

73507-1

FILED
November 23, 2015
Court of Appeals
Division I
State of Washington

73507-1

NO. 73507-I

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

AVIS HAMLIN,

Appellant,

v.

MARK HAMLIN,

Respondent.

Appeal from the Superior Court of Washington
for King County
(Cause No. 12-2-26519-4 SEA)

BRIEF OF RESPONDENT

REBECCA J. ROE, WSBA #7560
JOE CAMPAGNA, WSBA #40263

SCHROETER, GOLDMARK & BENDER
500 Central Building
810 Third Avenue
Seattle, Washington 98104
(206) 622-8000

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
III. STATEMENT OF THE CASE.....	3
IV. ARGUMENT	6
A. The Trial Court Properly Found The Requirements For Service By Publication Were Met Based On A Sufficient Affidavit.	8
1. Requirements For Service By Publication Were Met.	8
2. Mark Hamlin Satisfied Every Requirement For Service By Publication.	10
3. Respondent’s Affidavit Was Appropriately Based In Personal Knowledge.	10
B. Washington Caselaw Has Held For Decades That A Plaintiff Is Not Required To Exhaust Every Possible Avenue For Personal Service – An Honest And Reasonable Attempt At Personal Service Suffices.....	11
C. Cases Cited By Respondent Are All Distinguishable, Involving Conclusory Affidavits, Failures To Diligently Search For A Defendant, Or Failures To Use Information Already Possessed.....	14
V. CONCLUSION.....	17

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Boes v. Bisiar</i> , 122 Wn. App. 569, 94 P.3d 975 (2004).....	8, 11, 13
<i>Brenner v. Port of Bellingham</i> , 53 Wn. App. 182, 765 P.2d 1333 (1989).....	9, 16
<i>Bruff v. Main</i> , 87 Wn. App. 609, 943 P.2d 295 (1997).....	8, 15, 16
<i>Burns v. Stolze</i> , 111 Wash. 392, 191 P. 642 (1920).....	9
<i>Carras v. Johnson</i> , 77 Wn. App. 588, 892 P.2d 780 (1995).....	12, 13, 14
<i>Carson v. Northstar Dev. Co.</i> , 62 Wn. App. 310, 814 P.2d 217 (1991).....	9
<i>Charboneau Excavating, Inc. v. Turnipseed</i> , 118 Wn. App. 358, 75 P.3d 1011 (2003).....	15
<i>Chase v. Carney</i> , 199 Wash. 99, 90 P.2d 286 (1939).....	9
<i>Dobbins v. Mendoza</i> , 88 Wn. App. 862, 947 P.2d 1229 (1997).....	8
<i>Jesseph v. Carroll</i> , 126 Wash. 661, 219 P. 429 (1923).....	8
<i>Jones v. Stebbins</i> , 122 Wn.2d 471, 860 P.2d 1009 (1993).....	8
<i>Kent v. Lee</i> , 52 Wn. App. 576, 762 P.2d 24 (1988).....	15
<i>Longview Fibre Co. v. Stokes</i> , 52 Wn. App. 241, 758 P.2d 1006 (1988).....	10
<i>Martin v. Meier</i> , 111 Wn.2d 471, 760 P.2d 925 (1988).....	9, 12

Table of Authorities, continued

Page

Martin v. Triol,
121 Wn.2d 135, 847 P.2d 471 (1993)..... 12

Pascua v. Heil,
126 Wn. App. 520, 108 P.3d 1253 (2005)..... 9, 14, 16, 17

Rodriquez v. James-Jackson,
127 Wn. App. 139, 111 P.3d 271 (2005)..... 14

Statutes

RCW 4.28.100(2)..... 8

Rules

Civil Rule 55(f)(1) 4-5

Civil Rule 60(b) 8

I. INTRODUCTION

Appellant Avis Hamlin has lived at the same address for decades – 3103 - 16th Ave. in Seattle, Washington. Respondent Mark Hamlin, after confirming that this was still her correct address, hired a professional process server to personally serve her with the summons at her residence. CP 7. The process server tried to effect personal service seven times, but was unable to get Appellant to answer her door. CP 7, 13. The process server told Respondent's counsel that Appellant appeared to be inside but would not answer the door. *Id.* Respondent obtained an order to serve by publication (CP 18, 19), but continued to send copies of pleadings related to this lawsuit to Appellant's residence via mail. CP 25, 34, 117, 122. None were returned as undeliverable.

