

67404-8

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No. 67404-8-I

COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

RICHARD EROG ET AL, Appellants,

v.

L.D.M. WORLDWIDE CORP. Respondent

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellants RICHARD EROG and BROADCAST FACILITY are Nevada residents who were named as Defendants in a breach of contract action brought by Respondent/Plaintiff L.D.M. WORLDWIDE INCORPORATED. After receiving notice of a Default Judgment in Washington, Appellants moved to vacate the Court's Order of Default and Default Judgment. (CP 42-84, Motion to Vacate) That motion was denied on May 20, 2011 the King County Superior Court (Hon. Suzanne Barnett). (CP 156-158, Order Denying Motion to Vacate) After the denial of a Motion for Reconsideration (CP 165-166, Order Denying Motion to Reconsider), this Appeal now follows.

The two most prominent grounds for reversal are: 1) Respondent/Plaintiff LDM Worldwide's failure to serve the summons and complaint; and 2) the lack of insufficient contacts to satisfy the constitutionally minima for requiring the Nevada Defendants (Appellants) to be hailed into court in the State of Washington.¹

II. ASSIGNMENTS OF ERROR

No. 1 The trial court erred in denying Appellants' Motion to Vacate the Order and Judgment by Default;

¹ A third ground is that the Default Judgment exceeded the prayer in the Complaint.

No. 2 The trial court erred in denying Appellants' Motion for Reconsideration.

Issues Pertaining to Assignments of Error

No. 1 Did the trial court err when it denied Appellants' Motion to Vacate where: (a) a genuine issue of fact exists as to whether or not Appellants were served a copy of the summons and complaint; and (b) the Respondent/Plaintiff did not establish the minimum contacts necessary to compel the out of state Appellants to defend in Washington ? (Assignment of Error 1)

No. 2 Did the trial court incorrectly deny Appellants' Motion for Reconsideration which requested an evidentiary hearing on the issue of service (Assignment of Error 2)

III. STATEMENT OF THE CASE

On December 7, 2010, Respondent/Plaintiff L.D.M. moved the trial court via the ex parte department for an Order of Default and Default Judgment. (CP 38-39, Order of Default; CP 36-37, Default Judgment) The ex parte department granted the motion based upon Affidavits of Service stating that the Appellants/Defendants Erog and Broadcast Facility had been served by personal service upon Appellant Richard Erog at a residence in Las Vegas Nevada. (See CP 19-23, Affidavits of Service; CP 38-39, Order of Default) However, as set forth below, Appellants Erog

and Broadcast Facility dispute being served. The Respondent/Plaintiff has also not shown the existence of constitutionally sufficient minimum contacts with Washington such as to be force the Appellant/Defendants to defend here.

A. Issue Of Service

Mr. Erog and Broadcast Facility testify that they were never served a copy of the lawsuit in Nevada, where Mr. Erog resides. (CP 54-55, Decl. of R. Erog, at CP 54, ¶8) The Affidavits of Service allege service at the Erog residence on September 15, 2010 at 9:32pm. (CP 19-23, Affidavits of Service) The original Affidavit of Service failed to state any reference as to who supposedly answered the door at Mr. Erog's home and who allegedly received service that evening while Mr. Erog was away (CP 19-23, Affidavits of Service)²

Mr. Erog was not home on September 15, 2010 at 9:23pm, but was instead away with out-of-state friends visiting the Las Vegas Strip. (CP 54-55, Decl. of Richard Ergo, at CP 54, ¶3; CP 57-59, Decl. of Olena Gordiyenko; CP 61-63, Decl. of Efecan Gurel). In actuality, on the evening of September 15, 2010, Mr. Erog had hired a babysitter. (CP 54-55, Decl. of Richard Erog, at CP 54, ¶6; CP 57-59, Decl. of Olena

