

No. 72225-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

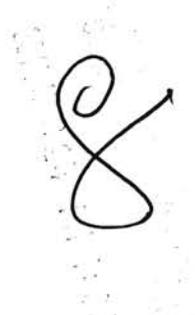
KARL BENZ and CATHERINE RILEY,

Appellants,

v.

JOHN RASHLEIGH, an individual,
PETER C. OJALA, an individual,
CARSON LAW GROUP, PS, a Washington corporation,
and DOES I thru V, inclusive,

Respondents

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BRIEF OF RESPONDENT JOHN RASHLEIGH

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I. INTRODUCTION

John Rashleigh (“Rashleigh”) is a process server. He tried to serve Plaintiffs Karl Benz and Catherine Riley (“BENZ/RILEY”) at a residence, but the premises appeared abandoned and the electricity was “red-tagged.” He filed an affidavit of attempts that was accurate in stating that BENZ/RILEY were not living in the residence. The affidavit of attempts included some additional factual statements that BENZ/RILEY asserts were inaccurate. BENZ/RILEY’s appeal ignores the essential accuracy of the affidavit of attempts – the fact that BENZ/RILEY could NOT be found at the residence. BENZ/RILEY focus instead on secondary details in the affidavit of attempts in an attempt to create a cause of action where none exists.

II. RESTATEMENT OF ISSUES

Did the trial court err as a matter of law when it dismissed all claims against Defendant Rashleigh?

III. RESTATEMENT OF THE CASE

All facts presented by Benz/Riley (the non-moving party) are assumed to be true for purposes of the de novo review of the dismissal of the claims against process server Rashleigh under CR 12(b)(6).

The following facts presented by Benz/Riley in their complaint relate to the claims against Rashleigh:

- a) Rashleigh is a professional process server (CP Vol. I, 35.)
- b) Rashleigh was retained to serve Benz/Riley (CP Vol. I, 36.)
- c) Rashleigh allegedly attempted service at the residence of Benz/Riley (CP Vol. I, 36.)
- d) Rashleigh executed his affidavit of attempted service, stating that he was unable to effect service and listed two reasons:
 - 1. Abandonment/no furniture
 - 2. Electricity turned off/red-tagged for non-payment (CP Vol. I, 36.)
- e) Rashleigh made statements he knew were false. (CO Vol. I, 36.)
- f) Benz/Riley's residence was red-tagged, but for another reason/power diversion concern. (CP Vol. I, 37.)
- g) Benz/Riley's were in fact NOT living in the residence at the time of attempted service. (CP Vol. I, 37.)
- h) Rashleigh did not include process server registration number or county of residence on his affidavit of attempted service. (CP Vol. I, 38.)

These facts must be considered true for purposes of this de novo review of the dismissal of the complaint against Rashleigh per CR 12(b)(6). These facts do not support a cause of action against Rashleigh.

IV. ARGUMENT

A. Standard of Review for a CR 12(b)(6) Motion

The standard of review is de novo. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005).

B. The Trial Court Properly Granted RASHLEIGH's Motion for Dismissal under CR 12(b)(6)

1. **No Facts Consistent with Complaint are Legally Sufficient to Support BENZ/RILEY's Claim.**

Rashleigh's motion to dismiss for failure to state a claim upon which relief can be granted is authorized by Court Rule 12 (b)(6):

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) ... (6) failure to state a claim upon which relief can be granted, (7) ...¹

¹ No matters outside the pleadings were presented, and so the motion was not treated as one for summary judgment, as provided by the same court rule:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56,

As noted by BENZ/RILEY, Rashleigh is entitled to dismissal under CR 12(b)(6) only if appears beyond doubt that BENZ/RILEY cannot prove any set of facts consistent with the complaint that would justify recovery.

CR 12(b)(6) motions should be granted only “sparingly and with care.” *Haberman*, 109 Wash.2d at 120, 744 P.2d 1032 (citing *Orwick*, 103 Wash.2d at 254, 692 P.2d 793). “[A]ny hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support Plaintiff’s claim.” *Halvorson v. Dahl*, 89 Wash.2d 673, 674, 574 P.2d 1190 (1978).

Bravo v. The Dolsen Companies, 125 Wn.2d 745, 750, 888 P.2d 147 (1995). (Emphasis added.)

Put another way: “This court reviews de novo a trial court’s dismissal pursuant to CR 12(b)(6) and will affirm where no set of facts consistent with the complaint justify recovery.” *McCarthy Fin., Inc. v. Premera*, 182 Wn. App. 1, 6, 328 P.3d 940 (footnote omitted), *review granted*, ___ Wn.2d ___, 337 P.3d 325 (2014).

