

Case No. 50086-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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MEEKER COURT CONDOMINIUM OWNERS ASSOCIATION AND  
SUMMERHILL RENTAL MANAGEMENT, LLC,

Appellant,

vs.

NICOLE GONZALEZ, et. al.

Respondents.

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BRIEF BY RESPONDENT DEUTSCHE BANK NATIONAL TRUST  
COMPANY

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## **I. INTRODUCTION**

It is well established that when a defendant is served personally out-of-state using the long arm statute, the plaintiff must substantially comply with the statute's declaration requirement in RCW 4.28.185(4) before entry of judgment. The law is also clear that when there is no compliance before judgment, the judgment is void for lack of personal jurisdiction. In this case it is undisputed there was no compliance with RCW 4.28.185(4) before the default judgment was entered against the Respondent, and the judgment was appropriately vacated. This Court should affirm.

## **II. BACKGROUND**

The underlying foreclosure action was initiated by appellant Meeker Court Condo Owners Association ("Meeker Court") to foreclose its lien securing the Condo owner's delinquent assessments. CP at 1-6. Respondent Deutsche Bank Trust Company as trustee for a securitized mortgage trust ("Deutsche Trust Co.") is the mortgage holder against the Condo and was named as a defendant to the action.

On April 3, 2015, a declaration of service was filed in the case where it was stated that service of the summons and complaint was personally made on a

manager at a “Deutsche Bank” in California. CP at 9. The declaration does not say service was effectuated on Deutsche Trust Co<sup>1</sup>.

On July 2, 2015, an order of default was entered against Deutsche Trust Co. incorrectly stating that Deutsche Trust Co. was “...personally served in Pierce County, Washington....” CP at 11.

On October 7, 2015, final judgment by default was entered against Deutsche Trust Co. CP at 98-100. It is undisputed that at the time judgment was entered against Deutsche Trust Co. there was no compliance by Meeker Court with the long arm statute’s RCW 4.28.185(4) affidavit requirement.

Upon discovering the default judgment, Deutsche Trust Co. retained the undersigned counsel who filed a motion to vacate the default judgment for lack of jurisdiction. CP at 161-164. In response to the motion, Meeker Court filed an affidavit purporting to satisfy the RCW 4.28.185(4) requirement. CP at 171-172.

The Superior Court granted the motion to vacate for lack of jurisdiction, although no other orders were entered concerning the rights and interests of the parties to the Condo. CP at 242. This appeal followed.

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<sup>1</sup> Whether Deutsche Trust Co. actually received the pleadings purportedly served on Deutsche Bank was irrelevant to the underlying motion to vacate, but to be clear, Deutsche Trust Co. never told its undersigned attorney that it received the pleadings and Deutsche Trust Co.’s attorney never made that representation to the Court. This Court should not interpret Deutsche Trust Co.’s restatement of the record, including affidavits of service, as an admission that any pleadings were actually received by Deutsche Trust Co.

For reasons set forth below, this Court should affirm the order vacating the default judgment against Deutsche Trust Co. for lack of jurisdiction.

### III. ARGUMENT

#### A. Standard on Review.

Deutsche Trust Co. agrees that a trial court's decision to grant a motion to vacate is reviewed on appeal for abuse of discretion. Because the Superior Court in this case vacated the default judgment against Deutsche Trust Co. based on the black letter jurisdictional law of this state it did not abuse its discretion.

#### B. Meeker Court Failed to Comply with the Long Arm Statute.

Under Washington's long arm statute, RCW 4.28.185(4), "[p]ersonal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state." (emphasis added); *Golden Gate Hop Ranch v. Velsicol Chem. Corp.*, 66 Wn.2d 469, 472 (1965). The statute is strictly construed because the exercise of jurisdiction over a person who is not within the state by service outside of the state is of purely statutory creation and is in derogation of the common law. *Hatch v. Princess Louise Corp.*, 13 Wn. App. 378, 379 (Div. 1 1975).

It is the black letter law of this state that the RCW 4.28.185(4) affidavit, or substantially complying affidavits, must be made and filed prior to entry of judgment. *ShareBuilder Sec. Corp. v. Hoang*, 137 Wn. App. 330, 334 (Div. 1 2007); *Hatch*, 13 Wn. App. 378, 380; *Schell v. Tri-State Irrigation*, 22 Wn. App.

