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JUL 09 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 320201

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

THE COLLECTION GROUP LLC
Respondents/Plaintiffs,

v.

DAVID R. COOK and JANE DOE COOK
Appellants/Defendants

Appellants' Reply Brief

Dustin Deissner
Washington State Bar No. 10784
DEISSNER LAW OFFICE PC
1707 W. Broadway
Spokane, WA 99201
(509) 462-0827
Attorney for Appellants

Table of Contents

Table of Authorities ii

STATEMENT OF THE CASE 1

REPLY ARGUMENT 2

 1. Facially Invalid Affidavit of Service 2

 2. Abuse of Discretion 5

CONCLUSION 7

Table of Authorities

Cases

Braam v. State, 150 Wash.2d 689, 706, 81 P.3d 851 (2003)
..... 7

Farmer v. Davis, 161 Wn.App. 420, 250 P.3d 138 (2011)
..... 4

Griggs v. Averbek Realty, 92 Wash.2d 576, 584, 599 P.2d
1289 (1979) 6

In re Marriage of Leslie, 112 Wash.2d 612, 618-19, 772 P.2d
1013 (1989) 6

In re Marriage of Markowski, supra; *Woodruff v. Spence*, 76
Wash.App. 207, 209, 883 P.2d 936 (1994)
..... 5

<i>John Hancock Mut. Life Ins. Co. v. Gooley</i> , 196 Wash. 357, 83 P.2d 221 (1938)	3
<i>Lee v. Western Processing Co., Inc.</i> , 35 Wn.App. 466, 469, 667 P.2d 638 (1983)	4
<i>Leen v. Demopolis</i> , 62 Wn.App. 473, 477, 815 P.2d 269 (1991)	6
<i>Little v. King</i> , 160 Wn.2d 696, 703, 161 P.3d 345, 349 (2007)	6
<i>Woodruff v. Spence</i> , 88 Wash.App. 565, 571, 945 P.2d 745 (1997), <i>review denied</i> , 135 Wash.2d 1010, 960 P.2d 938 (1998)	4
<i>Yeck v. Dep't of Labor & Indus.</i> , 27 Wash.2d 92, 95, 176 P.2d 359 (1947)	7

STATEMENT OF THE CASE:

Appellant again notes that the only information in the Affidavit of Service was as follows:

I, ROGER PAPINI DECLARE:

I am a resident of the State of Washington, County of Spokane. I am over the age of 18 years of age and I am not a party to this case. I am competent to be a witness in this action.

I served **David R. Cook & Jane Doe Cook** by delivering to and leaving with a **white female, who would not give her name**, approximately mid to late 40's, 5'2", glasses, above shoulder blond hair, who stated she lived there (a person of suitable age & discretion a resident therein) 2 true copy(ies) of the following documents: Summons; Complaint

Date: July 2, 2006 Time: 1:55 p.m.

Address: 1515 S. Lilac Lane, Liberty Lake, WA

[CP 111]

DAVID COOK's declaration [CP 16] is uncontradicted that:

- The Liberty Lake house where service occurred was leased by co-owner Richard Cook (David's brother) to a company called Timberland-Ag LLC in August 2005;
- Timberland-Ag was still leasing the Liberty Lake house on July 2, 2006;
- In June and July 2006 – the time of the service – COOK was not residing at the house and in fact was buying a

home in California.

- Mr. Cook did not himself receive copies of any legal papers that may have been delivered to the house in 2006.

Marti Mortensen (now married to DAVID COOK) stated in her declaration [CP 20] :

- In 2006 she and her then-husband V. Jerry Mortensen owned the Company called Timberland-Ag.
- Timberland-Ag leased the Liberty Lake house from Richard Cook, beginning August 2005 and through August 2006.
- Records [CP 22 - 23] showed that Timberland-Ag made mortgage payments on the house in 2005 and in May 2006.
- She was not present at the Liberty Lake house on the date of service.

Appellants believe nothing that happened after the date of service is relevant as discussed below.

REPLY ARGUMENT

1. Facially Invalid Affidavit of Service

Respondent spends 20 pages trying to distract the Court

from the only issue that is important: the affidavit of service did not recite that DAVID COOK lived at the address where service took place. Respondent says, ‘but the process server asked the woman if she lived there and she said yes.’

I served David R. Cook and Jane Doe Cook by delivering to and leaving with a white female, who would not give her name, approximately mid to late 40's, 5'2", glasses, above shoulders blond hair, **who stated SHE lived there...** [Emphasis mine] [CP 111]

But the fact she lived there does not mean DAVID COOK lived there. There are TWO requirements: the person served resided there, and the house was the Defendants “usual place of abode.” COOK didn’t live there. He rented the house out to whomever that woman was. The process server assumed DAVID COOK lived there, probably because that was the address on the years-old credit card account. The process server did nothing to verify that. Most important, the process server didn’t state that in the text of his affidavit.

