

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

WELLS FARGO BANK, NA,	)	NO. 67240-1-I
successor in interest to FIRST	)	
INTERSTATE BANK OF	)	DIVISION ONE
WASHINGTON, N.A.,	)	
	)	
Plaintiffs,	)	
	)	
JPRD INVESTMENTS, LLC, a	)	
Washington limited liability company,	)	
	)	
Respondent,	)	UNPUBLISHED OPINION
	)	
v.	)	
	)	
THEARY NGY and JOHN DOE NGY,	)	
and their marital community,	)	
	)	
Appellants,	)	FILED: September 10, 2012
	)	
US BANK,	)	
Garnishee Defendant.	)	
	)	

Leach, C.J. — For a court to have personal jurisdiction over the defendant in a lawsuit, the defendant must be properly served with a summons and complaint. This generally requires personal service, though service by mail may be appropriate if the plaintiff acts with reasonable diligence but cannot accomplish personal service.

Wells Fargo obtained a default judgment against Theary Ngy in 2003.

Later, JPRD Investments LLC, Wells Fargo's assignee, garnished Ngy's bank account. Ngy appeals a trial court's denial of her motion to vacate the default judgment and to quash the writ of garnishment, arguing that the judgment is void for lack of personal jurisdiction due to improper service. Because Wells Fargo did not exercise reasonable diligence to serve Ngy in person, it was not entitled to serve her by mail. We reverse the court's denial of Ngy's motion to vacate the default judgment and award her reasonable attorney fees and costs.

#### FACTS

In June 2000, Theary Ngy financed her purchase of a used BMW automobile with Wells Fargo. She listed on the loan paperwork as her address her brother's address in Federal Way.<sup>1</sup> By 2002, Ngy had moved out of her brother's house.<sup>2</sup> She worked only part-time and could no longer afford her monthly loan payments. She contacted Wells Fargo, which arranged to repossess the vehicle. The bank sent a tow truck to pick the car up from the address Ngy provided—an apartment in SeaTac, Washington, where she was living. After the car sold at auction for less than the outstanding loan balance, Wells Fargo filed a lawsuit against Ngy for the deficiency. It hired Advantage Process & Investigators to serve the complaint. Investigator Terry Poppa

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<sup>1</sup> The brother is Vanna Ngy. We refer to him as "Vanna" to avoid confusion with the appellant.

<sup>2</sup> Ngy's declaration states that she moved out in 1998 or 1999. Vanna's declaration says that she moved out in 2000.

unsuccessfully tried to locate Ngy. Ultimately, his employee, Dawn Baldwin, left two copies of the summons and complaint with Ngy's brother at his Federal Way address.<sup>3</sup> Baldwin also mailed two copies of the documents to Ngy at her brother's address. Ngy never responded, and the court entered a default judgment against her.

In 2008, Wells Fargo assigned the judgment to JPRD Investments LLC. Ngy first learned about the lawsuit when JPRD garnished her bank account in February 2011. She filed a motion to vacate the default judgment less than a month later. The trial court denied the motion to vacate, deciding that the personal abode service was invalid under RCW 4.28.080(15) but that service by mail was proper under RCW 4.28.080(16) because Vanna represented to the process server that Ngy received mail at his address and because Bank of America sent Ngy's account statements there.

#### STANDARD OF REVIEW

Generally, we review a motion to vacate for abuse of discretion,<sup>4</sup> but because courts have a mandatory, nondiscretionary duty to vacate void judgments, we review de novo a trial court's decision to grant or deny a motion to vacate for lack of jurisdiction<sup>5</sup>

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<sup>3</sup> The declaration of service identifies the brother as "Vanna Theray." Regardless, Vanna does not dispute that he received a copy of the paperwork.

<sup>4</sup> Wright v. B&L Props., Inc., 113 Wn. App. 450, 456, 53 P.3d 1041 (2002).

