

 ORIGINAL

No. 67155-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOHN F. BUCHAN CONSTRUCTION INC.,
a Washington Corporation,

Respondent,

v.

MICHAEL GIACOMO AUSTIN, an unmarried individual,
GIACOMO DUMMOND AUSTIN, an unmarried individual,
J. P. CHASE BANK, N.A., a federally chartered bank as successor-in-
interest to WASHINGTON MUTUAL BANK, and
JOHN DOES and JANE DOES 1-10,

Appellants.

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REPLY BRIEF OF APPELLANTS

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A. INTRODUCTION

John F. Buchan Construction Inc. (“Buchan”) failed to strictly comply with the Service By Publication Statute by mailing the summons and complaint to an address it knew was not Michael Austin and Giacomo Austin’s (collectively “the Austins”) place of residence. As a result, the trial court never had jurisdiction over the Austins. Under the contract between the Austins and Buchan, an arbitrator was to determine the arbitrability of any dispute between the parties. Buchan turned its back on that provision. Instead, it rushed into court and obtained a default judgment against the Austins who were residing in Italy. The trial court erred in not granting the Austins’ motion to vacate judgment and their motion for reconsideration.

B. RESPONSE TO RESTATEMENT OF FACTS

In the interest of brevity, the Austins will not respond in detail to Buchan’s statement of the facts. It should be noted however, that the property at the center of the dispute (“the House”) was a rental property that burned down. CP 270. There is no indication in the record that the Austins resided at the House at any time during its reconstruction or at the time Buchan commenced its suit against the Austins.

C. ARGUMENT

(1) The Trial Court Did Not Have Jurisdiction Because Buchan Did Not Strictly Comply With RCW 4.28.100

Buchan did not strictly comply with the requirements of the service by publication statute, RCW 4.28.100. As a consequence, the trial court did not have jurisdiction over the Austins. That is the central fact of this case. Buchan's failure to determine the Austins' place of residence and properly mail the summons and complaint there is an enormous hole below the waterline of its case, a hole its vigorous arguments to the contrary cannot plug.

Buchan insists it complied with the requirements of RCW 4.28.100. It did not. The statute requires that a copy of the summons and complaint be mailed to the defendant *at his or her place of residence*. Buchan did not send a copy of the summons and complaint to the Austins' place of residence. Instead, Buchan sent the summons and complaint to a rental house the Austins owned, a house which had burned down and Buchan had been hired to rebuild. There is no evidence that the House was the Austins' place of residence, either before the fire or during the time Buchan worked on it. Indeed, Buchan points out that it is incontrovertible that the Austins resided in Europe; its affidavit in support of service by publication stated that one of the Austins was residing between Milan and London while the other resided in Rome. Buchan

knew that the Austins lived in Europe but failed to exercise *any* diligence in determining their actual place of residence. Instead, it sent the documents to their “last known address.” Sending the summons and complaint to the House and declaring it to be the Austins’ place of residence is highly disingenuous.

Service by publication is in derogation of the common law and cannot be used when personal service is possible. *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997).

In order to justify service by publication, the plaintiff must first exercise diligence in attempting to locate the defendant for personal service. *Boes v. Bisiar*, 122 Wn. App. 569, 574, 94 P.3d 975 (2004), *review denied*, 153 Wn.2d 1025 (2005); 15A Karl B. Tegland, *Washington Practice: Washington Handbook of Civil Procedure* § 16.2 at 227 (2010). Due diligence requires that the plaintiff make “honest and reasonable efforts to locate the defendant.” *Martin v. Meier*, 111 Wn.2d 471, 482, 760 P.2d 925 (1988). A plaintiff has the burden of showing proper service by publication. *Charboneau Excavating, Inc. v. Turnipseed*, 118 Wn. App. 358, 362-63, 75 P.3d 1011 (2003), *review denied*, 151 Wn.2d 1020 (2004). Service by publication is constructive only and is not, as a practical matter, an effective means of notifying a party of the pendency of a lawsuit. *Caouette v. Martinez*, 71 Wn. App. 69, 75, 856 P.2d 725

(1993). There is a greater likelihood that a judgment will be set aside when it is based upon service by publication than if it is based on personal service. *Id.* If default judgment is rendered against a party who was entitled to, but did not receive, notice, the judgment will be set aside. *Tiffin v. Hendricks*, 44 Wn.2d 837, 847, 271 P.2d 683 (1954).

