IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DEBRA STEWART, Appellant, v. GRIFFITH INDUSTRIES, INC., a Washington Corporation; GRIFFITH INDUSTRIES, INC., a Washington Corporation d/b/a/ GRIFFITH FLOOR COVERING; ROSALES CARPET; CESAR ALBERTO ROSALES and JANE DOE ROSALES, and the marital community composed thereof, Respondents.	)	NO. 67009-3-I DIVISION ONE UNPUBLISHED OPINION FILED: November 13, 2012

Lau, J. — After the statute of limitations had run, the trial court granted summary judgment dismissing Debra Stewart's personal injury lawsuit against Cesar Rosales and Rosales Carpet for insufficient service of process. Stewart contends summary judgment was improperly granted because the defendants waived the affirmative defense. Because the defendants raised the defense in their answer and engaged in

no actions inconsistent with this defense, the trial court properly concluded the waiver doctrine is inapplicable to bar the affirmative defense. We affirm.

FACTS

The underlying facts are not in dispute. On August 9, 2006, Debra Stewart fell and injured her hip on newly-installed flooring in her apartment. Stewart bought the flooring from Griffith Industries, Inc. Griffith arranged for Rosales Carpet to perform the installation.

Stewart filed a lawsuit, naming as defendants Griffith, Rosales Carpet, and its owner, Cesar Rosales, on March 20, 2008. She alleged that adhesive was negligently left on the surface of the flooring and caused her to fall. Shortly after filing her complaint, Stewart served Griffith's registered agent and filed a declaration of service. On April 28, 2008, Stewart filed a confirmation of service in superior court, indicating that neither Rosales nor Rosales Carpet (collectively "Rosales") had been served.

Rosales filed no answer to the complaint. Stewart did not request an answer, move for default judgment, or seek any discovery from Rosales. Rosales's counsel served interrogatories and requests for production on Stewart, but Stewart did not respond.[1] Rosales did not contact Stewart or file a motion regarding the lack of response.

The lawsuit proceeded against Griffith. Rosales participated in no discovery between Stewart and Griffith. Griffith filed a motion for summary judgment, arguing that

[1] Rosales's counsel was retained on his behalf by his liability insurance carrier.

it was not liable for the alleged negligence of Rosales in installing the flooring because Rosales was an independent contractor. In July 2009, the trial court granted Griffith's motion. Stewart appealed. While the appeal was pending, Rosales's counsel twice agreed via e-mail to orders continuing the case.

On October 11, 2010, we affirmed the trial court's ruling dismissing the claims against Griffith. Stewart v. Griffith, noted at 158 Wn. App. 1005, 2010 WL 4008827. Before this decision was filed, Rosales's attorney retired. Upon taking over the case, the new attorney noted that the case was continued pending outcome of the appeal. Around that same time, Rosales's new counsel filed a jury demand and a witness list.

When he received notice of the Stewart v. Griffith decision, Rosales's attorney reviewed the file more closely and discovered that Rosales had never been served with a complaint. On November 11, Rosales filed an answer to the complaint, asserting that Rosales had not been properly served and the lawsuit was barred by the statute of limitations. Shortly after, Rosales filed a motion for summary judgment seeking dismissal on the same basis.

Stewart argued that Rosales was not entitled to summary judgment because he was, in fact, properly served with a copy of the complaint more than a year earlier, in August 2009, at his usual abode under RCW 4.28.080(15). Stewart also claimed that Rosales had, in any event, waived the defense of insufficiency of service of process.

Stewart provided the declaration of Juston Smith, the son of one of her attorneys. In his January 6, 2011 declaration, Smith stated that sometime during the week of August 17, 2009, he had served an adult male at a residence in Redmond,

Washington with a summons and complaint. Although the individual refused to provide his identity, Smith said the individual he served confirmed that he was over 18 and that "Mr. Rosales lived there."

In reply, the defense filed the declaration of an investigator who stated that the defendant, Cesar Alberto Rosales, had never been associated with the Redmond address where he was purportedly served. But a person with a different middle name, Cesar Abarca Rosales, was associated with the address in August 2009. The investigator described the steps he took in reaching this conclusion.

Following a hearing on Rosales's motion, the court determined that the statute of limitations had run on Stewart's cause of action and Rosales had not waived the defense of insufficiency of service.[2] In light of the new information provided by Rosales's counsel indicating that the address where service was attempted was not the defendant's usual abode, the court granted the plaintiff additional time to gather information to rebut the defendant's showing of insufficient service of process.

