

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000414-001 DT

10/30/2012

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
J. Eaton
Deputy

THE POINTE SOUTH MOUNTAIN
RESIDENTIAL ASSOCIATION

CHAD A HESTER

v.

JOSEPH WEIRATHER (001)

BEN J HIMMELSTEIN

REMAND DESK-LCA-CCC
SOUTH MOUNTAIN JUSTICE COURT

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2011-032296 RC.

Defendant Appellant Joseph Weirather (Defendant) appeals the South Mountain Justice Court's determination granting Plaintiff a default judgment. Defendant contends the trial court erred. For the reasons stated below, the court reverses the trial court's judgment.

I. FACTUAL BACKGROUND.

On February 16, 2011, Plaintiff filed a breach of contract complaint against Defendant alleging he breached his contractual obligation to the Association by failing to pay (1) his dues and fine assessments; (2) late charges; (3) interest; and (4) related costs of collection. Plaintiff claimed (1) \$6,897.73 in past due amounts; (2) future maintenance assessments at the rate of \$110.00 per month; (3) interest at the rate of 10%; plus (4) attorney fees.

Plaintiff served Defendant by publication after unsuccessfully attempting to serve him at his prior address on South 56th Street, Phoenix, Arizona. On appeal, Defendant asserted he left the residence in June, 2010, and moved from Phoenix to Mesa. Defendant also claimed (1) he changed his address to his Mesa address at the time of his move; (2) the Arizona Department of Transportation, Motor Vehicle Division records, indicated his Mesa address; and (3) his lender foreclosed upon the 56th Street Phoenix residence on June 18, 2010—approximately six months before he was served by publication. Defendant claimed he never received notice of the lawsuit and never received any documents pertaining to the lawsuit.

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On October 27, 2011, Plaintiff received a default judgment against Defendant for delinquent HOA fees and assessments as well as for attorney fees that included charges for months after the home had been foreclosed. Defendant asserted (1) the amount claimed was in error because much of the debt had been discharged in his prior bankruptcy; and (2) the judgment should be set aside because he was not properly served. The trial court did not set the default judgment aside.

In contrast, Plaintiff asserted it met its due diligence standard before serving Defendant by publication and referred to a hearing the trial court held on July 28, 2011. Plaintiff did not provide this Court with either an audio CD or a written transcript for this hearing. Plaintiff also asserted Defendant was precluded from raising claims about Defendant's bankruptcy discharge as Plaintiff was not listed as a creditor on Defendant's bankruptcy petition and Plaintiff therefore had no notice of the bankruptcy discharge. To support Plaintiff's position, Plaintiff included a Return of Non-Service prepared by Process Server Scott Decker. The Return of Non-Service indicated the following:

I, Scott Decker, do hereby affirm that on the 28th day of February, 2011 [sic] at 5:00 pm, I:

NON-SERVED the Summons and Complaint because all reasonable inquiries suggest the defendant moved to an undetermined address.

Additional information pertaining to this Service:

2/18/2011 5:35 pm No answer.

2/23/2011 4:00 pm No answer. Complex manager says defendant does not currently reside within complex. He did reside there at one time, but moved leaving no forwarding address, September, 2007.

The court file does not reflect that Plaintiff filed a due diligence statement before proceeding to serve Defendant by publication although he did file a Notice of Service By Publication on May 13, 2011. According to Plaintiff, the trial court held a hearing on July 28, 2011, where due diligence was discussed. The trial court record does not reflect that an audio recording of this hearing was made and/or retained. Instead, the trial court record indicates that the only records are the pleadings filed in the case and the July 28, 2011, hearing which lasted one minute.

After the appellate memoranda were filed, Defendant filed an Appellant's Motion To Supplement—Or, Alternatively—Reply Memorandum informing the Court about the Bankruptcy Court's Order precluding Plaintiff from seeking to collect or maintain a judgment that included pre-petition portions of debt. Thereafter, Plaintiff filed a Notice of Partial Satisfaction and/or Amendment of Default Judgment reducing the principal amount of the judgment by \$2,588.29 to account for the pre-petition debt that was discharged in Defendant's bankruptcy proceeding.

