Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000373-001 DT 12/06/2013

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
J. Eaton
Deputy

MESA SIERRA RANCH I I HOMEOWNERS ASSOCIATION, INC

CRAIG L ARMSTRONG

v.

JUAN ESCOBEDO (001)

RICHARD N GROVES

ARCADIA BILTMORE JUSTICE COURT
REMAND DESK-LCA-CCC

HIGHER COURT RULING / REMAND

Lower Court Case No. CC2007–055507RC.

Defendant Appellant Juan Escobedo (Defendant) appeals the Arcadia Biltmore Justice Court's determination that (1) service was proper and (2) the default judgment should not be set aside. Defendant contends the trial court erred. For the reasons stated below, the court reverses the trial court's judgment.

I. Factual Background.

On March 12, 2007, Plaintiff, Mesa Sierra Ranch II Homeowners Association Inc. (Mesa Sierra Ranch) filed a Complaint against Defendants Juan C. Escobedo, Jane Doe Escobedo, Humberto Jimenez, and Monica Villegas claiming the Defendants owed unpaid assessments plus interest, attorneys' fees and costs. Humberto Jimenez and Monica Villegas are married to each other. Defendant—the only party appealing from the judgment—was served on April 18, 2007, by substituted service on Humberto Jimenez who was listed as a co-resident. The Affidavit of Service indicated Defendant was served by Get Smart Process Service as follows:

> I, Anji Gonzales, do hereby affirm that on the 18th day of April, 2007 at 12:55 p.m., I
>
> Substitute Served by leaving true copies of this SUMMONS AND COMPLAINT with Humberto Jimenez, CO-RESIDENT who is of suitable age and resides

therein.

The AOS indicated the documents were to be served on Defendant, a single man, 9656 East Jan Avenue, Mesa, AZ 85208.

Plaintiff requested a default judgment on May 24, 2007, and asked for attorneys' fees of $1,294.00 as well as past due assessments of $607.25. The trial court awarded judgment to Plaintiff. Thereafter, Plaintiff—on September 13, 2007—moved for a Judgment Debtor exam which was subsequently scheduled for November 2, 2007. When Mr. Jimenez and Ms. Villegas failed to appear at the Judgment Debtor exam, Plaintiff moved for a civil arrest warrant which the trial court granted on November 30, 2007. The trial court issued civil arrest warrants on January 4, 2008, against both Mr. Jimenez and Ms. Villegas.

On March 5, 2012, Plaintiff applied for a writ of garnishment against Defendant Juan Escobedo and asserted (1) it had recovered a judgment against him for $1,901.25 plus late fees, court costs, attorneys' fees and accruing interest on May 29, 2007; and (2) the Judgment had been recorded in Maricopa County; and (3) the Judgment was renewed on March 12, 2012. Plaintiff alleged the current amount due on the judgment was $5,883.76 plus interest at the rate of 10% per year. The trial court docket reflects the Notice of Renewal of Judgment was signed on March 21, 2012, and a copy was mailed to Plaintiff's attorney—but not to Defendant—on March 22, 2012. The Notice of Renewal of Judgment indicated the new expiration date for the Judgment was March 16, 2017.

On June 29, 2012, Defendant filed a Statement of Complaint Against a Notary Public and claimed he was a victim of identity theft/fraud on the part of Humberto Jimenez and Monica Villegas. The substance of his claim was Mr. Jimenez and Ms. Villegas fraudulently obtained mortgages on several pieces of property and included his name on the loan documents although he had not signed the documents and the various notaries public were responsible for the fraud because they notarized documents he did not sign.[1]

On September 18, 2012, Defendant's lawyer wrote to Plaintiff's attorney and told him (1) Defendant never lived in Arizona; (2) Defendant had always lived in California; (3) the substituted service on which the default judgment was based was improper; and (4) the trial court lacked personal jurisdiction over Defendant. On September 28, 2012, Defendant's lawyer again wrote to Plaintiff's attorney and informed him the underlying judgment in this case was void based on a lack of proper service. Defense counsel requested the default judgment be vacated and all monies garnished from Defendant's salary be returned to him. On October 3, 2012, Defendant's lawyer wrote to Plaintiff's attorney for the third time and claimed Defendant had been employed by Cintas Corporation in San Jose, California, on April 18, 2007, and was living

