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NO. 67009-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

DEBRA STEWART,

Appellant,

v.

GRIFFITH INDUSTRIES INC DBA ET AL,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE KIMBERLEY PROCHNAU

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1 The trial court erred in entering the order of January 21, 2011 finding that Rosales did not waive his defense of improper service as Rosales waived this defense by participating in litigation and being dilatory in asserting the defense.

2. The trial court erred in denying Stewart's March 15, 2011 motion to strike Rosales' affirmative defense of improper service.

B. ISSUES PRESENTED

1. **DID THE TRIAL COURT ERR WHEN IT DETERMINED THAT ROSALES DID NOT WAIVE HIS AFFIRMATIVE DEFENSE OF LACK OF SERVICE?**

2. **DID THE TRIAL COURT ERR WHEN IT DENIED STEWART'S MOTION TO STRIKE ROSALES' AFFIRMATIVE DEFENSES UNDER CR 37(D)?**

C. STATEMENT OF THE CASE

On August 9, 2006 former Defendant Griffith Industries contracted with Rosales to install flooring in the apartment of Debra Stewart. Adhesive was left of the floor causing Stewart to slip and fall breaking her hip. CP 2-3. On March 20, 2008 Appellant filed suit against former Defendant Griffith Industries and Rosales. CP 1-4.

Initially Griffith was served, but Rosales was not. CP 17-19. Despite not being initially served, Rosales, through his attorney, participated in the lawsuit. Rosales sent out Interrogatories and Requests for Production to Stewart as well as providing a list of his witnesses. CP 82. None of Rosales' Interrogatories or Requests for Production addressed service of process. RP 13.

In August, 2008 service of process was attempted to be made on Cesar Alberto Rosales and Rosales Carpet. Stewart hired Northwest Legal Support to attempt service. Service was attempted but Northwest Legal Support could not locate Cesar Alberto Rosales. CP 81.

In July, 2009 Stewart's counsel learned from Ron Belec of Northwest Legal Support that they were unable to serve Rosales as he was no longer at his last known address. Mr. Belec further reported that Rosales was not registered to vote in Washington State, had no vehicles listed under his name in Washington and no current business licenses in this state. CP 81.

After examining Rosales' bonding company documents and asking for additional contact information Stewart's counsel was giving an old address provided by Rosales. CP 81.

In July, 2009 Stewart hired Kivu Consulting, an investigative firm, and provided Kivu with all of the contact information previously provided to Northwest Legal Support and the information about the additional

associated address. CP 81. In early August, 2009 Kivu Consulting provided Stewart's counsel with the address of 16495 NE 80th St. Redmond Washington as an address that was believed to be linked with Rosales. CP 81.

After receiving this information service of process was made to the above Redmond address. During the week of August 17th 2009 Justin Smith served Rosales' Complaint and Summons to an unknown adult male at the address. CP 88.

After this service Rosales continued to participate in the lawsuit. The trial date and case schedule was continued twice while Stewart appealed a motion for summary judgment granted by the trial court in 2009 that dismissed Griffith from the lawsuit. The Court of Appeals affirmed the trial court's dismissal on October 11, 2010. CP 82, CP 67-72. During the time that the appeal was pending and prior to the Court's ruling Rosales' counsel Robert Reinhard agreed to continue the trial date and the case schedule on two dates. CP 20-22, CP 27-29. At no time prior to the October 11, 2010 ruling affirming the trial court did Rosales bring up an issue with service of process. On November 12, 2010 after the ruling Rosales filed his Answer claiming the affirmative defense of improper service. CP 35-39. Prior to this date no issue of improper service had been raised. Rosales then filed a Motion for Summary Judgment based in

this affirmative defense. CP 45-51. Stewart's response brief outlined the abode service conducted in 2009. CP 73-79. Rosales' reply brief included a declaration from a private investigator challenging the assertion of Stewart that the address served was Rosales' true address. CP 99-105, CP 89-98.

On January 11, 2011 the Court, having received Rosales' motion and reply, Stewart's response and the attached declarations for all briefing heard initial oral argument for Rosales' Motion for Summary Judgment. CP 110, 1 RP 1-29. The court rejected Stewart's argument that Rosales had waived their affirmative defense of improper service. 1 RP 24. The court expressed concern as to the wording of the declaration of service 1 RP 25. The court agreed to continue the motion stating:

I believe that the plaintiff's are entitled to a continuance because it wasn't until the reply. . .that they're presented with the additional information indicating that there may be a need to get further clarification of whether there's been abode service.

I think *the plaintiffs*, because we are interested in trying to get to the merits of the case and not dismissing on procedural grounds, *should have additional time to attempt to make out their case that there has been actual good abode service.* This doesn't do it, but the plaintiffs should have the opportunity.

I will continue that matter and give the plaintiffs some additional opportunity to make their record and the defendants to reply.
(Emphasis added) 1 RP 26.

The matter was then continued to March 15, 2011 to address the issue of service. CP 111.