Where a plaintiff possesses information that might reasonably assist in determining a defendant's whereabouts, but fails to follow up on that information, the plaintiff has not made the honest and reasonable effort necessary to allow for service by publication. *Brenner v. Port of Bellingham*, 53 Wn. App. 182, 187, 765 P.2d 1333 (1989).

Due process required Buchan to make an honest and reasonable effort to locate the Austins before seeking service by publication. *Carson v. Northstar Development Co.*, 62 Wn. App. 310, 316, 814 P.2d 217 (1991). It did not do so, and its affidavit makes no claim that it did. Buchan, however, insists it was under no obligation to locate the Austins. *Id.* at 19.

Buchan acknowledges that Washington courts have held that when the location of a defendant is unknown, the affidavit submitted in support of service must demonstrate that the plaintiff made an "honest and reasonable" effort to locate the defendant before resorting to service by publication. Resp't br. at 18. But it frames the objective of such an

inquiry as merely to determine whether the defendant can be served within the state. *Id.* According to Buchan, once it had determined the Austins were not Washington residents, its obligation to make an honest and reasonable inquiry was complete. *Id.* at 19. This is a categorical misreading of the intent behind the service of process laws, which is to provide due process to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Wichert v. Cardwell*, 117 Wn.2d 148, 151, 812 P.2d 858, 859 (1991); *Carson*, 62 Wn. App. at 317.

To support its argument, Buchan reaches back more than a century to *De Corvet v. Dolan*, 7 Wash. 365, 35 P. 72 (1893). There the Court held that under section 65, Laws 1877 (dating to when Washington was still a territory), an affidavit in support of service by publication need not show where the defendant lived. *Id.* at 367. The Court did not indicate that the statute in question required that the summons and complaint be mailed to the defendant. It confined its holding to the language of the statute and held that the affidavit in question was sufficient. *Id.* at 367-68. While *De Corvet* has not, as Buchan points out, been overruled, it does not in any way mean a plaintiff need not make a reasonable good faith effort to ascertain a defendant's whereabouts. One hundred and three years of Washington case law and state statute say otherwise.

That a plaintiff must exercise some minimal diligence in locating a defendant is crisply stated in another old case, *McKeand v. Bird*, 116 Wash. 208, 199 P. 293 (1921). In that case, the plaintiff's affidavit stated the defendant was not a resident of Washington and could not be found within the state, and that the summons and notice had been mailed to the defendants' place of residence in Pasco, Washington. The Court noted the "positively contradictory" statements in the affidavit that the defendant was not a resident of Washington and that the summons and complaint had been mailed to his place of residence in Washington. It held that the "slightest diligence by way of inquiry...would have readily shown that [the defendant's] address was in La Jolla, CA." *Id.* at 210.¹

Precisely the same contradiction is found here. Buchan's declaration stated that the Austins are not residents of Washington state but are instead residing in Europe. CP 20, 21. The declaration then states that a copy of the summons and complaint would be sent to the House in Redmond, Washington. Just as in *McKeand*, Buchan determined that the Austins are not residents of Washington but mailed the summons and

¹ Doing so would have qualified the maker of the affidavit to comply with the statute, "and at the same time to have carried out the purpose and policy of the statute *that the owner of the property shall have his day in court.*" *Id.*, emphasis added. The Court went on to note that the statute required that the summons and complaint be directed to the defendant at his place of residence, unless stated in the affidavit that such residence was not known. *Id.*

complaint to an address in Washington. Tellingly, the declaration refers to the address as the Austins' "last-known address" rather than the statutory language "place of residence." Referring to the Redmond address as the "last-known address" is a transparent bid to evade the statutory requirement that the summons and complaint be mailed to the Austins' *place of residence*.

Just as in *McKeand*, the slightest diligence on Buchan's part would have revealed the Austins' place of residence. Buchan describes any attempt to locate the Austins as a "wild goose chase" because in October 2010 DiGiacomo stated that one son divided his time between Milan and London and the other lived in Rome, and in March she stated that one son was in Lazio while the other was in Germany. Resp't br. at 25. Buchan filed the complaint in October 2010, so where the Austins were in March is irrelevant. Determining their place of residence would not have been a "wild goose chase even in October. The Austins' whereabouts could be easily determined: a simple email to them or DiGiacomo would likely have sufficed. But Buchan, by its own admission, made no such effort.

