

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re:)
)
 [REDACTED]) Bankruptcy No. 11-19014-TWD
)
 Debtor.) Internal Appeal No. 12-S005
)
 _____)
 [REDACTED]) Adversary No. 11-01873-TWD
)
 Plaintiff,) USDC Case No. 2:12-cv-00062-JLR
)
 vs.)
)
 WELLS FARGO BANK,)
)
 Defendant.)
)
 _____)
 [REDACTED])
 [REDACTED],)
)
 vs.)
)
 K. MICHAEL FITZGERALD, Trustee;)
)
 and WELLS FARGO BANK,)
)
 Appellees.)
 _____)

APPELLANT'S OPENING BRIEF

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STATEMENT OF FACTS

On September 8, 2011, the Complaint was filed against Wells Fargo Bank and assigned cause No. 11-01873 in the United States Bankruptcy Court, Appellant's Appendix/Excerpt from the Record (hereinafter AER), Tab 1, Pg. 1.

On September 12, 2011, the summons was issued by the clerk. AER, Tab 2, Pg. 10. The Summons and Complaint were personally served on Cuong Sam, the Branch Manager of Wells Fargo at the Ballard Branch on 1819 NW Market Street by Shelly Malleis by on September 15, 2011. AER, Tab 3, Pg. 12.

On November 23, 2011, Plaintiff filed a motion for a default and default judgment AER, Tab 4, Pg. 13, and Memorandum in Support of Motion for Default. AER, Tab 5, Pg. 16. This was denied by order of the court dated December 30, 2011. AER, Tab 6, Pg. 23.

The notice of appeal was filed on January 10, 2012. AER, Tab 7, Pg. 25.

STATEMENT OF JURISDICTION

Jurisdiction is vested in this court pursuant to 28 U.S.C. §158. The Order was docketed on December 30, 2011. The appeal was filed with the Court on January 10, 2012, within the 14-day limit established by BR 8002.

STANDARD OF REVIEW

This issue presented is a legal issue. The Court reviews legal issues *de novo*. *In re New England Fish Co.*, 749 F 2nd 1277 (9th Cir. 1984).

SUMMARY OF ARGUMENT

Service of Process by personal service upon Cuong Sam, the Branch Manager of the Wells Fargo Ballard Branch at 1819 NW Market Street, Seattle, WA, in accordance with F.R.

Civ. P. 4(h) is sufficient service to obtain *in personam* jurisdiction over Wells Fargo Bank, the defendant in this action. Even if BR 7004(h) is applied, personal service on a bank manager is sufficient service to subject the bank to the court's jurisdiction. The plaintiff should not be penalized because he used a higher level of service (personal hand delivery) than that ostensibly required by the rule or statute. (certified mail).

ISSUE PRESENTED

Is Service of Process on a bank effective when the Summons and Complaint are personally served on the bank by hand delivery to the bank manager in the branch in which he is employed as the manager?

LEGAL ARGUMENT

Personal service of the Summons and Complaint upon a branch manager is sufficient to confer jurisdiction on a Bankruptcy Court to resolve a law suit.

Service of Process in a bankruptcy proceeding is governed pursuant to BR 7004. BR 7004(a)(1) provides as follows:

(1) Except as provided in Rule 7004(a)(2), Rule 4(a), (b), (c)(1), (d)(1), (e)-(j), (l), and (m) F.R.Civ.P. applies in adversary proceedings. Personal service under Rule 4(e)-(j) F.R.Civ.P. may be made by any person at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

BR 7004(a)(2) provides that "[t]he clerk may sign, seal, and issue a summons electronically by putting an "s/" before the clerk's name and including the court's seal on the summons." It is important to note that BR 7004(a)(1) does not provide an exception for BR 7004(h). Thus, the only circumstance in which the forms of service outlined in Rule 4 do not

apply is when the clerk issues a summons electronically. Therefore, F.R.Civ.P. 4 allowing personal service applies for service in any other circumstances in adversary proceedings.

