

No. 36450-6 II

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

UNITED STATES SHEEPSKIN, INC.,
a Washington corporation,

Appellant,

v.

MAO LI YING, an individual,
d/b/a MOONSOFT,

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY
STATE OF WASHINGTON
THE HONORABLE LINDA LEE

REPLY BRIEF OF APPELLANT

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COMES NOW Appellant UNITED STATES SHEEPSKIN, INC. (“US Sheepskin”), by and through its attorney of record, MAHER INGELS SHAKOTKO CHRISTENSEN LLP, and Kelly DeLaat-Maher and Jordan K. Foster, and submits Appellant’s reply to the brief of respondent as follows:

I. STATEMENT OF THE CASE

U.S. Sheepskin relies upon the Statement of the Case contained in Appellant’s opening brief, and particularly on those portions wherein US Sheepskin describes its attempted service on Defendants.

II. ARGUMENT

U.S. Sheepskin substantially relies upon the argument contained in its Opening Brief. Notwithstanding, several points of clarification are needed.

A. APPELLANTS ARE NOT BARRED BY RCW 4.16.080

Defendants claim that US Sheepskin is bound by the Complaint wherein the agreement between the parties is identified as an oral contract, therefore subject to a three year statute of limitations under RCW 4.16.080. CP 5-11.¹ Defendant is correct that US Sheepskin did not amend the Complaint. Nonetheless, evidence of a written contract was

¹ Please Note that the Clerk’s Papers cited in this reply brief refer to the re-sent and renumbered Clerk’s Papers sent by the Superior Court in November 15, 2007. These renumbered papers were not used in Appellant’s Opening Brief.

produced in response to Defendant's Motion for Summary Judgment. CP 255-314. US Sheepskin should not be bound by a single reference in its Complaint.

Defendants rely upon *Luellen v. City of Aberdeen*, 20 Wn.2d 594, 148 P.2d 849 (1944) in support of the proposition that a verified complaint is the equivalent of an affidavit that cannot thereafter be contradicted. *Luellen* is not applicable to this case, as the court therein was discussing whether a verified complaint was sufficient to stand in place of an affidavit in a mandamus action. *Id.* at 601. Furthermore, that case has also been overruled, albeit on different grounds. See *Stenberg v. Pacific Power & Light Co., Inc.*, 104 Wash.2d 710, 709 P.2d 793 (1985).

US Sheepskin's complaint was designed to give notice to Defendants of the claims being brought, in compliance with Washington civil rules. The primary intention of pleadings is to give the Court and the opponent notice of the general nature of the claims asserted. *Dumas vs. Gagner*, 137 Wn. 2d 268, 971 P.2d 17 (1999). Further, "... that under our liberal rules of procedure, pleadings are primarily intended to give notice to the Court and the Opponent of the general nature of the claim asserted, we are of the opinion that the Plaintiff's Complaint is not subject to Motion to Dismiss under rule 12(b)(6)." *Lightner vs. Balow*, 59 Wn. 2d

856, 370 P.2d 982 (1962); *Chen vs. State*, 86 Wn. App. 183, 937 P.2d 612 (1987). Washington is a notice pleading state.

Under CR 8(a), the only requirement for a Complaint or other claim of relief (counter-claim, cross-claim or third-party claim) is that it must contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief claimed. Here, US Sheepskin's complaint alleged that a contract existed between the parties, and that the contract had been breached. US Sheepskin should not be prevented from presenting evidence that said contract was written, and therefore subject to a longer statute of limitations.

B. A WRITTEN CONTRACT EXISTS

Defendant argues that no written contract between the parties existed, due to an "absence of any written instrument with the essential elements." Respondent's Brief, p. 15. Defendants' assertion is insupportable. Defendant offered multiple writings between the parties outlining their course of dealing and the terms between them. See Declaration of David Phillips, CP 255-314.

