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Case No. 329101

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COURT OF APPEALS, STATE OF WASHINGTON
DIVISION III

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STATE OF WASHINGTON
By _____

VICKI POSA, an individual

Appellant,

vs.

JOHN and LINDA ROBEL,
and the marital community comprised thereof,
d/b/a ROBEL'S ORCHARD, and
JOHN DOES 1-4 and CORPORATION ABC,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The appellant (“Posa”) appeals the granting of summary judgment in favor of respondent (“Robels”). The Spokane County Superior Court per the Honorable Michael P. Price, granted summary judgment to Robles on September 23, 2014, and this appeal followed.

II. ISSUES ON APPEAL

1. The trial court properly ruled that Posa did not make a necessary and adequate showing that service of process, by alternate means, was necessary.

2. Service of process in this case was defective and the statute of limitations expired on Posa’s claims.

The trial court’s order granting defendants’ motion for summary judgment should be upheld and Posa’s appeal should be denied.

III. STATEMENT OF THE CASE

The underlying lawsuit involved plaintiff’s alleged fall off a ladder at an orchard owned by defendants in Greenacres, Washington (CP 4). On July 20, 2010, Posa, an Arizona resident, showed up at Robels’ property, which was closed (CP 67). Robels advised Posa that the orchard was closed but that since she had traveled to Washington, Robels gave the plaintiff and her friend a bucket and told Posa she could go into the orchard and pick some

cherries for free (CP 67, 68). Posa was specifically told to only pick cherries that she and her friend were able to reach when standing on the ground (CP 68). Notwithstanding these admonishments, Posa, at some point, found a ladder in the orchard, took it to a tree, climbed it, and then somehow fell off the ladder. Posa claims personal injuries from the alleged fall. Id.

Posa filed a summons and complaint on July 18, 2013 (CP 1-7). On October 16, 2013, Monica Flood Brennan, counsel for Posa, filed a Declaration of Attempted Service of Process and Motion For Service By Mail and For Extension of Time (CP 78-79). Also filed on October 16, 2013, was the Declaration of Lynn Taylor re: Attempted Service of Process (CP 81-82). On October 16, 2013, a court commissioner signed the Order For Service By Mail (CP 9-10).

On October 23, 2013, counsel for Robels filed a Notice of Appearance on behalf of defendants (CP 29-30). The Notice of Appearance provided, in part:

. . . without waiving any available defenses or objections under CR 12 or other authority, hereby enter their appearance in the above cause and request that all further pleadings and papers herein (except process) be served upon their attorney, Andrew C. Bohrsen, at the address below stated.

(CP 29-30.)

The Declarations and Affidavits demonstrate that Posa never personally served Robels (CP 23-24; CP 32- 33). At all times relevant, when Posa was supposedly trying to serve Robels, Robels were never out-of-state, always resided at the same property, owned the business at which Posa was allegedly injured, and otherwise did not try to avoid service (CP 68). Robels never threatened a process server and never posted signs indicating that intruders would be shot or otherwise harmed on Robels' property. Id.

IV. ARGUMENT

A. Standard of Review For Summary Judgment. On appeal of a summary judgment order, the applicable standard of review is *de novo* and therefore the appellate court performs the same inquiry as did the trial court. *Folsom, et al. v. Burger King Int'l, et al.*, 135 Wn.2d 658, 958 P.2d 301 (1998).

Summary Judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). A material fact is one upon which the outcome of the litigation depends in whole or in part. *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d

250 (1990) (citing *Morris v. McNicol*, 83 Wn.2d 491, 519 P.2d 7 (1974)).

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. See *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). If the moving party meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial. If, at this point, the party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,” then the trial court should grant the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L.Ed.2d 265, 106 S.Ct. 258 (1986); See also *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630-32 (9th Cir. 1987). In *Celotex*, the United States Supreme Court explained this result: “In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.” *Celotex*, 477 U.S. at 322-23.

In making this responsive showing, the non-moving party cannot rely on the allegations made in its pleadings. CR 56(e) states that the response, “by affidavits or as otherwise provided in this rule,

must set forth specific facts showing that there is a genuine issue for trial.”

The *Celotex* standard comports with the purpose behind the summary judgment motion: “To examine the sufficiency of the evidence behind the plaintiff’s formal allegations in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists.” *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182, 188 (1989).

B. The Statute of Limitations Has Expired. The statute of limitations for personal injuries is three years. RCW 4.16.080(2). The accident occurred on July 20, 2010, and thus the statute of limitations expired on July 20, 2013. In this case, Posa filed her complaint on July 18, 2013. The statute of limitations is tolled for 90 days after the complaint is filed if service is completed within that 90-day period.