Buchan insists that once it had "plain notice" that the Austins were not in Washington, its inquiry was at an end and it would have been "nonsensical" to continue to seek them in Washington. Resp't br. at 24. It claims the objective of attempting to locate the defendant is to determine

whether the defendant can be served in the state. Resp't br. at 18. *McKeand* and eight decades of Washington Case law hold otherwise. The purpose of the statute is not to make a bald determination that the defendant cannot be found within the state - it is to provide constitutionally required notice. *Wichert*, 117 Wn.2d at 151. Due process required notice reasonably calculated to apprise the Austins of the pendency of the action and afford them an opportunity to present their objections. *Carson*, 62 Wn. App. at 317. Buchan could not merely establish that the Austins were out of the state, make no effort to determine their actual place of residence, publish a notice in an obscure local paper, and blithely mail the summons and complaint to an address they knew perfectly well was *not* the Austins' place of residence.²

That Buchan did not undertake a diligent search to determine the Austins' place of residence is underscored by its failure to avail itself of other statutory remedies available to it. RCW 4.28.185(1)(c), the Long

² Publication alone is not a reliable means of acquainting interested parties of the fact that their rights are before the courts. *Ashley v. Superior Court in and for Pierce County*, 83 Wn.2d 630, 635, 521 P.2d 711 (1974) quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S. Ct. 652, 658 (U.S. 1950). "It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed." *Id.* at 635-35. When notice is a person's due, process which is a mere gesture is not due process. *Id.* at 635. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. *Id.*

Arm Statute, allows the assertion of Washington jurisdiction over those who own property within the state. The statute provides for service outside the state, but requires personal service. RCW 4.28.185(2), (4). Like RCW 4.28.100, it requires an affidavit of non-residence. Buchan could have availed itself of the Long Arm Statute but did not. Had it done so, service would have been governed by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (“the Convention”). Curiously, Buchan complains that had it complied with CR 4 it would have then have had to comply with the Convention.³ Doing so, Buchan asserts, would have been a costly and complicated process. Resp’t br. at 22-23.

Under the Convention, an international treaty to which the United States and Italy are signatories, each nation designates a central authority to receive requests for service of process. *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 674, 10 P.3d 371 (2000). The designated central authority is solely responsible for serving the documents or having them served by a method prescribed by the country’s internal law for the service of documents in domestic actions upon persons who are within its territory. *Id.* The purpose of the convention is to create

³ The Austins made reference to CR 4 in their opening brief. CR 4(i)(1)(D) allows for service in a foreign country to be made by “any form of mail, requiring a signed receipt, to be addressed and mailed to the party to be served.”

appropriate means to ensure that judicial and extrajudicial documents to be served abroad *shall be brought to the notice of the addressee in sufficient time*. (A copy of the Convention is attached. It includes the necessary forms for requesting service of judicial documents abroad.)

Had Buchan complied with the Convention and sent the summons and complaint to Italy's central authority it would have avoided the "wild goose chase" it complains of. The Italian central authority would have carried out the service, relieving Buchan of doing so. Nor would there have been any untoward costs involved. Had Buchan complied with the Convention, the purpose behind the Convention would have satisfied, and the Austins would have been properly and timely served.

McKeand makes clear that the requirement to exercise diligence in determining a defendant's place of residence was a requirement more than three quarters of a century ago. The cases cited in the Austin's opening brief amply reinforce that requirement.

Buchan attempts to distinguish those cases by inferring that the requirement to make an honest and reasonable effort to locate the defendant in the state obtains only when the defendant is believed to be avoiding service. Resp't br. at 22. "Otherwise," Buchan states, "plaintiffs could avoid the trouble of personally serving a defendant within the state by making a cursory attempt at service and then using service by

publication.” *Id.* There is no distinction in the statute or the case law requiring a plaintiff to conduct a diligent search where the defendant might be secreting himself, while requiring minimal or no inquiry where the defendant is out of state. Buchan did precisely what it argues should not be done when a defendant makes himself scarce: it avoided the trouble of personally serving the Austins by making no attempt at locating them, and then resorting to service by publication.

Boes, 122 Wn. App. 569, is one of the cases Buchan pronounces inapposite. Resp’t br. at 22. But consider the extensive efforts the plaintiff undertook to locate the defendant in that case in order to serve him personally. A process server went to the address found on the accident report but was told the defendant did not reside there. *Id.* at 572. The process server consulted regional phone listings and conducted an unsuccessful internet search in Washington, Oregon, and Idaho. *Id.* The plaintiff hired a private investigator who checked police, utility, and voting records to no avail. *Id.* The investigator called and repeatedly visited a house owned by a woman with the same last name as the defendant who turned out to be only a distant relative of the defendant. Finally, the investigator went to the address listed on the defendant’s motor vehicle registration, but found that the car was registered to someone else entirely. *Id.* at 572-73. Only then did the plaintiff prepare

an affidavit and summons by publication. *Id.* at 573. The Court found these efforts constituted a reasonably diligent attempt to locate the defendant. *Id.* at 576.⁴

The Court explicitly rejected a distinction between avoiding service and residing out of state, noting that the affidavit must articulate facts to meet the statutory requirements, not prove intent to avoid service. *Id.* at 577. Indeed, short of a full fact-finding hearing, a finding on what the defendant knew or intended when he left the state was impossible. *Id.* *Boes* thus refutes Buchan's assertion that an honest and reasonable attempt to locate the defendant is only necessary where the plaintiff comes to believe the defendant is avoiding service.

