

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 30 2012

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

RUBICON GLOBAL VENTURES, INC.,
et al,

Plaintiffs - Appellants,

v.

CHONGQUING ZONGSHEN GROUP
IMPORT/EXPORT CORP., et al,

Defendants - Appellees.

No. 10-36148

D.C. Nos. 3:09-cv-00818-HA
3:09-cv-01397-HA
3:10-cv-00833-HA

MEMORANDUM*

RUBICON GLOBAL VENTURES, INC.,
et al,

Plaintiffs - Appellants,

v.

CHONGQUING ZONGSHEN GROUP
IMPORT/EXPORT CORP., et al,

Defendants - Appellees.

No. 11-35045

D.C. No. 3:05-cv-01809-HA

RUBICON GLOBAL VENTURES, INC.,
et al,

Plaintiffs - Appellees,

No. 11-35090

D.C. Nos. 3:09-cv-00818-HA
3:09-cv-01397-HA

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

v.

CHONGQUING ZONGSHEN GROUP
IMPORT/EXPORT CORP., et al,

Defendants - Appellants.

Appeal from the United States District Court
for the District of Oregon, Portland
Ancer L. Haggerty, District Judge, Presiding

Argued and Submitted July 9, 2012
Portland, Oregon

Before: B. FLETCHER and PREGERSON, Circuit Judges, and WALTER, Senior
District Judge.**

Appellants Rubicon Global Ventures, Inc. and Z Motors, Inc. appeal, *inter alia*: (a) the district court's setting aside of the default judgments in District Court Docket Nos. 3:05-cv-01809 ("*Rubicon I*"), 3:09-cv-00818 ("*Rubicon II*"), and 3:09-cv-01397 ("*Rubicon III*") on the basis of insufficiency of service; and (b) the district court's dismissal of Ying Zuo and Zongshen USA Holdings, Inc. for lack of personal jurisdiction. For the reasons below, we find that service was sufficient on all appellees other than Zongshen Zuo. As to the dismissals for lack of personal jurisdiction, we find that the district court erred only as to Ying Zuo. We therefore

** The Honorable Donald E. Walter, Senior United States District Judge for Western Louisiana, sitting by designation.

affirm in part, reverse in part, and remand for further proceedings.

The district court set aside the defaults and default judgments on the grounds that such judgments were void for insufficiency of service of process. The Ninth Circuit has found that “[a] final judgment is ‘void’ for purposes of Rule 60(b)(4) only if the court that considered it lacked jurisdiction, either as to the subject matter of the dispute or over the parties to be bound, or acted in a manner inconsistent with due process of law.” *United States v. Berke*, 170 F.3d 882, 883 (9th Cir. 1999) (internal citations omitted). As the district court’s rulings fit squarely within the ambit of Rule 60(b)(4), this Court reviews said rulings *de novo*. See *Thomas P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980) (“[t]here is no question of discretion on the part of the court when a motion is under Rule 60(b)(4)”).

“Service of process has its own due process component, and must be ‘notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” *S.E.C. v. Ross*, 504 F.3d 1130, 1138 (9th Cir. 2007) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). “Under the federal rules, foreign corporations may be served either (1) in accordance with the law of the state in which the district court is located, Fed. R. Civ. P. [4(h)(1)(A)], or (2) by delivering a copy of

the summons and the complaint ‘to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.’ Fed. R. Civ. P. [4(h)(1)(B)].” *Chan v. Soc’y Expeditions, Inc.*, 39 F.3d 1398, 1404 (9th Cir. 1994).