BENZ/RILEY’s complaint makes it clear that Rashleigh essentially got it right in his affidavit of attempted service: he was not able to serve BENZ/RILEY because they were not residing in the home;

and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

and the power to the residence was turned off. The complaint confirms those salient facts at paragraphs 21 and 22. (CP Vol. I, 37).

BENZ/RILEY asserts that Rashleigh committed perjury.

Assuming that to be true, as we must on this review, the BENZ/RILEY cannot show any damages that result from the same. This is clear when you compare the alleged “lies” with what is set forth in the complaint:

<u>THE “LIES” IN THE AFFIDAVIT OF ATTEMPTS</u>	<u>THE ALLEGATIONS IN THE COMPLAINT</u>
1. The residence appeared to be abandoned. There was no furniture present in the house. 2. The electricity has been turned off based on the residence being red tagged for non-payment. (CP Vol. I, 43.)	1. Riley was traveling at the time of attempted service. There was furniture in the premises. 2. The electricity was turned off at the request of Riley after receive of her December 3, 2013, electricity bill and it remained turned off as of April 2, 2014. ² The residence was red-tagged (albeit not for non-payment). (CP Vol. I, 37.)

² The date of the attempted service was January 29, 2014, between those two dates.

Neither BENZ/RILEY has claimed to be living in the residence where Mr. Rashleigh attempted service at the time the attempt was made. Indeed, to do so would be inconsistent with the allegation in the complaint that RILEY directed that the electricity be turned off in December 2013, before the attempt to serve, and it was still turned off as of April 2, 2014, after the attempt to serve. (CP Vol. I, 37.)

The alleged perjury, if true, could potentially cause problems for Rashleigh with the prosecuting attorney, because perjury is a crime. But even assuming Rashleigh committed perjury, as we must in this de novo review, that criminal act is not relevant to any cause of action. The salient facts were true: BENZ/RILEY could not be found in the home where service was attempted and the power had been turned off.

2. BENZ/RILEY have shown no evidence of any conspiracy. Merely alleging the same does not mean that the facts have been “well pleaded.”

The legal standard is discussed in *Trumble v. Wasmer*:

The party moving for judgment on the pleadings admits, for the purpose of the motion, the truth of every fact well pleaded by his opponent and the untruth of his own allegations which have been denied. *Miller v. Paul*, 155 Wash. 193, 283 P. 699 (1930) [additional citations omitted]. However, a motion for judgment on the pleadings admits only facts well pleaded and not mere conclusions or the pleader's interpretation of statutes involved or his

construction of the subject matter. 71 C.J.S.,
Pleading, § 426, page 868; *Miller v. Paul*, *supra*.

Trumble v. Wasmer, 43 Wn.2d 592, 596, 262 P.2d
538, 541 (1953). (Emphasis added.)

Mr. Rashleigh attempted to service BENZ and RILEY. He was unsuccessful. He said the residence appeared to be abandoned. He saw that the power was turned off – red-tagged – and made the assumption that it was for non-payment. It turns out it was turned off for another reason, according to the complaint, but the salient fact remains true: the power was turned off.

Mr. Rashleigh provided his affidavit of attempts to the law firm seeking to serve BENZ/RILEY. Mr. Rashleigh had no control over what the law firm did with his affidavit.

A civil conspiracy has been defined as,

[A] combination of two or more persons agreeing to commit a criminal or unlawful act, or to commit a lawful act by criminal or unlawful means, or as a combination of two or more persons by concerted action to accomplish an unlawful purpose, or some purpose not in itself unlawful by unlawful means. *Couie v. Local Union*, 51 Wn.2d 108, 116, 316 P.2d 473 (1957), citing *Harrington v. Richeson*, 40 Wn.2d 557, 245 P.2d 191 (1952).

There is no evidence proffered by BENZ/RILEY to support the notion that Mr. Rashleigh agreed with any other person to commit an act that would constitute a civil conspiracy.

BENZ/RILEY cite the statute defining criminal conspiracy in their opening brief and BENZ/RILEY allege that one occurred, but they cite no facts, even hypothetical facts, to support such a claim.

The bald-faced assertion that Mr. Rashleigh was somehow, some way involved in a conspiracy, be it criminal or civil, is not enough. That cause of action is not well pled. Dismissal under CR 12(b)(6) was appropriate.

V. CONCLUSION

The Order of Dismissal in favor of RASHLEIGH should be affirmed.

Dated: December 22nd, 2014

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on this 22nd day of December, 2014, I caused a true and correct copy of the Brief of Respondent John Rashleigh to be mailed as follows:

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