Appellant now complains that the affidavit supporting the motion for publication was insufficient. Appellant does not contend that Respondent was using the wrong address. Appellant does not contend she was away from home when the process server attempted service. Appellant does not contend she was unaware of the proceedings. Appellant does not even challenge the finding that she was concealing herself with the intent to avoid service. Rather, she argues that the affidavit improperly relied on hearsay and did not meet the statutory standards.

Respondent's affidavit met every statutory requirement for service by publication. The affidavit was sufficiently based in counsel's personal knowledge. CP 6-7, 13. It laid out specific facts taken to attempt person service, avoiding conclusory recitations of the statutory factors. *Id.* It provided a sufficient factual basis for an inference that Appellant was intentionally concealing herself with the intent to avoid service. *Id.* And it provided evidence of a reasonable and diligent attempt at personal service. *Id.* For all of these reasons, the affidavit was sufficient, service by publication was proper, and the trial court's entry of judgment should be affirmed.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should the trial court's entry of judgment against Appellant be affirmed where it is clear Appellant had notice of the law suit against her, lived at the residence where personal service was attempted seven times, and when service by publication was properly authorized?

2. Should the trial court's entry of judgment against Appellant be affirmed when Appellant has not averred that any other means of service such as service on an attorney on a non-related matter would have resulted in personal service, because appellant demonstrably did not want to be served?

III. STATEMENT OF THE CASE

Respondent Mark Hamlin filed his Complaint against Appellant Avis Robinson Hamlin on August 8, 2012. CP 1-3. Respondent's counsel used two electronic databases to locate Ms. Hamlin in this state, residing at 3103 - 16th Ave. S., Seattle, Washington. CP 7. Appellant has owned the residence since 1977. Using the information obtained, Respondent attempted to personally serve Appellant via ABC Legal Messengers at her residence. CP 13. The process servers made a total of seven attempts to serve Appellant at her residence, beginning on August 21, 2012 and concluding on September 5, 2012. *Id.* The process server reported to Respondent's counsel that Appellant appeared to be home, but refused to come to the door. On the sixth attempt, the process server spoke with Appellant's neighbor, who confirmed that Appellant lived at that address, but very rarely went outside. *Id.*

On September 12, 2012, Respondent moved for leave to serve the summons by publication. CP 6-13. In support of the motion, Respondent filed an affidavit, attesting that:

1. Plaintiff's counsel used two electronic databases to locate Avis Robinson Hamlin in this State: Westlaw and Address Screener. Using the information obtained from these databases, Plaintiff's counsel has attempted to personally serve Ms. Hamlin (via ABC Legal Services) at her current address. CP 13.

2. ABC Legal Services advises they can tell Defendant Hamlin is inside the home, but she will not open the door. CP 13.

3. In light of the above, Plaintiff's counsel has a good faith belief that Defendant Hamlin is concealing herself in the State to avoid service of process. CP 13.

4. A copy of the Summons, Complaint and Civil Case Schedule has been placed in the mail directed to Defendant Hamlin at her place of residence. CP 13.

An Order Allowing Service by Publication was entered December 18, 2012 (CP 18-19) and service via publication was completed. CP 14-15. A copy of the Summons, Complaint, and Civil Case Schedule was also placed in the U.S. Mail directed to Appellant at her place of residence. CP 7. These were not returned undeliverable.

On September 13, 2013, Respondent filed a Motion for Order of Default of Defendant Avis Robinson Hamlin. CP 20-34. At time of filing, a copy of the motion and proposed order of default was placed in the U.S. Mail directed to Appellant at her place of residence. CP 22, 27. These were not returned undeliverable. Commissioner Bradburn-Johnson entered an Order Granting Motion for Order of Default. CP 35-36. The Order was based on the fact that Appellant was properly served by publication but never appeared nor answered the Complaint in this case.