The burden of proving the existence of a contract is on the party asserting its existence. *Johnson v. Nasi*, 50 Wash.2d 87, 91, 309 P.2d 380 (1957). In order for a contract to exist, the parties must have mutual

assent to the contract's essential terms. *Yakima County (W.Valley) Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wash.2d 371, 388-89, 858 P.2d 245 (1993). However, whether or not there is mutual assent may be deduced from the circumstances between the parties, including the ordinary course of dealing between them. See *Kintz v. Read*, 28 Wn.App. 731, 735, 626 P.2d 52 (1981); and *Ross v. Raymer*, 32 Wn.2d 128, 137, 201 P.2d 129 (1948). The parties' signatures are not essential to the determination. See *Urban Dev., Inc. v. Evergreen Bldg. Prods., L.L.C.*, 114 Wn.App. 639, 651, 59 P.3d 112 (2002) (signatures not essential elements of a written contract).

Defendant disputes US Sheepskin's interpretation of Washington law that a written contract need not be made up of one document. US Sheepskin cites to *Smith v. Skone & Connors Produce, Inc.*, 107 Wn.App. 199, 206, 26 P.3d 981 (2001). That case, in turn, cites to *Boyd v. Davis*, 127 Wn.2d 256, 897 P.2d 1239 (1995). Review of the language of that case does not change that interpretation. Indeed, the court stated as follows:

Common law governs in the absence of contract provisions addressing the issues.

“As a general rule ..., where several instruments are made as part of one transaction, they will be read together, and each will be construed with reference to the other. This is

true, although the instruments do not in terms refer to each other.”

Levinson v. Linderman, 51 Wash.2d 855, 859, 322 P.2d 863 (1958) (quoting *17 C.J.S. Contracts* § 298, at 714 (1939)). Whether separate agreements are in fact part of one transaction depends upon the intention of the parties as evidenced by the agreements. *Don L. Cooney, Inc. v. Star Iron & Steel Co.*, 12 Wn.App. 120, 122, 528 P.2d 487 (1974).

Id. at 261.

Here, the parties had a long history of communication and writings between them, outlining the basic terms of the contract between them. These terms were subsequently reflected in the course of dealing between the parties. The writings were sufficient to form a written contract between the parties, as the essential terms of the agreement were contained therein. Defendant’s signature is not a necessary element, but her subsequent compliance with the terms contained within the writings is indicative of her agreement thereto.

C. SERVICE OF PROCESS WAS COMPLETED

Defendant argues that service of process has not been had. This is contrary to what actually occurred, regardless of the title of documents filed by the Process Server.

As outlined in Appellant’s Opening Brief, although a later service was made on Defendant Mao personally (June 24, 2006), Defendant Mao

was actually served on February 9, 2004, as outlined an Affidavit of Non-Service of Summons and Complaint attached to the Declaration of Jordan Foster CP 223-254. This Affidavit, although entitled Affidavit of Non-Service, actually identifies service on Mao by stating “. . .**Service was completed on Mao Li Ying** by leaving with a resident of the 14908 E. Palomino Lane, Mica, WA, who refused to identify himself but replied he did live with Mao Li Ying, but was not her husband, and refused to provide any other information regarding Mao Li Ying or Moonsoft Sheepskin Co.” (Emphasis Added). The Affidavit goes on to state that only Moonsoft was not served.

The title of the document, “Affidavit of Non-Service”, is not controlling as to what actually occurred. As argued in Appellant’s Opening Brief, in *John Hancock Mut. Life Ins. Co. v. Gooley*, 196 Wash. 357, 83 P.2d 221 (1938), the court stated that it is the facts of service rather than the statement in the return of service that effectuates service of process. Specifically, the court stated that “[i]t is the fact of service which confers jurisdiction, and not the return, and the latter may be amended to speak the truth.” *Id.* at 363. Here, the title of the affidavit cannot take away the facts contained therein, which clearly evidences service on a resident of suitable age at Defendant Mao’s place of residence, regardless

of whether that resident supplied their name to the process server. US Sheepskin subsequently obtained service once again in July, 2006.