RCW 4.16.170 provides in relevant part:

For the purpose of tolling any statute of limitations, an action shall be deemed commenced when the complaint is filed or the summons served, whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. . . . If . . . following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

In this case, there was no personal service of Robels within the 90-day period, and thus the issue in this case is whether the service by mail was proper. As explained herein, the service by mail was deficient and thus invalid. Therefore, Posa missed the statute of limitations.

C. Service Was Improper. CR 4(d)(4) provides for alternative service by mail in circumstances justifying service by publication. Robels challenged the alternative service on two grounds, arguing that it was served outside the 90-day commencement period and that the affidavit supporting the order of alternative service is insufficient. When a supporting affidavit is insufficient, service is not complete, is therefore not timely, and the statute of limitations therefore runs.

Alternatively, Posa could have also attempted service by publication, which she did not. CR 4(d)(3) provides:

By Publication. Service of summons and other process by publication shall be as provided in RCW 4.28.100 and .110, 13.34.080, and 26.33.310, and other statutes which provide for service by publication.

RCW 4.28.100 provides:

When a defendant cannot be found within the State, and upon the filing of an affidavit of the plaintiff, his agent, or attorney, with the clerk of the court, stating that he believes that the defendant is not a resident of the State, or cannot be found therein, that he has

deposited a copy of the summons (substantially in the form prescribed in RCW 4.28.110) and complaint in the post office, directed to the defendant at this place of residence, unless it is stated in the affidavit that such residence is not known to the affiant, and stating the existence of one of the cases hereinafter specified, the service may be made by publication of the summons by the plaintiff or his attorney in any of the following cases:

* * *

- (2) When the defendant, being a resident of this state, has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent;

RCW 4.28.110 provides in relevant part:

The publication shall be made in a newspaper of general circulation in the county where the action is brought once a week for six consecutive weeks: *Provided*, That publication of summons shall not be made until after the filing of the complaint, and the service of the summons shall be deemed complete at the expiration of the time prescribed for publication. The summons must be subscribed by the plaintiff or his attorney or attorneys. The summons shall contain the date of the first publication and shall require the defendant or defendants upon whom service by publication is desired, to appear and answer the complaint within sixty days from the date of the first publication of the summons; and the summons for publication shall also contain a brief statement of the object of the action. The summons for publication shall be substantially as follows: . . .

The statutes do not authorize alternative service simply because the defendant cannot be found. *Kent v. Lee*, 52 Wn. App. 576, 579, 762 P.2d 24 (1988). Instead, the specific requirements of

the statutes must be satisfied. *Kent v. Lee*, supra at 579. Because the statutes require strict compliance, an "affidavit that omits the essential statutory elements is as good as no affidavit at all." *Kent v. Lee*, supra at 579. Finally, while a plaintiff need not exhaust all conceivable means of personal service, the plaintiff is required to make an honest and reasonable effort to find the defendant. *Painter v. Olney*, 37 Wn. App. 424, 427, 680 P.2d 1066, review denied, 102 Wn.2d 1002 (1984).

These statutes thus set forth fundamental requirements that a plaintiff's affidavit must contain in order to be authorized to conduct service by publication.

In this case, Posa never attained personal service on Robels, failed to comply with requirements for service by mail, and did not even try service by publication. The declarations do not sufficiently delineate the actual personal service attempts on Robels. The declarations only indicate that the process server tried two times to personally serve Robels at their home. One time no one answered. It is possible that at this time no one was home, but the process server never indicated the time she tried to serve. The second time the process server indicated she saw a car drive up as she was on the property. She did not knock on the door, but rather yelled at the car's

occupant. It is impossible to know if this was John Robel as the process server indicated. She again did not indicate the time this happened, never provided a car description nor a description of the car's occupant. Proper service does not entail just leaving documents on a house's door either.

Personal service was never obtained. The lack of diligent tries does not allow for alternative service by mail or publication (the latter of which Posa did not even try). These failures mean that service is deficient and therefore this court does not have jurisdiction over Robels. On this basis alone, Posa's appeal should be denied.

The statute and the case law is very clear that there are certain requirements that must be set forth in a plaintiff's affidavit to even make a *prima facie* showing that there is a legitimate basis for serving a defendant by mail. In this case, Posa failed to set forth any facts or allegations to meet the basic statutory requirements, and thus the affidavit is clearly ineffective and should be treated as if no affidavit was filed at all.

The court explained that a "bare recitation of these factors is insufficient. The conclusions are required, but so are the facts supporting the conclusions." *In re Marriage of Logg*, 74 Wn. App. 781, 875 P.2d 647 (1994). "An affidavit that omits the essential statutory

elements is as good as no affidavit at all.” *In re Marriage of Logg*, 74 Wn. App. at 785.

