

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2024-000143-001 DT

05/14/2024

HONORABLE JULIE A. LAFAVE

CLERK OF THE COURT
S. Ortega
Deputy

PALM VALLEY COMMUNITY ASSOCIATION TREVOR L ASH

v.

CYNTHIA A MCALISTER (001)
MARK A MCALISTER (001)

WILLIAM R RICHARDSON

COMM. LAFAVE
REMAND DESK-LCA-CCC
WHITE TANK JUSTICE COURT

RECORD APPEAL RULING — REVERSED & REMANDED

White Tank Justice Court Case No. CC2015-095536

Defendant/Appellant, **MARK MCALISTER**¹, appeals from a civil judgment entered against him in the White Tanks Justice Court. That trial court granted a Default Judgment in favor of Plaintiff/Appellee, **PALM VALLEY COMMUNITY ASSOCIATION**, and denied Appellant’s Motion to for Relief pursuant to Justice Court Rules of Civil Procedure Rule 141 (“Motion to Set Aside”). This Court has jurisdiction pursuant to Ariz. Const. art. VI, § 16 and A.R.S. §§ 12-124, 22-261. For the following reasons, this Court reverses and remands for further proceedings.

I. FACTUAL BACKGROUND & PROCEDURAL HISTORY

¹ The Judgment entered in this case also lists Cynthia A. McAlister. Ms. McAlister is not a party to this appeal and this Ruling is not applicable to any legal rights or obligations created by the Judgment or this Ruling.

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“It is better to ask for forgiveness than permission”. *Grace Hopper*. Perhaps in some cases. However, when the permission is required by the Justice Court Rules of Civil Procedure (“JCRCP”), forgiveness cannot permission’s place. This is a classic case of just that occurring.

On May 28, 2015, Appellee filed its Complaint. *See* Complaint. On September 10, 2015, it filed a request for an extension to time to serve Appellant. *See* Rule 113(i) Motion for Extension of Service Deadline. Appellee represented “Plaintiff is currently in the process of evaluating the possibility of serving Defendants by publication”. *Id.* at 2:3-4. On September 14, 2015, the deadline for Service was extended to December 4, 2015. *See* Order Granting Extension of Service of Process Deadline. While the subsequent request for extension is not contained in the record on appeal, it appears Appellee sought and was denied a further extension. *See* Calendar Events and Hearings (“Docket”) at P:6.

On December 2, 2015, Appellee Filed a Motion to Reconsider Denial of Rule 113(i) Motion for Extension of Service Deadline and asked the trial court to further extend the service deadline. It did not request the trial court order service by publication although it indicated “Plaintiff is currently in the process of serving Defendants by publication”. *Id.* at 2:3-4. Attached as exhibits to the request for an extension were the certificate of due diligence, dated September 17, 2015, and the Copy of Notice of service by publication conducted on November 4, 11, 18 and 25, 2015. *Id.*

On December 4, 2015, that deadline was again extended to December 18, 2015. *See* Order Granting Extension of Service of Process Deadline. No Order was sought to permit the actions Appellee had already taken although the JCRCP do not preclude doing so while such a motion is pending. Appellee filed its Affidavit in Support of Service by Publication indicating it had already served Appellant by publication as it “had no other alternative” but to do so. *Id.* at 2:3-6.

On January 14, 2016, Appellee filed its Application for Entry of Default and Affidavit on Default and Entry of Default (collectively “Default”). The Default represented to the trial court that “Since the service of a copy of the Complaint and Summons...” there had been no response from Defendants. *Id.* at 2:3-6. On January 20, 2016, the trial court properly noted there was no record of service and thus the case faced dismissal. *See* Corrective Action Required (Civil Filing). On January 27, 2016, Appellee filed its Service by Publication Affidavit. There was no motion filed for alternative service and no order granting a request for same. On February 17, 2016, Appellee again filed its Default documents.

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On May 20, 2016, Appellee filed a request for Default and accompanying request for Judgment and Attorneys' Fees and Costs. Plaintiff/Appellee's Answering Brief on Appeal ("Response") indicates the record on appeal, which was not provided to this Court, contains the default hearing wherein it presented all material supporting the Service by Publication. *See* Calendar and Events, entry July 12, 2016, Hearing re: Default; *See also* Response at 6:16-24. The Response admits the argument regarding the need for alternative service occurred only at the default hearing:

Here, McAlister has argued that the Association did not exercise adequate due diligence in attempting to locate him, and so should not have been able to serve him by publication. This exact question was the subject of a default hearing, where evidence was taken as to the efforts made by the Association locate McAlister prior to serving him by publication... an entire hearing was dedicated to investigating the very questions McAlister has raised on appeal.

