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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

U.S. BANK NATIONAL ASSOCIATION, SUCCESSOR) BY MERGER TO U.S. BANK NATIONAL) ASSOCIATION ND,

Respondent,

v.

DANIEL C. PETERSON AND KRISTI J. PETERSON, HUSBAND AND WIFE;

Appellants,

NATIONAL CITY BANK; EASTSIDE ASSOCIATES, INC.; DR. JOACHIM HERTEL; STATE OF WASHINGTON; PINNACLE BUSINESS FINANCE, INC.; UNITED STATES OF AMERICA; ALLIED GROUP, INC.; NORTHEAST SAMMAMISH SEWER AND WATER DISTRICT; NEW GLEN ACRES PHASE I OWNERS ASSOCIATION; UNKNOWN PARTIES IN POSSESSION; OR CLAIMING A RIGHT TO POSSESSION; AND UNKNOWN OCCUPANTS,

Defendants.

No. 80125-2-I

DIVISION ONE

UNPUBLISHED OPINION

CHUN, J. — This case concerns the efforts of U.S. Bank National Association (US Bank) to foreclose on property owned by Daniel and Kristi Peterson (Property). In a previous appeal, U.S. Bank National Association v. Peterson,[1] we reversed the trial court's denial of the Petersons' motion to vacate

[1] Noted at 197 Wn. App. 1055 (2017).

Citations and pin cites are based on the Westlaw online version of the cited material.

a default judgment against them. Since remand, the trial court granted summary judgment against the Petersons on US Bank's foreclosure claim. The Petersons appeal, arguing that the trial court lacked personal jurisdiction because US Bank's attorney did not sign its summons. We agree. We reverse and remand for the trial court to determine whether the Petersons properly moved to dismiss for lack of personal jurisdiction, and to consider any motion by US Bank to amend the summons. We also grant the Petersons' request for attorney fees.

I. BACKGROUND

In 2005, the Petersons borrowed $351,000 from US Bank, secured by a deed of trust on the Property. Peterson, slip op. at 2. US Bank filed a foreclosure complaint in May 2015. Peterson, slip op. at 2. US Bank filed a first amended complaint on November 10, 2015. US Bank alleged that the Petersons had made no payment on their note since 2009. A process server stated that he personally served Daniel Peterson with the summons and complaint at the Property on November 16, 2015. Peterson, slip op. at 2.

The court entered a default judgment against the Petersons. The Petersons moved to vacate the default judgment, claiming that they did not receive proper service of the summons and complaint. In support of their motion, Daniel Peterson filed an affidavit stating that he had not been personally served and that he was not at the Property on the day of the alleged service. The trial court denied the motion to vacate without prejudice. The Petersons appealed and we reversed and remanded to schedule an evidentiary show cause hearing. Peterson, slip op. at 6.

After remand, US Bank moved to vacate the default order and judgment. The trial court set an evidentiary hearing for September 1, 2017. The Petersons did not appear at the hearing. There, the trial court vacated the default order and judgment and stated that it would set a new trial schedule.

After vacation of the judgment, US Bank, through new counsel, served the Petersons with the first amended foreclosure complaint and first amended summons from 2015. The summons did not include the new counsel's signature. US Bank moved for summary judgment, and the Petersons moved to dismiss the foreclosure claim. The trial court granted US Bank's motion for summary judgment and entered a judgment and decree of foreclosure against the Petersons. The Petersons appeal.

II. ANALYSIS

The Petersons present three issues. They argue the trial court erred by (1) failing to hold an evidentiary hearing as ordered by our mandate, (2) failing to dismiss US Bank's foreclosure claim and granting its summary judgment motion, and (3) failing to determine whether it provided a fair and neutral forum, "where [the judges'] pension funds are heavily invested in mortgage backed securities the value of which is substantially determined by their granting foreclosures as a matter of course in a case like this." The Petersons also request attorney fees. US Bank argues that the trial court complied with this court's previous mandate and that it properly granted their motion for summary judgment. US Bank also argues that the issue of judicial disqualification is not properly before us.
US Bank does not address the fees motion. We determine that the trial court

properly complied with our mandate, but that the trial court did not have personal jurisdiction over the Petersons, so it erred in granting summary judgment. We also decline to reach the issue of judicial disqualification, since the Petersons raise it for the first time on appeal, and grant the Petersons' attorney fees request.

