Court of Appeals, Division I, No. 72131-3-I

NO. 91997-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FORD SERVICES, LLC, a Washington limited liability company,

Appellant,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee on behalf of Certificate-holders of the Morgan Stanley ABS Capital 1 Inc. Trust 2006-HE6, Mortgage Pass-Through Certificates, Series 2005-HE6,

Respondent.

RESPONDENT DEUTSCHE BANK'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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A. Summary of the Argument

Washington's long-arm statute authorizes personal service out of state but provides that "[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." RCW 4.28.185(4). The City of Sedro Woolley, plaintiff below,[1] commenced an action to foreclose a lien on real property located in Washington state, and served Deutsche Bank, a junior lienor, out of state, but failed to file the required affidavit before taking a default judgment.

Deutsche Bank sought to have the judgment vacated, and the trial court and the Court of Appeals correctly ruled that the default judgment was void for failure to comply with affidavit requirement of the long-arm statute. *Sharebuilder Sec. Corp. v. Hoang,* 137 Wn. App. 330, 335, 153 P.3d 222 (2007); *Morris v. Palouse River & Coulee City R.R. Inc.*, 149 Wn. App. 366, 371-72, 203 P.3d 1069 (2009).

As the holder of a mortgage against real property located in Washington, Deutsche Bank had submitted to the jurisdiction of the Washington courts, as Ford conceded to the Court of Appeals. RCW

[1] Appellant Ford Services LLC was the ultimate purchaser of the foreclosed real property. Opinion at 2.

4.28.185(1)(a) and (c).[2] As the Court of Appeals noted in its Opinion, "[t]he parties agree that Deutsche Bank has "submitted" itself to the jurisdiction of Washington courts. Deutsche Bank lent money and recorded a deed of trust on property located in this state. . . . Having "submitted" to the jurisdiction of Washington courts, both RCW 4.28.180 and RCW 4.28.185 apply to any out of state service upon Deutsche Bank." Opinion at 5-6 (citation omitted).

As Deutsche Bank argued to the trial court and the Court of Appeals, Ford's basic argument – that the long-arm statute permits or preserves different treatment of foreclosure cases – has no basis in the statute or otherwise. The long-arm statute recognizes that its enactment did not render invalid other legally valid manners of service, but the statute does not exclude foreclosure actions – or any other particular substantive type of lawsuit – from its reach. RCW 4.28.185(6).[3] Simply put, a foreclosure action is a not a "manner of service." Ford's argument is without merit.

In sum, there is no issue worthy of this Court's review in this case. This case is a straightforward application of plain rules to undisputed

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[2] "(a) The transaction of any business within this state;" and "(c) The ownership, use, or possession of any property whether real or personal situated in this state."

[3] "Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law."

facts. The Court of Appeals' Opinion is not in conflict with any Washington Supreme Court case. Personal service on Deutsche Bank was made out of state under the long-arm statute, and the required affidavit was not filed before judgment. The Court of Appeals correctly ruled that an affidavit was required in this case, as in all others that fall under RCW 4.28.185. The judgment is void, as the lower courts correctly ruled.

B. Argument

1. Ford's Original Argument In The Trial Court Was Based Upon The Treatment of Foreclosure Actions Under *Pennoyer v. Neff*

As the Court of Appeals correctly noted, "[t]he constitutional due process notice and minimum contacts standards apply equally to actions in rem, quasi in rem, and in personam." Opinion at 3. But throughout this case, Ford has made several arguments attempting to exclude foreclosure actions from the reach of the long-arm statute because Ford asserts (incorrectly) that foreclosure actions are "in rem" actions and are therefore accorded different treatment.[4] Ford's original argument in the trial court asserted that a foreclosure action was "in rem" and as such fell outside RCW 4.28.185 which, Ford asserted, applied only to "in personam" actions:

[4] *See* Respondent Deutsche Bank's Appellate Brief at 3-5.

> "Deutsche Bank's argument conflates *in personam* jurisdiction and *in rem* jurisdiction. An action to foreclose a lien does not require *in personam* jurisdiction over the defendant, on *in rem* jurisdiction over the defendant's property – because RCW 4.28.185 deals only with *in personam* jurisdiction, it does not apply."

CP 83-92.

At one time, as Ford argues, a state court was deemed to have jurisdiction over any property located within its borders, and if it entered a judgment that only affected such property, constructive notice to the owner of the property was all that was required. *Pennoyer v. Neff*, 95 U. S. 714 (1878). This legal theory is the basis of the argument set out above, and of the cases upon which Ford relies in its petition to this Court.