Id. at 6:16-25.

This Court notes that had that been the hearing to determine the appropriateness of alternative service, that hearing, and the ruling on same, would have been material. However, a default judgment hearing is a separate proceeding and can only occur after service, and after a defendant has been given the opportunity to respond under the governing rules. Therefore, whatever was presented to contemporaneously obtain belated "permission" to serve as it had already done, and a default judgment is immaterial as to do so was a violation of Appellant's rights under JCRCP.

A default judgment was entered against Appellant following the hearing. *See* Judgment, dated July 12, 2016. Appellant filed a Motion to Set Aside the Default and Default Judgment on November 3, 2023, alleging he was never served. That motion was denied on December 18, 2023. This timely appeal followed.

II. GENERAL APPELLATE CONSIDERATIONS

This Court reviews the denial of a Motion to Set Aside Judgment for an abuse of discretion. *Norwest Bank (Minnesota), N.A. v. Symington*, 197 Ariz. 181, 184, ¶ 11 (App. 2000). It is "an abuse of discretion for a trial court to act arbitrarily or make decisions unsupported by fact or law." *Id.* "The trial court has broad discretion in deciding whether to vacate a default judgment, and this court will not disturb the trial court's ruling absent a clear abuse of

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discretion”. *BYS Inc. v. Smoudi*, 228 Ariz. 573, 577(App. 2012), as amended (Mar. 13, 2012). This court considers only Appellants’ argument that the Motion was improperly denied. Thus, the scope of the appeal is limited to the issues raised in that Motion. *See Goglia v. Bodnar*, 156 Ariz. 12, 16 (App. 1987).

Under the clear abuse of discretion standard, the trial court ruling will be upheld if there “is any reasonable evidence in the record to sustain it.” *State v. Morris*, 215 Ariz. 324, 341, ¶ 77 (2007) (internal quotation omitted). A “court abuses its discretion when it makes an error of law in reaching a discretionary decision or when the record, viewed in the light most favorable to upholding the trial court’s decision, is devoid of competent evidence to support the decision.” *Michaelson v. Garr*, 234 Ariz. 542, 544, ¶ 5 (App. 2014) (internal quotation omitted).

III. ISSUES ON APPEAL

Appellant argues the Default was improperly granted as he was never served.

IV. DISCUSSION

In Arizona, [P]roper, effective service on a defendant is a prerequisite to a court's exercising personal jurisdiction over the defendant. *Koven v. Saberdyne Sys., Inc.*, 128 Ariz. 318, 321(App.1980); *Kadota v. Hosogai*, 125 Ariz. 131, 134(App.1980) (“[T]he law is clear that a judgment is void if the trial court did not have jurisdiction because of a lack of proper service.”); *Barlage v. Valentine*, 210 Ariz. 270, 272–73(App. 2005); *Sprang v. Petersen Lumber, Inc.*, 165 Ariz 257 (App. 1990); *Master Financial, Inc. v. Woodburn*, 208 Ariz. 70, 74 ¶ 19 (App. 2004).

JCRCP 113(c)(7) permits service by publication if such service complies with Arizona Rules of Civil Procedure (“ARCP”) 4.1(l) which reads:

(1) Generally. If a party shows that the service provided by Rule 4.1(c) through 4.1(k)--including an alternative means of service--is impracticable, ***the court may, on motion and without notice to the person to be served, order that service be accomplished by publication.*** A serving party may initiate the service by publication procedure described in Rule 4.1(l)(2) prior to moving for such an order or while the motion is pending. The court may permit service by publication, in such manner and form as the court may direct, if:

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(A) the serving party, despite reasonably diligent efforts, has been unable to determine the person's current address; or the person to be served has intentionally avoided service of process;

(B) service by publication is the best means practicable in the circumstances for providing the person with notice of the action's commencement; and

(C) *the motion* is supported by affidavit that sets forth the serving party's reasonably diligent efforts to serve the person.

ARCP 4.1(emphasis added).

Appellee's efforts may well have been reasonably diligent under the rule. The affidavit must "set [] forth facts indicating [the serving party] made a due diligent effort to locate an opposing party to effect personal service." *Barlage* at 273; *Sprang* at 261; *See also Omega II Inv. Co. v. McLeod*, 153 Ariz. 341, 342 (App.1987) (finding of due diligence before service by publication is jurisdictional prerequisite). Appellee may well have been able to begin service by publication efforts while a motion to permit same was pending. What it had no legal authority to do, was simply file a notice with the trial court asserting publication was proper, that it had been done, and that it could move to a default hearing having done so. Appellee neglected to ask permission. The result was a violation of Appellant's rights to notice and to defend the action.