On February 26, 2014, Respondent filed a Note for Motion for Default Judgment, set for March 14, 2014. CP 38-39. Pursuant to Civil

Rule 55(f)(1), Appellant was entitled to notice of the motion for default judgment on the grounds that she had failed to appear or respond in any manner to this matter and it being more than one year since service of process. On February 26, 2014, Respondent mailed a copy of the Notice of Hearing on Motion for Default Judgment to Appellant at her last known address; the same address at which she has continuously resided. CP 37-39. The copy of the notice sent regular mail was not returned as undeliverable. Additionally, Respondent published a copy of the notice in a newspaper of general circulation in King County on February 28, 2014, more than ten days prior to the hearing set for March 14, 2014. CP 40-42

Respondent's Motion for Order of Default Judgment was granted by the Hon. Theresa Doyle on March 28, 2014. Findings of Fact and Conclusions of Law and Judgment were entered specifically finding that Appellant had been properly served with the Summons and Complaint on October 16, 2012. CP 44-49.

On April 2, 2015, Appellant moved to vacate the default judgment, arguing that the affidavit supporting the service by publication was defective and the default was therefore void. On May 1, 2015, the trial court denied the motion to vacate judgment. CP 142-143. This appeal followed.

It is clear that Appellant received notice of the summons, as her friend and alleged private detective Janet Christensen Obrien appeared at

Respondent's counsel's office in February 2013 to complain and threaten a Bar complaint about the pending suit. CP 202-203. Ms. O'Brien subsequently lodged a Bar complaint against plaintiff's counsel, which was dismissed by the WSBA. CP 167-168, 205. O'Brien posted a video online in which Appellant was shown discussing Rebecca Roe's "unethical behavior" in regard to this lawsuit. CP 209-210.

Tellingly, Appellant has never declared that Respondent was attempting to serve her at the wrong address, that she never received the mailed summons, or that she was unaware of this suit. In fact, Appellant has a history of refusing to respond to suits, then appealing default orders. CP 183-191.

IV. ARGUMENT

Appellant Avis Hamlin deliberately avoided personal service of the summons in this case, and was properly served by publication. Respondent Mark Hamlin did everything a plaintiff is required to do before resorting to service by publication. He correctly located Appellant's residence – 3103 - 16th Avenue S, Seattle, Washington – the same residence she has lived at for decades. Appellant has never disputed that this is her correct residential address. Respondent diligently attempted to personally serve Appellant at this address. He hired a professional process server. The process server made seven attempts to complete personal

service at Appellant's residence. The process server noted that on at least one occasion, Appellant appeared to be home but was refusing to answer the door. The server also spoke to a neighbor who stated that Appellant lived at that residence but rarely left the house. Only after making these diligent attempts at personal service, Respondent moved for leave to serve by publication. Respondent supported the motion for publication with an affidavit that contained facts sufficient to satisfy every element of the statute.

After Appellant was served by publication, with additional copies being mailed to her residence, she simply chose not to respond to the suit. None of the mailed pleadings were returned as undeliverable. As a result of Appellant's failure to appear, a default judgment was properly entered.

Appellant does not contend she does not or did not reside at the above address. She does not contend she was not receiving mail, that she did not know about all the proceedings, or that she moved. That is because none of those things are true. Appellant deliberately evaded personal service, and was properly served by publication.

A. The Trial Court Properly Found The Requirements For Service By Publication Were Met Based On A Sufficient Affidavit.

A trial court's decision to grant or deny a CR 60(b) motion to vacate a default judgment for lack of jurisdiction is reviewed de novo. *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997).

