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No. 72131-3-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

FORD SERVICES, LLC, a Washington limited liability company,

Appellant,

v.

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

Appellee.

Appellant Ford Services, LLC's Reply Brief

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I. REPLY

Respondent Deutsche Bank National Trust Company ("Deutsche Bank") bases its response on the argument that service is not appropriate under the long arm statute because Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977), abolished the distinction between jurisdiction in rem, quasi in rem, and in personam. While Deutsche Bank's argument is substantively incorrect – Shaffer did not eliminate actions in rem or quasi in rem – it suffers from a more fundamental flaw. The distinction between actions in rem and in personam provides a useful analogy to understand this case, but this case does not turn on that distinction, or on anything having to do with the constitutionality of service following Shaffer. Rather, this case turns on the plain language of the long arm statute, RCW 4.28.185.

The long arm statute defines certain requirements for service out of state, and then provides that "Nothing herein contained limits of affects the right to serve process in any other manner now or hereafter provided at law." RCW 4.28.185(6). Although Washington did not generally permit service of process out of state before the adoption of the long arm statute in 1959, it did allow such service in some circumstances, including actions

for foreclosure of property located within Washington. See, e.g., Harder v. McKinney, 187 Wash. 457, 460-61, 60 P.2d 84 (1936). This is an action to foreclose property within Washington. Deutsche Bank was served out of state in accordance with Harder. Therefore, the service is valid, as it was carried out in a manner that was "provided at law" at the time of adoption of the long arm statute.

A. Service in This Case Satisfied the Long Arm Statute Under RCW 4.28.185(6).

Validity of service generally turns on two factors. First, service must satisfy constitutional requirements. It must be sufficient to provide notice to the Defendant. See, e.g., Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 319, 70 S. Ct. 94, 94 L. Ed. 865 (1950). And it must be against a Defendant with sufficient "minimum contacts" with the forum state that the exercise of jurisdiction does not offend traditional notions of "fair play and substantial justice." International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945). Second, service must comply with state prescribed procedures governing service. So long as service satisfies the constitutional requirements, however, the state is free to design any system of service it desires.

There is no dispute that service in this case satisfied Mullane's notice requirement – Deutsche Bank received actual notice – or that Deutsche Bank has the minimum contacts with Washington necessary to satisfy International Shoe. Instead, the only question is whether service also satisfied Washington's statutory or common law requirements.

The requirements for valid service in this case are not complicated. RCW 4.28.185, the long arm statute, is the primary statute governing service on out of state Defendants for actions within Washington. That statute imposes a number of requirements, most relevant for this case that, under the long arm statute, "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).[1] However, the long arm statute also contains a fall back provision that "[n]othing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law." RCW 4.28.185(6). This provision reflects the fact that the long arm statute effected a significant expansion of cases in which out of state service was allowable; it was not limiting or affecting any right to serve out of state that already existed at the time of its

[1] The parties do not dispute that no such affidavit was filed in this case, and Deutsche Bank relies on the lack of such an affidavit as defeating the validity of service.

adoption. Therefore, if service in this case would have been appropriate before 1959, the long arm statute does not defeat the validity of such service today.

Service on out of state Defendants was permissible even before adoption of the long arm statute. At least as early as 1936, the state Supreme Court considered whether service on a defendant in Portland, Oregon was sufficient to establish jurisdiction for purposes of a foreclosure action. Harder v. McKinney, 187 Wash. 457, 460-61, 60 P.2d 84 (1936). This case addressed service under the predecessor to Washington's general out of state service statute, RCW 4.28.180, which provided that service out of state was equivalent to service by publication. Id.; See also, RCW 4.28.180 (noting that service outside the state on a person who has not submitted to the jurisdiction of the state shall have the force and effect of service by publication). The court held that service on an out of state defendant was sufficient to establish jurisdiction for the foreclosure action. Harder, 187 Wash at 460-61.

Nothing further should be required to resolve this case. Before enactment of the long arm statute in 1959, Washington allowed service on out of state defendants in foreclosure actions. Id. The long arm statute expressly provides that "[n]othing herein contained limits or affects the

right to serve any process in any other manner now or hereafter provided by law." RCW 4.28.185(6). Imposing the affidavit requirement of RCW 4.28.185(4) on foreclosure actions would "affect" a right to serve process in a manner that existed at the time of the adoption of the long arm statute. Therefore, by its plain language, the long arm statute cannot require the filing of an affidavit in a foreclosure action. Service in this case was appropriate under the long arm statute's "fall through" provision.