[1] On August 20, 2007, Defendant filed a crime report with the Office of the Sheriff-Coroner, County of Santa Cruz, Case number 07–8082, and alleged Humberto Jimenez used his personal information to purchase several homes in Mesa and Phoenix and had forged Defendant's name on the documents. Defendant claimed he went to the Maricopa County website and found at least four houses had been purchased in his name.

in Santa Cruz California on the date and time of the alleged service. Defense counsel claimed (1) Defendant was never served; (2) the Arcadia Biltmore Justice Court had no personal jurisdiction over Defendant; and (3) the default judgment was void pursuant to A.R.C.P., Rule 60(c)(4).

On October 18, 2012, Defendant filed a Motion For Relief from Default Judgment Pursuant to A.R.C.P. Rule 60(c)(4). Defendant provided an affidavit stating he never lived in Arizona and never resided at 9656 East Jan Ave., Mesa, Arizona—the location where the substituted service occurred. On October 22, 2012, Plaintiff's counsel filed a Motion To Vacate Judgment against Defendant and claimed Plaintiff was not aware Defendant did not reside at the 9656 East Jan Avenue, Mesa, Arizona address when service occurred. On October 25, 2012, Plaintiff withdrew its Motion To Vacate. Defense counsel filed a Motion for Sanctions and requested both Plaintiff and its attorney be found in contempt for failing to return monies seized pursuant to a writ of garnishment. Defense counsel also filed an Application for an Order To Show Cause on October 29, 2012.

Plaintiff responded to Defendant's Motion For Relief from Default Judgment Pursuant to A.R.C.P. Rule 60(c)(4) and alleged (1) Defendant was dilatory in his request to set the default aside; and (2) Plaintiff did not engage in wrongful conduct in believing Defendant resided in Mesa. Plaintiff averred "numerous sources confirm Juan Carlos Escobedo's address as the residence at which he was served."[2] Plaintiff attached (1) a report from an investigative research service, Locate Plus, indicating the E. Jan Ave. address; (2) the Experian credit profile for Defendant which confirmed the E. Jan Ave. address for Defendant; (3) the HOA's property management records which listed the E. Jan Ave. address for Defendant; (4) a copy of a letter sent to Defendant at the E. Jan. Ave. address which allegedly was never returned; and (5) a Warranty Deed indicating that when recorded, the deed should be mailed to Defendant at an E. Jan Ave., Mesa address. Plaintiff also claimed Defendant failed to timely seek relief from the default judgment because (1) the judgment was entered over five years ago; (2) it was approximately eight months after Defendant was notified about the garnishment before Defendant sought relief from the judgment; and (3) Defendant did not assert a meritorious defense.

Defendant replied to Plaintiff's Response to his Motion For Relief From Default Judgment Pursuant to ARCP Rule 60(c)(4) and alleged the underlying default judgment was obtained by fraud/identity theft because (1) Defendant never resided in Arizona; (2) the person who defrauded him/stole his identity was the person actually served with process; (3) Defendant reported the fraud to the Santa Cruz Sheriff's Department who forwarded the report to the Mesa Police Department; (4) Defendant was never properly served; (5) Defendant requested Plaintiff quash the garnishment on March 29, 2012, but Plaintiff did not do so until September 18, 2012; (6) Defendant requested Plaintiff set aside the default judgment and return all wrongfully

[2] Plaintiff's Response to Motion To Set Aside Default Judgment, p. 2, ¶ 2, filed on Nov. 6, 2012.

garnished money on October 3, 2012, but Plaintiff did not comply in a timely manner; and (7) Defendant filed his Motion for Relief from Default Judgment on October 18, 2012. Defendant requested the trial court vacate the default judgment and hold a hearing to consider Rule 11 sanctions against Plaintiff and Plaintiff's counsel. On November 29, 2012, the trial court set the matter for oral argument.