BR 7004(b) provides for an additional method of service in bankruptcy adversary proceedings: First Class Mail. It provides specifically:

Except as provided in subdivision (h), the methods of service authorized by Rule 4(e) -(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows: (1-10 state the specific rules for service by first class mail when serving certain types of individuals, corporations, governmental entities, etc.)

If the service is by mail on an insured depository institution, the serving party must comply with BR 7004(h), i.e., service must be by *certified* mail, rather than first class mail:

Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless—

- (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;
- (2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or
- (3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

BR 7004(a)(1) incorporates by reference F.R. Civ.P. 4(h), (hereinafter CR) that provides for personal service of the Summons and Complaint upon the defendant. CR. 4(h)(1) provides for service within the judicial district upon a corporation by delivering the complaint to “an officer, a managing or general agent.”

(h) Serving a Corporation, Partnership, or Association. Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

(1) in a judicial district of the United States:

(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or

(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and—if the agent is one authorized by statute and the statute so requires—by also mailing a copy of each to the defendant; or

This is not a highly litigated issue, however, it was addressed by the 9th Circuit in *Denver & R.G.R. Co. v. Roller*, 100 F. 738, 741, 41 C.C.A. 22 (9th Cir. 1900).

The object of the service is attained when the agent served is of sufficient rank and character as to make it reasonably certain that the corporation will be notified of the service, and the statute is complied with if he be a managing or business agent in any specified line of business transacted by the corporation in the state where the service is made.

In Washington, RCW 4.28.080 provides in part:

(10) If against a foreign corporation or nonresident joint stock company, partnership or association doing business within this state, to any agent, cashier or secretary thereof.

The authority of a branch manager to accept was decided in Washington state in *Reiner v. Pittsburg Des Moines Corp.*, 101 Wash.2d 475, 680 P.2d 55 (Wash.1984).

There are two methods by which an employee of a foreign corporation qualifies to receive process as an agent on behalf of the corporation. He must either be designated the official agent for service of process by the corporation pursuant to [RCW 23A.32.080](#), or he must be in such a managerial position that he is

a representative of the corporation. Either method is sufficient for service under RCW 4.28.080(10). *Crose v. Volkswagenwerk Aktiengesellschaft*, 88 Wash.2d 50, 58, 558 P.2d 764 (1977).

For jurisdictional purposes, 28 U.S.C. § 1348 deems banking associations as citizens of the states in which they are located. National banking associations are "located" in every state in which they maintain branch banks. *Schmidt v. Fleet Bank*, 16 F. Supp.2d 340 (S.D.N.Y 1998). General jurisdiction involving national banks is expressly conferred upon state courts. *First Nat. Bank of Oakland v. Superior Court of Santa Clara County*, 49 Cal.Rptr. 358, 240 Cal.App.2d 109, (Cal.App. 1 Dist. 1966), *certiorari denied*, 87 S.Ct. 65, 385 U.S. 829, 17 L.Ed.2d 65.

Other federal courts have determined who is an officer, a managing agent, and a general agent for the purposes of service of process. Where service of process upon a Delaware corporation in Puerto Rico was effected upon an individual designated as the chief field operator of the Delaware corporation at a refinery in Puerto Rico, and the Delaware corporation by its contract was required to provide at refinery a competent chief operator having authority to act as the corporation's representative at a job site, such chief operator was a "general agent" or "managing agent" of the corporation in Puerto Rico, and hence personal service upon him was effective service upon the corporation. *Com. Oil Refining Co. v. Houdry Process Corp.*, 185 F.Supp. 485 (D.C. Puerto Rico 1960).

Service of process on the head of the Palestine Liberation Organization (PLO) Mission to the United States established personal jurisdiction over the PLO and the Palestinian Interim Self-Government Authority (PA) an action alleging, *inter alia*, violations of the Antiterrorism Act (ATA), arising out of the terrorist bombing of a bus in Israel; the chief representative of the

PLO qualified as a general or managing agent of the PLO and the PA. *Estate of Klieman v. Palestinian Authority*, 547 F.Supp.2d 8 (D.D.C. 2008).

