IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

GLOBAL EDUCATION SERVICES, INC., on behalf of itself and all others similarly situated,	)	No. 67824-8-I
Respondent,	)	
v.	)	
MOBAL COMMUNICATIONS, INC.,	)	UNPUBLISHED OPINION
Appellant.	)	FILED: November 5, 2012

Ellington, J. — For a court to have personal jurisdiction over a defendant, the summons and complaint must be properly served. Because service here was inadequate, the trial court did not acquire personal jurisdiction over Mobal Communications, Inc. (Mobal) and its default judgment against Mobal is void. We reverse.

BACKGROUND

Mobal is a New York State corporation that rents telephones for international use. It has no offices, agents, or employees in Washington state. Global Education Services, Inc. (Global Education) is a Washington nonprofit corporation. Its objectives are not clear from our record.

In October 2005, Global Education filed a putative class action lawsuit against

Mobal, alleging that Mobal sent it "one or more"[1] unsolicited facsimile advertisements in violation of the Telephone Consumer Protection Act of 1991,[2] the Washington Unsolicited Telefacsimile statute,[3] and the Washington Consumer Protection Act .[4] Global Education did not file an affidavit attesting that service could not be made in Washington. But it delivered the summons and complaint to a secretary at the New York City offices of Segal, Tesser, and Ryan, a law firm that had previously represented Mobal.

Mobal failed to appear or answer within 60 days. The trial court entered a default judgment awarding Global Education $3,840 in damages and enjoining Mobal from sending further unsolicited facsimile advertisements. The court also certified the class under CR 23(b)(2) and retained jurisdiction to enforce the injunction and to consider future requests for damages from class members.

Mobal moved to vacate the judgment, arguing that it was not properly served and the trial court never acquired personal jurisdiction.[5] The court denied the motion, ruling that although jurisdiction was not properly invoked under the long-arm statute because Global Education failed to file the necessary affidavit, the "doing business" statute, RCW 4.28.080, provided an alternative basis for jurisdiction and Mobal was properly served thereunder.

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[1] Clerk's Papers at 4.

[2] 47 U.S.C. § 227.

[3] RCW 80.36.540.

[4] Ch. 19.86 RCW.

[5] The motion states, "Global's Summons and Complaint were personally served on a secretary at an address that has never been Mobal's business address." Clerk's Papers at 66.

Mobal appeals.

DISCUSSION

A trial court does not acquire jurisdiction over an improperly served defendant,[6] and a default judgment entered without personal jurisdiction is void.[7] "'Because courts have a mandatory, nondiscretionary duty to vacate void judgments, a trial court's decision to grant or deny a CR 60(b) motion to vacate a default judgment for want of jurisdiction is reviewed de novo.'"[8]

Washington's long-arm statute, RCW 4.28.185(1), specifies the acts that will subject a foreign defendant to the jurisdiction of Washington courts.[9] Section 2 requires personal service,[10] and section 4 provides that "[p]ersonal service outside the

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[6] Powell v. Sphere Drake Ins. P.L.C., 97 Wn. App. 890, 899, 988 P.2d 12 (1999).

[7] In re Marriage of Markowski, 50 Wn. App. 633, 636, 749 P.2d 754 (1988).

[8] Ahten v. Barnes, 158 Wn. App. 343, 350, 242 P.3d 35 (2010) (quoting Dobbins v. Mendoza, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997)).

[9] RCW 4.28.185, which is captioned "Personal service out of state—Acts submitting person to jurisdiction of courts—Saving," reads, "(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts: (a) The transaction of any business within this state; . . . . (2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state. . . . (4) Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state. . . . (6) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law."

[10] RCW 4.28.180 specifies the form and methods of service of the summons and complaint to be used in accomplishing personal service outside of Washington. It reads, "Personal service of summons or other process may be made upon any party outside the state. If upon a citizen or resident of this state or upon a person who has submitted to the jurisdiction of the courts of this state, it shall have the force and effect

state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state."[11]

It is undisputed that Global Education failed to file the affidavit required by the long-arm statute.[12] The default judgment is therefore void unless another basis exists for the exercise of personal jurisdiction.[13]

The long-arm statute provides, "Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law."[14] Global Education argues that jurisdiction was properly acquired under RCW 4.28.080(10), the doing business statute, which allows Washington courts to assert general jurisdiction over a nonresident corporation doing business in Washington and provides that service upon a foreign corporation is accomplished by delivering a copy of the summons "to any agent, cashier, or secretary thereof."[15] The trial court agreed that the doing business statute provided an independent basis for acquiring personal jurisdiction over Mobal. Mobal contends this was error, arguing that the long-arm statute is the sole basis for

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of personal service within this state; otherwise it shall have the force and effect of service by publication. The summons upon the party out of the state shall contain the same and be served in like manner as personal summons within the state, except it shall require the party to appear and answer within sixty days after such personal service out of the state."

[11] RCW 4.28.185(4).

[12] RCW 4.28.185(4) requires substantial compliance, meaning that "viewing all affidavits filed prior to judgment, the logical conclusion must be that service could not be had within the state." Sharebuilder Sec. Corp. v. Hoang, 137 Wn. App. 330, 334-35, 153 P.3d 222 (2007); see also Ralph's Concrete Plumbing, Inc. v. Concord Concrete Pumps, Inc., 154 Wn. App. 581, 590-91, 225 P.3d 1035 (2010).