The trial court held a hearing on February 12, 2013. Defense counsel argued it asked Plaintiff to return the money and vacate the judgment but Plaintiff failed to do so.[3] Defense counsel asserted Plaintiff (1) had an obligation to investigate the facts re the improper issuance of the judgment; (2) had the opportunity to do so; but (3) ignored the opportunity and failed to return Defendant's money.[4] Defense counsel claimed it prevailed on its underlying motion to have the default set aside and requested the trial court order Plaintiff to refund the $2,255.92 garnished from Defendant and award attorneys' fees because Defendant was "forced to file this particular motion, and we've prevailed upon it."[5]

Plaintiff's counsel responded Defendant (1) had the burden to show by clear and convincing evidence there was a defect in the service of process; (2) the evidence was not clear that Defendant did not reside at the property; (3) an independent investigative service reported Defendant had addresses in Arizona; (4) an Experian credit profile reflected an address for Defendant in Arizona and correctly listed Defendant's prior employer; (5) letters were sent to Defendant at the address where he was served that were not returned; and (6) the joint tenancy deed ostensibly had an acceptance of joint tenancy that was allegedly signed by Defendant and certified by a notary public; and (7) Plaintiff's counsel sent letters to Defendant in California and the only contact Plaintiff had was after the garnishment was completed.[6] Plaintiff's counsel maintained Plaintiff was entitled to rely on the evidence indicating Defendant was an Arizona resident; and, in most identity fraud cases, there are companion events where the alleged defrauded party (1) records a quit claim or disclaimer deed to clear title and show they do not own the property; or (2) engages in litigation to adjudicate the identify fraud and demonstrate the victim is not responsible for debts related to the property.[7] Plaintiff's counsel claimed Defendant's motion was untimely and, in the alternative, if the trial court determined Defendant met his burden of proof, the trial court find the Plaintiff acted in good faith based on the evidence it located.[8]

Defense counsel replied Defendant's action was based on Rule 60(c)(4) and there were no specific time limits in which to file a motion to set aside a void judgment. Defense counsel asserted he presented Plaintiff with copies of work records, telephone bills, and utility bills which

[3] Hearing Transcript, Feb. 12, 2013, at p. 6, ll. 17–23.
[4] *Id*. at p. 7, ll. 1–15.
[5] *Id*. at p. 7, ll. 12–19.
[6] *Id*. at p. 8, ll. 7–25; p. 9; p. 10, ll. 1–8.
[7] *Id*. at p. 10, ll. 11–25; p. 11, ll. 1–3.
[8] *Id*. at p. 12, ll. 3–16.

established Defendant resided in California during the time period in question.[9] He argued that the fact that a business indicates Defendant lived at an address in Arizona did not make the assertion true.[10] He maintained Plaintiff's counsel had a duty to do something about the Defendant's claim once he provided information about the problem with the underlying judgment. The trial court took the matter under advisement.

The trial court concluded service was proper and denied Defendant's motions to set aside the default and for sanctions. In its February 28, 2013 ruling on the Motion for Relief from Default Judgment Pursuant to ARCP 60(c)(4) [sic.], the trial court stated:

> Based upon the Court's review of the motions submitted by both parties, the arguments presented at the oral argument and the evidence regarding service. Numerous sources confirm Defendant Juan Carlos Escobedo's address as the residence at which service was effectuated.
>
> As such, Defendant has not established to the Court by clear and convincing evidence that service was not proper. Judgment remains as ordered.

In its February 28, 2013 ruling on the Motion for Sanctions, the trial court said:

> Defendants [sic.] Motion for Sanctions alleges that Plaintiff refused to return all monies seized from Defendant pursuant to a garnishment after this Court vacated the judgment against Defendant.
>
> Upon review of the Court's record, judgment against Defendant was never vacated. As such, Defendants [sic.] Motion for Sanctions is hereby denied.