Mr. COOK has pointed at the case of *John Hancock Mut.*

Life Ins. Co. v. Gooley, 196 Wash. 357, 83 P.2d 221 (1938) which creates a bright-line test: if the affidavit of service doesn't say, "the place I served the papers is the Defendant's house of usual abode," then the affidavit is defective. If the affidavit is defective, then the presumption of validity does not apply and the burden of proof is a mere preponderance. *Farmer v. Davis*, 161 Wn.App. 420, 250 P.3d 138 (2011).

Is *Gooley* still good law? In 1983 *Gooley* was cited with approval in *Lee v. Western Processing Co., Inc.*, 35 Wn.App. 466, 469, 667 P.2d 638 (1983) for the proposition that an affidavit of service is subject to attack and may be discredited by competent evidence. *Woodruff v. Spence*, 88 Wash.App. 565, 571, 945 P.2d 745 (1997), *review denied*, 135 Wash.2d 1010, 960 P.2d 938 (1998) shows that when the process server does demonstrate some basis for belief that the place of service was the Defendant's usual place of abode, the affidavit is

facially valid.¹ Whether the affidavit must in fact contain some explanation of the process-server's reason for believing he was at the "usual place of abode" can wait for another case. The point here is simply that in this case the affidavit does not recite that it is the usual place of abode.

This rule is put in place to prevent Defendants like Mr. Cook who are wrongfully defaulted after invalid service from being left with no recourse from the improperly obtained judgment.

The Court below applied the clear and convincing standard, which was in error. This Court may determine the facts, based entirely on written documents, as well as the trial court, and should conclude that service was not effective and the case must be dismissed.

¹ Respondent says a "judgment should be set aside only upon clear and convincing evidence that the return of service was incorrect." [Resp. Br. P. 7] That is not quite correct: the question of whether the return of service is facially correct is determined from the document itself and is necessarily a matter of law. Only once that threshold determination is made does the presumption arise requiring clear and convincing evidence of improper service.

2. Abuse of Discretion

A default judgment entered without proper jurisdiction is void. *In re Marriage of Markowski*, 50 Wash.App. 633, 635-36, 749 P.2d 754 (1988); *Woodruff v. Spence*, 76 Wash.App. 207, 209, 883 P.2d 936 (1994). No showing of a meritorious defense is required to vacate the judgment. *Leen v. Demopolis*, 62 Wn.App. 473, 477, 815 P.2d 269 (1991). There is no time limit for bringing the motion and no laches. *In re Marriage of Leslie*, 112 Wash.2d 612, 618-19, 772 P.2d 1013 (1989). The Supreme Court in *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345, 349 (2007) commented,

As a general matter, default judgments are not favored because " [i]t is the policy of the law that controversies be determined on the merits rather than by default." " *Griggs v. Averbek Realty, Inc.*, 92 Wash.2d 576, 581, 599 P.2d 1289 (1979) (quoting *Dlouhy*, 55 Wash.2d at 721, 349 P.2d 1073). But we also value an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules. See *Griggs*, 92 Wash.2d at 581, 599 P.2d 1289. The fundamental principle when balancing these competing policies is " 'whether or not justice is being done.' "

Accordingly the decision whether to vacate a default judgment is within the trial court's discretion. *Griggs v. Averbek Realty*, 92 Wash.2d 576, 584, 599 P.2d 1289 (1979), and is reviewed for abuse of discretion. *Yeck v. Dep't of Labor & Indus.*, 27 Wash.2d 92, 95, 176 P.2d 359 (1947). Among other things, discretion is abused when it is based on untenable grounds, such as a misunderstanding of law. *Braam v. State*, 150 Wash.2d 689, 706, 81 P.3d 851 (2003). Judge Price misapplied the law and applied far too high a burden of proof. This Court has the same evidence before it and should reverse the trial court once the correct burden of proof is applied.

CONCLUSION

This Court should reverse the decision of the Superior Court and dismiss the case against Appellants.

July 8, 2014


Dustin Deissner WSB# 10784

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2014 I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to the following:

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopier (fax)

To: Robert W. Sealby
Carlson McMahon & Sealby
37 S. Wenatchee Ave. Ste. F
PO Box 2965
Wenatchee WA 98807-2965

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopier (fax)

To: Alexander Kleinberg
Eisenhower & Carlson
1201 Pacific Ave Ste 1200
Tacoma WA 98402-4395

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopier (fax)

Andrea Lynn Asan
Paukert & Troppmann
522 W. Riverside Ste 560
Spokane WA 99201-0519

July 8, 2014



Dustin Deissner WSB# 10784