788, 791-92 (Div. 3 1979); *Barr v. Interbay Citizens Bank*, 96 Wn.2d 692, 696 (1981) (“As they were filed before judgment, the affidavits were timely”); *Barer v. Goldberg*, 20 Wn. App. 472, 482 (Div. 2 1978) (“No particular time of filing is required as long as ... [the affidavit] precedes the judgment.”).

The affidavit cannot be made and filed after judgment. *Hatch*, 13 Wn. App. 378 (rejecting attempt by plaintiff to make and file the affidavit after judgment); *Schell*, 22 Wn. App. 788 (same); *ShareBuilder*, 137 Wn. App. 330, 334-35 (“Hoang's affidavit that she has never been to Washington cannot create substantial compliance because it was not filed before entry of the judgment.”). To allow filing of the affidavit after judgment “...would eliminate the statutory requirement of the affidavit unless it was challenged.” *Schell*, 22 Wn. App. 788, 792.

Here, Meeker Court's use of the long arm statute to obtain jurisdiction over Deutsche Trust Co. through personal service out-of-state required at least substantial compliance with RCW 4.28.185(4) before judgment. It is undisputed the “statute was ignored” and there was zero compliance before entry of judgment. *Schell*, 22 Wn. App. 788, 792 (1979). Meeker Court is not allowed to make and file the affidavit for the first time *after* judgment and the Superior Court did not abuse its discretion in refusing to allow it.

Because Meeker Court failed to comply with the long arm statute's RCW 4.28.185(4) requirement, the default judgment against Deutsche Trust Co. is void for lack of jurisdiction and the judgment was appropriately vacated by the Superior

Court. *ShareBuilder*, 137 Wn. App. 330, 335; *Schell*, 22 Wn. App. 788, 791; *Morris v. Palouse River & Coulee City R.R.*, 149 Wn. App. 366, 372 (Div. 3 2009).

**C. Ekanger Not Timely Raised / Not Applicable.**

Appellants did not cite *First Fed. Sav. & Loan Ass'n v. Ekanger*, 93 Wn.2d 777 (1980) in their opposition to Deutsche Trust Co.'s motion to vacate, and the Superior Court did abuse its discretion in refusing to consider the case when raised by Appellants for the first time at oral argument.

In any event, *Ekanger* has no application to this case and does not help Appellants. *Ekanger* concerned service by publication which is governed by a different statute and also the civil rules, specifically CR 4<sup>2</sup>. *Ekanger* did not overturn the authorities cited by Deutsche Trust Co. above which speak directly to personal service out-of-state and compliance with RCW 4.28.185(4). In fact, a year after *Ekanger* was decided, the Washington Supreme Court in *Barr v. Interbay Citizens Bank*, 96 Wn.2d 692, 696 (1981) cited with approval *Schell v. Tri-State Irrigation*, 22 Wn. App. 788 (Div. 3 1979) and held that the RCW 4.28.185(4) affidavits in the case were "timely" because they were filed before judgment.

Yet even if this were a service by publication case, *Ekanger* and CR 4 would still not help Appellants. In *Ekanger*, the plaintiff's attorney timely filed the declaration required for service by publication *before* judgment, and the *Ekanger*

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<sup>2</sup> CR 4 generally does not apply to personal service out-of-state. CR 4(e)(2)

Court merely allowed “amendment” of the declaration post-judgment to include additional information. *Ekanger* did not permit the plaintiff’s attorney to make and file the entire declaration after judgment, and neither does CR 4.

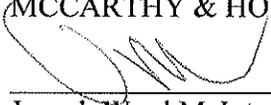
**IV. CONCLUSION**

The law is clear that compliance with the RCW 4.28.185(4) affidavit requirement must occur *before* judgment when personal service is made out-of-state using the long arm statute. To allow filing of the affidavit after judgment “...would eliminate the statutory requirement of the affidavit unless it was challenged.” *Schell*, 22 Wn. App. 788, 792.

Here, it is undisputed there was no compliance with RCW 4.28.185(4) before entry of the judgment against Deutsche Trust Co. The inquiry ends there. The judgment is void for lack of jurisdiction and the Superior Court did not abuse its discretion in vacating it. This Court should affirm.

Dated: August 17, 2017

MCCARTHY & HOLTHUS, LLP

  
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Joseph Ward McIntosh, WSBA # 39470  
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