On the same date of January 11, 2011 Stewart's counsel began attempts to schedule Rosales' deposition. CP 128. As counsel later told the court during the March 15, 2011 hearing getting Rosales' deposition was vital to show (1) where his place of abode was, (2) was he properly served and (3) where he has been since the case has been filed to determine if he was in the jurisdiction of the state. 2 RP 7. On February 23, 2011 Stewart's counsel sent Rosales' counsel a notice of deposition. CP 137-138. Rosales did not appear at his scheduled deposition. CP 128.

On March 4, 2011 Rosales filed a Supplemental Memorandum which included declarations from Steve Foltz and Rosa Diaz. CP 114-120. Ms. Diaz' declaration stated that Rosales did not live at the Redmond address. CP 124-126. On March 10, 2011 Stewart filed her Response to Supplemental Memorandum and a Motion to Strike Affirmative Defenses. CP 127-133. On March 15, 2011 the trial court denied Stewart's Motion and granted Rosales' Motion for Summary Judgment. CP 152-156.

D. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT FOUND THAT ROSALES' PARTICIPATION IN LITIGATION AND DISCOVERY DID NOT WAIVE HIS AFFIRMATIVE DEFENSE OF IMPROPER SERVICE

A decision to grant a Motion for Summary Judgment is reviewed de novo. Bunnell v. Blair, 132 Wn.App. 149, 152, 130 P.3d 423 (2006) (citing Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002)). When the Court reviews an order granting summary judgment de novo, the Court engages in the same inquiry as the trial court and considering all facts and reasonable inferences in the light most favorable to the nonmoving party. Korslund v. DynCorp Tri-Cities Servs., Inc., 156 Wn.2d 168, 177, 125 P.3d 119 (2005). Summary judgment is proper if the record before the court shows that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 861, 93 P.3d 108 (2004). The moving party is held to a strict standard. Any doubt as to the existence of a genuine issue of material fact is resolved against the moving party. Atherton Condo. Assn. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

Under the doctrine of waiver, affirmative defenses such as insufficient service of process may, in certain circumstances, be waived by

a defendant as a matter of law. Lybbert v. Grant County, 141 Wash.2d 29, 38-39, 1 P.3d 1124 (2000). A defendant waives any deficiency in service of process if (1) assertion of the defense is inconsistent with [the] defendant's prior behavior or (2) the defendant [was] dilatory in asserting the defense. King v. Snohomish County, 146 Wn.2d 420, 424, 47 P.3d 563 (2002). In this case Rosales has waived his affirmative defense by both asserting a defense that is inconsistent with his prior behavior and by being dilatory in asserting the defense.

In Lybbert v. Grant County the plaintiffs sued Grant County after being injured due to road conditions. They mistakenly served process on the wrong county official. Lybbert at 32. Grant County participated in litigation by filing its notice of appearance, serving plaintiffs with discovery demands and associating with outside counsel. Id at 32-33. After the statute of limitations had run Grant County then filed its answer and a motion for summary judgment. Id. The Lybbert Court stated that, “the civil rules require that the defense of insufficient service of process be brought forth in a pleading.” Id. at 43. See also CR 12(b). The Lybbert Court then compared the Lybbert facts to the facts in French v. Gabriel, 116 Wn.2d 584, 806 P.2d 1234 (1991):

We held [in French] there was no waiver because the defendant preserved the defense by pleading it *prior* to objecting to the trial date, taking a deposition, and consenting to amendment of the

complaint. . . Moreover, the answer, although late, was filed more than a year before the statute of limitations extinguished the plaintiff's claim. . . By contrast, here, the County failed to preserve the defense by pleading it in its answer or other responsive pleading before proceeding with discovery. Instead, it engaged in discovery over the course of several months and then, after the statute of limitations had apparently extinguished the claim against it, it asserted the defense. French does not remotely stand for the proposition that it is acceptable for a defendant to lie in wait, engage in discovery unrelated to the defense, and thereafter assert the defense after the clock has run on the plaintiff's cause of action.

In this case Rosales participated in litigation when his counsel filing notice of appearance, serving plaintiff with discovery demands, providing its witness list and actively participating in motions to continue. This participation continued for over two years. Only after the case against Defendant Griffith was dismissed and the statute of limitations had run did Rosales file its answer and for the first time assert his defense. See also Blankenship v. Kaldor, 114 Wn.App 312 at 320, 57 P.3d 295 (2002).

The trial court distinguished Lybbert from the facts in this case. The trial court stated that Grant County knew that the Lybberts believed they had properly conducted service and deliberately waited to raise the issue of service of process until after the statute of limitations had run. By comparison the trial court stated that Rosales and his attorney were never put on notice that Stewart believed Rosales had been served and that Rosales therefore had no reason to believe he had been served:

In this case, there can be hardly any laying in wait when the—Mr. Rosales is not put on—Counsel is not put on notice that plaintiff believes that he has been served. In fact, the only thing in the court file until this motion for summary judgment was a specific statement that he hadn't been served at that point when the—it was required to file the confirmation of issues, I believe. So he had no reason to believe that he had been served, and the—he is not required to assist the process server or to effect service on himself. 1 RP 24-25.