In *Charboneau*, another case Buchan claims is inapposite, the Court found the plaintiff's efforts inadequate where it did not try to contact the defendant's wife or daughter even though they probably would have known the defendant's address and whereabouts. *Id.* at 363. Before resorting to service by publication, a plaintiff should make efforts to locate the defendant by contacting those who might know where the defendant can be found, such as the defendant's friends and business associates. *Id.*

⁴ Where a plaintiff possesses information that might reasonably assist in determining a defendant's whereabouts, but fails to follow up on that information, the plaintiff has not made the honest and reasonable effort necessary to allow for service by publication." *Id.* at 575, citing *Brenner v. Port of Bellingham*, 53 Wn. App. 182, 187, 765 P.2d 1333 (1989).

Importantly, in respect to Buchan's argument regarding defendants avoiding service, the Court held that nothing in the record showed that the defendant was trying to conceal himself to avoid service of process, as opposed to simply being ignorant of the existence of the suit. *Id.* at 364. The Court directed that the declaratory judgment against the defendant be dismissed. *Id.* As in *Charboneau*, Buchan could have readily inquired of DiGiacomo as to the Austins' whereabouts before resorting to service by publication. It did not do so. In fact, it was not until four months after publication that Buchan asked the Austins' mother for their addresses. CP 195.

As it did below, Buchan continues to cloud the issue of service with what it terms "actual notice." It states that it has never argued that the emails constituted service. Resp't br. at 145. But the unmistakable gravamen of its argument below was that the emails were indeed intended to act as service, and that emailing the Austin's mother (who was not a party to the suit) was "actual notice" and sufficient to constitute service. Buchan argued to the trial court that the time and expense of service by publication could have been avoided if DiGiacomo had heeded its attorney's advice and retained an attorney who could have accepted service on their behalf. CP 145. Buchan still argues notice to DiGiacomo constituted notice to her sons. Resp't br. at 26 fn.5, *citing Deep Water*

Brewing, LLC v. Fairway Resources Ltd., 152 Wn. App. 229, 268, 215 P.3d 990 (2009), *review denied*, 168 Wn.2d 1024 (2010). But merely emailing the Austins' mother and suggesting she lawyer up is not service on the Austins themselves.

Buchan did not strictly comply with the requirements of RCW 4.28.100. Proper service of the summons and complaint is essential to invoke personal jurisdiction over a party, and a default judgment entered without proper jurisdiction is void. *In re Marriage of Markowski*, 50 Wn. App. 633, 636, 749 P.2d 754 (1988). A court has a nondiscretionary duty to vacate a void judgment. *Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 323, 877 P.2d 724 (1994). The trial court should have granted the Austins' motion to vacate and motion to reconsider, and voided the judgment.

(2) The Dispute Between Buchan and the Austins Should Have Proceeded to Mediation or Arbitration

Buchan rushed into court without undertaking the mediation/arbitration required under its contract with the Austins. CP 165-66. On September 22, 2010, Di Giacomo sent Buchan an email disputing the amount she owed. CP 178, 270. Scarcely two weeks later, on October 7, 2010, despite the fact that the contract contained a provision requiring mediation/arbitration for any dispute between the parties,

Buchan filed a complaint for breach of contract, unjust enrichment, and foreclosure of lien. CP 16.

The contract provided that any dispute or claim arising between the parties related to the agreement be submitted to mediation, and, if mediation failed to resolve the matter, proceed to arbitration. CP 165. Buchan argues that mediation/arbitration was not required because it joined J.P. Morgan Chase Bank, N.A. (“Chase”) under a provision of the contract excluding third-party actions from the arbitration clause. That determination was not Buchan’s to make. Paragraph 13.4 of the contract specifies that “The arbitrator shall determine whether a Dispute is covered by this agreement to arbitrate.” CP 166. It was the arbitrator, not Buchan, who had the authority under the contract to determine whether the dispute would be covered by the mediation/arbitration agreement or whether Buchan was free to pursue a remedy in court.

