IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of CHARLES L. EAKINS, Appellant, and BEVERLY J. EAKINS, Respondent.	No. 39929-6-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — After Charles L. Eakins filed a petition for legal separation from his wife, Beverly J. Eakins, she filed a motion for temporary financial relief. Charles[1] appeals the order granting Beverly's request for temporary relief, arguing that it is void because she did not properly serve him with her motion. Because Charles had actual notice of the hearing and an opportunity to attend and be heard fully, we affirm.

Facts

Charles and Beverly were married for approximately five years and have a seven-year-old daughter. After Charles petitioned for legal separation, Beverly moved for temporary child

[1] We will refer to the parties by their first names for clarity; no disrespect is intended.

support, maintenance, mortgage payments, vehicle payments, and attorney fees. On the evening of September 25, 2009, her process server posted the following documents on the door of Charles's residence: a note for motion docket, sealed financial source documents with a cover sheet, a motion and declaration for temporary support, and a financial declaration of respondent.

On September 30, Charles filed a response to Beverly's motion in which he cited its improper service as one reason to deny the motion. At the beginning of the hearing on the motion, Charles noted his objections to the manner of service, and the trial court replied that it should take that issue up first "[b]ecause that's a preliminary issue whether or not it can be heard today." Report of Proceedings (RP) at 7. The court then attempted to determine whether any of the financial issues raised had already been ruled upon. When the court asked Charles whether it could go ahead with most of Beverly's financial issues, he replied, "We can go ahead." RP at 11. The issue of improper service was not mentioned again during the hearing, but after the court granted Beverly's motion and entered an order awarding her temporary maintenance and other financial relief, Charles again challenged the service in his motion for reconsideration. The court denied reconsideration without a hearing.

Charles then sought discretionary review of the order awarding Beverly temporary financial relief. Although he challenged the order on several procedural and substantive grounds, our commissioner granted review on the deficient service issue only.[2]

[2] The commissioner held that Charles did not show that the motion's service was untimely, that the financial declaration contained misstatements of fact, that Beverly's counsel violated CR 11, or that the order failed to satisfy statutory requirements for temporary maintenance orders.

Discussion

Motion Service

Virtually all pleadings, motions, notices, and other documents filed with a trial court must be served on all other parties. CR 5(a); 15 Karl B. Tegland, Washington Practice: Civil Procedure, § 50:5 at 367 (2d ed. 2009). Service is accomplished in accordance with CR 5. *Id*. Because the action has already been commenced, motions need not be served with the same formality as the original summons and complaint. *See* 15 Tegland, § 50:1 at 363 (service of process requirements are strictly construed and enforced to protect defendant's due process rights); *see also Hastings v. Grooters*, 144 Wn. App. 121, 131, 182 P.3d 447 (2008) (after action has been commenced, CR 5 allows papers to be served by leaving them with attorney's receptionist, but CR 5 does not apply to original service of process).

Under CR 5(b)(1), service of a motion that cannot be heard ex parte must be made upon a party who is appearing pro se by handing him a copy or by leaving a copy "at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." Beverly recognizes that her process server did not comply with either manner of service by posting her motion on the door of Charles's residence. She argues, however, that this posting substantially complied with the rule's requirements because Charles received actual notice of her motion on the day it was posted. By his own admission, he found the motion when he returned home later that evening with their daughter for a scheduled weekend visitation.

Division One of this court considered the issue of substantial compliance with CR 5(b)(1) in *In re the Marriage of Mu Chai*, 122 Wn. App. 247, 93 P.3d 936 (2004). There, the husband moved to convert a decree of separation to a decree of dissolution and took a copy of the motion

to the address his wife had listed on a joinder form. *Mu Chai*, 122 Wn. App. at 250-51. That address was to a colleague's apartment; the wife had never resided or worked there. *Mu Chai*, 122 Wn. App. at 250-51. The husband left the motion in the apartment's mailbox and the wife never received it. *Mu Chai*, 122 Wn. App. at 251. Division One rejected the trial court's conclusion that the husband had substantially complied with the rules governing service of motions, reasoning that substantial compliance requires both actual notice and service in a manner reasonably calculated to reach the party who is entitled to service. *Mu Chai*, 122 Wn. App. at 253 (citing *Petta v. Dep't of Labor & Ind.*, 68 Wn. App. 406, 409, 842 P.2d 1006 (1992), *review denied*, 121 Wn.2d 1012 (1993)).[3]

