State v. Folsom, No. 119-2-06 Wncv (Teachout, J., Sept. 4, 2007)

STATE OF VERMONT
WASHINGTON COUNTY

State of Vermont,	)	
Department of Taxes,	)	
Plaintiff,	)	**Washington Superior Court**
	)	**Docket No. 119-2-06 Wncv**
v.	)	
	)	
Gary Folsom,	)	
Defendant.	)	

FINDINGS, CONCLUSIONS, AND ORDER

This is an action to renew a 1998 judgment against Defendant Gary Folsom in *Vermont Dep't of Taxes v. Folsom*, No. 163-3-98 Wncv (dated June 30, 1998). In response to the complaint in this case, Mr. Folsom asserted that he was never served with process in the underlying case and never had actual notice of it.

An evidentiary hearing was held on July 25, 2007. The Department was represented by Attorney Timothy Collins. Gary Folsom represented himself. Based on the credible evidence, the court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

In 1998, the Department of Taxes sought to collect Meals and Rooms taxes related to a business entitled B & K Valley Enterprises, Inc. The Department asserted personal liability against Gary Folsom, corporate officer and owner, and filed a complaint against Gary Folsom in this court on March 31, 1998, which was assigned Docket No. 163-3-98 Wncv. On May 28, 1998, the Department filed a Return of Service that showed that Gary Folsom was served with the Summons and Complaint on May 19, 1998 "by delivering a copy of same to Eric Folsom, Brother, a person of suitable age and discretion and then and there a resident at the usual place of abode of said defendant [Gary Folsom] at [redacted address A], South Burlington, Vermont."

On June 8, 1998, a telephone message was logged at the Department that a call was received from Gary Folsom, and that he would call back. No further calls were received.

A Judgment Order issued June 30, 1998, based on default, in the amount of $24,316.62.

In the period prior to the filing of the suit, the Department had two addresses for Gary Folsom: [redacted address B], Waitsfield, Vermont, and [redacted address A], South Burlington, Vermont, and had sent mail to him at both addresses.

December of 1997 is the last month for which Mr. Folsom paid rent for the post office box in Waitsfield and received mail there. In January and February of 1998, he lived "above the restaurant" and traveled, staying sometimes with his parents. In May or June of 1998, he moved into an apartment in Essex Junction, Vermont, where he resided for 3-4 years. In 2003, he moved to [redacted address A] in South Burlington.

[Redacted address A] is a condominium in South Burlington that has been owned by his family for a long time. Mr. Folsom and his brother have each lived there from time to time, and he has used the address on a long-term basis for receiving mail, whether he was living there or not. In the spring of 1998, his brother was living there. Gary Folsom was not living there. Gary Folsom's brother did not give him a copy of the Summons and Complaint in the 1998 case. Gary Folsom was not served personally with the Summons and Complaint by the sheriff.

Gary Folsom does not recall telephoning the Department in June of 1998 and leaving a message. Prior to that date, the Department had been sending him bills in an attempt to collect the claimed taxes. Thus, even if he did call and leave a message, which the court finds that he did, the fact that the call was placed does not support an inference that he had the Summons and Complaint in hand.

The Department attempted to serve him with the default Judgment Order in #163-3-98 Wncv. On August 24, 1998, Deputy Sheriff Rebecca Pekley returned the Judgment Order to the Department with the following notation: "Per our conversation I am returning the papers on Gary Folsom. As you are aware his brother state [sic] he left that address on bad terms and he doesn't know where he is. If you have further questions feel free to contact me. Sincerely, Rebecca" No further attempts to serve him with the Judgment Order were made.

Thus, as of August of 1998, he was not living at [redacted address A], and had left that address "on bad terms" at some prior date. Although this credible evidence does not prove that he had stopped living at that address prior to May 19, 1998, it is consistent with that fact, and there is no evidence that shows that his departure from [redacted address A] was after May 19, 1998. His own testimony is that he was not living there on May 19, 1998, and did not receive the Summons and Complaint. The evidence does not support a finding of fact that Mr. Folsom was living at [redacted address A] on May 19, 1998.

Conclusions

"[T]he established rule is that an attack on a judgment in an action to renew such judgment is regarded as a collateral attack and can avail only when there is want of jurisdiction either of the parties or of the subject-matter." *Tingwall v. King Hill Irr. Dist.*, 155 P.2d 605, 607

(Idaho 1945). "The primary function of Rule 4 is to provide the mechanism for bringing notice of the commencement of an action to the defendant's attention and to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit." 4 Wright & Miller, Federal Practice and Procedure: Civil 3d § 1063 at 328.

A defect in process or service of process may be waivable, but "[w]here the flaw in the proceedings is lack of any notice sufficiently complying with due process standards, the shortage cannot be supplied by the implication of waiver without any evidence of actual notice." *Brady v. Brauer*, 148 Vt. 40, 46 (1987).

Mr. Folsom argues that the court's jurisdiction was not properly asserted over him in the underlying case because he was never given notice of that lawsuit. See generally, e.g., *Cukor v. Cukor*, 114 Vt. 456 (1946) (analyzing an analogous claim). The responsibility for failure of service lies with the Plaintiff. *Brady* at 44. Service upon an individual complies with Rule 4 if the summons and complaint are left at that individual's "dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." V.R.C.P. 4(d)(1). As the facts show, process was left with Mr. Folsom's brother at a location that was not Mr. Folsom's dwelling house or usual place of abode at the time, and Mr. Folsom never received actual notice of the lawsuit.

Plaintiff has not proved that Mr. Folsom resided at [redacted address A] in South Burlington on May 19, 1998. Because of this, the court does not need to determine whether, in the circumstances of this case, Mr. Folsom's brother was a person of "suitable age and discretion" as contemplated in Rule 4. The court concludes that Mr. Folsom never received notice complying with Rule 4 or due process standards, and that he did not have actual notice.

Because, due to insufficient service of process and lack of actual notice, there was no jurisdiction over Mr. Folsom in the underlying 1998 case. Thus, there is no basis for a renewal of that judgment in this case.

ORDER

For the foregoing reasons, Plaintiff shall take nothing, and this action to renew the 1998 judgment is dismissed on the merits.

Dated at Montpelier, Vermont this 30th day of August 2007.

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Mary Miles Teachout
Superior Court Judge