Because service by publication was never ordered by the trial court, Appellant's Motion to Set Aside was well founded². *See United Imports and Exports, Inc. v. Superior Court*, 134 Ariz. 43, 45 (1982)(emphasis added); *citing Richas v. Superior Court*, 133 Ariz. 512, 652 P.2d 1035 (1982). Arizona Rule of Civil Procedure 60(b) is identical in substance to R. 141(c)

Until a defendant is served, a trial court has no jurisdiction over it. Thus, without proper service, Appellant was not subject to a Default Judgment and the one entered by the trial court was void as a matter of law. *See Kadota* at 134. The Response admits that it believed

² This Ruling is limited to the vacating the Judgment on the grounds that service never occurred. This Court takes no position on the merit of the arguments made in Appellant's Memorandum regarding challenges to any efforts made by Appellee or that those were insufficient. That argument is properly raised to the trial court. Here, the only issue is that Appellee lacked authority to serve via publication thus there was no service in the case and no jurisdiction by the trial court to enter the default and subsequent Judgment.

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Appellant’s whereabouts were unknown and “[T]hus, service on Defendants was effectuated by publication...” but fails to cite the legal authority which permitted it to act without an order from the trial court. *See* Response at 5:12. Appellee then concludes, with no legal support that “service was proper in various ways” making the Default and Judgment valid.

In essence, Appellee argues it tried to serve Appellee unsuccessfully. Appellee then argues it properly took matters into its own hands and now should be rewarded by obtaining a judgment against a party who was never served. While a review of the record indicates Appellee may well have prevailed on the merits of any motion for alternative service, it is equally clear that none was filed. Litigants are entitled to all the protections of JCRCP. To uphold the Judgment against Appellant, this Court would have to violate those protections, ordering both that a party may serve another in any means it deems proper, and that a defendant’s right to be first served and then provided an opportunity to respond to a default is waived when the offending party violates the rules. That is will not do. The trial court committed an error of law when it granted a default judgment against a party who had not been served. Because it lacked jurisdiction to do so, the Judgment must be vacated.

Appellant further requests this Court dismiss the underlying case. This Court lacks jurisdiction to dismiss a case filed in another jurisdiction. However, it is clear the time for service has expired and there is no rule which would extend it at this time.

V. ORAL ARGUMENT

This matter was decided on the narrow procedural issue of service of process. Having reviewed the record, this court finds oral argument would not have assisted it in its decision. This Court determined the issue as a matter of law and therefore denies the request for Oral Argument.

VI. COSTS AND ATTORNEYS’ FEES ON APPEAL

As the apparent prevailing party, Appellant may be entitled to his taxable costs and reasonable attorneys’ fees on appeal. Upon compliance with Rule 13, Superior Court Rules of Appellate Procedure—Civil, this Court will consider its request for costs and fees. If Appellant contends that this Court is required to award reasonable attorneys’ fees due to a provision of a contract between the parties, his SCRAP-Civil Rule 13 filing must either supply the contractual

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provision requiring the award of fees or specifically identify where in the existing record that provision can be found. *See Bennett Blum, M.D., Inc. v. Cowan*, 235 Ariz. 204, 206 (App. 2014). Appellants filing also “must disclose the terms of any fee agreement for the services for which the claim is made.” *Rule 54(g)(4), Ariz. R. Civ. P. See also Jerman v. O’Leary*, 145 Ariz. 397, 403 (App. 1985) (“[I]t is vital to know what the agreement was between appellees and their lawyer.”).

VI. DISPOSITION & ORDERS

The trial court made an error of law in permitting service by publication without first ordering same. To do so and then grant judgment against Appellant violated his rights under JCRCP. The trial court further abused its discretion in denying Appellant’s Motion to Set Aside Judgment. As Appellant was not properly served, the trial court had no jurisdiction to enter Default Judgment.

Accordingly,


IT IS THEREFORE ORDERED denying Appellee’s request for Oral Argument.

IT IS ALSO ORDERED vacating the judgment of the White Tank Justice Court.

IT IS ALSO ORDERED that, because the issue of attorneys’ fees and costs remain pending, this ruling is not a final decision of this Court for purposes of Ariz.R.Civ.P. 54(c) and Sup.Ct.R. App. P.-Civil R. 12(d). At an appropriate time, this Court will consider a motion from either party declaring these review proceedings to be concluded and issue its final order once that issue had been briefed and determined.

IT IS ALSO ORDERED remanding this matter to the White Tank Justice Court for further proceedings consistent with this ruling, to include dismissal of the case.

IT IS ALSO ORDERED signing this ruling as a formal order of the Court.



THE HON. JULIE A. LAFAVE
Judicial Officer of the Superior Court

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