

FILED
Court of Appeals
Division II
State of Washington
9/19/2019 4:25 PM

Court of Appeals No. 53277-8-II
Grays Harbor Co. Superior Court No. 18-2-363-14

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

TAO YUAN, INC. AND ANDY ZHENG

Appellant,

v.

GRAYS HARBOR COUNTY DRUG TASKFORCE,

Respondent.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David Edwards

APPELLANT'S REPLY BRIEF

By:
Christopher Black
Teymur Askerov
Attorneys for Appellant
Black Law, PLLC
705 Second Avenue, Suite 1111
Seattle, WA 98104
(206) 623-1604

TABLE OF CONTENTS

I. INTRODUCTION1

II. ARGUMENT1

 A. INTERESTED PARTIES' DUE PROCESS RIGHTS WERE VIOLATED IN THIS CASE.....1

 B. THE STATE 'S FAILURE TO EXERCISE REASONABLE DILIGENCE TO SERVE INTERESTED PARTIES VIOLATED RCW 23.95.450.....5

 C. FINDING THAT SERVICE ON THE SECRETARY OF STATE WAS INSUFFICIENT AFTER SERVICE WAS EFFECTED ON TYI'S REGISTERED AGENT WOULD NOT LEAD TO ABSURD RESULTS.....11

III. CONCLUSION.....12

TABLE OF AUTHORITIES

Cases

Conner v. Universal Utils., 105 Wn.2d 168, 712 P.2d 849 (1986).....5

Crystal, China, and Gold Ltd. v. Factoria Center Investments, Inc., 93 Wn. App. 606, 969 P.2d 1093 (1999).....8, 9

Davis v. Blumenstein, 7 Wn. App. 2d 103, 432 P.3d 1251 (2019).....8, 9

Downey v. Pierce County, 165 Wn. App. 152, 267 P.3d 445 (2011).....7

Durland v. San Juan County, 182 Wn.2d 55, 340 P.3d 191 (2014).....7

Hangartner v. City of Seattle, 151 Wn.2d 439 (2004)..... 8

In re Dependency of K.D.S., 176 Wn.2d 644 (2013).....8

Jones v. Flowers, 547 U.S. 220, 126 S. Ct. 1708, 1713, 164 L. Ed. 2d 415 (2006).....1, 2, 3, 4

Lybbert v. Grant County, 141 Wash.2d 29, 1 P.3d 1124 (2000).....11

Martin v. Meier, 111 Wn.2d 471, 760 P.2d 925 (1988)9, 10

Martin v. Triol, 121 Wn.2d 135, 847 P.2d 471 (1993).....9

Prakash v. Perry, 40 Wn. App. 849, 700 P.2d 1201 (1985).....9, 10

Robinson v. Hanrahan, 409 U.S. 38, 93 S. Ct. 30, 34 L.Ed. 2d 47 (1972).....3

State v. McKinney, 148 Wn.2d 20 (2002)6

State Dept. of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 43 P.3d 4 (2002).....13, 17

Statutes

RCW 23.95.450.....*passim*

I. INTRODUCTION

Appellant, Interested Parties, by and through undersigned counsel, submits the following reply to the State's answering brief ("Response").

II. ARGUMENT

A. Interested Parties' Due Process Rights Were Violated in this Case.

In response to Interested Parties' assertion that Interested Parties' right to due process was violated in this case the State argues that because the procedures set forth in RCW 23.95.450 are generally sufficient to satisfy due process, Interested Parties' constitutional argument lacks merit. See Response at 14.

Notwithstanding the State's arguments to the contrary, the Supreme Court has made clear that even where a statutory scheme is constitutionally sufficient to provide adequate notice in the ordinary case, failure to take additional measures to ensure service of notice in a particular case may nonetheless violate due process depending on the circumstances. See Jones v. Flowers, 547 U.S. 220, 230, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006) ("In prior cases, we have required the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case.").

The State seeks to limit the holding of Flowers, arguing that in Flowers the Supreme Court held only that simply mailing a letter that is later returned as undeliverable is insufficient to satisfy the due process notice requirements, and distinguishes the instant case by arguing that in the instant case in addition to attempting service by mail, the State also attempted personal service on Interested Parties. See 14 – 15. But, the holding of Flowers is not so narrow. Rather, Flowers holds that where the State is aware that its chosen method of service is unsuccessful, it must attempt other reasonable methods of giving actual notice to a property owner of a property sale or seizure. See Flowers, 547 U.S. at 229 – 30 (“Although the State may have made reasonable calculation of how to reach Jones, it had good reason to suspect when the notice was returned that Jones was no better off than if the notice had never been sent. Deciding to take no further action is not what someone desirous of actually informing Jones would do: such a person would take further reasonable steps if any were available.”). It matters not whether the failed method of service was personal service or service by mail. Under Flowers, once the State becomes aware that the method of service it chose to use did not reach the intended recipient, it has a duty to attempt service through other reasonable means available to it to effect actual notice. The State failed to do so in this case.