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Defendant filed a timely appeal. Plaintiff filed a responsive 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 In Refusing To Set The Default Aside.*

Standard of Review

Defendant appeals from the trial court’s denial of his motion to set aside the default judgment Plaintiff obtained. This Court first notes that in reviewing a trial court’s ruling on a motion to set aside a default judgment, this Court must view the facts in the light most favorable to sustaining the trial court’s ruling. *Blair v. Burgener*, 226 Ariz. 213, 215 ¶ 2, 245 P.3d 898, 900, ¶ 2 (Ct. App. 2010). Appellate courts review a trial court’s denial of a motion to set aside a default judgment for an abuse of discretion. *Id.* 226 Ariz. at 216, ¶ 7, 245 P.3d at 901, ¶ 7. However, “a trial court, ‘must vacate ... a [void] judgment [,] ... [and] a party seeking relief from a void judgment need not show that their [sic] failure to file a timely answer was excusable, that they acted promptly..., or that they had a meritorious defense.’ ” *Id.*

Service By Publication

Defendant raised procedural issues about his ability to have notice and an opportunity to be heard before the trial court granted Plaintiff’s Default Judgment. As stated earlier, Defendant was served by publication after Plaintiff made two attempts to serve him at his prior address. Plaintiff provided no Affidavit of Due Diligence and no explanation as to what investigation—if any—Plaintiff undertook to locate Defendant’s current address. According to Defendant, at the time he was served, he had been out of the S. 56th Street home for over six months and it had been over six months since the home was foreclosed. Defendant asserted his new address was available through the Motor Vehicle Department, the utility company, and voter registration. Defendant provided records from these places indicating his address. If Plaintiff—or Plaintiff’s legal representatives—looked for a new address, they failed to attest to this search. Therefore, Plaintiff failed to comply with the mandates of A.R.C.P., Rule 4.1 (m) which states in relevant part:

The party or officer making service shall file an affidavit showing the manner and dates of the publication and the mailing, and the circumstances warranting the utilization of the procedure authorized by this subpart, which shall be prima facie evidence of compliance herewith.

In *Sprang v. Petersen Lumber, Inc.*, 165 Ariz. 257, 798 P.2d 395 (Ct. App. 1990) the Arizona Court of Appeals discussed service of process by publication following two attempts at personal service. In *Sprang v. Petersen Lumber, Inc., id.*, a copy of the summons and complaint was (1) mailed to a post office box as listed as the address on Mr. Sprang’s tax records and (2) attempted to be served at Mr. Sprang’s home which was found to be vacant. Thereafter, Mr. Sprang was served by publication. The Plaintiff filed an affidavit of service by publication and indicated (1) Mr. Sprang’s residence was unknown; and (2) Plaintiff exercised due diligence in trying to

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ascertain Mr. Sprang's whereabouts. The Court of Appeals found this affidavit was insufficient. *Id.*, 165 Ariz. at 261, 798 P.2d at 399. The Court of Appeals stated:

Before resorting to service by publication, a party must file an affidavit setting forth facts indicating it made a due diligent effort to locate an opposing party to effect personal service. *Omega II Investment Co. v. McLeod*, 153 Ariz. 341, 342, 736 P.2d 824, 825 (App. 1987); Rule 4(e) (3),¹ Arizona Rules of Civil Procedure. A "due diligent effort" requires such pointed measures as an examination of telephone company records, utility company records, and records maintained by the county treasurer, county recorder, or similar record keepers.

Id., 165 Ariz. at 261, 798 P.2d at 399. The Court of Appeals continued and held the record on appeal indicated the postal service records, the utility company records, and the records at the Navaho County Assessor's office would have revealed information about Mr. Sprang's current address.

The Plaintiff in *Sprang, id.*, did more due diligence than was done by the Plaintiff in the case before this Court. Here, the Plaintiff only sent a process server out twice. Plaintiff failed to file an Affidavit of Due Diligence expressing that Plaintiff even tried to use due diligence and locate Defendant. As with *Sprang, id.*, there was sufficient information available from which Plaintiff—with the exercise of due diligence—could have located Defendant's current address.

The Court of Appeals commented on the need for "heightened" due diligence when serving by publication in *Blair v. Bergener, id.*, 226 Ariz. at 218, ¶ 14, 245 P.3d at 903 ¶ 14. In addition, in *Brennan v. Western Sav. And Loan Ass'n*, 22 Ariz. App. 293, 296 526 P.2d 1248, 1251 (Ct. App. 1974) the Court of Appeals held "Due diligence in trying to serve the summons personally is required before jurisdiction through publication will be granted." The Court of Appeals continued and ruled: "It is not enough to state that residence is unknown without setting forth the efforts made to locate the party." *Id.* Plaintiff fell short of this heightened due diligence requirement. Plaintiff failed to file his affidavit of due diligence and this Court doubts Plaintiff presented much in the way of due diligence testimony in the unrecorded July 28, 2011, hearing that lasted for only one minute.

Because Defendant was not properly served, he (1) did not have an opportunity to challenge Plaintiff's claims and (2) was deprived of due process. Due process requires each side to have a meaningful opportunity to be heard. *Huck v. Haralambie*, 122 Ariz. 63, 65, 593 P.2d 286, 288 (1979).

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

¹ This is a predecessor to rule 4.1 (m).

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Pioneer Federal Sav. Bank v. Driver, 166 Ariz. 585, 588, 804 P.2d 118, 121 (Ct. App. 1990), quoting from *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950).

The Arizona Court of Appeals held in *Sprang, id.*, 165 Ariz. at 262, 798 P.2d at 400, (1) a finding of due diligence prior to service by publication is a jurisdictional requirement; and (2) if an affidavit failed to indicate due diligence was exercised to locate the defendant, any default judgment is void on its face for lack of jurisdiction. Here, Plaintiff failed to demonstrate due diligence before serving by publication. Because this is a jurisdictional requirement, the default judgment is void. Therefore, the trial court should have set it aside.

B. Is Defendant Entitled To His Attorneys' Fees On Appeal.

Defendant requested attorneys' fees for his appeal. This Court finds an award of attorneys' fees is warranted. Generally, "[t]he trial court has broad discretion in determining whether to award attorneys' fees under A.R.S. section 12-341.01. *State Farm Mut. Auto Ins. Co. v. Arrington*, 192 Ariz. 255, 963 P.2d 334 ¶27 (Ct. App. 1998). Here, Defendant prevailed on his appeal. In analyzing a request for attorneys' fees, this Court notes the purpose behind the attorneys' fees statute is to mitigate the burden for the expense of litigation. *Fousel v. Ted Walker-Mobile Homes, Inc.* 124 Ariz. 126, 602 P.2d 507 (Ct. App. 1979); *Associated Indem. Corp., v. Warner*, 143 Ariz. 567, 694 P.2d 1181 (1985). In the current case, this Court finds it appropriate that Defendant's burden be mitigated. Defendant was not properly served and was deprived of his opportunity to contest Plaintiff's actions. Plaintiff asserted claims that were barred by Defendant's earlier bankruptcy and—when informed of the bankruptcy discharge—steadfastly refused to modify its judgment until the Bankruptcy Court ordered it to do so. In addition, Defendant offered Plaintiff the opportunity to negotiate any alleged debt and notified Plaintiff about the problems with Plaintiff's lack of due diligence. Plaintiff refused to budge. Plaintiff could have avoided this appeal but chose not to. Plaintiff should be responsible for the fees it caused Defendant to incur.

The Arizona Supreme Court established factors to consider before awarding attorney fees. *Associated Indemnity Corporation, id.*, 143 Ariz. at p. 570, 694 P.2d at 1184. These factors included (1) the merits of the claim presented by the unsuccessful party; (2) if the litigation could have been avoided or settled; (3) whether assessing fees against the unsuccessful party would cause extreme hardship; and (4) whether the successful party prevailed with respect to all the relief sought. The Arizona Supreme Court then held:

We also believe that the trial court should consider whether the award in any particular case would discourage other parties with tenable claims or defenses from litigating or defending legitimate contract issues for fear of incurring liability for substantial amounts of attorney's fees.

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Id., 143 Ariz. at p.570, 694 P.2d at 1184. [Citation omitted.] This Court will examine the factors established in *Associated Indemnity Corporation, id.* First, Defendant presented a meritorious claim. Second, Plaintiff, upon being informed of the problems with the original service, should or could have examined the Affidavit of Service and determined if Defendant was properly served. Because Plaintiff ignored the required due diligence affidavit in the initial case and then compounded this error by discounting Defendant's claims about improper service, the litigation could not have been avoided. Third, this Court does not know if assessing fees against Plaintiff would cause Plaintiff additional hardship. However, this Court notes Plaintiff accepted a fee award for its attorneys' fees when it believed it was the successful party. Fourth, this Court does not believe that awarding attorneys' fees to Defendant would compromise the ability of future litigants to either bring or defend a claim about improper or ineffective service. Finally, Defendant prevailed on his issue(s) with this Court as (1) this Court set aside Plaintiff's default judgment; (2) found the service by publication did not meet due process standards as there was no statement of due diligence; and (3) did not need to address Defendant's claims about pre-petition debt as any issue about pre-petition debt was moot based on the Bankruptcy Court ruling.

III. CONCLUSION.

Based on the foregoing, this Court concludes the South Mountain Justice Court erred when it failed to set aside the default judgment Plaintiff obtained. This Court also concludes Defendant is entitled to his reasonable attorneys' fees for this appeal. Defendant shall provide this Court with a China Doll statement in accordance with the mandates of the requirements of *Schweiger v. China Doll*, 138 Ariz. 183, 673 P.2d 927 (Ct. App. 1983).

IT IS THEREFORE ORDERED reversing the judgment of the South Mountain Justice Court.

IT IS FURTHER ORDERED remanding this matter to the South Mountain 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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