² The Affidavits of Service were also legally insufficient under Washington law admissibility standards as failing to meet the required statutory standard for testimony as the statements failed to Declare under the Penalty of Perjury under the laws of the State of Washington. See RCW Chap. 5.28.60, RCW 9A.72.085

Gordiyenko) The babysitter did not live at the home and (while not authorized to receive any service) also did not in fact receive service of any summons and complaint. (CP 57-59, Decl. of Olena Gordiyenko)

No one was home on September 15, 2010 to receive service of any complaint, and no one did in fact receive service of the complaint for any of the three Defendants. The only other residents of Mr. Erog's home at the time were his minor children. (CP 54-55, Decl. of Richard Erog, at CP 54, ¶6)

However, in response to the Motion to Vacate, the Respondent produced a new declaration of service that introduced new alleged facts as to who was served on the night in question. (CP 141-143, Declaration of Marc J. Amell) The new declaration creates a material fact in dispute by contradicting three witnesses. (Compare CP 54-55, Decl. of Richard Erog; CP 57-59, Decl. of Olena Gordiyenko; CP 61-63, Decl. of Efecan Gurel; with CP 141-143, Decl. of Marc J. Amell)

As for failure to serve Appellant Broadcast Media, the same facts apply since Mr. Erog is alleged to be the owner (See CP 42-84, Motion to

Vacate) and therefore must be personally served for this entity to become a party to the suit.³

B. Insufficient, Minimum Contacts With Washington

In addition to the failure of service, it is asserted that Washington does not have a sufficient nexus to extend its long arm statute for purposes of personal jurisdiction to reach the Appellants. This is because Mr. Erog and Broadcast Facility are residents of Las Vegas, the events at issue took place outside of Washington –in Southern California and South Africa – and there exist only communications between the Plaintiff and Mr. Erog in the form of email and phone conversations without any evidence of intent to be amenable to suit in Washington. (CP 54-55, Decl. of Richard Erog; CP 105-108 Decl. of Larry Meyer)

IV. SUMMARY OF ARGUMENT

At the very least, a question of fact exists as to whether or not the Respondent/ Plaintiff (LDM Worldwide) served a copy of the summons and complaint on the Defendant. And, regardless of whether service took place or not, Washington lacks sufficient contacts with the Appellant/Defendants to satisfy the constitutionally minima for requiring the Nevada Defendants to defend a lawsuit in the State of Washington.

³ As Mr. Erog is not a partner with any of the other Defendants (See CP 54-55, Decl. of R. Erog, at CP 55, ¶13) service on any other person would also not be valid as service upon Mr. Erog.

V. ARGUMENT

A. Standard of Review

While an appellate court ordinarily reviews a trial court's decision on both a motion for default judgment and a motion to vacate a default judgment for an abuse of discretion (see *Morin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007); *Hwang v. McMahon*, 103 Wn.App. 945, 949, 15 P.3d 172 (2000)), this is not the case with judgments that are void *ab initio*. Since "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." *Ahten v. Barnes*, 242 at 38-39 (quoting *In re Marriage of Markowski*, 50 Wn.App. 633, 635-36, 749 P.2d 754 (1988)). "Because courts have a mandatory, nondiscretionary duty to vacate void judgments, a trial court's decision to grant or deny a CR 60(b) motion to vacate a default judgment for want of jurisdiction is reviewed de novo." *Ahten v. Barnes*, 242 P.3d 35, 39 (Wash.App. Div. 1 2010) (quoting *Dobbins v. Mendoza*, 88 Wn.App. 862, 871, 947 P.2d 1229 (1997)).⁴

This de novo review framework is also set within the context of a long history of Washington jurisprudence which favors judgments by default.

⁴ The appellate court reviews findings of fact under a substantial evidence standard. *Clayton v. Wilson*, 168 Wash.2d 57, 227 P.3d 278 (2010).