[13] See Ralph's, 154 Wn. App. at 591.

[14] RCW 4.28.185(6).

[15] RCW 4.28.080(10).

jurisdiction and that even if the doing business statute applies, Mobal was not properly served under that statute.

Whether RCW 4.28.080(10) is an independent source of personal jurisdiction over a foreign corporation, invoked merely by service on an agent without the prerequisite of an affidavit, is a question we do not decide because Mobal was not properly served under either statute.

Service on a foreign corporation under RCW 4.28.080(10) is reviewed for substantial compliance.[16] "'Substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of the statute. It means a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was adopted.'"[17] When determining whether a person is an "agent" for purposes of accepting service of process under RCW 4.28.080(10), a court looks to "all the surrounding facts and proper inferences therefrom."[18]

Here, the trial court ruled that "under the totality of the circumstances," service was valid under the doing business statute:

> Mobal's argument is that Segal, Tessler was not the registered agent. Yet had Global served Mobal at the Department of State, we would be in the same place—the Department of State would have taken the papers, mailed them to Segal, Tessler, and presumably Segal, Tessler would have taken the same action as they did here and mailed them to Mobal. Mobal clearly gave some agency authority of [sic] Segal, Tessler to act on its behalf. Mobal appears to be using an important term of art, "agent," to

[16] Powell, 97 Wn. App at 900.

[17] James v. Kitsap County, 154 Wn.2d 574, 588, 115 P.3d 286 (2005) (quoting In re Habeas Corpus of Santore, 28 Wn. App. 319, 327, 623 P.2d 702 (1981)).

[18] Fox v. Sunmaster Products, Inc., 63 Wn. App. 561, 567, 821 P.2d 502 (1991).

> avoid service, while delegating the firm to accept service from the Dept. of State.[19]

We disagree with this analysis. The statute requires personal service by delivery to the corporation's employees or its agent. Clearly the objective is to ensure that initial process is delivered to someone authorized to represent the defendant. The New York Department of State was such an agent. Segal was not. RCW 4.28.080(10) is to be liberally construed, but agent status will not be conferred on an individual having neither express nor implied authority to represent the corporation.[20]

As the trial court acknowledged, the New York Department of State's website clearly stated that Mobal had no registered agent. And Segal's managing partner explicitly informed the process server that Segal was not authorized to accept the papers and that service would not be valid. Under these circumstances, it was not reasonable to believe that the Segal firm had express or implied authority to act as Mobal's agent.[21] Service upon Segal did not carry out the intent of the statute and did not constitute substantial compliance.

Global Education makes much of the fact that the website also stated the Department of State would forward papers properly served upon it to Segal. We may surmise from this that although Mobal was no longer its client, Segal still had some

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[19] Clerk's Papers at 530.

[20] Fox, 63 Wn. App. at 567; Crose v. Volkswagenwerk Aktiengesellschaft, 88 Wn.2d 50, 58, 558 P.2d 764 (1977) (quoting 20 C.J.S. *Corporations* § 1942(b) (1940)).

[21] The parties devote some of their briefing to discussing whether an attorney may accept service for his or her clients. This issue is irrelevant because the Segal law firm no longer represented Mobal at the time Global Education attempted service.

procedure in place for forwarding correspondence from the Department of State. But even if the trial court correctly anticipated that direct service on Segal would, like service on the Department of State, result in actual notice to Mobal, actual notice is insufficient to demonstrate substantial compliance.[22] If it were, the United States mail would usually suffice for initial service of process. Instead, RCW 4.28.080(10) requires personal delivery to Mobal or its agent.

Mobal was not properly served under the doing business statute.[23] We therefore reverse and remand for vacation of the default judgment and dismissal of the action.

Mobal seeks attorney fees and costs associated with its defense of this lawsuit.[24] Under RCW 4.28.185(5) the court may award reasonable attorney fees to a defendant who is served under Washington's long-arm statute and prevails on a motion to dismiss for lack of jurisdiction:

> In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees.[25]

Such an award is discretionary and is limited to the amount necessary to compensate a

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[22] See Hernandez v. Dep't of Labor and Indus., 107 Wn. App. 190, 196-97, 26 P.3d 977 (2001).

[23] Global Education asserts for the first time on appeal that it complied with the requirements for service under the Consumer Protection Act, RCW 19.19.86.160. We decline to consider this argument. RAP 2.5; Mavis v. King County Pub. Hosp. Dist. No. 2, 159 Wn. App. 639, 651, 248 P.3d 558 (2011).

[24] Mobal does not request attorney fees on appeal under RAP 18.1.

[25] See also Scott Fetzer Co. v. Weeks, 114 Wn.2d 109, 124, 786 P.2d 265 (1990).

foreign defendant for the added costs of litigating in Washington.[26] Mobal is the prevailing party. On remand, the trial court should determine whether to award Mobal its reasonable fees and costs.

Reversed and remanded for further proceedings consistent with this opinion.

WE CONCUR:

[26] Id. at 120-21.