But those days are long past, swept, as the phrase goes, into the "dustbin of history." The 19th century theory of long-arm jurisdiction of *Pennoyer* that Ford relied upon was rejected by *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 312, 70 S. Ct. 652, 94 L. Ed. 865 (1950); *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977), *Int'l Shoe Co. v. State of Wash.*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 796 n.3, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983) and their progeny, including this Court in *Wenatchee Reclamation Dist. v. Mustell*, 102 Wn.2d 721, 725-26, 684 P.2d 1275 (1984):

> Prior to *Mullane*, due process rights tended to vary depending on whether an action was in rem or in personam. Personal service was considered essential when a state court based its jurisdiction upon its authority over a defendant's person; constructive notice to nonresidents satisfied the requirements of due process when jurisdiction was based upon the court's authority over property within its territory. *See generally Shaffer v. Heitner*, 433 U.S. 186, 196-205, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977). The *Mullane* Court, however, rejected this distinction between in rem and in personam actions for purposes of determining the sufficiency of notice, stating "we think that the requirements of the Fourteenth Amendment . . . do not depend upon a classification for which the standards are so elusive . . ." 339 U.S. at 312.
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> . . . Recently, in *Mennonite Bd. of Missions v. Adams*, ___ U.S. ___, 77 L. Ed. 2d 180, 103 S. Ct. 2706 (1983), the Court held that notice by publication and posting does not provide a mortgagee of real property adequate notice of a proceeding to sell the mortgaged property for nonpayment of property taxes. The Court reasoned that, since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale. Constructive notice to a mortgagee who is identified in the public record does not satisfy *Mullane*. Personal service or mailed notice is required. *Mennonite*, 103 S. Ct. at 2711-12."

Wenatchee Reclamation Dist. 102 Wn.2d, at 725-26 (first and second ellipsis in original). On appeal, Ford, while it abandoned its argument that "in rem" and "in personam" cases were entitled to different treatment under the long-arm statute, did not abandon its position that foreclosure

actions are entitled to different treatment. However, as explained in the following sections, Ford's argument fares no better under the provisions of the long-arm statute.

2. The Long Arm Statute Does Not Exclude Foreclosure Actions From Its Operation

Instead of resting its argument on the rejected distinction between "in rem" jurisdiction and "in personam" jurisdiction, Ford changed gears to argue that foreclosure actions retained a special status by virtue of subsection (6) of the long-arm statute. Ford argues that RCW 4.28.185(6) preserves service in "foreclosure" cases, i.e., a party may commence a foreclosure action with personal service out of state without the need to file the required affidavit. Subsection (6) provides that

> "Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

But Ford's argument is plainly a non-sequitor. Subsection (6) preserves *other manners of service of process*, not substantive types of lawsuits. "[P]rocess [served] in any other manner" would include, among others, service by publication, by mail, upon the secretary of state, upon the insurance commissioner, etc. But a foreclosure action is not a "manner of service," and the long-arm statute does not provide blanket exceptions from its coverage for substantive types of cases.

To the contrary, the long-arm statute establishes a comprehensive scheme for personal out of state service for a broad number of acts that "submit" the actor to the jurisdiction of the state. RCW 4.28.185(1)(a)-(e). Nothing in the statute suggests that particular types of lawsuits, like foreclosure suits, are excluded from the long-arm statute's coverage, particularly when holding a real property deeds of trust like the deed of trust held by Deutsche Bank plainly falls within RCW 4.28.185(1)(a) and (c).

Moreover, service outside of the state is in derogation of common law and the statutes permitting service must be strictly followed to make that service effective. *Boyd v. Kulczyk,* 115 Wn. App. 411, 415, 63 P.3d 156 (2003). RCW 4.28.180 and RCW 4.28.185 were enacted in 1959 (substantially in its current form) in 1959 as part of the same act. The two sections are therefore read together. An act is construed as a whole, giving effect to all the language used, with related statutory provisions interpreted in relation to one another. *See C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 708-09, 985 P.2d 262 (1999); *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993) ("Statutory provisions must be read in their entirety and construed together, not piecemeal."). RCW 4.28.185(4) establishes a condition precedent to personally serving a party not within the territorial

jurisdiction of Washington courts. This condition must be satisfied in order to use the method of service specified in RCW 4.28.185(2) and RCW 4.28.180 effectively.

