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No. 72131-3-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

FORD SERVICES, LLC, a Washington limited liability company,

Appellant,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee on
behalf of Certificateholders of the Morgan Stanley ABS Capital 1 Inc.
Trust 2006-HE6, Mortgage Pass-Through Certificates, Series 2005-HE6,

Appellee.

Appellant Ford Services, LLC's Opening Brief

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I. INTRODUCTION

Washington adopted its long arm statute in 1959, essentially allowing personal service outside the state of Washington to the full extent allowed by the United States Constitution. Before adoption of the long arm statute, service outside the state of Washington was effective only for a limited range of cases, and only subject to specific limitations. However, while service out of state was limited before adoption of the long arm statute, it was not non-existent, and service out of state was permitted for actions to foreclose title to property located within Washington.

In this case, the City of Sedro Woolley (the “City”) brought an action against Jose and Mary Amaro (the “Amaros”), and Deutsche Bank National Trust Company (“Deutsche Bank”) to foreclose title to property located within Washington. The City served Deutsche Bank in California. Neither defendant appeared or answered the complaint, and the Court entered a default judgment.

Deutsche Bank now seeks to vacate that judgment, not because it was not served, or because it did not have notice of the action, but on the sole ground that the City did not file an affidavit under the long arm statute stating that Deutsche Bank could not be served within the state of

Washington. Deutsche Bank may have a valid argument if the City sought a money judgment or other personal relief against Deutsche Bank, but it did not. However, the City sought to foreclose title to real property within Washington – an action for which personal service out of state was valid decades before enactment of the long arm statute.

Washington’s long arm statute is clear – it is an expansion of out of state service, and does not, in any way, limit or affect methods of service that were legal at the time of its adoption. Personal service for out of state parties was permissible in foreclosure actions before adoption of the long arm statute. The superior court erred when it held that the long arm statute added the requirement that the party seeking to foreclose title must file an affidavit, as that would “affect the right to serve any process in any other manner” provided by law. Ford Services, LLC (“Ford), the purchaser at the sheriff’s sale, respectfully requests that this Court reverses the superior court’s vacation of the judgment and reinstate the judgment and subsequent sale of the property.

II. ASSIGNMENTS OF ERROR

1. The superior court's Order Granting Deutsche Bank's Motion to Vacate Default Judgment Against Deutsche Bank was in error.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the superior court err in holding that the long arm statute's requirement of filing an affidavit stating that personal service cannot be made within the state, RCW 4.28.185(4), applies in an action to foreclose property located within Washington State, because service in such actions was permissible before adoption of the long arm statute.

IV. STATEMENT OF THE CASE

The facts in this case are straightforward and not in dispute.

A. The Original Foreclosure Action

On November 1, 2012, the City filed this action against the Amaros and against Deutsche Bank seeking to foreclose municipal utilities liens against:

Lot 6, "THYME SQUARE BINDING SITE PLAN", approved October 19, 2005 and recorded on November 10, 2005, under Auditor's File No. 2005111100117, records of Skagit County, Wash.

(P123733)

(the “Property”). CP 34-36. The Amaros were named as the record owners of the Property. CP 34. Deutsche Bank was named as the successor beneficiary of two deeds of trust encumbering the property. CP 34-35. Deutsche Bank was served with the summons and complaint on November 12, 2012, in Santa Ana, California. CP 120.

Neither party answered the complaint. On January 9, 2013, the City moved for summary judgment against the Amaros. CP 61-62. The Court granted the motion for default against the Amaros on January 11, 2013. CP 93. The City moved for entry of a default judgment against Deutsche Bank. CP 117-118. The superior court granted the motion for default against Deutsche Bank on January 28, 2013. CP 121.

On April 19, 2013, the sheriff sold the property at a Sheriff’s sale to Heritage Forest, LLC (“Heritage”). CP 29-30. The sale was confirmed on May 17, 2013. *Id.* On January 9, 2014, appellant Ford redeemed the property from Heritage and received a certificate of redemption from the Sheriff. CP 45-47. Ford Services issued a Notice of Expiration of Redemption Period on March 3, 2014, CP 51-53, and the redemption period has since expired.

B. Deutsche Bank Attempts to Vacate the Judgment

On April 10, 2014, after ignoring the lawsuit for over a year, Deutsche Bank moved to vacate the default judgment entered against it. CP 56-60. Deutsche Bank did not argue that it had not been served, or that it had not received adequate notice of the suit. In fact, it did not offer any reason that it had failed to respond to the suit. *Id.* Instead, it raised the purely technical issue that the City had served Deutsche Bank outside the state of Washington, but had not filed an affidavit stating that service could not be made within the state. *Id.* Deutsche Bank claimed that this alleged technical defect violated RCW 4.28.185(4), and deprived the superior court of jurisdiction, necessitating vacation of the judgment.