This court has long favored resolution of cases on their merits over default judgments. Thus, we will liberally set aside default judgments pursuant to CR 55(c) and CR 60 and for equitable reasons in the interests of fairness and justice. Similarly, if default judgment is rendered against a party who was entitled to, but did not receive, notice, the judgment will be set aside.

Morin v. Burris, 160 Wn.2d 745, 161 P.3d 956 (2007) (citing *Tiffin v. Hendricks*, 44 Wn.2d 837, 847, 271 P.2d 683 (1954)).

Thus trial courts “should ‘exercise [their] authority 'liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done.'” *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 599 P.2d 1289 (1979) (quoting *White v. Holm*, 73 Wn.2d 348, 351, 438 P.2d 581 (1968)).

In considering Constitutional challenges (here due process regarding both the failure of notice and minimum contacts), the appellate court’s review is also de novo. *Lamtec Corp. v. Dep't of Revenue*, 170 Wn.2d 838, 842, 246 P.3d 788 (2011), *petition for cert. filed*, 79 U.S.L.W. 3629 (2011); *Optimer Int'l, Inc. v. RP Bellevue, LLC*, 170 Wn.2d 768, 771, 246 P.3d 785 (2011).

Finally, a trial court's ruling on a CR 59 motion for reconsideration is reviewed under the abuse of discretion standard. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002).

B. Specific Grounds For Relief Under CR 55 and 60

In terms of Relief under the Civil Rules, the Appellant/Defendants moved the Court pursuant CR 55(c), Setting Aside Defaults as well as directly under CR 60(b)(1), CR60(b)(5) and CR 60(b)(11) (any other reason justifying relief from the operation of judgment).⁵

1. *CR 60(b)(5)*

It is clear that Civil Rule 60(b)(5) provides a means for vacating void orders and judgments. In *Lindgren v. Lindgren*, 58 Wn.App. 588, 596-598, 794 P.2d 526 (Wash.App. Div. 1 1990) the Court wrote:

CR 60(b)(5) authorizes vacations of void judgments. Motions to vacate void judgments may be brought at any time and a party does not waive this challenge merely because time has elapsed. *In re Marriage of Leslie*, 112 Wash.2d 612, 618-19, 772 P.2d 1013 (1989). The validity of a default judgment requires that a proper summons was served upon the defaulting party. It is the summons alone which conveys to a defendant that failing to appear and defend can result in the entry of a default judgment. The default judgment is void if [the Defendant] did not receive a proper summons. CR 4 requires service of a summons that is signed and dated by a plaintiff. . .

2. *CR 60(b)(1)*

⁵ Civil Rule 60 provides the basis for moving for relief from an Order of the Court:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

* * *

(5) The Judgment is void;

* * *

(11) Any other reason justifying relief from the operation of the judgment.

Civil Rule 60(b)(1) also provides a basis for vacating the default order in this case due to irregularity, surprise and excusable neglect.

An irregularity for purposes of CR 60(b)(1) has been defined as the want of adherence to some prescribed rule or mode of proceeding; and it consists either in the omitting to do something that is necessary for the due and orderly conducting of a suit, or in doing it in an unreasonable time or improper manner.

Haller v. Wallis, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978). *See also*

Summers v. Dep't of Revenue, 104 Wn.App. 87, 93, 15 P.3d 902 (2001)

(Irregularities within the meaning of CR 60(b)(1) concern departures from prescribed rules or regulations and involve procedural defects unrelated to the merits.

Excusable neglect has been found in cases where an alleged tortfeasor acted with due diligence but the victims' counsel attempted to conceal the existence of the litigation. *See Morin v. Burris*, 160 Wn.2d 745, 759, 161 P.3d 956 (2007).

Here, if the Defendants were not provided notice of the litigation, then CR 60(b)(1)'s defense and grounds for vacation of "surprise", "excusable neglect" and "irregularity" are all present.

In the case of CR 60(b)(1), the Motion was also brought within one year of the Order of Default and Default Judgment.