## ANALYSIS

Ngy contends that the trial court should have granted her motion to vacate the default judgment because the court lacked personal jurisdiction due to improper service. “Proper service of the summons and complaint is essential to invoke personal jurisdiction over a party, and a default judgment entered without proper jurisdiction is void.”<sup>6</sup> Thus, despite the general requirement that personal jurisdiction be raised in the answer or in a motion prior to filing the answer,<sup>7</sup> if a judgment has been entered by default and the judgment is later shown to be void for lack of personal jurisdiction, the court may vacate the judgment at any time under CR 60(b)(5).<sup>8</sup>

Under RCW 4.28.080, the plaintiff accomplishes service on a person by personally delivering a summons to him or her or by leaving a copy of the summons at his or her usual abode with some person of suitable age and discretion then resident therein.<sup>9</sup> If the plaintiff acts with “reasonable diligence” but the defendant for some reason cannot be personally served, mail service may be effected

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<sup>5</sup> Ahten v. Barnes, 158 Wn. App. 343, 350, 242 P.3d 35 (2010).

<sup>6</sup> Allstate Ins. Co. v. Khani, 75 Wn. App. 317, 324, 877 P.2d 724 (1994) (quoting In re Marriage of Markowski, 50 Wn. App. 633, 635-36, 749 P.2d 754 (1988)).

<sup>7</sup> See generally CR 8(c); CR 8(d); CR 12(b)(2).

<sup>8</sup> Khani, 75 Wn. App. at 323-24.

<sup>9</sup> RCW 4.28.080(15).

[b]y leaving a copy at his or her usual mailing address with a person of suitable age and discretion who is a resident, proprietor, or agent thereof, and by thereafter mailing a copy by first-class mail, postage prepaid, to the person to be served at his or her usual mailing address.<sup>10]</sup>

Here, the trial court found that proper abode service did not occur. Thus, the court's finding of personal jurisdiction depended on the statute's service by mail provision, making the relevant question whether the trial court erred in determining that service by mail was proper.

Ngy identifies two alleged deficiencies in Wells Fargo's attempted mail service. First, she contends that mail service was not available because Wells Fargo did not exercise reasonable diligence trying to serve her personally, which is a statutory prerequisite to mail service. Second, she argues that Wells Fargo's attempt failed because it did not mail the summons and complaint to her "usual mailing address."

Reasonable diligence requires that the plaintiff make "honest and reasonable efforts to locate the defendant."<sup>11</sup> While this does not mean that a plaintiff must employ every possible means of contact, he or she must follow up on any information possessed that might reasonably assist in determining the defendant's whereabouts.<sup>12</sup>

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<sup>10</sup> RCW 4.28.080(16). For the purposes of this subsection, "usual mailing address" does not include "a United States postal service post office box or the person's place of employment."

<sup>11</sup> Martin v. Meier, 111 Wn.2d 471, 482, 760 P.2d 925 (1988).

<sup>12</sup> Carson v. Northstar Dev. Co., 62 Wn. App. 310, 316, 814 P.2d 217

In Martin v. Meier,<sup>13</sup> the plaintiff sued for damages related to an automobile accident. Martin tried unsuccessfully to serve Meier at the address he provided on the accident report. Neighbors reported that the family had moved to California. University officials at the college where Meier had been a student told Martin's investigator that Meier was no longer enrolled there. Martin also checked the county directory and contacted the police to try to find a good address for Meier. Based on these circumstances, our Supreme Court found that Martin had no other information that he should have investigated before resorting to mail service. Thus, it held mail service was valid. However, significant to this case, our Supreme Court noted, "In addition, if plaintiff has information available pertaining to defendant's whereabouts other than that contained in the accident report, plaintiff must make reasonable efforts to investigate based on that information as well."<sup>14</sup>

Here, Wells Fargo repossessed Ngy's car at an address she provided to it. When Wells Fargo, acting through Poppa, later sued Ngy, it made no effort to serve her at the address she had last provided to the bank, the one where it repossessed the car. Thus, Wells Fargo failed to investigate an address for Ngy in its possession when it commenced its lawsuit. This address was the last

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(1991).

<sup>13</sup> 111 Wn.2d 471, 760 P.2d 925 (1988).