Defendant filed a timely appeal. Plaintiff filed a responsive memorandum. Defendant requested—and was given—the opportunity to file a reply memorandum. Defendant filed a reply memorandum. This Court has jurisdiction pursuant to Arizona Constitution Art. 6, § 16, and A.R.S. § 12–124(A).

II. Issues:

> *A. Did The Trial Court Err By Failing To Find The Default Judgment Was Void For Lack Of Proper Service.*

Standard of Review

Appellate courts review the denial of a motion to vacate a void judgment de novo but view the facts in the light most favorable to upholding the trial court's ruling on a motion to set aside a default. As the Court of Appeals stated:

> We view the facts in the light most favorable to upholding the trial court's ruling

[9] *Id*. at p. 15, ll. 7–12.
[10] *Id*. at p. 15, ll. 13–16.

on a motion to set aside a default judgment.

Ezell v. Quon, 224 Ariz. 532, 233 P.3d 645, ¶ 2 (Ct. App. 2010). However, the Court of Appeals also held:

> We review de novo, however, the denial of a Rule 60(c)(4) motion to vacate a void judgment. When a judgment is void due to lack of jurisdiction, "the court has no discretion, but must vacate the judgment."

Ezell v. Quon, ¶ 15 (citations omitted). This Court shall review the trial court's denial of the Rule 60(c)(4) motion de novo.

Denial of the Rule 60(c)(4) Motion

Defendant's claim is based on his assertions that (1) he was not properly served because he did not reside at the home where the substituted service occurred; (2) the failure of proper service deprived the trial court of personal jurisdiction; (3) absent personal jurisdiction, any judgment was void; and (4) there is no time limit within which a Rule 60(c)(4) motion must be brought. Defendant's premises that (1) a judgment is void if the court entering it lacked personal jurisdiction; and (2) a trial court has no discretion but to vacate a void judgment; is correct. The Arizona Court of Appeals stated:

> Rule 60(c)(4) permits a court to relieve a party from a final judgment or order when "the judgment is void." The State argues that the judgment must be set aside because it was entered without proper notice and jurisdiction and, therefore, is void. If a judgment or order is void, the trial court has no discretion but to vacate it. There is no time limit in which a motion under Rule 60(c)(4) may be brought; the court must vacate a void judgment or order "even if the party seeking relief delayed unreasonably." A judgment or order is "void" if the court entering it lacked jurisdiction: (1) over the subject matter, (2) over the person involved, or (3) to render the particular judgment or order entered.

Martin v. Martin, 182 Ariz. 11, 14-15, 893 P.2d 11, 14-15 (Ct. App. 1994) (citations omitted).

Defendant was served by substituted service at 9656 East Jan Avenue, Mesa, Arizona where the copies of the summons and complaint were left with Humberto Jimenez who was identified as a "co-resident" who was of suitable age and "resided therein." Service of process is governed by A.R.C.P. Rule 4.1 and provides service on an individual is effected by delivering a copy of the summons and pleading to the individual personally or by leaving copies at the individual's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein. The affidavit of service did not indicate the person receiving service was a person of suitable discretion. Defendant also challenged the process server's assertion that he was a co-resident of Humberto Jimenez at the 9636 East Jan Avenue address. Defendant claimed (1) he never resided at that address and (2)—at the date and time when service allegedly occurred—he

resided in California. Defendant provided utility statements showing his California residence and work payroll information listing his California address during the time when he was allegedly served in Mesa Arizona.