D. IN THE ALTERNATIVE, THE STATUTE OF LIMITATIONS SHOULD HAVE BEEN TOLLED

Not surprisingly, Defendant disagrees with US Sheepskin's argument that the Statute of Limitations should have been tolled due to Defendants' concealment under RCW 4.16.180. US Sheepskin urges that the trial court erred in failing to determine that the statute of limitations was tolled during the period of time in which the Defendants concealed themselves from service. The trial court declined to apply any tolling of the statute of limitations in accordance with RCW 4.16.180.

US Sheepskin agrees that RCW 4.16.180 requires a willful concealment, and even clandestine removal from a known address. See *Brown v. ProWest Transport Ltd.*, 76 Wn.App. 412, 886 P.2d 223 (1994), wherein the Court of Appeals stated as follows:

Judicial interpretations of the standard of "concealment" necessary to the tolling of the statute of limitations are scarce. *Bethel v. Sturmer*, 3 Wn.App. 862, 867, 479 P.2d 131 (1970). Concealment under RCW 4.16.180 is defined as a " 'clandestine or secret removal from a known address' ". *Caouette v. Martinez*, 71 Wn.App. 69, 74, 856 P.2d 725 (1993) (quoting *Patrick v. DeYoung*, 45 Wn.App. 103, 109, 724 P.2d 1064 (1986), review denied, 107 Wash.2d 1023 (1987)). Willful evasion of process appears to be a necessary ingredient. *Muncie v. Westcraft Corp.*, 58 Wn.2d 36, 38, 360 P.2d 744 (1961).

Brown v. ProWest Transport Ltd., 76 Wn.App. at 420-421.

However, review of US Sheepskin's attempts at personal service throughout the course of the action reveal willful concealment at addresses which Defendant Ying asserts were hers. US Sheepskin provided evidence of several attempts at service at Defendants admitted residence in Spokane, and even her place of business in China. As argued in Appellant's opening brief, those attempts resulted in, amongst others, an individual who refused to identify himself but admitted that he lived with Defendant Mao; an individual who refused to identify himself and indicated no knowledge of Defendant Mao or her company whatsoever; the Ministry of Justice of the People's Republic of China's return on service indicating that no person or company exists at the reported address; and service on an individual identified as Daniel Simmons, who subsequently claimed it was not him who was served (June 24, 2006). The evidence also revealed several attempts on the admitted residence, wherein individuals were clearly home, but refused to answer the door (Declaration of Kelly DeLaat-Maher filed June 7, 2006, CP 132-147). There is no evidence whatsoever that the process server was in the wrong location, as the address on each attempted service was correct.

This evidence presented to the court at summary judgment indicated Defendant Mao's attempts to conceal herself and the company.

She was aware of the suit, aware of the attempts to serve her, and actively participated in refusing to accept service and conceal herself. RCW 4.16.180 is applicable, and should have been applied by the trial court.

E. DEFENDANTS WAIVED JURISDICTION.

Appellant relied upon the arguments propounded in its Opening Brief in relation to defendants' waiver of jurisdiction.

Notwithstanding, the court should recognize the Defendants active role in the underlying litigation, which should have constituted a waiver of jurisdiction. As argued in the Opening brief, Defendants answered the Complaint and asserted Counterclaims, brought a Motion for Dismissal, and most tellingly, brought two Motions for protective orders. Defendants also filed a jury demand, and further filed a list of possible primary witnesses in accordance with the case schedule. Simply put, Defendants participated in the action, up and beyond what should have been done to preserve jurisdictional defenses.

III. CONCLUSION

Summary Judgment was not appropriate. The action should be remanded to the court for trial on the merits, as requested in Appellant's Opening Brief.

DATED this 22nd day of January.

MAHER INGELS SHAKOTKO
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A handwritten signature in black ink, appearing to read 'K. Delaat-Maher', written over a horizontal line.

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CERTIFICATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington, I hereby certify that I served the above Appellant's Reply Brief to counsel of record as follows:

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DATED this 22nd day of January, 2008.



 Jordan K. Foster

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