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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FEDERAL HOME LOAN MORTGAGE CORPORATION, Plaintiff/Appellee, v. DAVID TIETJEN, Defendant/Appellant.	2 CA-CV 2010-0212 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CV201003551

Honorable Robert Carter Olson, Judge
Honorable Bradley M. Soos, Judge Pro Tempore

VACATED

David Tietjen

San Tan Valley
In Propria Persona

Tiffany & Bosco, P.A.
By Leonard J. McDonald, Jr. and
William M. Fischbach III

Phoenix
Attorneys for Plaintiff/Appellee

K E L L Y, Judge.

¶1 David Tietjen appeals the trial court's October 22, 2010, order granting judgment against him and in favor of appellee, Federal Home Loan Mortgage Corporation ("FHLM"), on FHLM's forcible entry and detainer action. Because we find the court lacked personal jurisdiction over David and his wife Camille, we vacate its order.

Background

¶2 In 1998, the Tietjens purchased real property in Queen Creek. In 2006, they obtained a loan from First Magnus Financial Corporation ("First Magnus") secured by a deed of trust on the property. On January 6, 2009, after Wells Fargo Bank, N.A. ("Wells Fargo") was assigned "all beneficial interest" in the deed, it named Michael A. Bosco, Jr. as trustee. FHLM purchased the property at a trustee's sale in July 2010.

¶3 On August 11, 2010, Bosco, as attorney for FHLM, mailed the Tietjens notice demanding they relinquish possession of the property. The following day, a process server hand delivered a copy of the notice to Camille. On August 31, 2010, FHLM filed a complaint in Pinal County Superior Court alleging the Tietjens continued to maintain "wrongful possession of the property."

¶4 The trial court held a hearing on FHLM's forcible entry and detainer action on September 10, 2010. David specially appeared with counsel and asked the court to dismiss the action for lack of personal jurisdiction.[1] After the court denied the motion, David's counsel filed a motion to dismiss on nonjurisdictional grounds pursuant to the

[1]Camille was not present for this hearing.

Rules of Procedure for Eviction Actions ("RPEA") and the trial court reset the hearing to give FHLM time to respond to the motion.

¶5 Following a hearing on October 22, 2010, the trial court entered an unsigned minute entry denying the motion to dismiss and granting judgment in favor of FHLM. In its judgment the court ordered the Tietjens to immediately vacate the property, and granted FHLM its attorney fees. David Tietjen filed a notice of appeal in propria persona on October 27, 2010. Because the trial court's October 22 order was unsigned, we revested jurisdiction for the purpose of obtaining a signed order, and a signed judgment was entered February 9, 2011. We have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 12-2101.

Discussion

¶6 "Proper, effective service on a defendant is a prerequisite to a court's exercising personal jurisdiction over the defendant." *Barlage v. Valentine*, 210 Ariz. 270, ¶ 4, 110 P.3d 371, 373 (App. 2005). David maintains the trial court lacked personal jurisdiction and therefore erred in entering judgment against him. Whether a trial court has jurisdiction over a person is established by "the fact of service and the resulting notice." *Hirsch v. Nat'l Van Lines, Inc*., 136 Ariz. 304, 308, 666 P.2d 49, 53 (1983). If "service remains incomplete, or is defective, the court never acquires jurisdiction." *Postal Instant Press, Inc. v. Corral Restaurants, Inc.*, 186 Ariz. 535, 537, 925 P.2d 260, 262 (1996). We review de novo whether a court has personal jurisdiction over a party. *Bohreer v. Erie Ins. Exch.*, 216 Ariz. 208, ¶ 7, 165 P.3d 186, 189 (App. 2007).

¶7 Rule 5(f), RPEA, provides "[s]ervice of the summons and complaint shall be accomplished . . . as provided by Rule 4.1 or 4.2 of the Arizona Rules of Civil Procedure." Rule 4.1(d), Ariz. R. Civ. P., requires service "by delivering a copy of the summons and of the pleading to that individual personally or by leaving copies thereof at that individual's dwelling house . . . with some person of suitable age and discretion." Alternative forms of service, such as mailing and posting, may be acceptable in certain circumstances. *See* Ariz. R. Civ. P. 4.1(m); *Ariz. Real Estate Inv., Inc. v. Schrader*, 226 Ariz. 128, ¶ 8, 244 P.3d 565, 567 (App. 2010). Here, it is uncontested that the summons and pleadings were not delivered to either of the Tietjens personally, or to any "person of suitable age and discretion" in their home. *See* Ariz. R. Civ. P. 4.1(d). Rather, the complaint and summons were mailed and posted at the doorway of the home.