B. Shaffer, a Case Addressing Constitutional Requirements for Service, Has no Bearing on Service in This Case

Deutsche Bank argues that service did not satisfy service requirements, because Shaffer changed the requirements for service, and eliminated in rem jurisdiction. Deutsche Bank is incorrect. As noted above, valid service has two components, a constitutional component and a state law component. Shaffer dealt entirely with the constitutional component of service – the only component at issue in this case is the state law component.

As discussed briefly above, two historic Supreme Court decisions in the middle of the last century established the general boundaries of what constituted constitutional service under the United State Constitution.

First, in 1945, the Supreme Court held that a state court's exercise of jurisdiction over an out of state defendant could only be valid if the defendant had sufficient "minimum contacts" with the forum state such that the exercise of jurisdiction did not offend "traditional notions of fair play and substantial justice." International Shoe, 326 U.S. at 316. Second, in 1950, the Supreme Court held that service must satisfy certain notice requirements such that the exercise of jurisdiction was appropriate. Mullane, 339 U.S. at 319.

These cases left open, however, the question of whether actions in rem were exempted from their requirements, or whether the constitutional requirements applied to all cases. The Supreme Court resolved this question in 1977, when it held that whether a claim is characterized as in rem or in personam, it still must meet constitutional requirements for service. Shaffer v. Heitner, 433 U.S. 186, 207, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977). Deutsche Bank argues that because Shaffer changed the constitutional requirements for service, a plaintiff now must file the affidavit required by RCW 4.28.185(4) even in a foreclosure action.

Shaffer is certainly important from a Constitutional perspective, but Deutsche Bank's reliance on Shaffer conflates the constitutional requirements for service with the state law requirements for service.

There is no dispute that Deutsche Bank has sufficient minimum contacts with Washington to allow the exercise of jurisdiction over it, and there is no dispute that Deutsche Bank had actual notice of the pending lawsuit against it. The constitutional requirements for service were satisfied.

The only question is whether Plaintiff satisfied the separate requirements imposed by RCW 4.28.185. Shaffer, International Shoe, and Mullane have nothing to say about the requirements imposed by RCW 4.28.185. Those requirements are entirely creations of state statutory law, and the law is unambiguous. Service on an out of state defendant must either satisfy the general requirement of the long arm statute, including filing of the affidavit, or it must be done in accordance with a method of service that was permissible under state law at the time the long arm statute was adopted. RCW 4.28.185.

Service on an out of state defendant for purposes of foreclosing property within Washington was permissible before adoption of the long arm statute. Therefore the service in this case satisfied the state law requirements. RCW 4.28.185(6). There is no dispute that service also satisfied constitutional requirements, so Shaffer has no bearing on this case. Service was valid.

C. The Distinction Between Actions In Rem and In Personam Provides Helpful Context to This Case, But the Validity of Service Does not Turn on That Distinction

Deutsche Bank places significant weight on its argument that Shaffer eliminated the distinction between actions in rem and in personam, and therefore, even if this action is characterized as in rem service is invalid. Deutsche Bank is incorrect for two reasons.

First, as Ford Services noted in its opening brief, the validity of service in this case "comports with the long standing distinction between in personam jurisdiction . . . and in rem or quasi in rem jurisdiction," but validity of service is not dependent on that distinction. The distinction is helpful because it shows that Washington State has long distinguished between actions to obtain a money judgment against a person and actions to enter judgment with respect to ownership of property, and that it continues to make that distinction. See, e.g., In re Proceedings of King County Foreclosure of Liens, 117, Wn.2d 77, 811 P.2d 945 (1991) (noting that a tax foreclosure is a proceeding in rem). The two main statutes governing out of state service also draw a similar distinction, with RCW 4.28.185 specifically referring to people who have submitted to the jurisdiction of the state, and RCW 4.28.180 addressing both people who

have submitted to the jurisdiction of the state and those who have not. Washington Practice also notes the different requirements for service in in rem actions under RCW 4.28.185, noting that "As an alternative to service by publication, in-hand service may be made outside the state in an in-rem action. Such service has the effect of service by publication. . ." 14 WAPRAC Civil Procedure § 5:9 (Notice and Hearing Required for Rem-Type Jurisdiction) and n. 9 (discussing RCW 4.28.185).

The distinction is also important because it has come up in this very context – the failure to file an affidavit in connection with an action to foreclose a lien. In Hatch v. Princess Louise Corp., 13 Wn. App. 379, 534 P.2d 1036 (1975), the court considered a case in which a plaintiff sought foreclosure of a lien and a personal judgment against an out of state defendant. The plaintiff did not file the affidavit required by RCW 4.28.185(4) before entry of the judgment. Id. at 379. The defendant challenged the in personam judgment for failure to file the affidavit. Id. On appeal, the court reversed the judgment "as to the exercise of personam jurisdiction over the Princess Louise Corporation" but affirmed the judgment "as to the exercise of in rem jurisdiction in foreclosing the mortgage on the hulk." Id. at 380. The same rule should apply here.

These are all reasons the Court should consider the distinction informative, but the distinction is not necessary to the Court's decision. Rather, all that is necessary to resolve this case is reading the plain language of RCW 4.28.185(6) in conjunction with the pre-long arm statute case of Harder. Because service in foreclosure actions was valid without filing of an affidavit before enactment of the long arm statute, the same service is valid after enactment of the long arm statute. It does not matter whether the claim is referred to as being in rem, in personam, quasi in rem, or any other type of claim.

Second, Deutsche Bank's argument is incorrect because Shaffer did not eliminate the distinction between in rem and in personam; it maintained the distinction while unifying the constitutional standard for service in both types of action. See generally, Shaffer, 433 U.S. 189. Post Shaffer, Washington State still recognizes the distinction between proceedings in rem and in personam. See, e.g., In re Proceedings of King County Foreclosure of Liens, 117 Wn.2d 77, 811 P.2d 945 (1991) (noting that a tax foreclosure is a proceeding in rem and that jurisdiction over the res must be obtained). Therefore, Deutsche Bank is incorrect when it argues that the distinction between actions in rem and in personam no longer exists – the distinction is no longer relevant when considering

constitutional requirements for service of process, but constitutional requirements for service of process were never at issue in this case.[2]

For the reasons stated above, service against Deutsche Bank was valid. Service on out of state defendants for the purpose of foreclosing property within the state was allowed in Washington at the time of the adoption of the long arm statute. By its plain language, the long arm statute cannot affect any method of service that existed at the time of its adoption. Therefore, service in this case was valid, notwithstanding the long arm statutes requirement of filing an affidavit, because it complied with a method of service that existed before adoption of the long arm statute. The Superior Court should be reversed.

D. If Jurisdiction Did Not Exist, the Sale Was Invalid and Should be Reversed

Although Ford Services believes that the Superior Court should be reversed on the issue of the validity of service, if the Superior Court is upheld on that issue, it should also be upheld on the invalidation of the subsequent sale. As Deutsche Bank argues in its response brief "[a] void judgment is, in legal effect, no judgment. By it no rights are divested.

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[2] It is also not relevant whether the case is described as "in rem" or "quasi in rem." The Harder case was an action for foreclosure of a lien against property. Whether that case is described as in rem or quasi in rem it is the same as the action in this case.

From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars anyone." Johnson v. Berg, 147 Wash. 57, 66, 265 P. 473 (1928). If the judgment is void, then the subsequent sale also must be void, and the parties should be returned to their original positions.

The contrary result would substantially prejudice Ford Services' rights. Ford Services obtained its rights in the property based on the judgment obtained by the City of Sedro Woolley, which gave the purchaser the property essentially unencumbered. Allowing the City's sale to stand, but vacating the judgment and restoring Deutsche Bank's lien, would allow the City to retain the money obtained through its purportedly improper judgment while depriving Ford Services of any value in the property (as Deutsche Bank could simply immediately foreclose its lien). This result would not be equitable, and should be avoided. If the Court upholds the Superior Court with respect to vacation of the judgment, it should also uphold the Superior Court with respect to the vacation of the sheriff's sale based on the judgment.

II. CONCLUSION

Deutsche Bank was properly served in a method that was permissible before adoption of the long arm statute. Under RCW 4.28.185(6), that method of service remains valid after adoption of the long arm statute. Ford Services therefore respectfully requests this Court reverse the erroneous ruling of the trial court.

DATED this 21st day of January, 2015.

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CERTIFICATE OF SERVICE

I, Madeleine Hottman, hereby certify that on the 21st day of January, 2015, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

John E. Glowney, #12652 Stoel Rives LLP 600 University Street, Suite 3600 Seattle, WA 98101 *Attorneys for Plaintiff*	☒ U.S. Mail, postage prepaid ☐ Hand Delivered ☐ Overnight Courier ☐ Facsimile ☒ Electronic Mail
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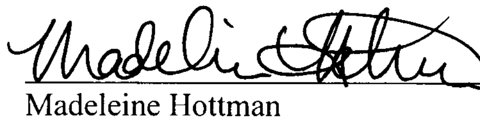
I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 21st day of January, 2015, at Seattle, Washington.



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