As the redemptioner, Ford appeared in the case, without objection, to oppose vacation of the judgment—an opposition in which it was joined by the City. CP 83-92, 78-82. Ford opposed vacation of the judgment primarily on the ground that out of state service for foreclosure actions predates the enactment of the long arm statute, RCW 4.28.185, and the long arm statute specifically exempts from its coverage “the right to serve any process in any other manner now or hereafter provided by law.” RCW 4.28.185(6).

The Superior Court disagreed, holding that the long arm statute *did* affect the preexisting right to serve process out of state in foreclosure action, and therefore the judgment must be vacated. CP 104-105. The Superior Court erred in vacating the judgment because its decision is contrary to the plain language of the redemption statute. Ford therefore appealed the decision to this Court. CP 106-110 and 111-116.

V. ARGUMENT AND AUTHORITY

A. Standard Of Review

The only question on appeal is whether, in a foreclosure action, service outside the state must comply with the long arm statute's requirement of filing an affidavit "to the effect that service cannot be made within the state." RCW 4.28.185(4). "Because the facts are not in dispute, the only questions are those of law, which [the appellate court] review[s] de novo." Wash. Equip. Mfg. Co. v. Concrete Placing, Co., Inc., 85 Wn. App. 240, 244, 931 P.2d 170 (1997); Sherman v. State, 128 Wn.2d 164, 183, 905 P.2d 355 (1995). The same is true of the trial court's interpretation and application of court rules regarding vacation of judgment, which are reviewed de novo. City of College Place v. Staudenmaier, 110 Wn. App. 841, 845, 43 P.3d 43 (2002).

B. The Long Arm Statute's Affidavit Requirement Does not Apply to Foreclosure Actions

Washington adopted its long arm statute in 1959 to effect an expansion of jurisdiction over persons served out of state. RCW 4.28.185. Keeping with this expansion, the long arm statute expressly provides that “[n]othing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.” RCW 4.28.185(6) (emphasis added). The long arm statute added authorization to serve persons out of state for a variety of acts committed within the state; e.g. transaction of business, commission of torts, contracting to insure persons or property, ownership of property, and other acts.

It also added requirements and conditions on service for these acts. For example, service must be made by personal service, RCW 4.28.185(3), and if the out of state party prevails in the action, costs and reasonably attorneys’ fees may be assessed against the plaintiff, RCW 4.28.185(5). Most important for this case, it also added the requirement that, for actions under the long arm statute, “[p]ersonal 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.” RCW 4.28.185(4). However, because the long arm statute expressly disclaims any affect on

“the right to serve any process in any other manner” that was permitted at the time of its adoption, these requirements can only apply in actions in which personal service outside the state was not permissible prior to adoption of the long arm statute. RCW 4.28.185(6). That rule prohibits application of the affidavit requirement in this case.

The lawsuit that the City filed against Deutsche Bank was for foreclosure of Deutsche Bank’s rights, as holder of a deed of trust, in the Property. The City did not seek damages against Deutsche Bank, or any other “personal” relief against Deutsche Bank; it sought only foreclosure. Decades before Washington adopted its long arm statute, it already permitted service out of state in foreclosure actions. See, e.g., Harder v. McKinney, 187 Wash. 457, 460-61, 60 P.2d 84 (1936) (holding that service on a defendant in Portland, Oregon was sufficient to establish jurisdiction over the defendant for purposes of a foreclosure action). This case was upheld under the predecessor to a separate service statute, RCW 4.28.180, which provided that service out of state was equivalent to service by publication. Id., See also, RCW 4.28.180 (noting that personal service of a summons outside the state on a person who has not submitted to the jurisdiction of the state shall have the force and effect of service by publication). Because service out of state, without filing an affidavit, was

permissible in foreclosure actions before enactment of the long arm statute, it must remain valid after enactment of the long arm statute. RCW 4.28.185(6).

This understanding of service requirements comports with the long standing distinction between *in personam* jurisdiction necessary to enter a personal money judgment, and *in rem* or *quasi in rem* jurisdiction necessary to enter a judgment with respect to property. See, e.g., In re Proceedings of King County Foreclosure of Liens, 117 Wn.2d 77, 811 P.2d 945 (1991) (noting that a tax foreclosure is a proceeding *in rem* and that jurisdiction over the *res* must be obtained) (citing Kupka v. Reid, 50 Wn.2d 465, 467, 312 P.2d 1056 (1957)). The long arm statute speaks specifically to obtaining jurisdiction over the person. See, e.g., RCW 4.28.185(1) (any person . . . who in person or through an agent does any of the acts in this section enumerated, thereby submits said person . . . to the jurisdiction of the courts of this state). (emphasis added). RCW 4.28.180, on the other hand, refers both to persons who have submitted to the jurisdiction of the state and persons who have not submitted to the jurisdiction of the state. RCW 4.28.180 (“Personal service of summons or other process may be made upon any party outside the state. If upon a citizen or resident of this state or upon a person who has submitted to the

jurisdiction of the courts of this state, it shall have the force and effect of personal service . . . otherwise it shall have the force and effect of service of publication.”) (emphasis added).

