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NO. 63297-3-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

CONCORD CONCRETE PUMPS, INC.,

Appellant/Defendant,

v.

RALPH'S CONCRETE PUMPING, INC.,

Respondent/Plaintiff.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE PALMER ROBINSON
King County Superior Court No. 08-2-02714-7 SEA

REPLY BRIEF OF APPELLANT/DEFENDANT CONCORD CONCRETE PUMPS, INC.

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I. SUMMARY

Ralph's argues it was not required to file a RCW 4.28.185(4) affidavit because it served Concord by mail under CR 4 (i). Ralph's has it backward. CR 4(i) allows alternate methods of service only when service has already been authorized by some other statute or rule. If no other statute or rule has authorized service, CR 4(i) does not provide independent authority. Ralph's failed to comply with the long-arm statute; therefore, no service of any manner was authorized and Ralph's had no authority to serve Concord under CR 4(i). The default judgment against Concord is void. Moreover, Concord is not subject to personal jurisdiction in Washington's courts. This Court should (i) reverse the King County Superior Court's Order Denying Defendant's Motion to Vacate Default Judgment and Set Aside Entry of Default, (ii) vacate the default judgment and entry of default, (iii) dismiss Ralph's complaint for lack of jurisdiction over Concord, and (iv) award Concord its fees and costs pursuant to RCW 4.28.185(5).

II. ARGUMENT

A. Under the Long-Arm Statute, an Affidavit under RCW 4.28.185(4) is Required Before Any Method of Service is Authorized, Including Those Set Forth in CR 4(i)

Ralph's attempted to serve Concord via mail in Canada "under the provisions of RCW 4.28.185 and Washington Court Rule 4(i)(D)." CP at 43. Even though it knew it was using the long-arm statute, Ralph's failed to file the affidavit required by RCW 4.28.185(4) to establish that service on Concord could not be made in Washington. Ralph's now argues that no affidavit was needed because it was serving Concord via mail under CR 4(i) instead of personally under the long-arm statute. Respondent's Br. at 18. Ralph's is wrong.

Out-of-state service is in derogation of common law and must be narrowly construed. Hatch v. Princess Louise Corp., 13 Wn. App. 378, 379, 534 P.2d 1036 (1975). CR 4(i) allows alternate methods of service only "[w]hen a statute or rule authorizes service upon a party not an inhabitant of or found within the state." And the long-arm statute does not authorize out-of-state service unless an affidavit is filed showing that service in Washington is impossible. RCW 4.28.185(4); Schnell v. Tri-State Irrigation, 22 Wn. App. 788, 790, 591 P.2d 1222 (1979)

("Subsection (4) of the statute . . conditions the validity of out-of-state service on the filing of the affidavit.").

Ralph's failed to file such an affidavit. Service on Concord, whether under CR 4(i) or not, was never authorized. Consequently, the default judgment against Concord is void for lack of personal jurisdiction. ShareBuilder Sec. Corp. v. Hoang, 137 Wn. App. 330, 335, 153 P.3d 222 (2007) ("If a plaintiff has not complied with RCW 4.28.185(4), then there is no personal jurisdiction and the judgment is void.").

i. Ralph's Interpretation Would Render the Operative Portions of CR 4(i) and RCW 4.28.185(4) Meaningless

In its brief, Ralph's correctly states that "[a] rule of court must be construed so that no word, clause or sentence is superfluous, void or insignificant." Respondent's Br. at 17. But then Ralph's argues for an interpretation of CR 4(i) that would render the first clause of CR 4(i) and the entirety of RCW 4.28.185(4) meaningless.

Ralph's argues that the mere existence of the long-arm statute means that the CR 4(i) alternate methods of service may be used. Respondent's Br. at 16. That is not the law. The long-arm statute only provides jurisdiction and allows service only after certain predicate conditions have been met. Ralph's failed to meet those conditions and had

no statutory authorization to serve Concord. Without such statutory authorization, CR 4(i) is inapplicable by its very terms:

> *When a statute or rule authorizes service upon a party* not an inhabitant of or found within the state, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made
> . . . .

(emphasis added).