At the second hearing two months later, the plaintiff was unable to produce additional evidence to establish proper abode service.[3] The court granted summary

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[2] Stewart does not challenge the trial court's ruling that the three-year statute of limitations for her personal injury claim had expired by the time Rosales raised the defense in November 2010. See RCW 4.16.080(2). While proper service of one defendant tolls the statute of limitations as to unserved defendants, if the served defendant is dismissed, the statute of limitations continues to run as if the action had never been brought. Sidis v. Brodie/Dohrmann, Inc., 117 Wn.2d 325, 329-30 815 P.2d 781 (1991); Fittro v. Alcombrack, 23 Wn. App. 178, 180, 596 P .2d 665 (1979).

[3] Defense counsel submitted additional evidence pertaining to service, including the declarations of an insurance agent who helped Rosales procure insurance and could identify his photograph and a person who lived at the Redmond address at the

judgment, dismissing Stewart's complaint. Stewart appeals.

ANALYSIS

Waiver of Service of Process Defense

Stewart argues that the trial court erred in granting summary judgment because Rosales waived his defense of insufficiency of service of process.

Washington courts recognize that in certain cases, the common law doctrine of waiver will preclude the defendant from raising the defense of insufficient service of process. Lybbert v. Grant County, 141 Wn.2d 29, 38, 1 P.3d 1124 (2000). A defendant may waive the affirmative defense if (1) assertion of the defense is inconsistent with defendant's prior behavior or (2) the defendant has been dilatory in raising the defense. King v. Snohomish County, 146 Wn.2d 420, 424, 47 P.3d 563 (2002). The doctrine of waiver in this context is "designed to prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage." King, 146 Wn.2d at 424. The doctrine is also intended to encourage the assertion of procedural defenses "before any significant expenditures of time and money [has] occurred and at a time when the [plaintiff may remedy] the defect." King, 146 Wn.2d at 426.

Relying on Lybbert, Stewart argues that because Rosales proceeded with discovery before asserting the defense, the defense was waived. In Lybbert, the plaintiffs mistakenly served a summons and complaint on the administrative assistant to

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time of attempted service and confirmed that Rosales did not reside there.

the county commissioners when, by statute, they should have served the county auditor. The county appeared and for the next nine months, acted as if it were preparing to litigate the merits of the case without mentioning any problem with the sufficiency of service of process. The Lybberts propounded interrogatories asking the county if it intended to rely on the defense of insufficient service of process. The county did not respond. After the statute of limitations had run, the county answered the Lybberts' complaint and raised, for the first time, the affirmative defense of insufficient service of process. The county then obtained summary judgment dismissal.

The Supreme Court reversed. The court found it particularly significant that the Lybberts' interrogatories were designed to ascertain whether the county would rely on a service-related defense. Had the county responded to these interrogatories in a timely fashion, the Lybberts would have had several days to cure the defective service. Lybbert, 141 Wn.2d at 42. Also, because a declaration of service had been filed, the county had reason to know that the Lybberts believed they had properly accomplished service.

As the Lybbert court emphasized, the mere act of engaging in discovery is not necessarily inconsistent with a later assertion of the defense of insufficient service. Lybbert, 141 Wn.2d at 41. But where circumstances indicate that the defendant has engaged in discovery while lying "in wait" for the statute of limitations to run, waiver will apply. Lybbert, 141 Wn.2d at 45. For instance, in Romjue v. Fairchild, 60 Wn. App. 278, 281, 803 P.2d 57(1991), plaintiff's counsel had written to defense counsel before the statute of limitations expired, stating that he understood the defendants had been

properly served. Nonetheless, the defendant engaged in discovery unrelated to a service-related defense before moving to dismiss and waited until three months after the statute of limitations expired to notify plaintiff's counsel of insufficient service. Romjue, 60 Wn. App. at 281-82. The court held that the defendant waived the defense by acting in a manner inconsistent with the later assertion of the defense.

Similarly, in King, parents filed a complaint against Snohomish County after their child was injured in a county park. The plaintiffs timely filed their complaint but failed to comply with the county's notice claim provisions. A month after the complaint was filed, the county answered and raised 11 affirmative defenses, including failure to comply with claim filing requirements. King, 146 Wn.2d at 423. More than three years of litigation and discovery followed, with each party moving for summary judgment on grounds not related to notice claim requirements. When asked in an interrogatory what defenses it intended to raise, the county called the question vague and referred to the list of defenses in its answer. King, 146 Wn.2d at 423. Finally, four years after the complaint was filed, the county moved to dismiss for failure to comply with the notice claim provisions. King, 146 Wn.2d. at 425. The trial court denied the motion, and the jury returned a verdict for the plaintiffs.