Parties to an agreement can agree that an arbitrator shall decide the question of whether a particular dispute is arbitrable. *Mount Adams Sch. Dist. v. Cook*, 150 Wn.2d 716, 724-25, 81 P.3d 111 (2003). When parties agree by contract to vest an arbitrator with authority to mediate disputes, the parties are bound by their consent to have the arbitrator fashion an appropriate remedy. *Clark County Pub. Util. Dist. No. 1 v. Int’l Bhd. of Elec. Workers*, 150 Wn.2d 237, 248-49, 76 P.3d 248 (2003). Where the

parties have agreed to allow arbitration, whether a grievance is arbitrable is for the arbitrator to decide. *Mount Adams*, 150 Wn.2d at 724-25. An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable. *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 879, 224 P.3d 818 (2009); RCW 7.04A.060. If the arbitration clause is enforceable (and Buchan makes no argument that the arbitration clause itself is unenforceable), all issues covered by the substantive scope of the arbitration clause must go to arbitration. *Id.* at 881; RCW 7.04A.060(2), (3). Unless a court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate. *Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscape Group, Inc.*, 148 Wn. App. 400, 404-05, 200 P.3d 254 (2009); RCW 7.04A.070(1).

Arbitration clauses should be liberally interpreted when the issue contested is the scope of the clause. *King County v. Boeing Co.*, 18 Wn. App. 595, 603, 570 P.2d 713 (1977). If the scope of an arbitration clause is debatable or reasonably in doubt, the clause should be construed in favor of arbitration.

That there is an enforceable agreement between the parties to arbitrate here is not in dispute. The arbitration provision plainly provides that the arbitrator shall determine whether a particular dispute is covered

by the agreement to arbitrate; consequently, the arbitrability of Buchan's claims must itself be arbitrated. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 816-17, 225 P.3d 213 (2009). It is not a matter for the courts to decide. *Id.* RCW 7.04A.060.

Buchan's haste in filing the complaint, rather than the demand notice specified in the agreement (paragraphs 13.1, 13.2), short-circuited the mediation/arbitration process laid out in the contract. Its rush into the courtroom deprived an arbitrator the opportunity required by the contract to determine whether Buchan's dispute with the Austins was covered by the agreement to arbitrate. Given Buchan's haste and the cavalier manner in which it tossed aside the requirement that an arbitrator determine the reach of the agreement, the Austins have every right to ask this Court to remand for mediation/arbitration.

Nor did the Austins waive the right to arbitration, as Buchan insists. Buchan cites to *Pederson v. Klinkert*, 56 Wn.2d 313, 352 P.2d 1025 (1960) for the proposition that an arbitration clause may be waived. The *Pederson* court held that a party may waive an arbitration clause by failing to invoke it *in the trial when an action is commenced against him on the contract*. *Id.* at 320. Critically, however, the defendant in *Pederson* was properly served with the summons and complaint and served a notice of appearance on the plaintiff. *Id.* at 314. The defendant

had thus “appeared” as defined in RCW 4.28.210.⁵ After appearing in the case and failing to invoke the arbitration clause in the trial court, the defendant was deemed to have waived arbitration. In this respect *Pederson* is utterly distinguishable from the present case where the Austins were *not* served and did not appear in trial court until after the default judgment was entered.

Woodruff v. Spence, 76 Wn. App. 207, 883 P.2d 936 (1995), *review denied*, 135 Wn.2d 1010 (1998) is an even more interesting case which Buchan cites in support of its argument that the Austins waived arbitration. *Woodruff* actually supports the Austins. The plaintiff in *Woodruff* filed a complaint along with an affidavit of service showing the defendant had been personally served. *Id.* at 209. Default judgment was entered against the defendant. *Id.* The defendant moved for relief from the default judgment and filed numerous affidavits attesting to the fact that he had never been served. *Id.* On appeal, the defendant argued that the default judgment was void for lack of personal service and that the trial should have been stayed pending arbitration. *Id.* at 209, 211. The Court agreed. It noted that proper service of the summons and complaint is a prerequisite to the court obtaining jurisdiction, and a judgment entered

⁵ RCW 4.28.210 states in part, “A defendant appears in an action when he or she answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his or her appearance.”