The Arizona Court of Appeals discussed the evidence that is used to support a finding that the residence where the summons and complaint were served was the usual place of abode for a litigant and said the determination must be made from the specific facts in a particular case as no "hard and fast" definition could be established. The Court of Appeals held:

> In evaluating this claim, we note that decisions interpreting the phrase "dwelling house or usual place of abode" indicate that no hard and fast definition can be laid down, 2 Moore's Federal Practice ¶ 4.11[2] at 4–118 (1982); *cf. Blackhawk Heating and Plumbing Co. v. Turner,* 50 F.R.D. 144 (D.Ariz.1970) (court notes that meaningful definitions of the phrase "usual place of abode" are few); hence, whether a particular location is a person's "dwelling house or usual place of abode" is to be determined from the facts in each particular case. *Karlsson v. Rabinowitz,* 318 F.2d 666, 668 (4th Cir.1963); *Capitol Life Insurance Co. v. Rosen,* 69 F.R.D. 83, 88 (E.D.Pa.1975).

French v. Angelic, 137 Ariz. 244, 246, 669 P.2d 1021, 1023 (Ct. App. 1983). In reviewing the circumstances surrounding the service of process, this Court notes Defendant claimed Humberto Jimenez stole his identity and used it to purchase homes in Arizona. Defendant reported the identity theft to his local police department in August 2007, and the police report reflects Defendant's claim that Humberto forged Defendant's signature on the documentation used to purchase homes in Mesa and Phoenix. Humberto Jimenez is the person who actually received the documentation for the lawsuit between Plaintiff and Defendant.

In contrast, Plaintiff asserted Defendant was a co-owner of the real property at issue and was served. Plaintiff established it relied on third party investigative sources to determine if the Jan Avenue addresses were valid addresses for Defendant. This Court notes the first issue to be resolved in order to determine if service was proper or improper is whether the 9659 E. Jan Ave. address was Defendant's "dwelling house or usual place of abode" and not if the Jan Avenue addresses were valid addresses for Defendant. Valid service requires that the service occur at the dwelling house or usual place of abode and not just at a property a person may happen to own. A "usual place of abode" generally refers to the place where the person was actually living.

> We agree that constitutional due process notice requires that substituted service at the defendant's "usual place of abode" must be at the place where the defendant normally actually resides so that service will be "substantially ... likely to bring home notice" to the party affected.

Bowen v. Graham, 140 Ariz. 593, 597, 684 P.2d 165, 169 (Ariz. Ct. App. 1984).

Arizona does not have a plethora of case law dealing with this specific problem where a

defendant may allegedly own more than one property. Persuasively, the U.S. District Court of the District of Massachusetts ruled on the proper location for service when a defendant owned more than one property and held:

> The cases make clear that it is not enough to leave a summons at a house that defendant owns or occupies from time to time. The house must be his usual and normal residence.

Shore v. Cornell-Dubilier Elec. Corp., 33 F.R.D. 5, 7 (D. Mass. 1963). Florida's courts have considered the meaning of the phrase "usual place of abode" and held:

> Not surprisingly, in applying the definition of the term "usual place of abode" set forth in *Heffernan*, courts have frequently invalidated substituted service of process in cases where the defendant was not actually living at the place where service was made. *See, e.g., Alvarez v. State Farm Mutual Auto Ins. Co.*, 635 So.2d 131, 132 (Fla. 3d DCA 1994) (invalidating substituted service on defendant's cousin where affidavits and supporting documentation, including a telephone bill and marriage license, established defendant was not living at that address on the date of service); *Milanes*, 507 So.2d at 778 (noting that service of process on the residence of defendant's ex-wife did not satisfy section 48.031); *Stern v. Gad*, 505 So.2d 531, 532 (Fla. 3d DCA 1987) (holding mere ownership of a condominium and service upon the wife of an owner will not suffice to establish "usual place of abode," when defendant submitted affidavit that he was not in the jurisdiction on the date of purported service and did not reside in the United States); *Gonzalez v. Totalbank*, 472 So.2d 861, 864 (Fla. 3d DCA 1985) (invaliddating substituted service where wife was separated from husband and no longer living at address where service was attempted); *Panter*, 406 So.2d at 1268 (finding substituted service at home of appellant's father invalid where uncontradicted affidavits stated appellant was living in Michigan when service was made). Notably, several of these cases involved familial relationships where presumably the defendant would be more likely to receive notice, yet the courts still invalidated the service of process because the defendant was not actually living at the place where service was made. *See Alvarez*, 635 So.2d at 132 (substituted service on defendant's cousin); *Stern*, 505 So.2d at 532 (substituted service on wife); *Panter*, 406 So.2d at 1268 (substituted service on appellant's father).