Ralph's interpretation—that the RCW 4.28.185(4) affidavit is not required for service under CR 4(i)—would read the words "[w]hen a statute or rule authorizes service upon a party" out of CR 4(i). Ralph's interpretation would also effectively remove the affidavit requirement from the long-arm statute. Indeed, using Ralph's logic, a plaintiff would never have to file the required affidavit establishing that service in Washington is impossible. Consequently, any plaintiff could serve any defendant—foreign or domestic—using any of the means set out in CR 4(i). That is not the law.

ii. Concord's Interpretation Correctly Harmonizes RCW 4.28.185(4) and CR 4(i)

CR 4(i) and RCW 4.28.185 should be read "in such a way that they can be harmonized." See Washington State Council of County and City Employees v. Hahn, 151 Wn. 2d 163, 168-69, 86 P.3d 774 (2004). Concord's interpretation provides such harmony. CR 4(i) does not

provide independent authorization for service, and instead only allows alternate methods of service once service has been authorized by a statute. The long-arm statute only authorizes service after the required affidavit has been made to establish that in-state service cannot be completed. To harmonize the rule and the statute requires reading the rule to only provide for alternate methods of service after the affidavit required by RCW 4.28.185(4) is filed.

Ralph's interpretation also creates a constitutional conflict. Washington's long-arm statute is co-extensive with the due process clause of the Constitution. Shute v. Carnival Cruise Lines, 113 Wn. 2d 763, 766-67, 783 P.2d 78 (1989). Interpreting CR 4(i) to authorize service by mail on Concord impermissibly expands the court's power beyond the constitutional limits mirrored in the long-arm statute. A court rule cannot supercede the Constitution. State v. Smith, 84 Wn. 2d 498, 501, 527 P.2d 674 (1974). Fortunately, the Court need not reach the constitutional issue. Ralph's never filed the required affidavit under RCW 4.28.185(4), service on Concord was never authorized, and the court below never had jurisdiction over Concord.

iii. There are No Cases Directly on Point

Ralph's correctly points out that Concord has cited no cases directly addressing the issue of whether the affidavit requirement of RCW 4.28.185(4) must be met if service is effected pursuant to CR 4(i). Presumably, this is because the rule and statute are clear, and no one has taken the untenable position Ralph's now takes.

Ralph's citation to Marriage of Tsarbopoulos is misleading. 125 Wn. App. 273, 104 P.3d 692 (2004). As Ralph's acknowledges, that case "was considering service of a complaint for dissolution of a marriage commenced under RCW 26.09." Respondent's Br. at 17, n. 11. In that case, "the long-arm jurisdiction under RCW 4.28.185 did not apply factually." Id. at 280. Thus, the Tsarbopoulos court did not discuss the long-arm statute's affidavit requirement. In short, Tsarbopoulos has no bearing here.

B. Concord is Not Subject to Personal Jurisdiction in Washington

Ralph's accuses Concord of not responding to Ralph's lawsuit until Ralph's enforced its default judgment and attached Concord's property. But Concord had no obligation to formally respond to Ralph's suit—it was never properly served. Without proper service, the court had no jurisdiction. Concord was under no obligation to travel to a foreign

country to join suit when there was no proper service and no jurisdiction over Concord.

Regardless, Ralph's characterization of the case history is irrelevant to the issues before the court. What is important is that Concord lacks sufficient contacts with Washington for the court to exercise jurisdiction. As established by the Declaration of Isidro Flores, Concord is a family-owned Canadian business with no offices, employees, or property in Washington. CP at 39-40. Moreover, Don Carlson—whose activities Ralph's pins its jurisdictional allegations on—is an independent concrete pump broker who has never has been a Concord employee. CP at 41. Mr. Carlson brokered the sale of Concord's concrete pump to Ralph's and communicated separately with both parties, who never spoke directly with one another. Id.

Ralph's cannot establish on this record that Concord did purposefully availed itself of the privilege of conducting activities in Washington, thereby invoking the benefits and protections of its laws. Walker v. Bonney-Watson Co., 64 Wn. App. 27, 34, 823 P.2d 518 (1992) (citing Hanson v. Denckla, 357 U.S. 235, 253 (1958)). Consequently, the Washington courts lack personal jurisdiction over Concord.

i. Concord's Sale of Products that Ultimately Enter Washington is not Sufficient to Establish Jurisdiction

Ralph's appears to argue that Concord is subject to personal jurisdiction in Washington merely because it sells products that end up in Washington. To support this argument, Ralph's cites Crose v. Volkswagenwerk, 88 Wn. 2d 50, 558 P.2d 764 (1970). That case is clearly distinguishable from this one. In Crose, Volkswagen distributed cars throughout Washington through a regional distributor and various local dealers. Id. at 53. While the distributor and dealers were technically independent from Volkswagen, they were nonetheless under the contractual control of Volkswagen. Id. at 53-54. In short, Volkswagen maintained "a well-organized, fully-integrated worldwide chain of distribution" that continuously shipped cars into Washington. Id. at 55.

The sale of Concord's concrete pump to Ralph's is an entirely different matter. Mr. Carlson acted as an independent broker, solicited Ralph's business, and consummated the sale. CP at 41. Concord merely placed its product "into the stream of commerce," which is not enough to subject it to the jurisdiction of the Washington courts. See Holland Am. Line Inc. v. Wartsila N. Am., Inc., 485 F.3d 450, 459 (9th Cir. 2007).

ii. The "But For" Jurisdictional Test is Inapplicable Here

Ralph's argues that CTVC of Hawaii, Co., Ltd. v. Shinawatra creates a "but for" test that should be applied in this case. 82 Wn. App. 699, 919 P.2d 1243 (1996). But the CTVC "but for" test is inapplicable here, as it only applies to a corporation's active solicitation of business in Washington:

> To determine whether a claim against a foreign entity *arises from its solicitation of business* within this jurisdiction, Washington courts apply the "but for" test. Jurisdiction is proper in Washington if the events giving rise to the claim would not have occurred "but for" the *corporation's solicitation of business* within this state.

CTVC, 82 Wn. App. at 719 (emphasis added). Concord did not solicit Ralph's business. CP at 41. Mr. Carlson did. Id. The CTVC "but for" test is inapplicable.

Nor is the purported "but for" test as easily satisfied as Ralph's asserts. The CTVC court recognized that mere execution of a contract with a Washington resident—certainly a "but for" factor in a later action related to that agreement—does not by itself establish the purposeful act requirement. CTVC, 82 Wn. App. at 711. Instead, the court "must examine the circumstances of the entire transaction," including the parties' actual course of dealing, prior negotiations, contemplated future consequences, and terms of the contract. Id.

C. Concord is Entitled to Attorney's Fees

Ralph's claims Concord is not entitled to attorney's fees under RCW 4.28.185(5) because Ralph's did not personally serve Concord, but instead served Concord via mail under CR 4(i). Ralph's is again misdirecting the Court's attention. In order to serve Concord, Ralph's needed statutory authority from the long-arm statute.

The point of CR 4(i) is merely to provide alternate methods of service once service is authorized by statute, not to amend or change the substantive law of the underlying jurisdictional statutes. The fee provision of the long-arm statute is there to compensate the defendant for the burden of litigating in Washington. As this court recognized in ShareBuilder, *supra*, an out-of-state defendant who is successful in vacating a default judgment for lack of personal jurisdiction is entitled to reasonable attorney's fees and costs, especially when the plaintiff's "errors necessitated th[e] appeal." 137 Wn. App. 330, 337.

IV. CONCLUSION

Because Ralph's failed to satisfy the requirements of Washington's long-arm statute and to prove that Concord has the necessary minimum contacts with Washington to support specific jurisdiction, Concord respectfully requests that this Court reverse the Superior Court's March 31, 2009 order denying Concord's Motion to Vacate Default Judgment and Set Aside Entry of Default, and vacate the default judgment and set aside the entry of default against Concord, then dismiss Ralph's complaint for lack of jurisdiction over Concord. Concord also respectfully requests that this Court award Concord its fees and costs under RCW 4.28.185(5).

DATED September 18, 2009.

Respectfully submitted,

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