We agree with the district court that it was not necessary in this case for the appellants to comply with the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil Commercial Matters, November 15, 1965 (Hague Service Convention), [1969] 20 U.S.T. 361, T.I.A.S. No. 6638. Instead, we must apply Oregon law. In determining whether service is adequate under Oregon law, the question is: “was the method of service selected . . . ‘reasonably calculated to apprise the defendant of the existence and pendency of the action?’” *Baker v. Foy*, 797 P.2d 349, 352 n. 6 (Or. 1990); Or. R. Civ. P. 7(D)(1). ORCP 7(D)(1) provides guidance for types of service that “may meet the ‘reasonable notice’ standard of adequate service,” and ORCP 7(D)(2) describes particular, non-exclusive methods of service which *may* be used. *Id.* at 352. Rather than absolute compliance with one of the methods specified in ORCP 7(D), “[w]hat is mandatory is that whatever manner or method of service is employed by a plaintiff, it must satisfy the aforementioned ‘reasonable notice’ standard of adequate service of ORCP 7(D)(1).” *Id.* Based on the totality of circumstances unique to this case, we find

that both ZS Group and ZSIE had sufficient, reasonable notice of the pendency of the actions against them.

We first address service on Chongqing Zongshen Group (“ZS Group”), which we understand to be one and the same as the entities commonly referred to in this case as Zongshen Industrial Group, Co. Ltd. (“ZIGCL”) and Zongshen Industrial Group (“ZIG”). ZS Group was served through Zongshen, Inc., as agent of ZS Group. The record reflects that Zongshen, Inc. was 95% owned by ZS Group, with the other 5% ownership held by Dexiu Yuan, who has positions in both companies. We conclude that ZS Group had sufficient, reasonable notice via service on Zongshen, Inc., given the following factors: (a) the substantial common ownership links between the two entities; (b) Mr. Xie Yenong’s 2004 letter to the EPA representing Zongshen, Inc. to be the agent for ZS Group; and (c) the decision in *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988), affirming an Illinois court’s finding that a domestic subsidiary was an involuntary agent based on similar, even less compelling facts.

ZIGCL is the ultimate parent company of Chongqing Zongshen Group Import/Export Corp. (“ZSIE”). As was the case with the domestic subsidiary in *Schlunk, supra*, Zongshen, Inc. was listed as the agent for service of process for ZSIE for the purpose of receiving notices under the National Traffic and Motor

Vehicle Safety Act (“NTMVSA”). Not only was Zongshen, Inc. placed in the foreground as the American face of all Chinese Zongshen entities, it was registered as ZSIE’s agent for suits arising under the NTMVSA *and* shared officers with the other Zongshen entities. Based on *Schlunk*, we find that ZSIE and Zongshen, Inc. were so closely related that the latter was ZSIE’s agent for service as a matter of law, “notwithstanding [ZSIE’s] failure or refusal to appoint [Zongshen, Inc.] formally as an agent.” *See Schlunk*, 486 U.S. at 697.

As to Zongshen Zuo, the only service attempted was substitute service on his spouse, Dexiu Yuan, at her usual place of abode in Florida. We agree with the district court’s assessment that Zongshen Zuo was not served pursuant to ORCP 7(D)(2)(b), as the Florida residence was not his usual place of residence or abode. Likewise, such service did not provide reasonable notice of suit as there is no evidence that the summons and complaint were mailed to Zongshen Zuo in China or that he otherwise received notice of the pendency of the actions against him. Thus, we affirm the district court’s ruling as to insufficiency of service of process on Zongshen Zuo.

The only remaining issue which this Court must address is the district court’s dismissal of Ying Zuo and Zongshen USA Holdings, Inc. (“ZUSA”) for lack of personal jurisdiction. We review a dismissal for lack of personal

jurisdiction *de novo*. *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1101 (2012) (citing *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008)). “Where, as in this case, the trial court ruled on the issue relying on affidavits and discovery materials without holding an evidentiary hearing, dismissal is appropriate only if the plaintiff has not made a prima facie showing of personal jurisdiction.” *Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986). In determining whether the appellants have met their burden, uncontroverted allegations in the complaint must be taken as true, and conflicts over statements contained in affidavits must be resolved in the appellants’ favor. *Love v. Associated Newspapers, Ltd.*, 611 F.3d 601, 608 (9th Cir. 2010).

The appellants allege specific personal jurisdiction over Ying Zuo, which is personal jurisdiction arising out of a defendant’s contacts with the forum. *See Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 412-413 (9th Cir. 1977). On June 7, 2010, the district court’s order regarding motions to set aside the defaults and default judgments included the following ruling:

This court will not exercise general personal jurisdiction over defendant Ying Zuo. During the relevant time frame, defendant Ying Zuo was a college student and was not involved in the day-to-day activities of the corporate defendants and had no involvement with the alleged fraud that occurred. Accordingly, this court lacks specific personal jurisdiction over her.

The district court ordered further briefing on matters unresolved by its June 7th order. The appellees also filed motions for dismissal based on the district court's June 7th rulings. On August 25, 2010, the district court dismissed Ying Zuo for lack of personal jurisdiction, ruling that there had "been no allegations of any conduct by Ying Zuo that would subject her to this court's jurisdiction or subject her to any liability in these cases, through RICO or otherwise."

Thereafter, the district court seems to have reversed itself in its November 19, 2010 ruling, by stating:

Plaintiffs' new allegation that Ying Zuo actively participated in the alleged fraud by meeting with plaintiffs and making representations that induced plaintiffs to enter the agreement with defendants provides *prima facie* evidence to support jurisdiction over her.

However, this Court can find no "new" allegations, creating jurisdiction where none existed before. In the operative *Rubicon II* complaint, the appellants had alleged:

The individual defendants include. . . (3) Ying Zuo, who on information and belief resides in Florida and is vice president, secretary, treasurer and director of [ZUSA]. Defendant Zuo met with plaintiffs and made certain false representations to them in order to induce them to market Zongshen products as discussed below. Both defendants Dexiu and Ying conspired with the other defendants to sell illegal motorbikes in the United States through Zongshen, Inc., plaintiffs and other persons like plaintiffs.

It is clear that the relevant complaint included allegations that Ying Zuo met with

the appellants in her capacity as a Zongshen officer and made false representations upon which the appellants, corporations registered in the forum state, relied. Even if these allegations were considered “bare bones” or legal conclusions, they are supported by the declarations of Tracy Titus (paralegal to appellants’ counsel) and Mohammad Rahman (main investor in the corporate appellants).

Although the appellants offered extensive affidavits, only the declaration of Tracy Titus was specifically offered in opposition to the motion to dismiss. The other referenced affidavit, that of Mohammad Rahman, was only offered in opposition to the appellees’ motions to set aside default judgments. However, both affidavits were filed and made part of the record before the district court ruled on the motion to dismiss Ying Zuo. *See Dist. Council No. 16 of Int’l Union of Painters & Allied Trades, Glaziers, Architectural Metal & Glass Workers, Local 1621 v. B & B Glass, Inc.*, 510 F.3d 851, 855 (9th Cir. 2007) (noting that the district court may rely on affidavits and discovery materials). Rahman swore that Ying Zuo was represented as a Zongshen officer by her father, Zongshen Zuo, and further that Rahman met with Ying Zuo in Florida as an officer of Zongshen, Inc. to discuss the proposed joint venture. “Conflicts between the parties over statements contained in affidavits must be resolved in the plaintiff’s favor.” *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008) (quoting

Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 800 (9th Cir.2004)).

Typically, the only relevant affidavits are those offered in opposition to a specific motion. However, the facts of this case encourage us to allow a wider margin.

Based on the law favoring plaintiffs, and the district court's November 19, 2010 ruling above, the appellants' allegations were sufficient to survive a Rule 12(b)(2) motion to dismiss Ying Zuo. *See Swartz v. KPMG LLP*, 476 F.3d 756, 766 (9th Cir. 2007) (citing *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1119 (9th Cir. 2002) (plaintiff generally required only to make out a prima facie showing of personal jurisdiction to overcome 12(b)(2) motion)).

The appellants attempted to allege personal jurisdiction over ZUSA by virtue of the fact that ZUSA is a Zongshen entity, and all other Zongshen entities are subject to personal jurisdiction. However, this cannot suffice to make out a prima facie case for personal jurisdiction over ZUSA. Because the appellants failed to allege sufficient facts for the court to assert personal jurisdiction over ZUSA, there was no error in dismissing ZUSA.

Each party should bear their own costs.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.