1. Requirements For Service By Publication Were Met.

Service by publication is permitted upon the filing of an affidavit containing the following facts: (1) that the defendant could not be found in Washington after a diligent search, (2) that the defendant was a resident of Washington, and (3) that the defendant had either left the state or concealed herself within it, with intent to defraud creditors or avoid service of process. RCW 4.28.100(2). While there must be strict compliance with the publication statute, “[a]n affidavit is sufficient when it ‘clearly shows all the conditions required, although it does not literally follow the wording of the statute.’” *Bruff v. Main*, 87 Wn. App. 609, 612, 943 P.2d 295 (1997) (quoting *Jones v. Stebbins*, 122 Wn.2d 471, 482, 860 P.2d 1009 (1993) and *Jesseph v. Carroll*, 126 Wash. 661, 666, 219 P. 429 (1923)). As to the intent of the defendant, “[t]he affidavit must clearly articulate facts to meet the required conditions, not clearly prove intent to avoid service.” *Boes v. Bisiar*, 122 Wn. App. 569, 577, 94 P.3d 975 (2004).

Additionally, a plaintiff must exercise due diligence to personally serve the defendant prior to publication, which means making “honest and reasonable efforts to locate the defendant.” *Martin v. Meier*, 111 Wn.2d 471, 482, 760 P.2d 925 (1988). A reasonable diligent search “does not require the plaintiff to employ all conceivable means to locate the defendant,” but the plaintiff must follow up on any information already possessed that might reasonably assist in determining the defendant’s whereabouts. *Pascua v. Heil*, 126 Wn. App. 520, 529, 108 P.3d 1253 (2005) (citing *Carson v. Northstar Dev. Co.*, 62 Wn. App. 310, 316, 814 P.2d 217 (1991)). For instance, in cases arising from an automobile accident, a diligent search would include using information contained in the accident report to locate the defendant. *Martin*, 111 Wn.2d at 482. On the other hand, in a quiet title action, a diligent search does not require searching for mortgage records not already possessed to locate a defendant. *Chase v. Carney*, 199 Wash. 99, 104, 90 P.2d 286 (1939).

When entry of a default judgment finds that proper service of process has occurred, a presumption of jurisdiction arises, which shifts the burden to the defendant to show that publication was based on a defective affidavit. *Brenner v. Port of Bellingham*, 53 Wn. App. 182, 186, 765 P.2d 1333 (1989) (citing *Burns v. Stolze*, 111 Wash. 392, 395-96, 191 P. 642

(1920) and *Longview Fibre Co. v. Stokes*, 52 Wn. App. 241, 244, 758 P.2d 1006 (1988)).

2. Mark Hamlin Satisfied Every Requirement For Service By Publication.

Respondent met every element required for service by publication. The affidavit and attachments contain facts sufficient to find that Appellant could not be found within the state, given that multiple attempts to personally serve her had failed. The affidavit and attachments contains facts sufficient to find that Appellant was a resident of Washington, residing at 3103 16th Ave. S., Seattle, Washington. Facts in the affidavit, including counsel's declaration that "ABC Legal Services advises they can tell Defendant Hamlin is inside the home, but she will not open the door," support an inference that Appellant was concealing herself for the purpose of avoiding service. Finally, the affidavit establishes that a diligent attempt at personal service was made, in the form of locating Appellant's correct residence through database searches, hiring a professional process server, and making seven different attempts at personal service, when even Appellant does not deny she was home.

3. Respondent's Affidavit Was Appropriately Based In Personal Knowledge.

Appellant claims that the affidavit in support of the motion to serve by publication was improperly based in hearsay. Respondent's affidavit

was based on counsel's personal knowledge. Counsel declared that she used two different databases – Westlaw and Address Screener – to locate Appellant's correct residential address in Washington. This declaration is not hearsay, and is the opposite of the conclusory recitations disapproved of in cases cited by Appellant. Counsel declared that she was told by the process server that Appellant seemed to be inside her home, but was refusing to open her door. Again, counsel is swearing to what she was personally told. As noted above, Respondent was never required to conclusively prove that Appellant had the intent to avoid service, rather, he was only required to "clearly articulate facts to meet the required conditions." *Boes*, 122 Wn. App. at 577. Counsel incorporated into her declaration a list showing the number of times that the process server attempted personal service, and the results of those attempts. Finally, counsel declared her belief, as a result of these facts, that Appellant was concealing herself to avoid service. This is all that is required.

