

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-007018

07/28/2014

HONORABLE BENJAMIN E. VATZ

CLERK OF THE COURT

S. Hack

Deputy

CAMELBACK VILLAGE IMPROVEMENT
ASSOCIATION INC

THOMAS P BURKE II

v.

COMMUNITY ASSOCIATION
UNDERWRITERS OF AMERICA INC, et al.

U S BANK
2222 E CAMELBACK RD # 100
PHOENIX AZ 85016
KATHERINE BRUGGEMAN
PO BOX 27008
PHOENIX AZ 85061
LOREN R UNGAR

RULING

On July 8, 2014, following hearing and argument on Defendant Cimros, Inc.'s ("Cimros") Motion to Vacate Default Judgment and Dismiss Garnishment Proceedings (the "Motion"), the court took this matter under advisement. The court has since received Cimros' Motion for Leave to File Sur-Reply in Support of Defendant's Motion. As the latter motion's primary goal is to complete the record by attaching thereto a copy of the transcript of the June 12, 2014 proceeding,

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IT IS ORDERED granting Cimros' Motion for Leave to File Sur-Reply in Support of Defendant's Motion.¹

The court has now considered Cimros' Motion, Plaintiff Camelback Village Improvement Association, Inc.'s ("CVIA") Response, Cimros' Reply and Sur-Reply and the attachments to the parties' memoranda. Based upon the matters presented and for the reasons hereinafter set forth,

IT IS ORDERED denying Cimros' Motion to Vacate Default Judgment and Dismiss Garnishment Proceeding.

Background

On August 1, 2005, CVIA enters into a property management agreement with MMS.

In June of 2008, a fire occurs causing damage to CVIA property.

On May 13, 2013, suit is filed, naming several defendants, including MMS.

On September 11, 2013, service is allegedly accomplished by personal service upon MMS' vice president and employee of over 30 years, Jane Knust, at MMS' place of business located at 5333 N. 7th Street, B114, in Phoenix ("MMS' address"). MMS' address is also the corporate address for Cimros. In his affidavit of service, certified process server Donald A. Foutz avers that Ms. Knust stated she was authorized to accept service. Ms. Knust does not deny making that statement to Mr. Foutz; however, she now qualifies it by denying that she ever stated she had authority to accept service for Cimros, dba Mutual Management Services.

On October 16, 2013, CVIA files an application for default and sends a copy to MMS' address.

On November 6, 2013, Ms. Bruggeman, the statutory agent for Cimros, sends an email to CVIA's counsel and references the claims "brought up against Mutual Management".

On November 27, 2013, seven days after the filing of CVIA's motion for entry of default judgment and mailing of a copy to MMS' address, Ms. Bruggeman sends a communication to

¹ Cimros contends that the transcript corrects the record before the court with reference to Katherine Bruggeman's alleged statement that Cimros and its trade name, Mutual Management Services, Inc. ("MMS") are "one and the same". Regardless of how one might interpret Ms. Bruggeman's statements, whether Cimros and MMS are "one in the same" is a question of law for the court to determine.

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Cimros' insurer and attaches a copy of the "default notice". She makes additional statements that are consistent with her having knowledge of the suit. And, she apologizes for any delay, noting that she has been "facing some severe medical trials the past 60 plus days".

MMS is not an entity. It is the duly registered trade name of Cimros. Cimros is an Arizona corporation dba Mutual Management Services, Inc.

Issues Presented

Cimros seeks Ariz. R. Civ. P. 60(c)(4) relief. It claims that the judgment entered on December 2, 2013 is void for lack of personal jurisdiction as (1) MMS is not an entity and the real entity, Cimros was not named; and (2) Cimros was never properly served.

Discussion

A. Is the default judgment void for lack of personal jurisdiction because of CVIA's naming of a trade name (MMS) as the defendant rather than the corporation (Cimros) that it is registered under?

The parties acknowledge that "[a] suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice..." *United States v. A.H. Fischer Lumber Co.*, 162 F.2d 872 (4th Cir. 1947). Then the games begin. CVIA accuses Cimros of "attempting to undermine the legal process" by holding out MMS as a corporation and Ms. Knust as its vice president. Cimros counters that CVIA is engaging in "trial by ambush".²

Cimros points to Ariz. R. Civ. P. 4.1 (i) and A.R.S. § 10-504(A); however, those citations set forth procedures for service upon corporations and do not directly address the issue presented herein.

CVIA counters that, despite an absence of any Arizona authority, there is a body of cases from other jurisdictions compatible with Arizona's notions of fair play and justice. *See, Hughes v. Cox*, 601 So. 2d 465 (Ala. 1992) and other cases cited therein. Those foreign jurisdictions conclude that while a corporation has the right to operate under a registered trade name, it should also be liable under that name. In short, the corporation and the trade name are one and the same.

²These barbs divert focus from the real issue at hand, namely, whether Cimros had notice and opportunity to properly prepare and defend. *See, Safeway Stores, Inc. v. Ramirez*, 99 Ariz. 372, 380, 409 P.2d 292, 297 (1965). "Service of process is for the purpose of notifying a defendant of the claim or charge against him so that he may properly prepare himself to answer it. It is this notice that gives the court jurisdiction to proceed."

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The court agrees. Such a result comports with Arizona authority that has long held that the purpose of the Rules of Civil Procedure is to obviate delay and administer speedy justice. *Union Interchange, Inc. v. Benton*, 100 Ariz. 33, 410 P.2d 477 (1966). Where, as here, the corporation held itself out to the public in the name of its registered trade name, the corporation that exalts a technicality over substance and fails to answer after service of the claim, does so at its peril.

B. Even if Cimros could be sued in the name of its trade name, was the default judgment void for lack of service?

Ariz. R. Civ. P. 4.1(i) provides in pertinent part that service upon a domestic corporation shall be made "...by delivering a copy of the summons and 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."

"Service of process can be impeached only by clear and convincing evidence." *Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 194, 836 P.2d 404, 407 (App.1992).

Cimros alleges that service is defective as it should have been upon its sole officer, director and statutory agent, Ms. Bruggeman. That assertion only has merit if the court concludes that CVIA knew that only Ms. Bruggeman was authorized to accept service. Based upon the court's review of the record presented and relied upon by the parties without further testimony, this the court cannot do.

Cimros held out Ms. Knust to be a vice president. She was a 30 year employee of Cimros. She was a signatory to the 2005 management agreement with CVIA. Every employee reported to her. She was produced by MMS (Cimros) as its Rule 30(b)(6) representative in one of the underlying suits. She acknowledged to Mr. Faust that she was authorized to accept service on behalf of MMS. That she may have not qualified that acknowledgement as she does now (never telling Mr. Faust that she had no authority to accept for Cimros), is a distinction without any difference. Cimros and MMS are one and the same.

Both parties cite *Koven v. Saberdyne Sys., Inc.* 128 Ariz. 318, 625 P.2d 907 (App. 1980). The court of appeals addressed the meaning of the term "agent" in Rule 4.1(i), stating that "the phrase agent authorized by law to receive service of process is sufficiently broad enough to permit service through an ostensible agent." 128 Ariz. at 322.

THE COURT FINDS that by holding Ms. Knust out as MMS' vice president, authorizing her to supervise the activities of all employees while conducting the business of Cimros at Cimros' corporate office and signing the CVIA agreement as a vice president, Cimros knowingly

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or negligently held Ms. Knust out as possessing, or allowing CVIA and others to assume that she possessed authority to accept service.

THE COURT FURTHER FINDS that even if CVIA knew or had reason to know that Ms. Bruggeman was the person authorized to “handle” the dispute, there was no limitation conveyed that only she had authority to accept service of the summons and complaint. CVIA acted reasonably in assuming that Ms. Knust had ostensible authority to accept service of the summons and complaint.

THE COURT FURTHER FINDS that service of the summons and complaint upon Ms. Knust satisfied the purpose of service...providing notice and opportunity to defend. The court rejects Cimros’ protestations that it did not learn of this lawsuit until the subject garnishment proceeding. Ms. Bruggeman’s actions in the period after the mailing of the Application for Default (see background section herein), reflect the actions of one who was dilatory and neglectful in responding to a complaint and is now reacting to that circumstance. Based upon the matters presented,

IT IS FURTHER ORDERED that CVIA shall lodge a form of judgment against garnishee U.S.Bank by **August 4, 2014**.

IT IS FURTHER ORDERED signing this minute entry as a formal written Order of this Court.

/ s / HONORABLE BENJAMIN E. VATZ

JUDICIAL OFFICER OF THE SUPERIOR COURT