3. *CR 60(b)(11)*

Last is CR 60(b)(11), which has been referred to as the “catch all” provision of the rule because it allows the court to vacate a judgment for reasons that do not fall squarely within any of the other specified grounds. *Kingery v. Dep’t of Labor & Ind.*, 132 Wn.2d 162, 937 P.2d 565 (1997). The use of CR 60(b)(11) normally requires extraordinary circumstances. *State v. Gamble*, 168 Wn.2d 161, 169, 225 P.3d 973 (2010). Extraordinary circumstances involve “reasons which are extraneous to the action of the court or go to the regularity of its proceedings.” *State v. Dallas*, 126 Wn.2d 324, 333, 892 P.2d 1082 (1995).

Here, the failure to serve goes to the regularity of the proceedings before the Court.

4. *No requirement that a Meritorious Defense be proven*

Because the failure to obtain personal jurisdiction results in a direct attack upon a judgment, there is no requirement that the Appellant/Defendants provide a defense on the merits. *Gooley* at 380 (“We hold that in a direct attack upon a judgment as void for want of jurisdiction, whether the proceeding be one at law or in equity, no showing of merits is necessary.”). The challenge also need not be brought within one year. *Matter of Marriage of Leslie*, 112 Wn.2d 612, 618-19, 772 P.2d 1013 (1989) (A challenge to a void judgment can be brought at any time.)

C. The Trial Court Erred by Failing to Grant the Motion to Vacate when the Appellants/Defendants were not served the Summons and Complaint. (Assignment of Error #1)

“There are in general three jurisdictional elements in every valid judgment, namely, jurisdiction of the subject matter, jurisdiction of the person, and the power or authority to render the particular judgment.” *John Hancock Mut. Life Ins. Co. v. Gooley*, 196 Wash. 357, 363, 83 P.2d 221, 226-227 (1938) If any of these elements are absent, and made apparent to the trial court, the judgment may be vacated at any time. *Id.* In fact, a trial court has no discretion when faced with a void judgment, and must vacate the judgment "whenever the lack of jurisdiction comes to light." *Mitchell v. Kitsap County*, 59 Wn.App. 177, 180-81, 797 P.2d 516 (1990)

It is a fundamental element of due process⁶ that a Defendant be given notice of a pending or impending lawsuit. *See City of Redmond v. Arroyo-Murillo*, 149 Wn.2d 607, 617, 70 P.3d 947 (2003). Without service being effectuated, the Defendant is not properly before the Court. *John Hancock Mut. Life Ins. Co. v. Gooley*, 196 Wash. 357, 83 P.2d 221 (1938). When a court lacks in personam jurisdiction over a party, any judgment

⁶ See Fourteenth Amendment to the United States Constitution; Article I, Section 3 of the Washington Constitution.

entered against that party is void. *Scott v. Goldman*, 82 Wn.App. 1, 6, 917 P.2d 131 (1996).

And of course, when the issue under consideration is jurisdiction over the person and service, “it is the fact of service which confers jurisdiction, and not the return...” *John Hancock Mut. Life Ins. Co. v. Gooley*, 196 Wash. 357, 363, 83 P.2d 221 (1938) Thus, if the Plaintiff fails to properly serve the Defendants (regardless of what the “return of service” document states), then the jurisdiction of the Court does not attach and any ensuing judgment is void for want of jurisdiction. *Longview Fibre Co. v. Stokes*, 52 Wn.App. 241, 245, 758 P.2d 1006 (1988); *John Hancock Mut. Life Ins. Co. v. Gooley*, 196 Wash. 357; *Rodriguez v. James-Jackson*, 127 Wn.App. 139, 111 P.3d 271 (Wash.App. Div. 1 2005)

Here, the Declarations of Mr. Ergo, Ms. Gordiyenko, and Mr. Gurel all confirm that Mr. Ergo was not served – which is contrary to the Affidavits of Service provided in support of the Motion for Default. (CP 19-23, Affidavits of Service #1)⁷

⁷ The first Affidavits of Service (provided with the Motion for Default) also failed to show exactly “who” was allegedly served on the date and time set forth, or how those persons were served (as there lacks any description of the alleged receiver of service or description of how service was made). See CP19-23, Affidavits of Service #1. The second Affidavit of Service attempts to make up for the insufficiency by stating that it was Mr. Ergo who was served. (CP 141-143, Affidavit of Service #2 provided in Response to the Motion to Vacate)

The Appellant/Defendants were simply not present and not served, and as a result, the trial court lacked jurisdiction to enter the Order of Default and Default Judgment. And, as set forth in Part II below, the trial court should have, at a minimum, had an evidentiary hearing to allow the Parties to testify in court regarding the issue of service.

D. The Appellant/Defendants Have an Insufficient Nexus to and Lack Minimum Contacts with Washington (Assignment Of Error #2)

In addition to the failure of service, Washington does not have a sufficient nexus to extend personal jurisdiction under its long arm statute to Defendants. This is because Mr. Eroglu and Broadcast Facility are residents of Las Vegas, the events at issue took place outside of Washington –in Southern California and South Africa – and there were only communications between the parties in the form of email and phone conversations without any intent to have the Defendants amenable to suit in Washington. And thus, there lack sufficient minimum contacts such that traditional notions of justice and fair play would be offended by extending person jurisdiction to Defendants.

1. Personal Jurisdiction Fails Under Washington's Long Arm Statute and the Three Prong Test

Washington State courts have applied a three-prong test to determine whether personal jurisdiction can be extended to nonresident defendants under Washington State's long arm statute, RCW 4.28.185:⁸

- (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction

⁸ **Personal service out of state — Acts submitting person to jurisdiction of courts — Saving.**

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

- (a) The transaction of any business within this state;
- (b) The commission of a tortious act within this state;
- (c) The ownership, use, or possession of any property whether real or personal situated in this state;
- (d) Contracting to insure any person, property or risk located within this state at the time of contracting;

* * *

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

(4) Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.

(5) In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees.

(6) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

The state statute does not appear to go far enough to satisfy the requirements of due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the Washington Constitution and thus Washington Courts have asserted factors that must be considered in addition to the requisites of the long-arm statute. See *CTYC of Hawaii*, 82 Wn.App. at 709-710 and *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 767, 783 P.2d 78 (1989)

in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC, 155 Wn. App. 643, 652-53, 230 P.3d 625 (2010). Moreover, “[t]he sufficiency of the contacts is determined by the quality and nature of activities, not the number of acts or mechanical standards.” *CTVC of Hawaii Co. v. Shinawatra*, 82 Wn.App. 699, 710-11, 919 P.2d 1243 (1996).

In the present case, none of the three prongs are satisfied. Plaintiff has failed to establish that personal jurisdiction exists.

i. Defendants did not purposefully do some act or consummate some transaction in the forum state

In order to determine whether the first prong of the test under the long-arm statute is met, the entire transaction must be examined. *See Raymond v. Robinson*, 104 Wn.App. 627, 637, 15 P.3d 697 (2001). This includes “negotiations; contemplated future consequences; the terms of the contract; and the parties’ actual course of dealing.” *Id.* Moreover, the mere existence of a contract with a Washington corporation is insufficient to

establish personal jurisdiction. *Freestone Capital*, 155 Wn.App. at 654 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478, 105 S. Ct. 2174, 2185, 85 L. Ed. 2d 528 (1985)); *Precision Lab. Plastics, Inc. v. Micro Test, Inc.*, 96 Wn.App. 721, 727, 981 P.2d 454 (1999); *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.*, 60 Wn.App. 414, 423, 804 P.2d 627 (1991).