The State tries to shift the blame onto Andy Zheng, TYI's registered agent, for its failure to provide constitutionally adequate notice to Interested Parties, arguing that Mr. Zheng violated statutory requirements by leaving the state and failing to update TYI's service address with the Secretary of State. See Response at 15. But, in Flowers the Supreme Court explained that a property owner's failure to update his or her mailing address with a state in accordance with its statutory scheme does not discharge the state of its obligation to give constitutionally adequate notice. See Flowers, 547 U.S. at 232 ("The Commissioner does not argue that Jones' failure to comply with a statutory obligation to keep his address updated forfeits his right to constitutionally sufficient notice, and we agree.").

The State's attempts to distinguish the instant case from Robinson v. Hanrahan, 409 U.S. 38, 93 S. Ct. 30, 34 L. Ed. 2d 47 (1972), are similarly unsuccessful. See Response at 15. While it is true that in Robinson the State had actual knowledge of the property owner's whereabouts, and that the State did not have actual knowledge of the whereabouts of TYI's registered agent in this case, that distinction is insufficient to change the outcome of this case. The relevant fact is that in the instant case the State had actual knowledge that its attempts at service on TYI and its registered agent were unsuccessful in reaching TYI, which triggered an obligation to attempt service by other reasonable means.

The State does not deny that it was aware at the time it made attempts to serve TYI by mail and personal service that the property where the service attempts were made was itself the subject of forfeiture proceedings and that it knew that its attempts at service were insufficient to place anyone at the address on notice. See Response at 16 – 17. The State simply argues that a forfeiture proceeding does not in and of itself deprive the owner of property of the right of ownership or occupancy. See id. at 17. But, it is irrelevant what the legal effect of a forfeiture proceeding is for purposes of the constitutional analysis at issue. The facts in this case are that the State was aware that there was, in fact, no one at TYI’s service address to receive notice and that its attempts at personal service and service by mail at that address were fruitless. Further, there is no dispute that even with the knowledge that its attempts at serving notice on TYI were unsuccessful, the State took no other reasonable alternative measures to locate or serve TYI or its registered agent. These facts are sufficient to establish that the State’s attempts at service violated due process under Flowers.

The State’s argument that Interested Parties’ due process argument should not be considered by the Court as beyond the scope of the argument presented in the trial court should also be rejected. It is blackletter law that the issue lack of notice in violation of due process may be raised for the first

time on appeal. See e.g., Conner v. Universal Utils., 105 Wn.2d 168, 171 – 74, 712 P.2d 849 (1986). Moreover, Interested Parties did, in fact, argue in the trial court that due process was violated because Interested Parties did not receive proper notice. See CP 48 – 49.

B. The State’s Failure to Exercise Reasonable Diligence to Serve Interested Parties Violated RCW 23.95.450.

In response to Interested Parties’ argument that the State failed to exercise reasonable diligence, as required by RCW 23.95.450, to locate TYI’s registered agent by using government databases and information it had access to in order to locate alternate mailing addresses for Mr. Zheng, the State argues that Interested Parties are arguing facts outside the record by pointing out that the State had access to registration information for Mr. Zheng’s vehicle and records from the Public Utilities District (“PUD”). See Response at 17 – 18. The State asserts that there is nothing in the record establishing that the State was aware of the license plate of Mr. Zheng’s vehicle. See Response at 18. The State’s assertion is wrong because the record clearly contains the license plate number of Mr. Zheng’s vehicle. The confusion is likely caused by an incorrect citation to the clerk’s paper’s in Appellant’s opening brief.² The following paragraphs are found on page

² Unfortunately, the Clerk’s Papers were not sequentially numbered by the Superior Court Clerk and it appears that counsel likely miscounted pages and cited to the wrong page of the record in the opening brief.

15 of the clerk's papers or page 5 of the Declaration of Detective Joseph Strong:

16. On December 11, 2017, Sgt. Mitchell obtained PUD records dating back to 2014 through an administrative subpoena. . . .