It is well established that *in rem* jurisdiction may exist even where *in personam* jurisdiction does not. See, e.g., Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977) (holding that *in rem* claims must meet constitutional standards of due process, but leaving intact the distinction between *in personam* claims and *in rem* claims); see also, State v. Superior Court for Lewis County, 80 Wash. 417, 422, 141 P. 906 (1914) (noting that condemnation proceedings are proceedings *in rem* and that “[j]urisdiction in such cases does not depend upon the disclosed identity of the parties defendant, but upon the subject matter and an opportunity to be heard. . .”).

The long arm statute does not apply to actions to foreclose property. Instead, service may be made under RCW 4.28.180, which provides that:

Personal service of summons or other process may be made upon any party outside the state. If upon a citizen or resident of this state or upon a person who has submitted to the jurisdiction of the courts of this state, it shall have the force and effect of personal service within this state; otherwise it shall have the force and effect of service by

publication. The summons upon the party out of the state shall contain the same and be served in like manner as personal summons within the state, except it shall require the party to appear and answer within sixty days after such personal service out of the state.

RCW 4.28.180 specifically contemplates service on people who have not otherwise submitted to the jurisdiction of the courts of the state, and provides that service on those people shall have the force and effect of service by publication. In fact, this result is required by the long arm statute, as the long arm statute cannot affect methods of service that existed at the time of its enactment, and service out of state was recognized in foreclosure actions before 1959. RCW 4.28.185(6).

This result is also consistent with the post-long arm statute case of Hatch v. Princess Louise Corp, 13 Wn. App. 378, 534 P.2d 1036 (1975). In that case, the plaintiff sued seeking foreclosure of a lien and a personal judgment against defendant. The plaintiff did not file the affidavit required by RCW 4.28.185(4) before entry of the judgment. Id. at 379. The defendant challenged the *in personam* judgment for failure to file the affidavit. Id. On appeal, the court reversed the judgment “as to the exercise of personam jurisdiction over the Princess Louise Corporation” but affirmed the judgment “as to the exercise of in rem jurisdiction in foreclosing the mortgage on the hulk.” Id. at 380. The same rule should

apply here – the Court’s exercise of jurisdiction in foreclosing the lien is appropriate.

C. Arguments About Constitutional Requirements for Service are not Relevant

In the superior court, Deutsche Bank placed significant weight on the argument that Shaffer v. Heitner eliminated the concept of *in rem* jurisdiction, but this argument is a red herring. Shaffer dealt with the constitutional question of whether a state court’s assertion of *in rem* jurisdiction had to meet the same standard of “minimum contacts” established in International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945). The court held that the same constitutional test of “fair play and substantial justice” had to be satisfied no matter whether the jurisdiction was asserted *in rem* or *in personam*. Shaffer, 433 U.S. at 207.

From a constitutional perspective, Shaffer makes sense. It raises serious due process concerns to allow a lawsuit that could deprive a person of property without first considering whether the assertion of jurisdiction satisfies “fair play and substantial justice.” This, however, is not a constitutional case.

Deutsche Bank does not dispute that it has sufficient minimum contacts with Washington for the assertion of jurisdiction. Nor does it dispute that it received notice of the lawsuit, so as to raise a concern under Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 319, 70 S. Ct. 652, 94 L. Ed. 865 (1950). As far as the Constitution is concerned, the superior court's assertion of jurisdiction was appropriate.

The only question is whether jurisdiction was appropriate under Washington law, and while Shaffer may have changed the constitutional requirements for *in rem* jurisdiction, it did not affect Washington's statutory requirements. As discussed above, the ability to serve a party out of state in a foreclosure action predates the enactment of the long arm statute and did not require filing an affidavit. In 1959, Washington adopted the long arm statute, but left undisturbed all previously valid methods of service. The long arm statute's requirement of filing an affidavit therefore does not apply in this case, and the superior court erred in vacating its judgment.

VI. CONCLUSION

The City properly obtained jurisdiction over Deutsche Bank by serving Deutsche Bank out of state. As the City sought only to foreclose a lien against the Property, the long arm statute's affidavit requirement did

not apply. Deutsche Bank failed to answer the complaint, and the superior court properly entered a default judgment and ordered the sale of the property. More than a year after the suit was filed, Deutsche Bank appeared to vacate the judgment. The superior court erred in granting Deutsche Bank's motion, and Ford respectfully requests this Court: (1) reverse the superior court's Order Granting Deutsche Bank Motion to Vacate Default Judgment Against Deutsche Bank; (2) reinstate the default judgment against Deutsche Bank and subsequent actions taken under that judgment; and (3) remand for further proceedings consistent with the Court's opinion.

DATED this 31 day of October, 2014.

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CERTIFICATE OF SERVICE

I, Madeleine Hottman, hereby certify that on the 31st day of October, 2014, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

John E. Glowney, #12652	<input type="checkbox"/>	U.S. Mail, postage prepaid
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I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 31st day of October, 2014, at Seattle, Washington.



Madeleine Hottman