Service of process upon a bookkeeper employee of a foreign corporation, who was neither an officer of the corporation nor authorized to accept service, but who advised the deputy marshal that he was the office manager, and who in fact appeared to be agent in charge of the corporation's headquarters in the absence of company officers, was proper to establish personal jurisdiction over the corporation. *Van Hoven Co. v. Stans*, 319 F.Supp. 180 (D.C Minn.1970).

Service of process on the general manager for an Illinois parent corporation of Kansas subsidiaries was sufficient to give the parent corporation due process notice of suit under sections 12-27 of Title 15 for treble damages, *Fooshee v. Interstate Vending Co.*, 234 F.Supp. 44 (D.C.Kan.1964).

A local manager supervising 25 salesmen and five office employees of a grocery products division of a foreign corporation doing continuous and extensive business in Ohio by selling and distributing merchandise was the "managing agent" upon whom summons could be served under subdivision (d)(3) of this rule, notwithstanding that the manager did not handle money of corporation. *Saxton v. General Mills*, 9 F.R.D. 76 (N.D.Ohio 1949). In a federal court action against a nonresident corporation doing business in Texas, service of process on one described as the division manager was sufficient in absence of a showing that he was not a managing or general agent. *Pure Oil Co. v. Petrolite Corp.*, 58 F.Supp. 716 (S.D.Tex.1944). A New York resident, employed by a Virginia corporation for sales promotion work with distributors of corporation's products in New York, maintaining offices therein, and describing himself as the corporation's regional sales manager in letters to the corporation suing a foreign corporation on

contract in federal district court for South District of New York, was such corporation's "managing agent," on whom process in such action was properly served. *Lane, Ltd v. Larus & Brother Co*, 140 F.Supp. 466 (S.D.N.Y.1956).

Case law makes it clear that personal service to an officer or managing agent is proper service.¹ While the court found initial service to be improper because the Swiss bank to be served had only equity interest in the French bank actually served, the court determined that dismissal was not required because "proper service might still be obtained by delivery of a copy of the summons and complaint to an officer or managing agent of bank in Switzerland." *SEC v. Gilbert, et. al.*, 82 F.R.D. 723.

BR 7004(h) was added in the Bankruptcy Reform Act of 1994 through Section 114 of Public Law Pub.L. 103-394 in 1994. This was the creation of Senator Helms, and there are still questions whether it is valid because of its violation of the Rules Enabling Act. Nothing was done, however, to change or limit service of process by personal service by hand delivery on a bank officer as provided in F.R.Civ.P. 4.

The legislative history supports this interpretation. Congressional Record Volume 140, Number 142 (Tuesday, October 4, 1994), states:

Section 114. Service of process in bankruptcy proceedings on an insured depository institution.

This section operates to amend Bankruptcy Rule 7004 to require that service of process to an insured depository institution be accomplished by certified mail in a contested matter or adversary

¹ Authority does exist regarding BR 7004(h), but those cases deal solely with the issue of first class versus certified mail or the failure to address certified mail to a specific, named officer or managing agent of the bank. *See e.g. In re Eleva, Inc.*, 2000 WL 33710904 (D. Utah Apr. 17, 2000); *In Re Franchi*, 451 B.R. 604 (2011); *In re Hamlet*, 322 F.3d 342 (4th Cir. 2003).

proceeding. The rule that is presently in operation only requires that service be achieved by first class mail.

In addition, the notes to the 1994 amendments to BR 7004 illustrate that either personal service or service by mail is proper:

The purpose of these amendments is to conform the rule to the 1993 revisions of Rule 4 F.R.Civ.P. and to make stylistic improvements. Rule 7004, as amended, continues to provide for service by first class mail ***as an alternative to the methods of personal service provided in Rule 4*** F.R.Civ.P., except as provided in the new subdivision (h) (emphasis added).