17. Sgt. Mitchell learned that the PUD subscriber is Andy Zheng who is the governing agent for Tao Yuan, Inc. DTF provided Sgt. Mitchell with information concerning Andy Zheng, specifically that he drives a white Lexus SUV, WA License BFX5236

CP 15. In light of the fact that the State had access to Mr. Zheng's license plate, the State could have easily determined the mailing address associated with Mr. Zheng's vehicle registration. Law enforcement officers routinely run license plates through the Department of Licensing ("DOL") database to learn information about a driver or vehicle owner. See, e.g., State v. McKinney, 148 Wn.2d 20, 60 P.3d 46 (2002) (holding that computerized license plate checks of license plate numbers and DOL licensing records do not violate the right to privacy).

Further, while the State is correct in asserting that there is no information in the record regarding the address that was listed in the PUD records available to the Drug Task Force ("DTF"), the record clearly demonstrates that Mr. Zheng was the registered subscriber listed on the PUD records, and it would certainly not have been unreasonable for the State to make attempts to ascertain Mr. Zheng's current address based on the information available to it between the DOL's database and the PUD

records available to it. See CP 15. Importantly, the State does not argue that the PUD records did not contain a different address for Mr. Zheng or that the PUD records were even examined to determine if they contained information that would lead to the discovery of Mr. Zheng's whereabouts.

The State also disputes Interested Parties' reading of RCW 23.95.450, arguing that the statute's plain language does not require the State to attempt service by every method set forth in subsections 1 through 3 of the statute before serving the Secretary of State. See Response at 20. The State bases its argument on the word "or" as used in subsection 4 of the statute, and the word "may" used in other provisions of the statute. But, contrary to the State's argument, the statute clearly outlines a procedure providing in subsection 1 of the statute that service on a corporation is made through its registered agent. See RCW 23.95.450(1). Under the plain language of the statute, service by the means set forth in subsection 2 is only permissible where the registered agent cannot be served through the exercise of reasonable diligence and service by the means set forth in subsection 3 is only permissible if service cannot be effected by the means set forth in subsection 2. See RCW 23.95.450(2), (3). Thus, despite the use of the words "or" and "may" in the statute, the only logical reading of the statute is that service on the Secretary of State is only effective to serve a corporation where service on the corporation cannot be made by any of the

methods set forth in subsections 1 through 3. At the very least, before resorting to substitute service on the Secretary of State the statute clearly requires a plaintiff to exercise reasonable diligence to serve the defendant corporation's registered agent as service on the registered agent must be attempted before attempting service under any of the other provisions of the statute. See RCW 23.95.450(1)

Finally, the State seeks to distinguish this case from Davis v. Blumenstein, 7 Wn. App. 2d 103, 432 P.3d 1251 (2019), by arguing that the language of the non-resident motorist statute explicitly requires service on a defendant at all known addresses, while the language of the corporate service statute, which is at issue in this case, does not require service at all known addresses. See Response at 21. While that may be true, like the non-resident motorist statute, the corporate service statute requires a plaintiff to exercise reasonable diligence when serving a registered agent before service can be made on the Secretary of State. See Crystal, China, and Gold Ltd. v. Factoria Center Investments, Inc., 93 Wn. App. 606, 611, 969 P.2d 1093 (1999). This term has been construed to have the same meaning as the term "due diligence" which is used in the non-resident motorist statute. See id. ("Crystal next argues that reasonable diligence as used in the substitute service provision for serving a registered agent should be given the same meaning as due diligence in the nonresident motorist

statute. We agree.”). At minimum, reasonable diligence requires that a plaintiff must “make honest and reasonable efforts to locate the defendant” but “[n]ot all conceivable means must be employed.” Martin v. Meier, 111 Wn.2d 471, 482, 760 P.2d 925 (1988). Davis clarified that failure to serve a defendant at a known address does not amount to due diligence. See id. at 116. It stands to reason that failure to make reasonable efforts to locate the registered agent of a corporation when the State knows that its efforts to serve the registered agent at his business address have been unsuccessful cannot amount to reasonable diligence under the corporate service statute.

Indeed, even in Crystal, where the reasonable diligence standard was found to be satisfied for purposes of the corporate service statute, the plaintiff made reasonable efforts to ascertain the registered agent’s home address when the registered agent could not be served at his business address. See Crystal, 93 Wn. App. at 612. Similarly, in Martin v. Triol, 121 Wn.2d 135, 847 P.2d 471 (1993), which is heavily relied upon by the State, the plaintiffs made efforts to find the defendant’s new home address after the defendants moved from the home where they were living at the time of the accident giving rise to the action. See id. at 150. The case law makes clear that the reasonable diligence standard requires a plaintiff to use available information to attempt to locate a defendant before resorting to substitute service. See Meier, 111 Wn.2d at 482 (“Not all conceivable

means need to be employed, but, at the least, the accident report, if made, must be examined and the information therein investigated with reasonable effort.”); Prakash v. Perry, 40 Wn. App. 849, 700 P.2d 1201 (1985) (lack of due diligence where plaintiff failed to examine the accident report which may have contained information that would lead to discovery defendant’s whereabouts).

As explained above, in the instant case, the State was aware that its efforts to serve TYI’s registered agent at his business address were unsuccessful because the property at the address where it attempted service was subject to forfeiture proceedings following a drug raid. Additionally, the State had access to databases and information, including the registered agent’s vehicle license plate, that could lead to discovery of the registered agent’s current address. Despite these facts, the State failed to take any action to ascertain Mr. Zheng’s whereabouts or identify alternative addresses for Mr. Zheng. The State’s actions in this case certainly cannot be said to amount to “honest and reasonable efforts to locate the defendant.” See Meier, 111 Wn.2d at 482. Because the State failed to exercise reasonable diligence to serve TYI’s registered agent before serving notice on the Secretary of State, substitute service on the Secretary of State was invalid.

C. Finding that Service on the Secretary of State was Insufficient after Service was Effected on TYI's Registered Agent Would not Lead to Absurd Results.

Finally, the State argues that finding that service was effected on TYI's registered agent, Mr. Zheng, when he received a copy of the complaint and warrant affidavit from the Gray's Harbor County Sheriff's Office constituted service would lead to absurd results, and that the Court should therefore find that service on the Secretary of State was the last proper service on TYI. See Response at 24. The State asserts that because Mr. Zheng did not receive all the pleadings necessary to effect service of process under the pertinent court rules and service statutes Mr. Zheng was never properly served with process. See id. A defendant can waive objections related to service or sufficiency of process. See e.g., Lybbert v. Grant County, 141 Wash.2d 29, 39, 1 P.3d 1124 (2000). Thus, a defendant can accept incomplete process as sufficient notice of a pending suit. Consequently, finding that Mr. Zheng was served with process when he received a copy of the complaint from the Sheriff's Office on October 18, 2018, would not lead to absurd results.

It would be much more absurd if despite the clear language of the corporate service statute, a plaintiff is permitted to file for default days after a defendant corporation first receives actual notice of an action when the plaintiff has failed to move for default for months after serving the Secretary

of State. Under RCW 23.95.450(4) service on the Secretary of State is only effective where the registered agent cannot be served through reasonable diligence. Here, after serving the Secretary of State, the State failed to move for an order of default for months. It was not until five days after Mr. Zheng received actual notice of the suit that the State moved for an order of default. See CP 39 – 40. Because Mr. Zheng received notice of the suit and was therefore served before the State moved for default, service on the Secretary was no longer effective under RCW 23.95.450.

III. CONCLUSION

For the foregoing reasons and the reasons set forth in Appellant's opening brief the Court should reverse the orders of default and forfeiture entered in this matter and remand this case to the trial court for further proceedings. Appellant should also be awarded reasonable costs and attorneys' fees.

DATED this 19th day of September, 2019.

Respectfully submitted,

BLACK LAW, PLLC

s/Christopher Black

Christopher Black, WSBA No. 31744

s/Teymur Askerov

Teymur Askerov, WSBA No. 45391

Attorneys for Interested Parties

705 Second Avenue, Suite 1111

Seattle, WA 98104

tim@blacklawseattle.com

BLACK LAW PLLC

September 19, 2019 - 4:25 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53277-8
Appellate Court Case Title: Grays Harbor Drug Task Force & Grays Harbor County, Respondents v. Real Property, et al, Appellants
Superior Court Case Number: 18-2-00363-2

The following documents have been uploaded:

- 532778_Briefs_20190919162301D2898663_6528.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was 19-09-22 Reply Brief.pdf

A copy of the uploaded files will be sent to:

- Tmunger@co.grays-harbor.wa.us
- appeals@co.grays-harbor.wa.us
- chris@blacklawseattle.com

Comments:

Sender Name: Teymur Askerov - Email: tim@blacklawseattle.com
Address:
705 2ND AVE STE 1111
SEATTLE, WA, 98104-1720
Phone: 206-623-1604

Note: The Filing Id is 20190919162301D2898663