B. Washington Caselaw Has Held For Decades That A Plaintiff Is Not Required To Exhaust Every Possible Avenue For Personal Service – An Honest And Reasonable Attempt At Personal Service Suffices.

Decades of case law shows that Respondent's affidavit and *efforts* were sufficient for service by publication. In *Chase v. Carney*, a quiet title action regarding Seattle property, service by publication was completed

after a search of Seattle directories turned up no evidence of the defendant, and after former neighbors had no information as to the defendant's whereabouts. *Chase*, 109 Wash. at 103. The Washington Supreme Court found the search appropriately diligent, even though the plaintiff did not find and examine mortgage records or question bank officials. *Id.* at 104. In *Martin v. Meier*, a case involving service using the non-resident motorist statute, the plaintiff used due diligence in attempting to serve at the address in the accident report, inquiring of neighbors and others as to the location of the defendant. *Martin*, 111 Wn.2d at 482-83. The Washington Supreme Court, in finding the efforts reasonable, noted that “[n]othing in the record suggests that plaintiff had other information available which should have been investigated with reasonable effort.” *Id.* at 483. In *Martin v. Triol*, 121 Wn.2d 135, 847 P.2d 471 (1993), another non-resident motorist case, the Court upheld as reasonably diligent attempts at personal service that included several attempts to serve at the correct residence address, although defendants were out of town on a sailing trip, and contacting neighbors. *Id.* at 150. In *Carras v. Johnson*, 77 Wn. App. 588, 892 P.2d 780 (1995), plaintiffs retained ABC Legal Messengers, the same company used here, to attempt personal service on defendants, which was unsuccessful after several searches throughout the area. *Id.* at 590-92. The Court noted the use of professional process

servers and the reliance of addresses in the information possessed by the plaintiff, and held that the “efforts, while certainly not exhaustive, were both honest and reasonable.” *Id.* at 594. Finally, in *Boes v. Bisiar*, a case involving an automobile accident, the plaintiff served by publication after hiring a process server to search for the defendant, using information in the accident report. *Boes*, 122 Wn. App. at 572-74. The defendant objected that personal service could have been completed if the plaintiff had obtained and searched tax records for the correct address. *Id.* at 575-76. The Court rejected the defendant’s arguments, holding that the search was reasonably diligent, and noting that the correct focus is “on what reasonable steps the plaintiff did take in light of what she knew – not on what other steps were possible.” *Id.* at 576.

The thread running through each of these cases is that a plaintiff has made a diligent effort to effect personal service by following up on information already in their possession, by locating a correct address or making an honest effort to do so, and by hiring a professional process server. Appellant claims that Respondent should have searched through online court records to find Appellant’s other litigation, noted her counsel, and tried to make service through that avenue. Nothing in the entire history of Washington case law requires those sort of efforts. Respondent did not have any reason to believe that a litigation search would help serve

Appellant, when he already had her correct residential address, and it would have been questionable whether her attorney would have accepted service in any event. Further, given Appellant's history in responding to lawsuits, there is no reason to believe she would have authorized an attorney on a non-related matter to accept service, nor is there a declaration under oath to that effect. Courts have repeatedly held that the plaintiff is not required "to employ all conceivable means to locate the defendant." *Pascua v. Heil*, 126 Wn. App. 520, 529, 108 P.3d 1253 (2005). Honest and reasonable efforts are the touchstone. *Carras*, 77 Wn. App. at 594.

C. Cases Cited By Respondent Are All Distinguishable, Involving Conclusory Affidavits, Failures To Diligently Search For A Defendant, Or Failures To Use Information Already Possessed.