In *Petta*, however, the test for substantial compliance was written in the disjunctive: substantial compliance requires actual notice *or* service in a manner reasonably calculated to give notice. 68 Wn. App. at 409. Other Washington cases agree that the test is a disjunctive one: "Washington courts . . . have held that substantial compliance may be sufficient to satisfy procedural notice requirements if the other party has actual notice or if the service was reasonably calculated to give notice to the other party." *Wilson v. Olivetti N. Am., Inc.*, 85 Wn. App. 804, 810, 934 P.2d 1231 (citing *In re Saltis*, 94 Wn.2d 889, 896, 621 P.2d 716 (1980)), *review denied*, 133 Wn.2d 1017 (1997). Substantial compliance requires some level of actual compliance with the essential substance of a rule, even though a procedural fault renders the compliance imperfect. *Clymer v. Emp't Sec. Dep't*, 82 Wn. App. 25, 28-29, 917 P.2d 1091 (1996). Compliance in a

[3] Division One noted in *Mu Chai* that the substantial compliance doctrine applies only to personal service and not to substitute service. 122 Wn. App. at 253 n.7. CR 5 contemplates both types of service. *See Weiss v. Glemp*, 127 Wn.2d 726, 731, 903 P.2d 455 (1995) (describing similar personal and substitute service provisions in service of process statute).

manner that does not fulfill the objective of the rule cannot constitute substantial compliance. *Petta*, 68 Wn. App. at 409-10.

Neither of the requirements for substantial compliance was satisfied in *Mu Chai*, which may have contributed to the manner in which the court phrased *Petta*'s applicable test. The wife did not receive actual notice of her husband's motion, and the method he used was not reasonably likely to result in notice since his wife had never resided at the address where he left the motion and had no reason to anticipate that documents might be left there for her after the separation decree was entered.[4] *Mu Chai*, 122 Wn. App. at 253-54. The manner in which the motion was served in *Mu Chai* clearly did not satisfy the objective of CR 5(b)(1). *See Litowitz v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 93 Wn. App. 66, 69, 966 P.2d 422 (1998) (purpose of service requirements is to provide notice and an opportunity to be heard).

Here, however, it is undisputed that Charles had actual notice of Beverly's motion. He responded to that motion with a timely written response and appeared for the hearing on the motion. Moreover, it is arguable that the manner of service was reasonably calculated to give notice, since Beverly knew Charles would be returning home that evening with their daughter for a scheduled visitation. In any event, leaving the motion on his door resulted in actual notice and we find substantial compliance on the facts presented.

We note here that Charles has filed a separate appeal of the final dissolution decree and support orders entered in this case. But because we do not know whether Charles made any payments under the temporary order, we do not dismiss this appeal of the order granting

[4] Other deficiencies clearly troubled the court. The motion papers contained no notice of any time or place for the hearing; the envelope enclosing them lacked postage or a return address, thus making its destruction likely; and the attempted service was not timely. *Mu Chai*, 122 Wn. App. at 253-54.

temporary financial relief as moot.

Attorney Fees

Charles requests an award of costs as well as sanctions to compensate him for the time spent on this appeal, and Beverly requests attorney fees on appeal. We deny both requests. Although Beverly is the prevailing party, she does not support her request with the requisite citation to authority. RAP 18.1(a); *In re Marriage of Hoseth*, 115 Wn. App. 563, 575, 63 P.3d 164, *review denied*, 150 Wn.2d 1011 (2003).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

VAN DEREN, J.

WORSWICK, A.C.J.