The Supreme Court affirmed, concluding that although the county was not dilatory in asserting the defense in its answer, by failing to raise the notice claim defense again until just before trial, after the statute of limitations had run, the county effectively ambushed the plaintiffs. King, 146 Wn.2d at 425. Accordingly, the county had waived the claim filing deficiencies as an affirmative defense by engaging in

conduct that was inconsistent with raising the defense. King, 146 Wn.2d at 427.

As compared to the defendants in these cases, Rosales engaged in minimal discovery and his behavior was not inconsistent with raising the defense of insufficient service. Rosales sent some initial discovery requests and filed a jury demand form and witness list. But apart from the jury demand form, none of these documents are in the record, so we cannot determine whether any of the information sought was relevant to the availability of defenses. Rosales and Stewart had no contact regarding the complaint, the answer, or discovery issues, and exchanged no substantive information about the claim. The record shows Stewart had done nothing to pursue her claim against Rosales apart from naming him in the complaint. There is no evidence that Rosales concealed the defense or was aware prior to asserting the defense that Stewart believed she had successfully served him. The only relevant information in the court file at the time Rosales filed his answer and summary judgment motion was the April 2008 confirmation of service, which indicated that Rosales had not been served.

Citing Meade v. Thomas, 152 Wn. App. 490, 217 P.3d 785 (2009), Stewart also claims that Rosales had an obligation to assert his defense before the statute of limitations had run. Stewart misreads Meade. In Meade, after the defendant called attention to the problem with the service by asserting the defense, the plaintiff had the opportunity to cure the defect before the statute of limitations expired. The court recognized that application of the doctrine of waiver is less compelling in these circumstances. Nothing in that decision, however, suggests that the defendant is responsible for ensuring that the plaintiff accomplishes timely service of process.

Indeed, the Lybbert court took pains to emphasize that the doctrine of waiver does nothing to "alter the traditional duties litigators owe to their adversaries." Lybbert, 141 Wn.2d at 39. The court stated, "Our holding today merely underscores the importance of preventing the litigation process from being inhibited by inconsistent or dilatory conduct on the part of litigants." Lybbert, 141 Wn.2d at 40.

The court in Meade determined that the defense was not waived because, unlike the county's counsel in Lybbert, the defendant had not engaged in significant litigation activity inconsistent with raising the procedural defense. In Meade, before filing an answer to the complaint and raising the affirmative defense, the defendant had sent a set of discovery requests, contacted plaintiff's counsel twice in regard to those requests, and made inquires about the plaintiff's deposition. The court concluded this discovery was "less extensive" than the discovery conducted in Lybbert. Meade, 152 Wn. App. at 495. Also, no affidavit of service was filed, so the defendant had no reason to know that the plaintiff believed the defendant had been properly served.

As in Meade, the record here indicates that discovery was insubstantial. Rosales's prior behavior created no impression that he was preparing to litigate the merits of the case instead of relying on a procedural defense. The trial court did not err in concluding that waiver did not preclude Rosales from raising the defense of lack of service.

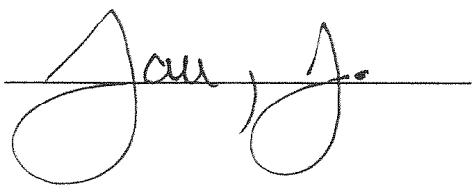
Motion to Strike

Stewart also contends the trial court erred in denying her motion to strike

Rosales's affirmative defense as a discovery sanction. Before the second hearing solely on the issue of whether the abode service was effective, Stewart sent a notice of deposition to Rosales's counsel. Although aware that Rosales's counsel was unable to locate Rosales and could not secure his attendance, she scheduled the deposition to take place a few days before the hearing. Rosales did not attend. Stewart then asked the trial court to strike Rosales's affirmative defense of insufficiency of service as a sanction for Rosales's failure to attend his deposition.

CR 37(d) authorizes a court to impose a broad range of sanctions for noncompliance with discovery rules, and a trial court's decision on sanctions will not be disturbed on appeal absent a clear showing of abuse of discretion. Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). Importantly here, Stewart does not allege, nor is there any evidence of, a willful discovery violation that would warrant the sanction of striking a defense. See Snedigar v. Hodderson, 53 Wn. App. 476, 487, 768 P.2d 1 (1989) (when the trial court imposes one of the harsher sanctions allowable under CR 37(b), the record must show that the court found a willful or deliberate discovery violation that substantially prejudiced the opponent and considered lesser sanctions). There is no evidence that Rosales had notice of the lawsuit or the deposition. Under these circumstances, the trial court acted well within its discretion in denying Stewart's motion to sanction Rosales by striking his defense.

Affirmed.



WE CONCUR: