

request to serve the summons by publication with a declaration of its counsel, stating that

defendants Michael Austin and Giacomo Austin “are not residents of this state.”

The declaration states further that copies of the summons, complaint, and other documents will be sent to the Austins at what is characterized as their “last-known address” in Redmond, Washington. This showing is deficient—it fails to direct notice to the defendants at their “place of residence”—and thus fails to meet the requirements of the statute. We reverse and remand with instructions to dismiss without prejudice.

Buchan contracted with Silvia Di Giacomo, the mother of the Austin brothers, to rebuild a house she owned in Redmond, Washington after it was severely damaged by fire. It appears that a tenant resided there at the time of the fire. There is no evidence in this record that the Austins ever resided there.

Prior to the completion of Buchan’s work, Di Giacomo conveyed title to the property to her sons as a gift. Di Giacomo also assigned the Buchan contract to her sons under an Assignment and Assumption of Construction Contract. Buchan signed this document indicating its consent to the assignment.

Disputes over payment on the contract arose. Di Giacomo continued to deal with Buchan, although the record indicates that she did so by way of e-mail. The disputes remained unresolved and Buchan recorded two mechanic’s liens against the Redmond property in August and September of 2010. Buchan and/or its counsel continued to communicate by e-mail with Di Giacomo

regarding payment.

In October, Buchan commenced this action for breach of contract, unjust enrichment, and foreclosure of the mechanic's liens. It named the Austins as defendants. Di Giacomo is not a party. Buchan also named others, who are not parties to this appeal, on the basis that they claimed some interest in the property.

In November 2010, Buchan sought permission from the court to serve the summons on the Austins by publication. Its counsel's declaration supporting that request states that the Austins "are not residents of this state." In so stating, counsel refers to an attached exhibit showing a string of e-mail exchanges in October 2010 between counsel and Di Giacomo. An October 16, 2010, message from her to counsel states that she and the Austins then resided in Italy. The record is devoid of any evidence that counsel requested the Austins' specific addresses in Italy when applying for service of the summons by publication.

The same exhibit contains an earlier e-mail dated October 10, 2010, from "rbrain" to Di Giacomo. In it, "rbrain" purports to attach to the e-mail "a Complaint For Breach of Contract, Unjust Enrichment and Foreclosure of Lien" that "rbrain" said was filed. Significantly, there is no mention of any filing of a summons.

Counsel's declaration also states that "[Buchan] will send a copy of the [summons, complaint, and other documents to the Austins] at their last-known

address, which is 25206 NE 108th Street, Redmond, Washington 98053”³

There is no evidence that the Austins either lived or resided at this address.

Buchan later sought an order of default due to the Austins’ failure to answer the complaint following publication of the summons. The court entered an order of default and a judgment and decree of foreclosure against the property then owned by the Austins.

In March 2011, Di Giacomo appears to have received an e-mail from a superior court employee regarding entry of the default judgment. She then e-mailed Buchan’s counsel, and he confirmed the entry of the judgment. The Austins then moved to vacate the order of default and default judgment. The court denied their motion. The court also denied their motion for reconsideration.

The Austins appeal.

SERVICE BY PUBLICATION

The Austins argue that Buchan failed to comply with the requirements for service of the summons by publication under RCW 4.28.100. We agree.

In order for a court to exercise personal jurisdiction over a defendant, he must be properly served with a summons.⁴ Though personal service of a summons is preferred, service by publication is authorized in certain

³ Clerk’s Papers at 21.

⁴ Woodruff v. Spence, 76 Wn. App. 207, 209-10, 883 P.2d 936 (1994) (quoting Lee v. W. Processing Co., 35 Wn. App. 466, 469, 667 P.2d 638 (1983)) (“Proper service of the summons and complaint is a prerequisite to the court obtaining jurisdiction over a party . . .”).

circumstances.⁵ Under RCW 4.28.100, a defendant may be served with a summons by publication if he is either not a resident or cannot be found in the state and certain other requirements are met. Among these requirements are: that the defendant has property in this state, “the subject of the action is real or personal property in this state, and the defendant has or claims a lien . . . therein.”⁶ Likewise, such publication may be ordered where “the action is . . . to enforce a lien of any kind on real estate in the county where the action is brought”⁷

Because service by publication is not the preferred way of giving proper notice to a defendant, a plaintiff must strictly comply with its requirements.⁸ To accomplish proper service by publication a party must make honest and reasonable efforts to find the defendant.⁹ “Not all conceivable means need be used, but an honest and reasonable effort should be made to find [the] defendant prior to service by publication.”¹⁰

A trial court’s ruling on whether a plaintiff has satisfied the requirements for service by publication under RCW 4.28.100 is a question of law, reviewed de

⁵ Pascua v. Heil, 126 Wn. App. 520, 526, 108 P.3d 1253 (2005) (citing Painter v. Olney, 37 Wn. App. 424, 427, 680 P.2d 1066 (1984)).

⁶ RCW 4.28.100(3), (6).

⁷ RCW 4.28.100(7).

⁸ Rodriguez v. James-Jackson, 127 Wn. App. 139, 143, 111 P.3d 271 (2005).

⁹ Martin v. Meier, 111 Wn.2d 471, 481, 760 P.2d 925 (1988).

¹⁰ Id. (citing Schmelling v. Hoffman, 111 Wash. 408, 414, 191 P. 618 (1920)).

novo by an appellate court.¹¹

Here, applying RCW 4.28.100 to the declaration of counsel supporting the request for service by publication shows that such service was not authorized. The statute states in relevant part:

When the defendant cannot be found within the state, and upon the filing of an affidavit of the plaintiff, his or her agent, or attorney, with the clerk of the court, stating that he or she believes that the defendant is not a resident of the state, or cannot be found therein, and that **he or she has deposited a copy of the summons** (substantially in the form prescribed in RCW 4.28.110) **and complaint in the post office, directed to the defendant at his or her place of residence, unless it is stated in the affidavit that such residence is not known to the affiant**, and stating the existence of one of the cases hereinafter specified, the service may be made by publication of the summons, by the plaintiff or his or her attorney in any of the following cases^[12]

The declaration states that the Austins “are not residents of this state,” as the first part of the above statute requires. But this only addresses one requirement of this statute.

In addition to the above proof, the statute next requires a showing that Buchan mailed “a copy of the summons . . . and complaint,” via the post office, directed to the Austins’ “place of residence,” unless the declaration states “such residence is not known.”¹³ Buchan failed to meet these statutory requirements in three respects.

¹¹ Rodriguez, 127 Wn. App. at 144 (citing Boes v. Bisiar, 122 Wn. App. 569, 576, 94 P.3d 975 (2004)).

¹² RCW 4.28.100 (emphasis added).

¹³ Id.

First, counsel failed to show the mailing of copies of the summons and complaint to the “place of residence” of the Austins. The declaration merely states that counsel “will send” these documents to the “last-known address” of the Austins in Redmond, Washington. There is no evidence that Redmond was ever their “place of residence.” In fact, the attachment to the declaration states they “currently resided” in either Italy or California. The declaration does nothing to resolve this patent conflict regarding the “place of residence” of these defendants.

Second, there is no evidence that the Austins ever lived at the Redmond address. Although they owned the property at the time of the commencement of this action, there is no evidence that they ever lived there, as residency would require. Rather, the record reflects the property was formerly occupied by a tenant who lived there at the time of the fire that damaged the property.

Third, and most importantly, to the extent that the declaration should be read as counsel representing to the court, that the residences of the Austins were not known, counsel failed to state that in his affidavit and failed to show reasonable diligence to determine those residence addresses. Washington courts have required reasonable diligence for plaintiffs to satisfy the honest and reasonable efforts test, and have particularly emphasized the importance of following up on information that might reasonably assist in locating a

¹⁴ See Dobbins v. Mendoza, 88 Wn. App. 862, 873-74, 947 P.2d 1229 (1997) (where plaintiff attempted to contact the defendant in numerous different ways, but failed to review tax records, the court held the plaintiff had not satisfied the diligence requirement for proper service by publication); Longview Fibre Co., 52 Wn. App. at 243-45 (plaintiff did not make reasonable efforts to locate defendant where she only

defendant.¹⁴

For instance, in Pascua v. Heil,¹⁵ the plaintiff failed to follow up with a third party who might have had information about the defendant's address, and the court held that he had failed to make "honest and reasonable efforts."¹⁶ Pascua was involved in a car accident with Heil.¹⁷ At the time of the accident, Heil gave her personal information and the Florida post office box of the registered owner of the vehicle.¹⁸ When Pascua attempted to personally serve Heil, he sent a legal messenger to Heil's last known address, and conducted a public records search for her in Washington, all without avail.¹⁹ After these unsuccessful attempts, Pascua served Heil by publication.²⁰ The court held that this service was improper.²¹

[T]he means Pascua used to locate [Heil] boil down to the following: attempts to contact her at the phone number and address listed in the police report; contacting the apartment manager at the Lacey address; and searches utilizing a public

checked the "local telephone directory, the city directory . . . , and the Cowlitz County PUD' and could find no address for [him]."); Carson v. Northstar Dev. Co., 62 Wn. App. 310, 316, 814 P.2d 217 (1991) (where plaintiff tried to serve defendant through various processes, including ascertaining his new place of employment and paying two different process servers, the lower court erred in vacating judgment without first hearing testimony regarding these efforts).

¹⁵ 126 Wn. App. 520, 108 P.3d 1253 (2005).

¹⁶ Id. at 530-31.

¹⁷ Id. at 524.

¹⁸ Id.

¹⁹ Id. at 525.

²⁰ Id. at 524.

²¹ Id. at 528.

records index, a phone directory, and internet search engines. While these efforts might generally be considered sufficient, they are not here. What Pascua did not do was attempt to locate [Heil] through contacting . . . the registered owner of the vehicle she was driving at the time of the accident. . . . Once Pascua's other efforts [to contact Heil] were unsuccessful, it was unreasonable not to contact [the car's registered owner] to see whether he knew and would provide [Heil's] current location^[22]

The court described what was required for service by publication. "While reasonable diligence does not require the plaintiff to employ all conceivable means to locate the defendant," a plaintiff must follow up on information that might reasonably assist him in finding the defendant.²³

Here, the declaration of counsel supporting the request for service by publication plainly shows exchanges of e-mails about the very subject of this action between counsel and Di Giacomo during the month of October 2010. This was just before the application for authority to serve the summons by publication.

Di Giacomo expressly advised counsel on October 16, 2010, that her sons then resided in Italy. Despite this knowledge, counsel failed to request their specific addresses. And the record fails to show any other attempts to determine their residence addresses.

It was not until after Buchan obtained the default judgment in February 2011 that it asked Di Giacomo for these addresses. This was too late to cure the defect in applying for permission to serve the summons by publication on the

²² Id. at 529-30.

²³ Id.

Austins in November 2010.

As in Pascua, Buchan had a contact that knew the Austins and likely knew their addresses. Despite this knowledge, Buchan failed to seek the addresses prior to its request for service of the summons by publication. Further, unlike in Pascua, Buchan appears to have done **nothing** to find contact information for the Austins before applying for service by publication. Thus, it failed to make the honest and reasonable efforts required for service by publication.

Buchan argues that because it was informed that the Austins were living out of the country, it was not required to make reasonable and honest efforts to locate them. It argues that such a requirement only applies in cases where it is not clear whether the defendant is actually in the state. We reject this argument, which is unsupported by any relevant authority.

“The purpose of statutes which prescribe the methods of service of process is to provide due process.”²⁴ As the Supreme Court noted in Mullane v. Central Hanover Bank & Trust Co.,²⁵ due process requires that notice be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”²⁶

Service by publication under the circumstances of this case was not

²⁴ Wichert v. Cardwell, 117 Wn.2d 148, 151, 812 P.2d 858 (1991).