A. Compliance with Mandate

The Petersons argue the trial court failed to conduct an evidentiary hearing as required by our previous mandate. They argue that the purpose of the evidentiary hearing should have been to determine whether they received proper service in 2015. They also argue that because, at the hearing, the trial court did not find that US Bank's process server lied about personally serving Daniel Peterson, the mandated evidentiary hearing could not have occurred. US Bank argues an evidentiary hearing occurred but that the Petersons did not appear. We conclude that the trial court adhered to our mandate.

"[O]nce there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation." Spokane County v. E. Wash. Growth Mgmt. Hr'gs Bd., 176 Wn. App. 555, 566, 309 P.3d 673 (2013).

In our previous opinion, we "reverse[d] the order dismissing the [Petersons'] motion to vacate and remand[ed] to schedule an evidentiary show cause hearing." Peterson, slip op. at 6. The purpose of the evidentiary hearing would be to decide whether service occurred, and ultimately whether the court should vacate the default judgment. In accordance with our mandate, the trial court scheduled an evidentiary hearing for September 1, 2017. US Bank moved

for the court to vacate the judgment. US Bank's motion eliminated the practical need for it to show cause why the court should not vacate the judgment and for any evidentiary hearing. And the hearing led to the vacation of the default judgment, ostensibly the purpose of the Petersons' motion to vacate. The trial court adhered to our mandate.

US Bank informed the court and the Petersons in advance that they did not plan to present any witnesses at the hearing, apparently since they agreed that the court should vacate the judgment. The Petersons argue that because US Bank did not plan to present evidence at the hearing, the proceeding did not constitute an "evidentiary hearing" as required by our mandate. The Petersons could have sought to present evidence at the hearing, though this apparently would have been unnecessary given the Bank's motion to vacate. But they chose not to do so and did not even appear at the hearing. The Petersons cannot argue that no such hearing occurred because their party opponent failed to present evidence supporting the Petersons' argument.

B. Summary Judgment

The Petersons argue the trial court lacked personal jurisdiction to hear the foreclosure claim because US Bank did not properly serve them with the first amended summons and complaint in 2015 or 2017. As to the 2017 service, the Petersons claim the summons did not include US Bank's then-attorney's signature, as required by CR 4(a)(1). Katrina Glogowski, who represented US Bank in 2015, signed the first amended summons, but the attorney who represented them in 2017 did not. US Bank claims that the Petersons suffered

no prejudice from this error.[2] We agree that the summons did not establish personal jurisdiction over the Petersons. But the record contains no properly filed motion to dismiss based on lack of personal jurisdiction. Thus, we remand for the trial court to determine whether the Petersons properly filed such a motion, and to consider any US Bank motion to amend the summons.

We review de novo summary judgments. Strauss v. Premera Blue Cross, 194 Wn.2d 296, 300, 449 P.3d 640 (2019). "'Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.'" Strauss, 194 Wn.2d at 300, (alternation in original) (internal quotation marks omitted) (quoting Ranger Ins. Co. v. Pierce County, 164 Wn. 2d 545, 552, 192 P.3d 886 (2008); CR 56(c).

"Proper service of the summons and complaint is an essential prerequisite to obtaining personal jurisdiction." Walker v. Orkin, LLC, 10 Wn. App. 2d 565, 568, 448 P.3d 815 (2019). The plaintiff bears the initial burden of proving sufficient service, but the party challenging service must show by clear and convincing evidence that service was improper. Walker, 10 Wn. App. 2d at 568–69. We review de novo whether service was proper. Walker, 10 Wn. App. 2d at 569.

Under CR 4(a)(1), the plaintiff or the plaintiff's attorney must sign and date the summons. "Errors in the form of original process are . . . generally viewed as

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[2] US Bank also claims service in 2015 was proper because it came before expiry of the statute of limitations, and because it served other named defendants. Accepting US Bank's contentions that it served the other named defendants in 2015, the fact of their service would only suffice to establish the tolling of the statute of limitations under RCW 4.16.170, and not personal jurisdiction over the Petersons.

amendable defects, so long as the defendant is not prejudiced." Sammamish Pointe Homeowners Ass'n v. Sammamish Pointe LLC, 116 Wn. App. 117, 124, 64 P.3d 656 (2003). "Dismissal should not be granted on a mere technicality easily remedied by amendment." In re Marriage of Morrison, 26 Wn. App. 571, 573, 613 P.2d 557 (1980). But even where the defect does not prejudice the defendant, a plaintiff must move to amend the defective summons. Walker, 10 Wn. App. 2d at 573. "Without such a motion, the proper action for the trial court is to determine whether to dismiss the cause for lack of jurisdiction." Morrison, 26 Wn. App. at 575.

