for finding service was valid. The *Plushner* court also upheld the service of process because the daughter was a trusted member of the family. Again, Washington does not apply a substantial nexus test. Moreover, the Jellicoes were not related to the Hawkinses. The *Plushner* case does not apply here.

In *Magazine v. Bedoya*, 475 So. 2d 1035 (Fla. App. 1985), the mother-in-law was served with the summons and complaint at her son-in-law's house during the course of a six-week stay while she recovered from a broken leg. Earlier Florida cases held that a ten-day stay did not qualify someone as a resident but a four-month stay established one as a resident. *Sangmeister v. McElnea*, 278 So.2d 675, 676-77 (Fla. App. 1973). The six-week stay was deemed sufficient in *Magazine*. And notably, unlike this case, the relatives served in *Magazine* and *Sangmeister* slept at the defendant's house, presumably ate meals there, and conducted all activities of daily living at the defendant's house.

In *Hartford Fire Ins. Co. v. Perinovic*, 152 F.R.D. 128 (N.D. Ill. 1993), the doorman in defendant's apartment building accepted service of process. The doorman was authorized to accept and sign for deliveries including legal documents. Here the Jellicoes were not agents designated to accept delivery for the Hawkinses. In fact, they did not sign for any of the Hawkinses' deliveries during January 2014.

The cases from other jurisdictions do not support appellant's contentions. The cases do not demonstrate any error in the superior court's order here. This Court should affirm.

IV. CONCLUSION

Appellant was required to timely serve the summons and complaint on a resident of the Hawkinses' house. The Jellicoes were not residents of the Hawkinses' house. They were contractors performing work for the Hawkinses. Because they were not residents of the Hawkinses' house, delivery of the summons and complaint to the Jellicoes was not valid substitute service of process. The superior court's order dismissing the case should be affirmed.

Dated this 3rd day of December, 2014.

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