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No. 699644
COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

Boris Petrenko, Appellant

v.

DISCOVER BANK, Respondent

APPELLANT'S REPLY BRIEF

~~2013 JUN 27 AM 11:06
COURT OF APPEALS DIV I
STATE OF WASHINGTON~~

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Respondent Discover Bank, in its brief, distorts the facts to such an extreme that correcting each misstatement and material omission would be an arduous task. Appellant Petrenko lacks the space necessary to completely correct the record and will instead concentrate on the areas in which the respondent twists the facts in service of its argument.

a. Petrenko Identified Proper Standard for Review by this Court for CR 60(b)(5).

Since this appeal involves Petrenko's motion to vacate *void* judgment, appellant Petrenko selected the proper standard of review applicable to CR 60(b)(5)(the judgment is void). (CP 15-24; CP 36-37; CP 50-59). A judgment entered without jurisdiction is void. *Brickum Investment Company v. Vernham Corporation*, 46 Wash.App. 517, 520, 731 P.2d 533 (1987) (citing *Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces*, 36 Wash.App. 480, 486, 674 P.2d 1271 (1984); *Bergren v. Adams Cy.*, 8 Wash.App. 853, 856, 509 P.2d 661, *review den'd*, 82 Wash.2d 1009 (1973)). Courts have the mandatory duty of vacating void judgments. *Scott v. Goldman*, 82 Wash.App. 1, 6, 917 P.2d 131 (1996); *In re Marriage of Markowski*, 50 Wash.App. 633, 635, 749 P.2d 754 (1988). Consequently, a ruling under CR 60(b)(5) on grounds that the judgment was void is reviewed as a matter of law.

Respondent Discover Bank mistakenly selects abuse of discretion standard of review applicable to CR 60(b)(1)(Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order). (Br. of Respondent Discover Bank at 3). *Brickum Investment Company v. Vernham Corporation*, 46 Wash.App. 517, 520, 731 P.2d 533 (1987) (citing *Fowler v. Johnson*, 167 Wn.App. 596, 602, 273 P.3d 1042 (2012); *Rosander v. Nightrunners Transport*, 147 Wn.App. 392, 401, 196 P.3d 711 (2008)).

Abuse of discretion standard has no application in the case at hand.

b. Petrenko Satisfied CR 60(e) Requirement.

Respondent Discover Bank, in its brief, further argues that Petrenko's motion to vacate was not supported by an affidavit asserting the facts, constituting a defense to the action or proceeding. (Br. of Respondent Discover Bank at 5, 19). Discover Bank's argument lacks any merit because Petrenko submitted the Declaration of Lena Petrenko in Support of Defendants CR 60(b)(5) and (11) Motion to Vacate Void Judgment (CP 34-35; CP 69-70). Moreover, appellant Boris Petrenko also submitted the Declaration of Witness Lena Petrenko in Support of Defendant Boris Petrenko's CR 60(b)(5) and (11) Motion to Vacate Void Judgment (CP 73-74). That the trial court filed such declarations is evident

by the record and cannot be disputed. The trial court order clearly reflects consideration of such declarations. (CP 85-86).

c. **Discover Failed to Substantially Comply with Service Statute Because Proper Service Was not Made per CR 4(15) on Petrenko.**

In its brief, Discover Bank argues that its service to Petrenko substantially complied with statutory requirements. (Br. of Respondent Discover Bank at 9). In support of its argument, Discover Bank cites and relies on *Overhulse Neighborhood Ass'n v. Thurston County*, 94 Wn.App. 593, 972 P.2d 470 (1999), *Skinner v. Civil Service Com'n of City of Medina*, 168 Wn.2d 845, 232 P.3d 558 (2010) and *Reiner v. Pittsburg Des Moines Corp.*, 101 Wn.2d 475, 680 P.2d 55 (1984). (Br. of Respondent Discover Bank at 9-10). However, those cases are not applicable and should not control the determination of issues in this case. Thus *Overhulse Neighborhood* case involved action against county, which requires service under RCW 4.28.080(1). The *Skinner* case did not mention the service under RCW 4.28.080 at all. The *Reiner* case involved service on a foreign corporation under RCW 4.28.080(10), not on the defendant personally

under RCW 4.28.080(15). The Respondent's attempted application of those cases is not clear with relation to the issues presented in this case.

“Substantial compliance has been defined as *actual compliance* in respect to the substance essential to every reasonable objective of [a] statute.” (Emphasis added). *Weiss v. Glamp*, 127 Wash.2d 726, 731, 903 P.2d 455 (1995) (citing *In re Santore*, 28 Wn.App. 319, 327, 623 P.2d 702, *review denied*, 95 Wn.2d 1019 (1981) (citing *Stasher v. Harger-Haldeman*, 58 Cal.2d 23, 29, 372 P.2d 649, 22 Cal.Rptr. 657 (1974))).

“Neither actual notice nor simply naming the defendant in the complaint will provide personal jurisdiction without substantial compliance with Rule 4.” *Travelers Casualty and Surety Company of America v. Brenneke*, 551 F.3d 1132, 1134 (2009).