without jurisdiction is void. *Id.* at 209. It held that the affidavits presented an issue of fact whether the defendant had been properly served, requiring remand for an evidentiary hearing on the issue. *Id.* at 210. Turning to the issue of arbitration, the Court noted that ordinarily if one party initiates court action in spite of an arbitration agreement, the other party is entitled to an order staying the litigation. *Id.* at 211. Whether the defendant had knowingly waived that right by failing to invoke it when the action was commenced depended on whether he had notice of the action against him prior to entry of the default judgment. *Id.* Because the Court could not determine whether the defendant had been properly served, resolution of the issue of waiver would depend on the outcome of the evidentiary hearing on remand. *Id.*

The Court's holding on this score bears emphasis: if the defendant was not properly served he would not have had proper notice of the action and could not have knowingly waived the right to enforce the arbitration clause. That is precisely the situation here. The Austins were not properly served and did not waive the right to arbitration.

(3) The Trial Court Abused Its Discretion In Denying the Austins' Motion to Vacate Default Judgment

Default judgments are generally disfavored in Washington based on an overriding policy which prefers that parties get their day in court

and resolve disputes on the merits. *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007); *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). Because default judgments are generally disfavored, a trial court should exercise its authority liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done. *Id.* at 582. The Austins satisfied the four factors for vacating a default judgment laid out in *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

(a) The Austins Have a Meritorious Defense

Buchan asserts that the Austins presented *no* evidence of a meritorious defense. That contention is unfounded – the Austins presented ample evidence of a defense. In the interest of brevity, the Austins will not repeat the facts laid out in their brief at 27-29. A prima facie defense, *however tenuous*, is sufficient to support a motion to vacate a default judgment. *C. Rhyne & Assocs. v. Swanson*, 41 Wn. App. 323, 328, 704 P.2d 164 (1985). The evidence and reasonable inferences are to be viewed in the light most favorable to the moving party to determine whether there is evidence of a prima facie defense. *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 834, 14 P.3d 837 (2000), *review denied*, 143 Wn.2d 1021 (2001). The court does not weigh the facts. *Id.* A declaration, such as DiGiacomo’s, viewed in the light most favorable to

the Austins, is sufficient to establish a prima facie defense. *Gutz v. Johnson*, 128 Wn. App. 901, 917, 117 P.3d 390 (2005), *affirmed*, 161 P.3d 956 (2007). In short, the Austins amply demonstrated the necessary facts to present a prima facie defense, and did not rely on mere argument or conclusions. *Calhoun v. Merritt*, 46 Wn. App. 616, 620, 731 P.2d 1094 (1986).

(b) The Austins' Failure to Appear Was Occasioned By Surprise or Excusable Neglect

Buchan argues that its attorney's emails to DiGiacomo were sufficient to put the Austins on notice and that their failure to respond to those emails was inexcusable neglect. Washington law is to the contrary. In the absence of proper service, a trial court is deprived of jurisdiction over the defendant. A defendant need not demonstrate a meritorious defense in order to have a default judgment vacated on the grounds that the court lacked jurisdiction to enter judgment. *Schell v. Tri-State Irrigation*, 22 Wn. App. 788, 792, 591 P.2d 1222 (1979) (reversing trial court's denial of motion to reconsider default judgment where plaintiff failed to comply with statute requiring affidavit asserting that service could not be made within state, thus depriving trial court of jurisdiction). Irregularities relating to procedural rules, such as failure to provide notice of default proceedings, generally justify vacation of a default judgment.

Gage v. Boeing Co., 55 Wn. App. 157, 164, 776 P.2d 991, *review denied*, 113 Wn.2d 1028 (1989). Excusable neglect is determined on a case by case basis. *Norton v. Brown*, 99 Wn. App. 118, 123, 992 P.2d 1019 (1999), *review denied*, 142 Wn.2d 1004 (2000). Washington courts have determined that even so careless an act as losing a summons and complaint in an insurance office does not constitute inexcusable neglect. *Boss Logger, Inc. v. Aetna Cas. & Sur. Co.*, 93 Wn. App. 682, 689, 970 P.2d 755 (1998). Where Buchan relies merely on its emails to DiGiacomo advising her to obtain legal counsel, it cannot credibly argue that the Austins were given sufficient notice, or that their failure to appear was inexcusable neglect and not the product of surprise.

(c) The Austins Acted With Diligence

RCW 4.28.200 gives persons who are constructively served the right to apply to reopen and defend within one year of the entry of a default judgment.⁶ *Caouette*, 71 Wn. App. at 75. A clear public policy favors personal service over constructive service. *Id.* at 76. Our Supreme Court long ago concluded, in *Chaney v. Chaney*, 56 Wash. 145, 105 P.