¶8 Rule 4.1(m) provides for alternative forms of service "as the court, upon motion and without notice, may direct." Here, FHLM did not obtain prior approval from the trial court authorizing alternative service. Instead, FHLM's counsel asked the court to authorize the alternative service already performed. Although recognizing "[t]here was no prior authorization" for alternative service as required, the court found that with "[David] being present, he obviously ha[d] notice of [the] proceeding," and denied the Tietjens' motion to dismiss for lack of jurisdiction.

¶9 "[W]here a jurisdictional notice is required to be given in a certain manner, any means other than that prescribed is ineffective." *Smith v. Smith*, 117 Ariz. 249, 252, 571 P.2d 1045, 1048 (App. 1977). Actual notice in such circumstances is ineffective to

vest jurisdiction in the court. *See Postal Instant Press*, 186 Ariz. at 537, 925 P.2d at 262. FHLM concedes "the Superior Court's finding that [the Tietjens] had waived any objection to service just by appearing was probably erroneous." It argues, nonetheless, "the Superior Court correctly denied . . . [the o]ral [motion to dismiss] because [David] waived any objection to personal service by filing a permissive counterclaim."

¶10 FHLM is correct that a defendant may waive an insufficiency of process defense by seeking affirmative relief from the court, such as by filing a voluntary counter-claim or cross-claim. *See Carlton v. Emhardt*, 138 Ariz. 353, 355-56, 674 P.2d 907, 909-10 (App. 1983); *see also Montano v. Scottsdale Baptist Hosp., Inc.*, 119 Ariz. 448, 452, 581 P.2d 682, 686 (1978) ("general appearance by a party who has not been properly served has exactly the same effect as a proper, timely and valid service of process"). Here, however, David and his counsel appeared specially for the sole purpose of contesting the court's jurisdiction. *See Ariz. Real Estate Inv.*, 226 Ariz. 128, ¶ 7, 244 P.3d at 566-67. Under these circumstances, we cannot say David waived the jurisdictional defense. *Cf. Kline v. Kline*, 221 Ariz. 564, ¶ 18, 212 P.3d 902, 907 (App. 2009) ("A party has made a general appearance when he has taken any action, *other than objecting to personal jurisdiction*, that recognizes the case is pending in court.") (emphasis added).

¶11 Personal jurisdiction as a defense is waived if the defendant "allow[s] judgment to be taken against him on the merits without obtaining a ruling on the jurisdictional defense." *Nat'l Homes Corp. v. Totem Mobile Home Sales, Inc.*, 140 Ariz.

434, 438, 682 P.2d 439, 443 (App. 1984). Here, it was not until after the trial court ruled that "[d]efendant being present, he obviously has notice of today's proceeding, he's here represented by Counsel, so the motion to dismiss is denied," that David took any action in the court—filing a new motion to dismiss under RPEA and, months later, an answer and counterclaim. The subsequent pursuit of an action in the trial court after the court rules on a party's jurisdictional defense does not constitute waiver. *Ariz. Real Estate Inv.*, 226 Ariz. 128, ¶ 7, 244 P.3d at 566-67; *Nat'l Homes Corp.*, 140 Ariz. at 437, 682 P.2d at 442; *see also Teyseer Cement Co. v. Halla Mar. Corp.*, 794 F.2d 472, 478 (9th Cir. 1986) (party "objected to in personam jurisdiction as effectively as it could have through a motion to dismiss . . . , and . . . its subsequent assertion of a counterclaim did not result in a waiver of that objection").

¶12 Because service of process here did not comply with the statute and was not waived, the trial court lacked personal jurisdiction over the Tietjens, and its order therefore is void. *See Barlage*, 210 Ariz. 270, ¶ 4, 110 P.3d at 373 (judgment void "'if the trial court did not have jurisdiction because of a lack of proper service'"), *quoting Kadota v. Hosogai*, 125 Ariz. 131, 134, 608 P.2d 68, 71 (App. 1980).[2]

[2]Because the trial court's judgment against the Tietjens is void, we do not address David's additional arguments. *See Ariz. Real Estate Inv.*, 226 Ariz. 128, n.2, 244 P.3d at 568 n.2.

Disposition

¶13 We vacate the trial court's order and its award of attorney fees to FHLM.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge