

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000463-001 DT

10/19/2011

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
H. Beal
Deputy

CAPITAL ONE AUTO FINANCE INC

JASON ERWIN

v.

KATHERINE W VARGO (001)

KATHERINE W VARGO
28009 N 59TH PL
SCOTTSDALE AZ 85266

DESERT RIDGE JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2010559503RC

Defendant Appellant Katherine Vargo (Blackstock) (Defendant) appeals the Desert Ridge Justice Court's determination granting Plaintiff judgment on the pleadings. Defendant contends the trial court erred. For the reasons stated below, the court affirms the trial court's judgment about Defendant but reverses the judgment about her co-Defendant Ronald Blackstock because there is no evidence he was properly served.

I. FACTUAL BACKGROUND.

Plaintiff filed a civil action against Defendant—and John Doe Blackstock (former husband)—to collect a debt based on an auto financing contract.¹ Plaintiff alleged Defendant owed the principal amount of \$9,881.80. Plaintiff did not claim any prejudgment interest but requested interest on the principal balance at the rate of 18.45% as well as reasonable attorney's fees and costs.²

Defendant was personally served on December 27, 2010, and filed (1) an Answer and (2) a Counterclaim. In her Answer—filed on December 30, 2010,—Defendant admitted:

That the creditors extended credit and provided auto financing to the Defendant(s): Capitol One Auto Finance. [Sic.]

¹ Complaint, Contract, filed on December 2, 2010.

² Plaintiff's requests about interest are contradictory.

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Defendant asserted Plaintiff was not entitled to relief and alleged:

That Plaintiff did falsely state that multiple attempts had been made to collect the debt, when no contact has been made in greater than 2 years. The Original Creditor did willfully violate multiple aspects of the Fair Debt Collections Act in July, August and September of 2008, including an on site visit to the defendant's employer. That the Plaintiff refuses to acknowledge the debt in marital community property and has not attempted to collect from Ronald Blackstock. That the Plaintiff refused to negotiate a resolution with the defendant when contacted on 12/27/10. [Sic.]

In her Counterclaim—also filed on December 30, 2010, Defendant requested \$1,000.00 and alleged:

The Plaintiff had committed multiple violations of the Fair Debt Collection Practices Act, including: 15 USC 1692b, parts 2, 3 and 5; 15 USC 1692c part 3 and 15 USC 1692d part 5. Verbal abuse and threats were also used by a "Caseworker DelGon" between July and August of 2008. A Recovery Company on behalf of the Plaintiff showed up at the defendant's place of employment 1 month after the vehicle had been voluntarily surrendered and disclosed to a co-worker the nature of the visit and that they were there on behalf of Capital One. For the court fees and humiliation suffered, restitution is requested as allowed by law.

Defendant did not verify either pleading.

Plaintiff filed a Motion for Judgment on the Pleadings on March 3, 2011. Plaintiff included a mailing certificate on the Motion for Judgment on the Pleadings indicating the motion was mailed to Defendant on February 28, 2011. On March 8, 2011, the parties engaged in mediation. According to the court docket, the mediation took one minute.³ On March 23, 2011, the trial court entered judgment for Plaintiff and awarded Plaintiff the principal amount of \$9,881.80, plus accrued interest of 0.00 % at the rate of 18.45 %; attorney's fees of \$800.00; and court costs of \$143.00

Defendant filed a timely appeal on April 20, 2011. In her appeal, Defendant alleged (1) Plaintiff failed to provide evidence or make disclosures; (2) Plaintiff failed to serve Ronald Blackstock, Defendant's former spouse; (3) Plaintiff failed to provide Defendant with "disclosures . . . verifying that Capital One is indeed the actual Plaintiff"; (4) Plaintiff violated the mandates for A.R.C.P. Rules 60 (c) (1), (2), (3); and (5); and Plaintiff's counsel acted in bad faith. There is no court transcript or CD. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12-124(A).

³ This Court has no knowledge about the amount of time actually spent mediating the parties' claims. The only time is that listed in the trial court docket.

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II. ISSUES:

A. Did Defendant Properly Present Her Issues On Appeal.

The Defendant submitted a brief that cites no relevant authority, provides no references to the record, and does not clearly state any legal issues. Consequently Defendant fails to comply with Rule 8 (a) (3), Super. Ct. R. App. P.-Civil, which states:

Memoranda shall include a short statement of the facts with reference to the record, a concise argument setting forth the legal issues presented with citation of authority, and a conclusion stating the precise remedy sought on appeal.

Defendant mentions several issues in her appeal but Defendant must do more than merely mention these issues. She must present arguments supported by authority that set forth her position on the issues raised. Defendant failed to do this. *See Adams v. Valley National Bank*, 139 Ariz. 340, 343, 678 P.2d 525, 528 (App. 1984) (Court is not required to assume the duties of an advocate and search the record to find facts substantiating a party's claim).

B. Did the Trial Court Err in Granting Plaintiff's Motion for Judgment on the Pleadings.

Defendant misunderstands the procedural posture of this case. Plaintiff requested—and was granted—judgment on the pleadings pursuant to A.R.C.P. Rule 12 (c). In making this request, Plaintiff asserted it raised a colorable claim and Defendant did not raise any material issue of fact or law in her Answer. Here, Plaintiff asserted Defendant owed money. Defendant admitted to the debt in her Answer. A.R.C.P. Rule 12 (c) provides a party may move for judgment on the pleadings after the pleadings are closed. If additional matters are raised by the pleadings, the motion “shall” be treated as a motion for summary judgment. In a motion for judgment on the pleadings, the court must take into consideration the allegations of both the Complaint and Answer. In this case, Plaintiff asserted Defendant owed it a debt. Defendant agreed she owed the debt in her Answer where she stated:

I admit the following portion(s) of plaintiff's complaint: That the creditors extended credit and provided auto financing to the Defendant(s): Capital One Auto Finance.

Defendant then asserted Plaintiff was not entitled to judgment because (1) no contact was made for more than 2 years; (2) The Original Creditor violated the Fair Debt Collections Act in July, August, and September of 2008; (3) Defendant failed to try to collect from Ronald Blackstock; (4) Plaintiff refused to negotiate a settlement; and (5) Plaintiff refused to “acknowledge the debt in marital community property” [sic]. Defendant's Answer was not verified.

A party is entitled to judgment on the pleadings if it demonstrates it is clearly entitled to judgment based on the information in the Complaint and any other initial pleading. In reviewing the judgment, the court treats the allegation of the complaint as true. *Giles v. Hill Lewis Marce*, 195 Ariz. 358, 359, 986 P.2d 143, 144 (Ct. App. 1999). The motion “tests the sufficiency of the

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complaint.” *Shannon v. Butler Homes, Inc.* 102 Ariz. 312, 314, 428 P.2d 990, 992 (1967). In the present case, Plaintiff alleged it extended credit to the Defendant(s) and they failed, refused, or neglected to pay. Defendant admitted the debt was incurred and did not deny the debt was owed. Defendant did not assert she paid the debt. Payment is an affirmative defense. A.R.C.P. Rule 8 (c) requires a party to set forth its affirmative defenses. A.R.C.P. Rule 8 (d) states that a claim which is not denied is deemed to be admitted. In *Hughes Aircraft Co. v. Industrial Commission*, 125 Ariz. 1, 4, 606 P.2d 819, 822 (Ct. App. 1979) the Court held:”Failure to plead such affirmative defenses results in waiver of the defense.” Because Defendant (1) admitted to the debt and (2) did not contradict Plaintiff’s assertion that Defendant owed this debt, Plaintiff is entitled to judgment.

Furthermore, Defendant failed to oppose Plaintiff’s Motion for Judgment on the Pleadings.⁴ Plaintiff filed its motion on March 3, 2011. Defendant’s time to respond ended prior to March 23, 2010, when the trial court granted Plaintiff’s motion.⁵ As Defendant failed to oppose Plaintiff’s request, and as Defendant already admitted it owed Plaintiff the debt, the trial court did not err in granting Plaintiff’s Motion for Judgment on the Pleadings.

Defendant raised several issues in her Counterclaim. In her Appellate Memorandum, Defendant alleged the trial court gave no consideration to her counterclaim. While remaining unresolved issues require the trial court to treat the motion for judgment on the pleadings as if it were a motion for summary judgment, Defendant has not shown how or why she believes the trial court erred or provided proof about any remaining unresolved issues. Nor did Defendant ever respond to Plaintiff’s Motion for Judgment on the Pleadings. Because Defendant (1) failed to respond to Plaintiff’s motion and (2) then failed to apprise the trial court of any issue(s) she had about the trial court granting the Motion for Judgment on the Pleadings, Defendant cannot now successfully raise those issues with this Court. While this may be a harsh result, a litigant proceeds at his or her peril when the litigant ignores procedural rules.

This means that “an adverse party who fails to respond does so at his peril because uncontroverted evidence favorable to the movant and from which only one inference can be drawn, will be presumed to be true.

Tilley v. Delci, 220 Ariz. 233, 237, 204 P.3d 1082, 1086 ¶ 11 (Ct. App. 2009). See also *Strategic Development and Const. Inc. v. 7th & Roosevelt*, 224 Ariz. 60, 66, 226 P.3d 1046, 1052 ¶ 23 (Ct. App. 2010) holding “the non-moving party may not simply fail to respond.” When the movant’s

⁴ This Court notes Defendant alleged in her Appellant Memoranda, p. 2, that “The Attorney for the Plaintiff (unknown office staff) at no time disclosed this filing for judgment [sic] to the Defendant, the Court or the Attorney of Record” The Motion for Judgment on the Pleadings has a mailing certificate indicating it was mailed to Defendant. This Court also notes Defendant never filed a Motion to Set Aside the Judgment, never filed a Motion for Reconsideration, and never challenged the judgment with the trial court.

⁵ Even if allowing for mailing after the date indicated on the mailing certificate, Defendant’s last day to submit a response would have been March 22, 2011.

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(Plaintiff's) allegations are taken as true—which the trial court must do on Plaintiff's Motion for Judgment on the Pleadings—and when the Defendant admits to the allegations, the trial court is justified in granting a Motion for Judgment on the Pleadings. Therefore, the trial court did not err in granting Plaintiff's unopposed motion.

C. Did Plaintiff Properly Serve Ronald Blackstock.

Although Plaintiff asserts it could have taken a default judgment against Ronald Blackstock,⁶ this Court finds no support for this contention as (1) Plaintiff failed to properly serve Ronald Blackstock; and (2) because Plaintiff failed to serve Ronald Blackstock, the trial court could not acquire personal jurisdiction over him. Whether the trial court had personal jurisdiction is subject to *de novo* review. *Bohreer v. Erie Ins. Exch.*, 216 Ariz. 208, 211, 165 P.3d 186, 189 ¶ 7 (Ct. App. 2007).

In this case, Plaintiff tried to serve Ronald Blackstock by serving Defendant. The Affidavit of Process for service on Mr. Ronald Blackstock indicates he was served by leaving the documents with Defendant. Defendant stated—in her Appellant Memorandum—the parties divorced in 2008.⁷ Plaintiff failed to show Ronald Blackstock lived with Defendant on December 30, 2011,—the date of the alleged service—and Plaintiff made no showing that Defendant was Mr. Blackstock's authorized agent for the purpose of accepting service. Plaintiff never demonstrated Mr. Blackstock was personally served. A.R.C.P. Rule 4.1 requires service of process either by (1) delivering a copy to the individual personally or (2) leaving copies of the documents at the “individual's dwelling house or usual place of abode” with some person of suitable age and discretion who lives at the home or (3) delivering the documents to an agent. Here, Plaintiff's process server did not meet any of these criteria.

The rules about service require a plaintiff to serve documents at the defendant's “dwelling place” or “usual place of abode” if personal service cannot be done. The Arizona Court of Appeals considered the definition of “usual place of abode” in *Melton v. Superior Court In and For Gila County*, 154 Ariz. 40, 42, 739 P.2d 1357, 1359 (Ct. App. 1987) and held:

The term “place of abode” is generally construed to mean the place where the person is living when service is attempted.

Here, there is no evidence demonstrating these divorced parties continued to reside together after the dissolution.

The underlying purpose for service of process is to give a party actual notice of the proceedings. *Scott v. G.A.C. Fin. Corp.* 107 Ariz. 304, 305, 486 P.2d 786, 787 (1971).

It has long been recognized, as a principle of law, that the purpose of process is to give the party to whom it is addressed actual notice of the proceedings against

⁶ See Plaintiff's Response to Defendant's Notice of Appeal, p. 3, ll. 7–8.

⁷ Appellant Memorandum, p. 2, ll. 1-2.

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him, and that he is answerable to the claim of the plaintiff. It is this notice which gives the Court jurisdiction to proceed.

In this case Plaintiff has not demonstrated it served notice of the proceedings to Ronald Blackstock, and, consequently, he was deprived of due process and the opportunity to have notice and be heard. Proper service of process is essential for a court to exercise personal jurisdiction over a defendant. *Koven v. Saberdyne Sys., Inc.*, 128 Ariz. 318, 321, 625 P.2d 907 (Ct. App. 1980). Because Mr. Blackstock was not properly served, the trial court could not exercise personal jurisdiction over him. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950) the U.S. Supreme Court addressed the due process issue and held the “right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.” In this case, Ronald Blackstock was deprived of that right as he did not receive notice of the action. Because there was no proper service as to Mr. Ronald Blackstock, the trial court could not acquire jurisdiction over him. Consequently, any order as to him is void and any attempt at default or judgment against him fails.

D. Did Plaintiff Fail to Make Timely Disclosures.

Although Defendant mentioned this issue in her appellate memorandum, Defendant did not develop it or provide this Court with any factual or legal basis. Consequently, this Court has no basis for determining any discovery issues. Therefore, this Court will not address—but will deny—this claim.

E. Did Plaintiff Violate the Mandates of Rules 60 (c) (1), (2), (3), and (5).

Rule 60 (c) deals with a court relieving a party from a final judgment based on a number of grounds including mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, or prior satisfaction of a judgment. As with the preceding sections, Defendant did not address these issues with the trial court and did not develop these issues for this Court. Because this Court has no legal or factual basis for resolving this issue, this Court will not address—but will deny—this claim.

E. Did Plaintiff's Counsel Act in Bad Faith

Defendant also alleges Plaintiff's counsel acted in bad faith but does not provide any legal authority or factual basis for this allegation.⁸ Defendant appears to assert her bad faith claim because she believes Plaintiff's counsel did not apprise the mediator Plaintiff filed for Judgment on the Pleadings. Defendant has not provided this Court with any authority indicating

⁸ Defendant refers to a case between a Scott Mills and a Pressler in the same paragraph as her claim against Plaintiff's counsel but fails to provide this Court with a citation to the case or any explanation as to how this case is relevant to the current lawsuit. This Court does not know if the case has (1) any precedential value or (2) applies to the situation before this Court. Because Defendant failed to properly cite to the case, this Court will ignore Defendant's reference to it.

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Plaintiff's counsel had an obligation to so advise the mediator. Defendant next maintains Plaintiff's counsel incorrectly advised the court it "resides in Tucson." The Motion for Telephonic Appearance states "Plaintiff's counsel offices in Tucson, Arizona, Pima County. Plaintiff resides in Tucson Arizona." Since the motion requests a telephonic appearance in Maricopa County and since the mailing address for the Burton Lippman Law Group, P.C. indicates a Tucson address, it is reasonable to believe Plaintiff's counsel referred to themselves when requesting the telephonic appearance.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Desert Ridge Justice Court erred in granting judgment against Ronald Blackstock but did not err in granting Plaintiff a Judgment on the Pleadings as against Defendant.

IT IS THEREFORE ORDERED affirming in part and reversing in part the judgment of the Desert Ridge Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Desert Ridge 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

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