Here, even the existence of a contract has not been shown. (See CP 27-29, Motion for Default & CP 105-104, Decl. of Larry Meyers, series of emails) What are the exact terms of the contract? What is the exact amount of payment? Where are the supplies to come from?

Yet even were the court to accept Respondent/Plaintiff's assertion that there existed a contract to perform video production services for Glen Helen Motorcross and South Africa World Cup events outside of Washington (see First Amended Complaint, CP 8-14), the Appellant/Defendants' contacts are still not sufficient enough to suggest that the Defendants had purposefully availed themselves of "the privilege of conducting activities within the forum state, thereby invoking the benefits and protections of its laws." *Walker v. Bonney-Watson Co.*, 64 Wn.App. 27, 34, 823 P.2d 518 (1992) (citing *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)).

These simple and few emails and phone calls between Plaintiff and Defendants are not sufficient contacts for personal jurisdiction, especially since the actual delivery of facilities and services occurred in California and South Africa. And, according to Respondent/Plaintiff's own evidence, Plaintiff initiated contact with the Defendants. (CP 105-140 Decl. of Larry Meyer, [first email] at CP 112) While evidence of who initiated the parties' relationship is not determinative, it is still relevant. *Byron Nelson Co. v. Orchard Management Corp.*, 95 Wn.App. 462, 466, 975 P.2d 555 (1999). Moreover, this deal did not involve goods being shipped in or out of Washington, advertising, or the provision of loans. *See Byron*, 95 Wn. App. at 467; *see Raymond*, 104 Wn.App. at 640; *Freestone Capital*, 155 Wn.App. at 655. The Appellant/Defendants' contacts were limited to arranging for activities to occur outside of Washington.

In *SeaHAVN Ltd. v. Glitnir Bank*, the court found that "communication by telephone and e-mail is not dispositive. The 'salient factor' is whether the defendant negotiates an ongoing business relationship with a Washington company that has substantive effects and created future obligations in Washington." 154 Wn.App. 550, 226 P.3d 141 (2010) (citing *Precision Lab.*, 96 Wn.App. at 727). Here, the only obligation created in Washington was the incidental obligation to pay Respondent/Plaintiff for services provided outside of Washington. There

is no evidence that the Appellant/Defendants ever entered Washington to do business.⁹

Furthermore, the fact that Plaintiff made arrangements from its office in Washington was incidental to the provision of services outside of Washington. In *Washington Equipment Mfg. Co., Inc. v. Concrete Placing Co., Inc.*, the court held that visits by employees to Washington, the telephone calls, and the delivery of the equipment were incidental to the sale of machinery to an Idaho business in Idaho. 85 Wn.App. 240, 247, 931 P.2d 170 (1997). In the present case, arrangements for services provided outside of Washington are likewise incidental. Thus, Respondent/Plaintiff has not established that Defendants purposely acted within Washington State.

ii. The cause of action did not arise from, nor was it connected with, an act or transaction in the forum state

Under the second prong, there needs to be a nexus between the cause of action and the Appellant/Defendant's activities in the forum state. *Raymond*, 104 Wn.App. at 640. The activities must pass the “but for” test. In other words, “[j]urisdiction is proper in Washington if the events giving rise to the claim would not have occurred ‘but for’ the corporation’s

⁹ Which, even if they had, the *SeaHAVN* did not find alone to be a sufficient contact. 154 Wn.App. at 566-688

solicitation of business in the forum state.” *CTVC of Hawaii Co.*, 82 Wn.App. at 719.

Here, the Appellant/Defendants did not solicit business in Washington State but were instead solicited in Nevada. Thus, under this “but for” test, it would appear that Nevada is the appropriate jurisdiction for suit.

iii. The assumption of jurisdiction by the forum state will offend traditional notions of fair play and substantial justice

With the absence of anything more than a few emails and allegations of phone calls (which are alleged to form a contract for activity to occur in states outside Washington), forcing an out of state defendant to appear and defend a suit in Washington not only offends traditional notions of fair play and substantial justice but undoes a lengthy of history of Washington jurisprudence requiring more than the insufficient contacts found here. This undoing of Washington law does not pass Constitutional muster.

If anywhere, suit must be brought in Nevada (where Defendants reside) or California (where the subject matter underlying this lawsuit took place).

E. The Court Erred by Not Reconsidering its Denial of the Motion for Reconsideration Holding an Evidentiary Hearing on Disputed Issues of Material Fact and Making Findings to Support its Decision

While Respondent/Plaintiff did not dispute that service is necessary to confer jurisdiction to the trial court, and while it was also not disputed that it is actual service (and not an Affidavit of Service) that confers jurisdiction, the court nevertheless believed Respondent/Plaintiff's single declaration over three witnesses (including the Appellant/Defendants). It is undeniable that the Parties clearly dispute whether or not service actually occurred (see CP 90-104, Responsive Brief; CP 175-180, Motion for Reconsideration) The only way to rectify this is by holding an evidentiary hearing and weighing the credibility of the witnesses. Otherwise, there is insufficient evidence (and insufficient findings) to support one declaration over three others.

Where a defendant challenges jurisdiction based on insufficient service of process, the plaintiff has the burden of proof to establish a prima facie case of proper service. *Gross v. Sunding*, 139 Wn.App. 54, 60, 161 P.3d 380 (2007). "Since proper service of process is required for jurisdiction, sufficiency of service of process is a question of law. As a result, the determination of valid service is reserved to the judge." *Id.* at 67. Moreover, a court may abuse its discretion by failing to hold an evidentiary hearing when affidavits present an issue of fact requiring a determination of witness

credibility. *Woodruff v. Spence*, 76 Wn.App. 207, 210, 883 P.2d 936 (1994).

Harvey v. Obermeit, 65846-8-I (WACA) (citation pending) (Aug 29, 2011) (citing with approval, the Trial Court's use of an evidentiary hearing to resolve disputed issues of material fact regarding service).

In addition, with respect to the minimum contacts issues, there is a dispute over where the product/accessories/supplies came from that were allegedly used in California, as this evidence was not in the record and therefore cannot support a finding of sufficient contacts. (CP 175-180, Motion for Reconsideration) The Appellant/Defendants also challenged the form of the Plaintiff's agent's for service as not meeting the requirement under Washington law (see CP 42-84, Motion to Vacate) – something that would also be resolved during an evidentiary hearing.

VI. CONCLUSION

The Defendants Richard Erog and Broadcast Facility respectfully request that the Court of Appeals reverse the trial court and enter an Order directing the Trial Court to vacate the Order of Default and Default Judgment and/or dismiss the Appellant/Defendants since the Appellants were not served notice of the lawsuit, and since the Appellants lack the requisite contacts and sufficient nexus with Washington so as to have purposefully availed themselves of the jurisdiction of this State.

Respectfully submitted this November 28, 2011.



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COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON

RICHARD EROG ET AL.,
Appellant,

v.

L.D.M. WORLDWIDE CORP.
Respondent.

CASE # 67404-8-I

**PROOF OF SERVICE APPELLANT
BRIEF**

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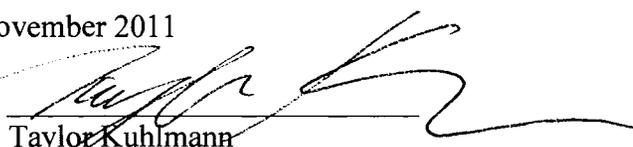
TO CLERK OF THE COURT OF APPEALS

AND TO: BENJAMIN T G NIVISON
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I, Taylor Kuhlmann, do hereby certify that a copy of the attached Appellant Brief was filed with the Washington State Court of Appeals, Division One and served by first class mail on Benjamin T G Nivison at the above address on November 28, 2011.

DATED this 28th day of November 2011

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