In sum, subsection (6) is designed to recognize that other valid *manners of service* may be utilized in applicable cases. Ford's argument that a foreclosure action fits within subsection (6) is without merit.

3. Ford's Case Citations Do Not Support Ford's Argument

Ford argues that the Court of Appeals' decision conflicts with several pre-long-arm statute cases permitting foreclosure cases to be commenced without filing the requisite affidavit. *Jennings v. Rocky Bar Gold Mining Co.,* 29 Wash. 726, 70 P. 136 (1902) and *Roznik v. Becker,* 68 Wash. 63, 122 P. 593 (1912).

The important thing to note about these cases is their vintage: 1902 and 1912. At that time, the *Pennoyor* theory of out of state service was the law of the land, based upon the (now rejected) distinction between "in rem" cases and "in personam" cases.

Jennings turned on exactly this point. Although the defendant was served out of state, and no affidavit was filed, the court noted that its jurisdiction only extended to property located within the state:

> The right to subject property within the state to the jurisdiction of its courts is undoubted. If property,

> real or personal, is appropriately placed within the dominion of the court, then the jurisdiction becomes complete to adjudicate all controversies and all rights in and to such property. The legislature has provided a constructive notice to all persons having an interest in the property. Such constructive notice must be given strictly under the provisions of the statute. But § 4879, Bal. Code, provides for personal service out of the state, and declares it shall be equivalent to service by publication. Thus such personal service out of the state is declared sufficient notice when the court has assumed control of the property within the state. This section itself prescribes that such service is constructive notice, and does not require the affidavit made necessary in service by publication.

Jennings, 29 Wash. at 728 (emphasis added).[5] *Jennings* expressly relied upon *Pennoyor*:

> It was said in Boswell's *Lessee v. Otis*, 9 How. 336:
>
> "Jurisdiction is acquired in one of two modes: first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill of chancery. It must be, substantially, a proceeding in rem."

[5] *Jennings* concluded that "It is settled law that no personal judgment can be entered against a defendant upon constructive service." *Jennings* 29 Wash at 728.

> For pertinent discussion of this question see *Cooper v. Reynolds*, 10 Wall. 308; and *Pennoyer v. Neff*, 95 U.S. 714.

Jennings, 29 Wash at 729-30 (emphasis added). Likewise, in *Roznik*, the court permitted the service to be effective because the reach of the judgment was limited to property in the state (and the defendant had specially appeared and raised various defenses and arguments). *Roznik,* 68 Wash. at 69 ("Such a judgment is not void, although it cannot be executed upon property other than the property attached.")

Jennings and *Roznik* may have been correctly decided under *Pennoyor*, but these cases have no continuing authority today under *Mullane, Shaffer, et. al.* Subsection (6) was not designed to continue to authorize constitutionally invalid theories of service. The Court of Appeals' Opinion follows *Wenatchee Reclamation Dist.*

Ford also cites to several later cases it argues are in line with *Jennings*. *Harder v. McKinney,* 187 Wash. 457, 60 P.2d 84 (1936) and *Hatch v. Princess Louise Corp.,* 13 Wn. App. 378, 534 P.2d 1036 (1975). The Court of Appeals correctly rejected these cases for the reasons set forth in the Opinion. Opinion at 4-5.

C. Conclusion

When a defendant is personally served out of state, an affidavit pursuant to RCW 4.28.185(4) must be filed. Ford's purported exception

for foreclosure lawsuits has no basis in the long-arm statute. The Court of Appeals' Opinion follows established law, and no issue worthy of this Court's review is presented. The Court is respectfully requested to deny Ford's petition for discretionary review.

DATED: September 2, 2015.

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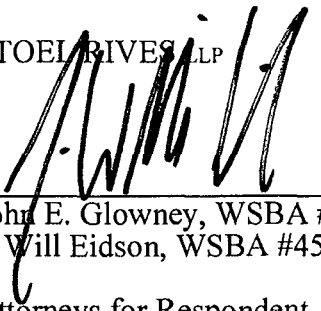

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CERTIFICATE OF SERVICE

I certify that the foregoing pleading, entitled **RESPONDENT DEUTSCHE BANK'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW,** is being served on counsel for the parties as set forth below **via PDF/EMAIL and via U.S. MAIL** and filed with the Court via **PDF/EMAIL**: Supreme@courts.wa.gov.

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