Every case cited by defendant is clearly distinguishable from the facts here. The cases relied upon by the defendant are cases where the defendant moved, or resided out of state, and the court decided the plaintiff should have looked harder and further to find the defendant. No such facts are present here: Appellant has and continues to live where service was attempted multiple times. In *Rodriquez v. James-Jackson*, 127 Wn. App. 139, 111 P.3d 271 (2005), heavily relied on by Appellant, the defendant in an auto case had moved from Renton, Washington to Texas a couple months after the accident. Two years later, when plaintiff

filed suit, she failed to make any attempt to locate the defendant – who had filed a change of address with the post office and her insurance company. Appellant has never moved – she simply refuses to open the door or acknowledge her mail.

Similarly, in *Kent v. Lee*, 52 Wn. App. 576, 762 P.2d 24 (1988), the defendant physician in a medical malpractice case had moved to California and started a medical practice there. Service by publication was insufficient because the doctor had moved and there were no efforts to find him. In *Charboneau Excavating, Inc. v. Turnipseed*, 118 Wn. App. 358, 75 P.3d 1011 (2003), the plaintiff tried to serve the defendant at an address *they were told was wrong*. Although provided information about possible accurate locations, the plaintiff failed to make follow-up attempts. In this case, *the process server was told the address was correct*. The defendant simply chose not to accept service.

In *Bruff v. Main*, the plaintiff stated only that the defendant could not be found within the state, and argued that his lack of a public persona and credit problems supported a reasonable inference of intent to defraud creditors or avoid process. *Bruff*, 87 Wn. App. at 611-13. The court held that the bare assertion that the defendant could not be found was insufficient, without listing the steps actually taken to serve personally, and that the bare assertion of prior credit problems was insufficient to raise

an inference of an intent to avoid process or defraud. *Id.* Here, Respondent listed the exact steps taken to locate Appellant and the means used to attempt personal service. The observation by the process server that she appeared to be inside but was refusing to answer the door, after multiple attempts to serve, supports a reasonable inference of her intent to avoid service.

In *Brenner v. Port of Bellingham*, the Port served a summons by publication on the heirs of Brenner based on an affidavit that it did not know the identity or location of the heirs, even though it possessed information showing as the identity of some of the heirs were, and a simple search would have shown their location. *Brenner*, 53 Wn. App. at 186-88. Additionally, the Port's affidavit was silent as to the efforts taken to locate the heirs. *Id.* at 188. The Court held the affidavit defective and the search not sufficiently diligent. *Id.* Here, Respondent's affidavit listed each step taken to locate Appellant, and Respondent did not possess any additional information that would have helped make an effective personal service. Respondent found Appellant's correct residence and notified her of the suit via mail, but she concealed herself to avoid service.

Finally, in *Pascua v. Heil*, plaintiff's affidavit for service by publication merely restated the statutory factors, without supporting facts, and was silent on any facts that would lead to an inference of intentional

concealment. *Pascua*, 126 Wn. App. at 527. The plaintiff also possessed contact information for a related co-defendant, but failed to pursue the lead. *Id.* at 529. Again, unlike the plaintiff in *Pascua*, Respondent pursued every reasonable lead it possessed. Respondent correctly located Appellant, and made diligent efforts to personally serve her. The affidavit and search were sufficient for publication. Appellant was not personally served because she did not want to be served.

V. CONCLUSION

Appellant Avis Hamlin deliberately evaded personal service. The affidavit in support of service by publication was factually and legally sufficient. Respondent's attempts at personal service were diligent. Service by publication was proper, and the appeal should be denied.

DATED this 23rd day of November, 2015.

Respectfully submitted,

SCHROETER, GOLDMARK & BENDER

s/ Joe Campagna

REBECCA J. ROE, WSBA #7560
JOE CAMPAGNA, WSBA #40263

Counsel for Respondent

CERTIFICATE OF SERVICE

On the 23rd day of November 2015, I caused to be served upon the following, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document:

Philip Mahoney 2366 Eastlake Ave. E., Suite 227 Seattle, WA 98102 undeterredphil@yahoo.com	<input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via U.S. Mail, 1 st Class <input checked="" type="checkbox"/> Via CM/ECF System <input type="checkbox"/> Via Overnight Delivery <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Email
---	--

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 23rd day of November, 2015.

s/ Darla Moran

DARLA MORAN
Legal Assistant