

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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BELLAIR TOWNHOUSES UNIT ONE ASSOCIATION,  
*Plaintiff/Appellee,*

*v.*

EMM'ET L. JOHNSON, *Defendant/Appellant.*

No. 1 CA-CV 16-0109  
FILED 7-6-2017

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Appeal from the Superior Court in Maricopa County  
No. CV2014-093080  
The Honorable David M. Talamante, Judge

**AFFIRMED**

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COUNSEL

Fowler St. Clair, PLLC, Mesa  
By Brian C. Locker  
*Counsel for Appellant*

Brown | Olcott, PLLC, Phoenix  
By Nathan Tennyson  
*Counsel for Appellee*

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**MEMORANDUM DECISION**

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge James P. Beene joined.

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**T H U M M A**, Judge:

¶1 Emm'et L. Johnson appeals from the denial of her motion for new trial, seeking to set aside a default judgment and to dismiss the complaint based on insufficient service of process. Because Johnson has shown no error, the denial of her motion for new trial is affirmed.

**FACTS AND PROCEDURAL HISTORY**

¶2 For many years, Johnson owned and lived in a Glendale townhome subject to a recorded Declaration of Covenants, Conditions and Restrictions (CC&Rs). When Johnson moved to Washington state in late 2013 or early 2014, she rented out the townhome. Claiming Johnson was more than \$4,000 in arrears on assessments imposed by the CC&Rs, in April 2014, Bellair Townhouses Unit One Association (Bellair) filed this action seeking to foreclose its assessment lien.

¶3 In June 2014, Bellair attempted to serve the complaint on Johnson at the townhome, but learned Johnson had rented out the townhome and did not live there. In July 2014, based on information obtained from a search company, Bellair unsuccessfully attempted to serve Johnson at a Phoenix address. In August 2014, after learning Johnson was forwarding her mail to a Washington state mailing address, Bellair "mailed a copy of the [s]ummons and [c]omplaint to the Washington address via certified and regular mail." In early September 2014, the United States Postal Service (USPS) returned the mail as undeliverable, indicating Johnson did not live at the Washington address and had provided the USPS no forwarding address. In October and November 2014, having been unsuccessful in its further attempts to locate Johnson, Bellair served her by publication, weekly, for four consecutive weeks in *The Record Reporter*, a newspaper published in Maricopa County. *See* Ariz. R. Civ. P. 4.2(f) (2015). Johnson did not respond.

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¶4 Bellair then filed an application for entry of default and, when Johnson did not respond, default was entered. Bellair then filed a motion for entry of default judgment, also seeking an award of attorneys' fees and costs, and various supporting affidavits and attachments. In February 2015, the court entered a default judgment in favor of Bellair for assessments, attorneys' fees and taxable costs totaling more than \$10,000. After Bellair secured a writ of special execution, and after providing prior notice for three consecutive weeks in the *Arizona Business Gazette*, in May 2015, the townhome was sold at a Sheriff's sale for \$11,603.

¶5 In November 2015, Johnson filed a motion for new trial pursuant to Ariz. R. Civ. P. 59(j) (2015),<sup>1</sup> seeking to set aside the February 2015 judgment and to dismiss the complaint based on insufficient service of process. Johnson argued Bellair failed to perform due diligence in effectuating personal service before serving by publication and failed to mail a copy of the pleadings to Johnson's last known address. After briefing, the court denied Johnson's motion, finding Bellair "exercised due diligence in effecting service as required by Rule 4.2(f)." This court has jurisdiction over Johnson's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) and -2101(A)(1).

### DISCUSSION

¶6 Johnson correctly notes the superior court has "wide latitude to set aside a judgment in cases of default with service by publication." *See* Ariz. R. Civ. P. 59(j) (2015). Accordingly, absent an error of law, this court will not reverse a ruling on a motion to set aside such a judgment. *See also United Imports & Exports, Inc. v. Superior Court of State In & For Maricopa County*, 134 Ariz. 43, 45 (1982) ("[T]he [superior] court has broad discretion to set aside judgments by default.").

¶7 Johnson argues Bellair failed to perform due diligence in attempting personal service before resorting to service by publication and failed to mail the pleadings to her "last known residence." Although discussed infrequently, Arizona law requires that, to be successful, a motion seeking to set aside a default judgment entered after service by

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<sup>1</sup> Rule 59(j) was amended and renumbered 59(g) effective January 1, 2017. For clarity, this decision cites to the Arizona Rules of Civil Procedure in place in 2015 at the time of briefing Johnson's motion before the superior court.

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publication must show a “meritorious defense” to the substantive claims made. See *Southwest Metals Co. v. Snedaker*, 59 Ariz. 374, 389 (1942); accord *Collins v. Streit*, 47 Ariz. 146, 155 (1936) (“a good defense”); *Gordon v. Gordon*, 35 Ariz. 532, 534 (1929) (“a defense to the action which has merit” or “a good defense to the action”); *Lockwood v. Lockwood*, 19 Ariz. 215, 218 (1917) (“Unless the proposed defense has merit the court will refuse to disturb the judgment.”). Johnson’s motion for new trial, however, made no such showing and did not claim she had a meritorious defense to Bellair’s claims. For this reason, Johnson has not shown the superior court erred in denying her motion.

¶8 Given Bellair’s service efforts before resorting to service by publication, Johnson also has not shown a failure to perform due diligence in effectuating personal service. Although Bellair’s actions did not mandate a finding of due diligence, collectively, they support such a finding by the superior court. See *Brennan v. Western Sav. & Loan Ass’n*, 22 Ariz. App. 293, 296-97 (1974); accord *HTS, Inc. v. Boley*, 954 F. Supp. 2d 927, 938-39 (D. Ariz. 2013).

¶9 Finally, citing Rule 4.2(f) (2015), Johnson argues Bellair was required to, but failed to, mail a copy of the pleadings to her “last known address.” This argument fails for two reasons. First, Bellair mailed the pleadings to Johnson’s “last known address” in Washington before serving her by publication. As noted above, however, the USPS returned the mail, indicating Johnson did not live at the Washington state mailing address and had not provided the USPS a forwarding address. Second, service by publication requires mailing the filings to the person to be served only “[w]hen the residence of the person to be served is known.” Ariz. R. Civ. P. 4.2(f)(3) (2015). When Bellair resorted to service by publication, however, it did not know Johnson’s residence even though it had made substantial efforts to locate that address. Accordingly, the superior court did not err in denying Johnson’s motion for new trial.

¶10 Both Johnson and Bellair seek attorneys’ fees pursuant to A.R.S. § 12-341.01 and taxable costs on appeal. Because Johnson is not the successful party, her request is denied. Bellair is the successful party on appeal and, as such, is awarded its taxable costs and reasonable attorneys’ fees contingent upon its compliance with Arizona Rule of Civil Appellate Procedure 21.

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**CONCLUSION**

¶11 The superior court's denial of Johnson's motion for new trial is affirmed.



AMY M. WOOD • Clerk of the Court  
FILED: AA