⁶ The statute provides in relevant part: If the summons is not served personally on the defendant in the cases provided in RCW 4.28.110 and .180, he or she at any time before judgment, shall be allowed to defend the action and, except in an action for divorce, the defendant or his or her representative may in like manner be allowed to defend after judgment, and within one year after the rendition of such judgment, on such terms as may be just.

229 (1909), that defendants have “additional rights” if the default judgment against them was based upon service by publication. *Id.* The intent is to provide the trial court in such instances with a greater discretion in granting a vacation than in the case of personal service of process. *Id.* at 76, citing Philip A. Trautman, *Vacation and Correction of Judgments in Washington*, 35 Wash. L. Rev. 527 (1960). The Austins filed their motion to vacate the order and decree of foreclosure only 15 days after it was entered. CP 130-36. Where RCW 4.28.200 allows one year for a defendant who was not personally served to defend, Buchan cannot seriously argue that the Austins did not diligently respond.

(d) Reversal Will Not Result in Hardship to Buchan

Buchan trots out preposterous arguments to convince this Court that reversal would cause it hardship. It complains of having to “resort to long-distance email correspondence” although it does not illuminate how an email to Italy is any more onerous than an email across town. That it chose service by publication is an historical matter and has no bearing on remand. Buchan complains that it would be faced with the prospect of litigating against an absent defendant who “has shown no inclination to respond, let alone participate in the process of litigation in Washington.” That statement is absurd: the matter is now before this Court and the Austins are represented by both trial and appellate counsel. Buchan

concludes with a vile slur. It anticipates that the Austins will dismiss their counsel and “continue to take advantage of their absence from the country.” Resp’t br. at 42.

If this Court remands, Buchan will merely have to proceed as any other plaintiff would, either to mediation/arbitration or to trial on the merits. The possibility of a trial is an insufficient basis for the court to find substantial hardship on the non-moving party. *Gutz*, 128 Wn. App. at 920. *See also, Johnson v. Cash Store*, 116 Wn. App. 833, 842, 68 P.3d 1099, *review denied*, 150 Wn.2d 1020 (2003) (vacation of a default inequitably obtained cannot be said to substantially prejudice the nonmoving party merely because the resulting trial delays resolution on the merits). This reasoning is consistent with Washington's policy that prefers parties resolve disputes on the merits, as opposed to default proceedings. *Gutz*, 128 Wn. App. at 920-21. Buchan will suffer no hardship sufficient to dissuade this Court from vacating the default judgment.

D. CONCLUSION

The trial court did not have jurisdiction over the Austins because Buchan failed to exercise reasonable diligence in locating the Austins as required under RCW 4.28.100. The contract with Buchan mandated that an arbitrator determine the arbitrability of any disputes between the

parties. Buchan ignored that provision of the contract and improperly chose to pursue a remedy in the courts instead. Default judgments are heavily disfavored in Washington. The Austins satisfied the four factors laid out in *White v. Holm*.

This Court should reverse the trial court and either order mediation and arbitration or remand for trial on the merits.

DATED this 30th day of September, 2011.

Respectfully submitted,


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APPENDIX

**14. CONVENTION ON THE SERVICE ABROAD OF
JUDICIAL AND EXTRAJUDICIAL DOCUMENTS
IN CIVIL OR COMMERCIAL MATTERS**

(Concluded 15 November 1965)

The States signatory to the present Convention,
Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,
Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.
This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I – JUDICIAL DOCUMENTS

Article 2

Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6.
Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.
The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either –

- a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or
- b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this Article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each Contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each Contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another Contracting State which are designated by the latter for this purpose.

Each Contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with –

- a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
- b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
- c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more Contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding Articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a Contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by —

- a) the employment of a judicial officer or of a person competent under the law of the State of destination,
- b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that —

- a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or
- b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention, and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each Contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this Article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled —

- a) the document was transmitted by one of the methods provided for in this Convention,
- b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,
- c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled –

- a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and
- b) the defendant has disclosed a *prima facie* defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each Contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This Article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II – EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a Contracting State may be transmitted for the purpose of service in another Contracting State by the methods and under the provisions of the present Convention.

CHAPTER III – GENERAL CLAUSES

Article 18

Each Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a Contracting State permits methods of transmission, other than those provided for in the preceding Articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more Contracting States to dispense with –

- a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of Article 3,
- b) the language requirements of the third paragraph of Article 5 and Article 7,
- c) the provisions of the fourth paragraph of Article 5,
- d) the provisions of the second paragraph of Article 12.

Article 21

Each Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following –

- a) the designation of authorities, pursuant to Articles 2 and 18,
- b) the designation of the authority competent to complete the certificate pursuant to Article 6,
- c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to Article 9.

Each Contracting State shall similarly inform the Ministry, where appropriate, of –

- a) opposition to the use of methods of transmission pursuant to Articles 8 and 10,
- b) declarations pursuant to the second paragraph of Article 15 and the third paragraph of Article 16,
- c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905, and on 1st March 1954, this Convention shall replace as between them Articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of Article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of Article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These Articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

Article 25

Without prejudice to the provisions of Articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the Contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 26, and to the States which have acceded in accordance with Article 28, of the following –

- a) the signatures and ratifications referred to in Article 26;
- b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 27;
- c) the accessions referred to in Article 28 and the dates on which they take effect;
- d) the extensions referred to in Article 29 and the dates on which they take effect;
- e) the designations, oppositions and declarations referred to in Article 21;
- f) the denunciations referred to in the third paragraph of Article 30.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic

channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

FORMS (REQUEST AND CERTIFICATE)
SUMMARY OF THE DOCUMENT TO BE SERVED

(annexes provided for Articles 3, 5, 6 and 7)

ANNEX TO THE CONVENTION

Forms

REQUEST
FOR SERVICE ABROAD OF JUDICIAL OR EXTRAJUDICIAL
DOCUMENTS

Convention on the Service Abroad of Judicial and Extrajudicial Documents in
Civil or Commercial Matters,
signed at The Hague, the 15th of November 1965.

Identity and address
of the applicant

Address of receiving
authority

The undersigned applicant has the honour to transmit – in duplicate – the documents listed below and, in conformity with Article 5 of the above-mentioned Convention, requests prompt service of one copy thereof on the addressee, *i.e.*,

(identity and address)

a) in accordance with the provisions of sub-paragraph a) of the first paragraph of Article 5 of the Convention*.

b) in accordance with the following particular method (sub-paragraph b) of the first paragraph of Article 5)*:

c) by delivery to the addressee, if he accepts it voluntarily (second paragraph of Article 5)*.

The authority is requested to return or to have returned to the applicant a copy of the documents - and of the annexes* - with a certificate as provided on the reverse side.

List of documents

.....
.....
.....
.....
.....
.....
.....
.....
.....

Done at, the
Signature and/or stamp.

* Delete if inappropriate.

Reverse of the request

CERTIFICATE

The undersigned authority has the honour to certify, in conformity with Article 6 of the Convention,

1. that the document has been served*
- the (date)
 - at (place, street, number)
 - in one of the following methods authorised by Article 5:
 - a) in accordance with the provisions of sub-paragraph a) of the first paragraph of Article 5 of the Convention*.
 - b) in accordance with the following particular method*:
 - c) by delivery to the addressee, who accepted it voluntarily* .

The documents referred to in the request have been delivered to:

- (identity and description of person)
- relationship to the addressee (family, business or other):

- 2) that the document has not been served, by reason of the following facts*:
-
-

In conformity with the second paragraph of Article 12 of the Convention, the applicant is requested to pay or reimburse the expenses detailed in the attached statement*.

Annexes

Documents returned:

In appropriate cases, documents establishing the service:
.....
.....

Done at, the
Signature and/or stamp.

* Delete if inappropriate.

SUMMARY OF THE DOCUMENT TO BE SERVED

Convention on the Service Abroad of Judicial and Extrajudicial Documents in
Civil or Commercial Matters,
signed at The Hague, the 15th of November 1965.

(Article 5, fourth paragraph)

Name and address of the requesting authority:

.....

Particulars of the parties*:

.....

.....

JUDICIAL DOCUMENT**

Nature and purpose of the document:

.....

Nature and purpose of the proceedings and, where appropriate, the amount in

dispute:

.....

Date and place for entering appearance**:

.....

Court which has given judgment**:

.....

Date of judgment**:

Time-limits stated in the document**:

.....

EXTRAJUDICIAL DOCUMENT**

Nature and purpose of the document:

.....

Time-limits stated in the document**:

.....

.....

* If appropriate, identity and address of the person interested in the transmission of the document.

** Delete if inappropriate.

DECLARATION OF SERVICE

On this day stated below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of: Reply Brief of Appellants in Court of Appeals Cause No. 67155-3-I to the following parties:

Jerry E. Walker
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Original filed with:

Court of Appeals, Divisions I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 30, 2011, at Tukwila, Washington.

Christine Jones
Talmadge/Fitzpatrick

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 SEP 30 PM 4:53