The legislative history says nothing about limiting personal service. It merely upgrades the requirement for service from first class mail to certified mail in certain cases. In this case, there was personal service on an officer. A higher level of service than that required by statute is proper service. In another case, a trustee's use of certified, rather than first-class, mail to serve his complaints did not affect propriety of the service, though the Bankruptcy Rule expressly provided for service by first-class mail; the trustee's voluntary compliance with a higher standard of certified mail did not violate the Rule, particularly where preference defendants did not claim that they did not receive process and were thus unaware of adversary proceedings. *In re Ted A. Petras Furs, Inc.*, 172 B.R. 170 (Bkrcty.E.D.N.Y.1994), subsequently dismissed, 100 F.3d 943. Here, the higher level of personal service than the required certified mail service is valid service.

Here, the Wells Fargo branch manager clearly had “authority to act as the corporation’s representative” under *Com. Oil, supra*; is clearly the “agent in charge” and certainly more in charge than a bookkeeper under *Van Hoven, supra*; is at least a “general manager” as defined in *Fooshee, supra*; a “local manager” (who did not even handle money) as defined in *Saxton, supra*; a division manager as defined in *Pure Oil, supra*; and a “regional sales manager” in *Lane,*

supra. A branch manager of a nationwide bank certainly carries more authority as a managing agent than the sales representative in *Jennings, supra*; the non-employee assistant manager of another corporation in *Young, supra*; the plant manager in *Staudinger*; or the out-of-state office manager in *Stetson China*. Finally, the branch manager served in this case is precisely like the managing agent in *Gilbert*. Thus, personal service to a branch manager of a bank is proper service under CR 4(h)(1).

In this case the Proof of Service provides that the manager of the Ballard Branch of the defendant bank was personally served with process in accordance with CR 4(h)(1). Personal service by hand delivery should be sufficient to confer *in personam* jurisdiction on the defendant bank.

Had he been sent the same documents by certified mail, this would comply with BR 7004(h) as amended. The rule does not specify which officer. It only specifies “an” officer. In this case the manager of the branch was served by personal service. As noted, *supra*, the Branch Manager is a person of sufficient authority to be considered an agent for service of process. In *Johanson v. United Truck Lines*, 62 Wash.2d 437, 383 P.2d 512 (1963), the court held that a temporary manager of a branch facility, who had the authority to hire and fire over half of the branch employees, possessed adequate representative authority to be an agent for service of process.

In this case, it is axiomatic that if the manager had received the document by certified mail, under the court below’s ruling, service would be acceptable. Clearly, personal service, a much higher level of service, was employed and should also be acceptable.

CONCLUSION

BR 7004(a)(1) incorporates by reference CR 4, which allows for personal service by hand delivery. BR 7004(b) provides for an additional method of service in bankruptcy adversary proceedings, by first class mail. If the service is by mail, and the service is on an insured depository institution, the serving party must comply with BR 7004(h), i.e., service must be by certified mail, rather than first class mail. CR. 4(h)(1) provides for service within the judicial district upon a corporation by delivering the complaint to “an officer, a managing or general agent.” Federal courts have determined who meets the definition of an officer, a managing or general agent. A bank branch manager meets the definition of a managing or general agent. Personal service to the Wells Fargo Ballard branch manager is proper. The court below erred when it ruled that a lower level of service was mandated. The court below should be reversed, and the case should be remanded with an Order directing the court below to enter the default judgment as requested.

Respectfully submitted March 19, 2012.

/s/ Marc S. Stern
Marc S. Stern, WSBA #8194
Attorney for Appellant

CERTIFICATION OF INTERESTED PARTIES
BAP Rule 8010(a)-1(b)

The undersigned certifies that the following parties have an interest in the outcome of this appeal. These representations are made to enable judges to evaluate possible disqualification or recusal:



Wells Fargo Bank

Dated: March 19, 2012.

/s/ Marc S. Stern
Marc S. Stern, WSBA #8194
Attorney for Appellant

CERTIFICATION OF RELATED CASES
BAP Rule 8010(a)-1(c)

The undersigned certifies that there are no related cases or appeals.

Dated: March 19, 2012.

/s/ Marc S. Stern
Marc S. Stern, WSBA #8194
Attorney for Appellant