Shurman v. Atl. Mortgage & Inv. Corp., 795 So. 2d 952, 954-55 (Fla. 2001). The District Court of Appeals of Florida, Second District, also commented on the meaning of a usual place of abode and held a person generally has only one usual place of abode *Kemmerer v. Klass Associates, Inc.*, 108 So. 3d 672, 674 (Fla. Dist. Ct. App. 2013). Thus, even if Defendant had been an owner of the property, the evidence Defendant produced about his utility payments and payroll address

during the relevant time period established the East Jan Avenue address was not his usual place of abode. Additionally, because Defendant (1) challenged the claimed fact that he was involved in the purchase of real property in Arizona; (2) filed an identity theft report with the Sheriff shortly after the summons and complaint were served where he denied authorizing the use of his name for the property purchases and claimed his signature was forged; (3) provided proof he was paying utility bills in California for a home with the listed address of 2627 Mattison Lane, Space 26, Santa Cruz, California 95062 at the time of the alleged service; (4) demonstrated he was working in California for a California company and his payroll form indicated his California address of 2627 Mattison Lane, Apt. 26, Santa Cruz, California, 95062 at the time of service; the facts in this case indicated Defendant was not properly served. Proper service is essential to establishing personal jurisdiction.

Once a party challenges personal jurisdiction, the party asserting the jurisdiction has the burden of proof.

> Once the existence of personal jurisdiction is challenged, the party asserting jurisdiction has the burden of establishing it.

Kadota v. Hosogai, 125 Ariz. 131, 133-34, 608 P.2d 68, 70-71 (Ct. App. 1980). Plaintiff had the burden to show the trial court had personal jurisdiction. If the trial court lacked personal jurisdiction because of a lack of proper service, any judgment would be void. *Marquez v. Rapid Harvest Co.*, 99 Ariz. 363, 365, 409 P.2d 285, 287 (1965). Here, because Defendant was not properly served, the trial court did not acquire personal jurisdiction over Defendant, and the resulting judgment was void. The trial court erred when it failed to set aside the default judgment.

B. Did Plaintiff Have A Right To Rely On Its Investigative Service When Seeking To Have Defendant Served.

Plaintiff claimed it had a right to rely on the investigation its third party sources provided about Defendant's alleged address. While Plaintiff could rely on these sources for purposes of attempting service, Plaintiff's use of the investigative sources—the Locate Plus report and the Experian Credit address—do not refute Defendant's claim that the information provided was erroneous. When Plaintiff referred to these sources, Plaintiff indicated the addresses were "valid residential addresses for the Defendant" and not Defendant's usual place of abode.[11] As previously stated, for service to be proper, the service must occur at the defendant's usual place of abode and not just at a "residential address." Even if the address Plaintiff suggested had been accurate—a point which Defendant did not concede—Plaintiff would not have been able to rely on the address absent proof that this address was Defendant's usual place of abode.

Plaintiff also referenced the "Warranty Deed" allegedly signed by Defendant at the time of

[11] Appellee's Answering Brief at p. 2.

the alleged purchase of the real estate at issue in this action.[12] However, Defendant denied purchasing the real estate. Defendant repeatedly claimed he was the victim of identity theft and his signature was forged. Defendant made these claims as early as 2007 when he filed a police report with the Santa Cruz Sheriff's department and requested the report be forwarded to the Mesa Police Department. The Crime Report in 07–8082 from the Office of the Sheriff-Coroner County of Santa Cruz indicated the sheriff—after investigation—agreed the signature on the documents was not the Defendant's signature. Deputy K Smith wrote—page 4 of the Crime Report dated 08/20/07:

> I located Escobedo's signature that is on file with the DMV and agree that they are similar but not the same. I have included this as well.
>
> I advised Escobedo of identity theft resources available to him and told him I would forward the report to Mesa PD.