²⁵ 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

²⁶ Id. at 314 (citations omitted).

reasonably calculated to provide the notice to the Austins that the statute requires. Buchan knew that the Austins were not residents of this state and that they “currently resided” in Italy. Yet it failed to ask Di Giacomo the Austins’ “place[s] of residence” for the purpose of mailing the summons and complaint to them, as the plain words of the statute require. There was simply no reason for Buchan to believe that mailing the summons and complaint to the Redmond address would fulfill the statutory requirement that the mailing should be to the “place of residence” of each defendant. Mailing the documents to their alleged “last-known address” fails to meet the plain words of the statute.

Buchan also appears to argue that its service by publication, together with the e-mail “notice” to Di Giacomo, was sufficient to satisfy due process. There simply is no support for this argument. There is no showing that a summons was included in the alleged transmittal. And the plain words of the statute require mailing, not e-mailing.

There is no provision in Washington law that holds that mailing the required documents by post office may be fulfilled by electronic communication. In any event, the evidence fails to show that a summons was attached to the e-mail message on which Buchan appears to rely for evidence that it sent to Di Giacomo copies of the complaint and other documents. Significantly, there is no evidence that she was authorized to accept service of process on behalf of the Austins. Thus, Di Giacomo was under no obligation to forward the e-mails from Buchan to her sons. It was Buchan that had the burden to properly serve the

Austins, not their mother.

Buchan relies on three cases to argue that their service by publication in this case was proper: DeCorvet v. Dolan,²⁷ Cook v. Cook,²⁸ and United States Bank National Ass'n v. Oliverio.²⁹ None are persuasive.

Cook and United States National Bank dealt with situations in which the plaintiff took steps to attempt to locate the defendant, or had a good faith belief that the defendant was at the specific address to which the summons and complaint were mailed.³⁰ As we already explained in this opinion, the facts here are quite different. Most importantly, Buchan knew the Austins resided in Italy and failed to ask Di Giacomo for their specific addresses in Italy when it applied to serve them by publication.

In 1894, DeCorvet held that a statement that a defendant lived out of state was sufficient to meet the requirements of a predecessor statute to RCW 4.28.100.³¹ On this basis, Buchan argues that making such a statement under the current statute is sufficient to meet the requirement of due diligence. Buchan is wrong.

²⁷ 7 Wash. 365, 35 P. 72 (1893).

²⁸ 118 P.2d 1070 (Or. 1941).

²⁹ 109 Wn. App. 68, 33 P.3d 1104 (2001).

³⁰ See Cook, 118 P.2d 1072 (plaintiff mailed copy of summons and complaint as part of service by publication to address where he usually sent mail to defendant, thus demonstrating good faith); U.S. Bank, 109 Wn. App. at 71 (Bank filed an affidavit in support of service by publication that “describ[ed] its efforts to find Audra Oliverio . . .”).

³¹ DeCorvet, 7 Wash. at 366.

Whatever that 1894 case said about the prior statute, the law since that time makes clear that due diligence requires more than just stating that a defendant lives out of state. Holding otherwise would undercut the requirement stated in Mullane: that notice to the defendant must be reasonably calculated to reach the defendant.³² Here, that failure was illustrated by not asking Di Giacomo for the specific addresses of the Austins.

Buchan also argues that it was not required to serve the Austins personally or by mail. The issue before us is the propriety of service of the summons by publication, not whether other methods of service were required. Accordingly, we need not address this argument.

Because service of the summons by publication was not authorized and Buchan failed to effect any other service of process, the trial court did not have personal jurisdiction over the Austins. Accordingly, any judgments against them are void.³³

Because we reverse on the basis of lack of personal jurisdiction, we need not address the other arguments of the parties.

³² Mullane, 339 U.S. at 314.

³³ Woodruff, 76 Wn. App. at 209.

We reverse and remand with directions to dismiss without prejudice.

Cox, J.

WE CONCUR:

Elemyon, J.

Becker, J.