In this case, substantial compliance requires service on Petrenko personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion, then resident therein, which Discover Bank failed to accomplish.

d. **Petrenko Presented Clear and Convincing Evidence to Rebut the Validity of Service Presumption.**

Respondent Discover Bank urges this court to affirm that Petrenko was properly served by a substitute service on Lena Petrenko. ((Br. of Respondent Discover Bank at 13-14). In its brief Discover Bank argues that this case is factually similar to *Wichert v. Cardwell*, 117 Wash.2d 148, 150-52, 812 P.2d 858 (1991). Moreover, Discover Bank offers additional factual inferences that were not made by the trial court. Nevertheless, the *Wichert* court said, “the facts come solely from the findings of fact and thus we are limited to those facts” *Wichert*, at 150. Factual issues raised by Plaintiff in the Court of Appeals must be excluded. *Wichert*, at 150.

The court in *Wichert* made specific factual findings that:

- Defendants were out of state when the service was made.
- Their residence was occupied by the wife of the Defendant’s 26-year-old daughter who had stayed there the night before the process was served.
- The daughter had a key to the Defendant's residence.
- The daughter lived in her own apartment, was self-supporting and had no personal possessions at the residence.
- The daughter infrequently stayed over at the Defendant's residence.

- The daughter was an overnight resident in the house of the Defendant's usual abode, and then the sole occupant thereof.
- The person served was a family member. *Wichert*, at 150-52.

Additionally, the *Wichert* court made observation that “the time for service was about to expire.” *Wichert*, at 152.

In this case the trial court made a finding that “the term resident as used in this circumstance does not require any particular length of stay, nor does it require that it be the exclusive residence of the person.” (CP 85-86). Unlike *Wichert*, the trial court made no factual findings that Lena Petrenko was staying overnight at Boris Petrenko’s residence; had or exercised any control over Boris Petrenko’s residence, had keys to enter Boris Petrenko’s residence or that Boris Petrenko was out of town and that Lena Petrenko was in exclusive control of the premises. The trial court made no findings regarding the relationship between Lena Petrenko and Boris Petrenko. The affidavit of service in the Court record clearly shows that Lena Petrenko was served, not Boris Petrenko. Lena Petrenko’s Declaration clearly states that she was not residing at Mr. Petrenko’s residence. (CP 73-74). Mr. Petrenko also submitted a Declaration that Lena Petrenko was not a resident at his address. (CP 34-35, 69-70).

While the hired process server's act may have resulted in actual notice, it was not the required “service.” *Brown-Edwards v. Powell*, 144

Wash.App. 109, 113, 182 P.3d 441 (2008) (citing *Gerean v. Martin-Joven*, 108 Wash.App. 963, 33 P.3d 427 (2001)).

In his opening brief, Petrenko correctly selected and argued *Salts v. Estes*, 133 Wash.2d 160, 170, 943 P.2d 275 (1997) as an analogous and applicable precedent. (Br. of Appellant Petrenko at 9-13).

Like defendant in *Salts*, in this case it is clear from the record that Boris Petrenko was not served.

e. **Discover's Notice of Summary Judgment Motion to Petrenko is Irrelevant to Determination of this Appeal.**

Discover Bank argues that Mr. Petrenko does not claim that he was not properly served with the summary judgment motion, nor does he claim that his failure to respond was excusable. (Br. of Respondent Discover Bank at 3-4, 16). The Discover Bank's notice of the Summary Judgment Motion is not the subject of this appeal and therefore irrelevant.

It is the fact of service that confers jurisdiction. *Lake v. Butcher*, 37 Wn.App. 228, 232, 744 P. 2d 1031 (1987). Discover Bank's notice of the Summary Judgment Motion sent to Petrenko did not confer personal jurisdiction over him.

f. **Petrenko Need Not Demonstrate Meritorious Defense**
Because the Judgment is Void.

Discover Bank argues that “Mr. Petrenko failed to supply facts demonstrating at least a prima facie defense against Discover’s claims.” (Br. of Respondent Discover Bank at 17-20). However, such showing is not required in case at hand.

The customary CR 60 meritorious defense requirement is immaterial where the court entering an in personam judgment had no jurisdiction of the defendants in the first instance. *Mid-City Materials, Inc, v. Heater Beaters Custom Fireplaces*, 36 Wash.App. 480, 486, 674 P.2d 1271 (1984) (citing *Bennett v. Supreme Tent of Knights of Maccabees*, 40 Wash. 431, 436, 82 P. 744 (1905)). The defendant need not offer a meritorious defense if the challenge to the judgment is based upon lack of personal jurisdiction. *Schell v. Tri-State Irrigation*, 22 Wash.App. 788, 792, 591 P.2d 1222 (1979)); *Whatcom County v. Cane*, 31 Wash.App. 250, 252, 640 P.2d 1075 (1982).

In this instance, Discover Bank’s argument that Petrenko has failed to demonstrate meritorious defense is lacking merits.

CONCLUSION

The trial court's record shows that no substitute service has been made upon appellant Petrenko. The judgment entered on August 24, 2012, against Boris Petrenko must be reversed and remanded to the trial court.

Respectfully submitted this 26th day of June, 2013.



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