Thereafter, in 2012, Defendant filed a complaint against the notary public who certified his signature on the sale documents. Because Defendant contradicted the veracity of the addresses Plaintiff used, Plaintiff may have erred in relying on these addresses.[13]

C. Is Defendant Entitled To Reasonable Attorneys' Fees For The Appeal.

Defendant requested—in his initial pleading—his litigation costs and attorneys' fees for (1) prosecuting this appeal; as well as (2) the trial court action; pursuant to A.R.S. §12–341.01. Defendant prevailed on appeal. The underlying claim was for an action based on a contract. When a party asserts a breach of contract cause of action, that party cannot disavow the claim merely because the party was unsuccessful. *True Center Gate Leasing, Inc. v. Sonoran Gate L.L.C.*, 427 F. Supp.2d 946, 949 (D. Ariz. 2006).

A request for attorney fees is subject to an analysis about the reasonableness of the fees. An award of fees under A.R.S. §12–341.01 is discretionary rather than mandatory. Our Arizona Supreme Court discussed the factors a court should consider prior to making an award. These include:

1. whether the unsuccessful party's position or defense had merit;
2. whether the litigation could have been avoided, or settled and how the successful party's efforts influenced the result;
3. whether assessing fees against the unsuccessful party would cause extreme hardship;
4. whether the successful party prevailed with respect to all of the relief sought;

[12] *Id*. at p. 3.

[13] While Plaintiff's initial reliance on its third party reports may justify Plaintiff's attempted service in 2007, when Defendant, in 2012, indicated the various sources showing the East Jan Street address was not—and had never been—his usual place of abode, Plaintiff should have taken steps to exonerate Defendant from any judgments.

5. whether the legal question was novel;
6. whether a similar claim had been previously adjudicated in this jurisdiction;
7. whether the particular award would discourage other parties with tenable claims or defenses from litigating or defending for fear of incurring liability for substantial amounts of attorney fees.

Assoc. Indem. Corp. v. Warner, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985); *Moedt v. General Motors Corp*., 204 Ariz. 100, 60 P.3d 240 ¶ 19 (Ct. App. 2003). In establishing these factors, the Arizona Supreme Court considered the language of A.R.S. 12–341.01 and cited subsection B which states the award

> . . . should be made to mitigate the burden of the expense of litigation to establish a just claim or a just defense. It need not equal or relate to the attorney's fees actually paid or contracted. . . .

Assoc. Indem. Corp. v. Warner, 143 Ariz. at 569, 694 P.2d at 1183. Defendant failed to address any of these factors in its memoranda. This Court finds Defendant is entitled to attorneys' fees but any fee request is subject to an analysis of the factors required by *Assoc. Indem. Corp. v. Warner* and contingent upon Defendant providing a China Doll affidavit as mandated in *Schweiger v. China Doll Restaurant, Inc*., 138 Ariz. 183, 673 P.2d 927 (Ct. App. 1983). Pursuant to Superior Court Rules of Appellate Procedure—Civil (SCRAP—Civ.) Rule 13(b) Defendant may request fees for the prosecution of his case at the trial court. Defendant shall have 14 days from the date of this minute entry to submit his request for costs and fees. Plaintiff shall have 10 days in which to respond to any requested costs and fees.

III. Conclusion.

Based on the foregoing, this Court concludes the Arcadia Biltmore Justice Court erred.

IT IS THEREFORE ORDERED reversing the judgment of the Arcadia Biltmore Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Arcadia Biltmore Justice Court for all further appropriate proceedings.

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

/s/ Myra Harris

The Hon. myra harris

Judicial Officer of the Superior Court 120620131454

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