73507-1 73507-1

No. 73507-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

AVIS HAMLIN,

Appellant,

v.

MARK HAMLIN

Respondent.

BRIEF ON APPEAL

E

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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A. ASSIGNMENTS OF ERROR.

The court was in error in failing to grant Appellant's Motion to Vacate Judgment.

B. STATEMENT OF THE CASE.

On September 10, 2012 Plaintiff filed a motion to serve the summons by publication, supported by the Declaration of Rebecca Roe (CP 5) and later supplemented on September 11, 2012 with an unsworn statement of facts by an unknown purported process server. (CP 7 and 17) Based on this the Honorable Carol Schapira signed and entered an order allowing service of summons by publication on December 18, 2012, which was effected. (CP 11) As noted above judgment was entered against the defendant. (CP 35)

Ms. Roe, in her declaration, stated she "...has a good faith belief that Defendant Hamlin is concealing herself in the State to avoid service of process." She gives no basis for personal knowledge of this but states, "ABC Legal Services advises they can tell Defendant Hamlin is inside the home, but she will not open the door." Roe does not indicate who "advised" of this or the basis

for this knowledge.

The later supplementation by an unidentified, unsworn person makes no such allegation but states that on five different occasions that the server was unable to obtain access to the defendant's door, that on one occasion "No answer at door, no noise inside, no movement inside and lights on inside." and that on a second occasion there was, "no answer at door, no noise inside, no movement inside and no lights."

There were no allegations indicating that the defendant lived elsewhere. Your author's undisputed Declaration indicated that Appellant's residence was at the place indicated and that contact could easily have been made as court records showed that your author was currently representing Appellant in another appellate matter before this state's courts. (CP 37 and 39)

Appellant objected, in her motion (CP 36), to material in Respondent's Declarations in support of their motion to publish which not only contained hearsay and speculation but failed to establish a proper foundation for the claimed observations. Respondent has never countered these objections below.

Respondent instead submitted to the court below Declarations (CP 42 and 43) alleging, without proof, that Appellant must have known about the suit because a third party accused them of misconduct and filed a bar complaint against Respondent's attorney, all of which Appellant objects to as irrelevant and without proper foundation to show personal knowledge thereof.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

CR 60 (b)(5) "The judgment is void" was the basis of Appellant's motion to vacate.

Division One, in Brenner v. Port of Bellingham 53 Wn. App. 182, 735 P.2d 1333 (1989), stated, at p. 188,

> A default judgment entered without valid service is void and may be vacated when the want of jurisdiction is established, regardless of the passage of time. (motions to vacate under CR 60(b)(5) are not barred by the "reasonable time" or the 1-year requirement of CR 60(b), but may be brought at any time after entry of the judgment). Courts have a nondiscretionary duty to vacate void judgments. (Citations omitted and emphasis added)

In Rodriguez v. James-Jackson, 127 Wn. App. 139, 111 P.3d 271 (Div. I, 2005) the court laid out requirements for service by publication,

> The requirements of the statute governing service of process by publication or mail are twofold: (1) following reasonably diligent efforts to personally serve the defendant by exhausting all information readily available, the defendant cannot be found in the state; and (2) facts must be provided supporting an inference that the defendant concealed himself or herself within the state or left the state with the intent to avoid the service of a summons.

See also RCW 4.28.100.

The facts alleged by Plaintiff don't meet this standard. There are no allegations that the defendant wasn't in the state. Essentially the only evidence from which the court might infer concealment is (as will be discussed later this is inadmissible) that on one occasion the server saw lights inside the house although observed nothing more and the Declaration of Ms. Roe who (this also is inadmissible) declares, "ABC Legal Services advises they can tell Defendant Hamlin is inside the home, but she will not open the door."

Ms. Roe's declaration is in conflict with her added report from the server who makes no mention of knowing "Defendant Hamlin is inside the home." Indeed, such a statement would require the x-ray eyes of Superman as the only thing the server

observed were lights on in the house. These facts, even if admissible, aren't sufficient to show that the Defendant was concealing herself.

While motions are typically decided on the basis of Declarations or Affidavits which are technically hearsay this doesn't mean that the rules of evidence are discarded as to the content of those Declarations. 5C Washington Practice, in commenting on ER 1101(a) states, at p. 418, "Except as otherwise provided in section (c) these rules apply to all actions and proceedings in the courts of the State of Washington."

Ms. Roe provides no foundation of personal knowledge for her statement that the defendant is "inside the home" and acknowledges in her declaration that the information is a hearsay statement from an unidentified person at ABC. This is clearly inadmissible and is the entire basis for publication. The supplemental report from the server isn't a Declaration or Affidavit and the person making it isn't identified so that it is clearly inadmissible.

In another service by publication case, Kent v. Lee, 52 Wn.