<sup>14</sup> Martin, 111 Wn.2d at 482.

known address Wells Fargo had for her. This failure defeats JPRD's contention that Wells Fargo acted with reasonable diligence.

JPRD argues that the law does not require that the plaintiff employ all conceivable means to locate the defendant.<sup>15</sup> It relies on Carson v. Northstar Development Co.<sup>16</sup> In Carson, we held that the trial court had insufficient facts to decide whether the plaintiffs exercised reasonable diligence to serve the defendant personally before resorting to service by publication.<sup>17</sup> Carson could not locate a home address for the defendant, McDonald, and instead made numerous unsuccessful attempts to serve him at the Devine Company in California, where Carson believed McDonald worked.<sup>18</sup> According to McDonald's affidavit, he stopped working for Devine several months before Carson attempted service.<sup>19</sup> Because the factual issue of whether McDonald actually worked at Devine bore directly on the reasonableness of Carson's effort to serve him there, we held that the trial court erred by vacating the default judgment without first conducting an evidentiary hearing to resolve the contested factual issue.<sup>20</sup>

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<sup>15</sup> Wright, 113 Wn. App. at 458 (citing Crystal, China & Gold, Ltd. v. Factoria Ctr. Invs., Inc., 93 Wn. App. 606, 611, 969 P.2d 1093 (1999)).

<sup>16</sup> 62 Wn. App. 310, 814 P.2d 217 (1991).

<sup>17</sup> Carson, 62 Wn. App. at 315.

<sup>18</sup> Carson, 62 Wn. App. at 312-13.

<sup>19</sup> Carson, 62 Wn. App. at 314.

<sup>20</sup> Carson, 62 Wn. App. at 314-15.

No similar factual dispute exists in this case. Here, the record reflects that Poppa performed a postal trace and went to the address listed and spoke to the resident (Vanna). He recorded the license plate numbers on the vehicles outside that house and traced them back to another relative. He followed up at the second address and determined Ngy did not reside there. Poppa also had statements from Bank of America showing Ngy's address as her brother Vanna's residence. Significantly, he did not investigate the SeaTac address for Ngy and offers no reason why his significant efforts to locate Ngy did not include any investigation of the obvious—that Ngy might be found at the last address she had provided Wells Fargo.

While JPRD correctly notes that the law does not require a plaintiff to exhaust every avenue for locating a defendant before resorting to mail service, this does not negate a plaintiff's clear obligation to investigate known information pertaining to the defendant's location. As a judgment assignee, JPRD stands in Wells Fargo's shoes, and Wells Fargo ignored known information pertaining to the defendant's location. Because Wells Fargo did not act with reasonable diligence, mail service was improper, and the trial court lacked jurisdiction to enter the default judgment against Ngy.<sup>21</sup>

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<sup>21</sup> Because we agree that Wells Fargo did not exercise reasonable diligence to locate and serve Ngy in person, we do not address her second argument—that Wells Fargo did not serve her at her "usual mailing address." Likewise, we need not address Ngy's remaining assignments of error.



Ngy seeks attorney fees incurred in the trial court and prosecuting this appeal. RCW 6.27.230 provides for a mandatory attorney fee award to a party who successfully opposes a writ of garnishment.<sup>22</sup> Ngy's original credit contract with Wells Fargo also provides for attorney fees in case of default. Because Ngy prevails in this appeal, she is entitled to reasonable attorney fees and costs in both the trial court and on appeal.

#### CONCLUSION

Because Wells Fargo did not act with reasonable diligence to investigate information pertaining to Ngy's location, it failed to establish a prerequisite to mail service—reasonable diligence. Thus, the trial court lacked jurisdiction to enter the default judgment and should have granted Ngy's motion to vacate. We reverse and remand with instructions to vacate the default judgment, without

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<sup>22</sup> Lindgren v. Lindgren, 58 Wn. App. 588, 598, 794 P.2d 526 (1990).

prejudice, to quash the writ of garnishment, and to award Ngy reasonable attorney fees and costs in the trial court and on appeal.

WE CONCUR:

Leach, C. J.

Schiveller, J.

Cox, J.