In support of their argument, the Petersons analogize to Walker. In Walker, the plaintiff served the defendant with a summons and complaint unsigned by any attorney. 10 Wn. App. 2d at 567–68. The statute of limitations for the plaintiff's action expired without the plaintiff serving the defendant with a signed copy of the summons. Walker, 10 Wn. App. 2d at 573. We dismissed the plaintiff's lawsuit because they did not correct the defect by either serving the defendant "with a signed summons before expiration of the statute of limitations or filing a timely motion to amend the summons." Walker, 10 Wn. App. 2d at 573.

The parties do not dispute that Glogowski did not represent US Bank at the time of service of the first amended summons. Thus, she was not US Bank's attorney under the meaning of CR 4(a)(1). Because the summons lacked US Bank's attorney's signature, service was improper and the trial court did not have personal jurisdiction over the Petersons.

But the record contains no properly filed motion to dismiss based on lack of personal jurisdiction. See KCLR 7(b)(5) (describing the required form for motions in King County Superior Court). Thus, we cannot determine whether the trial court should have dismissed the action. We therefore remand for the trial court to determine whether the Petersons properly filed such a motion. If they did, the proper remedy would be to dismiss US Bank's complaint without prejudice, because US Bank did not respond with a motion to amend the summons. See Montgomery v. Air Serv. Corp., Inc., 9 Wn. App. 2d 532, 545, 446 P.3d 659 (2019); see also Noll v. Am. Biltrite, Inc., 188 Wn.2d 402, 409, 395 P.3d 1021 (2017) ("dismissals based on lack of personal jurisdiction are *without* prejudice because the court has no power to pass upon the merits of the case.") (citing State v. Nw. Magnesite Co., 28 Wn.2d 1, 42, 182 P.2d 643 (1947)). Otherwise, on remand, the trial court should allow US Bank the opportunity to amend their summons under CR 4(h).[3]

C. Judicial Disqualification

The Petersons argue that the "likely explanation" for the trial court's ruling against them is that "Washington's judges . . . have been financially incentivized to side with entities, like US Bank, in foreclosing on people's real property regardless of what the equities are because public employees benefit

[3] The Petersons do not otherwise argue the 2017 summons was improper. If US Bank cures this issue through amendment, then the trial court will have personal jurisdiction over the Petersons regardless of any claimed defect with the 2015 summons. In such an event, the trial court would not need to address any claims that US Bank or its process server committed fraud or perjury in the course of delivering the 2015 summons.

economically." Thus, they argue the trial court failed to determine whether it could provide a fair and neutral forum under the meaning of the Due Process Clause of the United States Constitution's Fourteenth Amendment. US Bank argues the Petersons cannot bring this claim for the first time on appeal and disagree with the argument on its merits. We decline to hear this issue for the first time on appeal.

We may refuse to review any claim of error not raised in the trial court. RAP 2.5. Washington courts have applied the doctrine of waiver to similar claims, such as those of bias and under the appearance of fairness doctrine. See In re Marriage of Wallace, 111 Wn. App. 697, 705 n.1, 45 P.3d 1131 (2002) (reviewing various cases in which Washington courts have declined to hear claims of bias and appearance of fairness for the first time on appeal). The Petersons could have, but did not, file a notice of disqualification with the trial court under RCW 4.12.050. They argue they could not possibly have raised their arguments about unconstitutional conduct by the trial court until that conduct occurred. But the Petersons' argument against Washington judges overseeing foreclosure proceedings apparently applies to any Washington trial judge acting in foreclosure proceedings at any time, so the trial court could have heard the argument. The Petersons did not raise this issue below and we decline to hear it here.

D. Attorney Fees

The Petersons request attorney fees under RAP 18.1 and the terms of the note. The deed of trust in question allows recovery by the lender in any action

relating to the instrument. RCW 4.84.330 renders this attorney fees clause bilateral. Since the Petersons prevail on appeal, we grant their fees request subject to compliance with RAP 18.1(d).

We reverse and remand.

Chun, J.

WE CONCUR:

Bowman, J. Andrus, A.C.J.