App. 576, 762 P.2d 24 (Div. II, 1988) the court points out, at p. 579, "The statute must be strictly complied with. An affidavit that omits the essential statutory elements is as good as no affidavit at all." (citations omitted) They go on to say, at p. 579, "An affidavit is not a pleading, but is a solemn, formal asservation, under oath, upon which others might rely."

The court in Kent goes on to say, at p. 580,

> The affidavits presented on Kent's behalf showed only as fact that Kent and her attorney, after a not very exhaustive local search, were unable to locate Lee. They are devoid of any facts that would support an inference that Lee left Washington intending to defraud creditors or avoid process. The facts here, such as they are, do not, by any logical process of inference, support the conclusory statements in the attorney's affidavit."

Logic must prevail and nothing presented in the instant case gives rise to a logical inference that the defendant was concealing herself. In vacating judgment in Charboneau Excavating, Inc. v. Turnipseed, 118 Wn. App. 358, 75 P.3d 1011 (Div. 2, 2003) the court said, at p. 364, "Nothing in the record shows that Turnipseed was trying to conceal himself to avoid service of process, as opposed to simply being ignorant of the existence of the suit."

"First and basic to personal jurisdiction is service of process." Pascua v. Heil, 126 Wn. App. 520, 526, 108 P.3d 1253 (2005). "An elementary and fundamental requirement of due process … is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Cent. Hanover Bank & Trust Co., 339 U. S. 306, 314 (1950). "Because substitute and constructive service are not the ideal methods of providing such notice, … the authorizing judge must closely scrutinize the facts provided, rather than merely serving as a rubber stamp, to ensure that substitute or constructive service is being used only as a last resort." Pascua, 126 Wn. App. At 528.

Strict compliance with the statute is required for jurisdiction to attach when a summons is served by publication. Kent v. Lee, 52 Wn. App. 576, 579, 762 P.2d 24 (1988). Washington courts have interpreted the statute to mean that a party seeking an order allowing service by publication must show two elements. First, the party must demonstrate that he "…made

reasonably dislgent efforts to personally serve the defendan." Boes v. Bisiar, 122 Wn. App. 569, 574, 94 P.3d 975 (2004). Second, the party must "...set forth facts supporting a conclusion that [the defendant] had left the state or was concealing himself with intent to defraud creditors or avoid service of process." Bruff v. Main, 87 Wn. App. 609, 612, 943 P.2d 295 (1997); see also Charboneau Excavating, Inc. v. Turnipseed, 118 Wn. App. 358, 362-63, 75 P.3d 1011 (2003) ("One claiming jurisdiction under [RCW 4.28.100(2) ... mst produce ... facts [that] show (1) that his efforts to personally serve the defendant were reasonably diligent, and (2) that the defendant either (a) left the state with intent to defraud creditors or avoid service, or (b) concealed himself within the state to defraud creditors or avoid service.")

Even if we assume that Respondent made reasonably diligent efforts to locate and serve Appellant, Respondent's declarations do not support a conclusion that Appellant left the state or was concealing herself with intent to defraud Creditors or avoid service. The intent requirement under RCW 4.28.100 (2) is separate from the requirement that the plaintiff demonstrate he

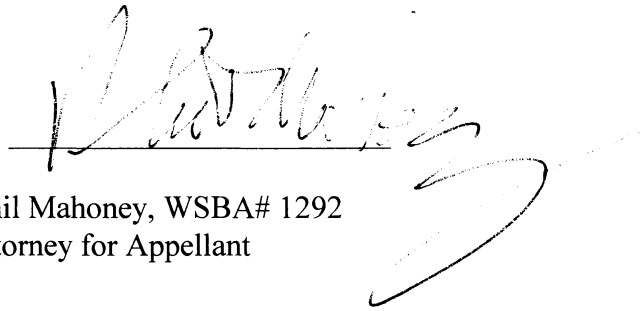
made reasonably diligent efforts to personally serve the defendant. See, e.g., Pascua, 26 Wn. App. At 526. The Respondent must present facts raising an inference that the Appellant was attempting to defraud creditors or avoid process. A record indicating the plaintiff was unable to locate the defendant is not enough to demonstrate the required intent.

As stated in Rodriguez v. James-Jackson, at p. 143, "When a court lacks personal jurisdiction over a party, the judgment obtained against that party is void." In vacating another judgment by publication service the court in Brenner v. Port of Bellingham.53 Wn. App. 182, 765 P.2d 1331 (Div. I, 1989) said, at p. 188, "Courts have a nondiscretionary duty to vacate void judgments." (emphasis added)

F. CONCLUSION

For the reasons stated above the Superior Court judgment should be vacated.

Respectfully submitted October 19, 2015,



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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on October 19, 2015 I served by first class mail a copy of Appellants Brief on Appeal to:

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Dated October 19, 2015 in Seattle, Washington.

Tom Nelson

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