In the case of *In re Marriage of Logg*, the plaintiff’s affidavit did not recite that the defendant could not be found in the state, but only that the defendant was on the road frequently and difficult to locate at any given time. The summons was not mailed to any of the three known addresses that the defendant had resided. There was no allegation that the defendant left the state for purposes of avoiding service, let alone a statement of supporting facts. Further, there was no allegation that the defendant concealed himself within the state to avoid service. Accordingly, the court held that the plaintiff’s affidavit failed to frame a basis for service of process by publication, and thus the service of process on the defendant was invalid. *In re Marriage of Logg*, 74 Wn. App. at 785.

Here, like the *Logg* case, Posa’s attorney and her process server did not demonstrate how Robels were allegedly attempting to evade service, as they were not. There was no allegation that Robels left the state to evade service, or facts supporting this allegation. There was no allegation or supporting facts that Robels were concealing themselves to evade service. Thus, Posa failed to comply with the requirements which would allow service by alternative means.

Service is therefore not proper. Without proper service this court does not have personal jurisdiction over Robels.

Even if this court finds that Posa made allegations to at least make a *prima facie* showing of a basis for conducting service of Robels by mail, Rosa has clearly failed to meet the high burden of proof that Robels had the requisite intent necessary to allow for service by mail. The rule allowing service by publication is analogous to service by mail “In order to perfect service by publication, the [plaintiffs] were required to set forth facts supporting a conclusion that [defendant] had left the state or was concealing himself with intent to defraud creditors or avoid service of process.” *Bruff v. Main*, 87 Wn. App. 609, 612, 943 P.2d 295 (1997). “A bare recitation of the statutory factors required to obtain jurisdiction is insufficient.” *Bruff*, 87 Wn. App. at 612.

In the case of *Bruff v. Main*, the court held that the facts alleged by the plaintiff in the affidavit of service were insufficient to satisfy the intent requirement set forth in RCW 4.84.100. In that case, the plaintiff’s counsel filed an affidavit for service by publication which:

recited, without further explanation, information that she had learned through discovery, including the fact that [the defendant] was not employed, that he did not have a listed telephone number, that he never lived at the Snohomish address listed on the police report, and that he had ‘a history of credit problems’ in Washington.

Counsel also appended declarations from two investigators who had attempted to serve [the defendant] personally. One investigator stated that he was unable to locate [the defendant] through the two addresses listed on the police report or through the two addresses Department of Licensing and Department of Motor Vehicle records, which still listed the Mill Creek address for [the defendant].

The second investigator, Michael Schoonover, knew [the defendant] from 'many previous contacts' and states that the best source of information for located him was his parent. Schoonover located [the defendant's] parents in British Columbia and spoke with [the defendant's] father, who said that he was living in the Seattle area.

Bruff, 87 Wn. App. at 613. The court reasoned that the mere fact that the defendant in the case had moved twice after the accident, nor that the:

bare allegation that [the defendant] had 'a history of credit problems' indicate that he was attempting to avoid a collection action or defraud a creditor. Significantly, the investigator who had had numerous prior contacts with [the defendant] provided no details about those contacts or any other facts suggesting that [the defendant] had attempted to conceal himself or avoid collection actions in the past.

In sum, the [plaintiffs'] affidavits contained no facts ***clearly suggesting*** that [the defendant's] change of residence, or any other conduct, ***was undertaken with the intent required by RCW 4.28.100(2)***. RCW 4.28.100(2) does not authorize service by publication merely because the [plaintiffs] were unable to locate [the defendant], despite diligent efforts.

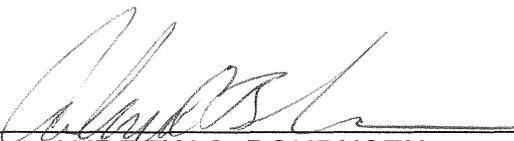
Bruff, 87 Wn. App. at 613. [Emphasis added].

V. CONCLUSION

In the present case, as indicated above, Posa failed to meet the requirements of the service attempts to allow service by mail or publication. The declarations submitted in support of service by mail are wholly deficient, as delineated above. Service was never timely or properly completed. Because of this, the statute expired. Without personal jurisdiction and with a stale claim outside the statute of limitations, Posa's cause of action was dismissed. Robels respectfully request that the summary judgment be affirmed.

RESPECTFULLY SUBMITTED this 11 day of August, 2015.

BOHRNSEN STOCKER SMITH LUCIANI,
PLLC

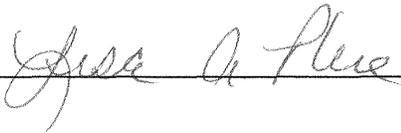
By: 
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Attorneys for Respondents

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing BRIEF OF RESPONDENTS was served on the following, by the method indicated on the 11 day of August, 2015:

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