But this reasoning does not address the key points in Lybbert—that Rosales failed to preserve the defense by pleading it in his answer or other responsive pleading before proceeding with discovery. Regardless of whether or not Rosales believed that service was improperly conducted or not conducted at all he still had an obligation to assert this defense prior to the statute of limitations expiring.

The importance of a defendant waiting to assert this defense prior to the statute of limitation expiring is found in Meade v. Thomas, 152 Wn.App 490, 217 P.3d 785 (2009). In Meade Meade was rear-ended by an individual who was driving Thomas's car. Meade did not serve Thomas. An attorney appeared for Thomas and served Meade with interrogatories. The discovery did not address service of process. Meade v. Thomas at 785. Thomas then filed his answer asserting he was never served and that the statute of limitations barred further action. The statute of limitations expired five days later. Thomas failed to complete service prior to the statute of limitations expiring. Meade at 786. The Court held

that, “Thomas was not dilatory in raising the defense because he raised it in his answer, *which he filed before the statute of limitations ran.*”

(emphasis added) Id. at 786. Again, in this case, unlike Meade, Rosales did not file his answer until after the statute of limitations expired.

2. THE TRIAL COURT ERRED WHEN IT DENIED STEWART’S MOTION TO STRIKE ROSALES AFFIRMATIVE DEFENSE OF LACK OF SERVICE UNDER CR 37(D)

A party may obtain discovery on any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. CR 26(b)(1). The requested discovery must be reasonably calculated to lead to the discovery of admissible evidence. CR 26(b)(1). Clarke v. Office of the Attorney Gen., 133 Wash.App. 767, 777, 138 P.3d 144 (2006), review denied, 160 Wash.2d 1006, 158 P.3d 614 (2007). Parties may obtain discovery by depositions upon oral examination. CR 26(a). The requirements for obtaining depositions are outline in CR 30(a) When Depositions May Be Taken:

After the summons and a copy of the complaint are served, or the complaint is filed, whichever shall first occur, any party may take the testimony of any person, including a party, by deposition upon oral examination.

Under the Civil Rules Stewart was entitled to Rosales' deposition prior to the March 15, 2011 motion for summary judgment. Stewart's counsel made attempts to obtain Rosales' deposition prior to the hearing.

Rosales did not appear at his deposition. The Civil Rules deliberately create consequences when a party fails to appear at his/her deposition.

CR 37(d) states:

If a party ... fails (1) to appear before the officer who is to take his or her deposition, after being served with a proper notice ... the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under sections (A), (B), and (C) of subsection (b)(2) of this rule.

CR 37(b)(2)(B) authorizes the court to enter an order refusing to allow a party to support designated claims or defenses. CR 37(b)(2)(C) allows the court to enter an order striking pleadings or parts thereof.

Stewart's motion for sanctions against Rosales for failure to appear at his deposition was denied by the court. The court stated that it did not have the authority to compel Rosales to appear at a deposition as he had not been properly served. 2 RP 17. Stewart contends that this position is incorrect as (1) the court had not yet made a finding that Rosales was not properly served and (2) CR 30(a) does not require that a party be served before depositions can be taken. CR 30(a) does state that

either service or filing of the complaint triggers the time when depositions can be taken. A complaint was filed in this case and Stewart therefore had the right to obtain Rosales' deposition.

It was essential for Stewart to plaintiff's case and opposition to the Motion for Summary Judgment that Rosales was deposed. Once he failed to appear at his deposition than the proper method to address his failure to appear was to grant Stewart's motion to strike his affirmative defenses—including his claim of improper service of process.

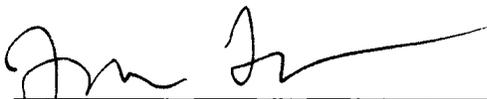
E. CONCLUSION

Stewart respectfully requests that the Court reverse the order of the trial court granting summary judgment to Rosales, strike Rosales affirmative defense of improper service and remand for trial.

DATED this 31st day of October, 2011.

RESPECTFULLY submitted,

By:



JAMILA A. TAYLOR, WSBA #32177

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Attorneys for the Appellant

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

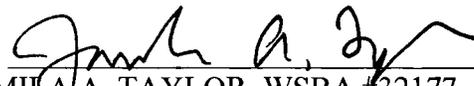
DEBRA STEWART,)
)
Appellant,) NO. 67009-3-I
)
vs.) CERTIFICATION OF SERVICE
)
GRIFFITH INDUSTRIES, INC., ET)
AL.)
)
Respondent.)
_____)

I hereby certify under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner indicated a copy of Brief of Appellant to:

Mark Dietzler Law Offices of Kelly J. Sweeney 1191 2 nd Ave Suite 500 Seattle, Wa 98101 <i>Attorney for defendant Rosales Carpet</i>	VIA E-FILING [] VIA REGULAR MAIL [X] VIA CERTIFIED MAIL [] VIA FACSIMILE [] HAND DELIVERED []
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DATED this 13th day of October, 2011.

THE LAW OFFICE OF JAMILA TAYLOR PLLC

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