IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

SMITH & WESSON CORP. and SMITH & WESSON HOLDING CORP.,
Plaintiffs/Appellees,

v.

THE WUSTER (d/b/a AIRSPLAT.COM), *Defendant/Appellant*.

No. 1 CA-CV 16-0378
FILED 11-21-2017

Appeal from the Superior Court in Maricopa County
No. CV2015-012668
The Honorable J. Richard Gama, Judge, *Retired*
The Honorable Michael L. Barth, Judge *Pro Tempore*

VACATED; DISMISSED WITHOUT PREJUDICE

COUNSEL

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OPINION

Chief Judge Samuel A. Thumma delivered the opinion of the Court, in which Presiding Judge Kenton D. Jones and Judge Jon W. Thompson joined.

T H U M M A, Judge:

¶1 Defendant The Wuster d/b/a Airsplat.com appeals from a default judgment entered in favor of plaintiffs Smith & Wesson Corp. and Smith & Wesson Holding Corporation (collectively S&W). Airsplat argues the superior court abused its discretion in denying its motion for enlargement of time to file a motion to dismiss and erred in exercising personal jurisdiction over Airsplat. As discussed below, Airsplat has shown no abuse of discretion in denying its motion for enlargement of time. On the record presented, however, the court erred in concluding that the well-pleaded factual allegations of the complaint, deemed admitted given default entered against Airsplat, authorized the exercise of personal jurisdiction over Airsplat. Accordingly, default judgment is vacated and this action is dismissed without prejudice for lack of personal jurisdiction.

FACTS AND PROCEDURAL HISTORY

¶2 In November 2015, S&W filed this case alleging Airsplat breached a written agreement resolving patent litigation in the United States District Court for the District of Arizona (the Settlement Agreement) by failing to pay $40,000. Airsplat is a California business with its principal place of business in California and S&W served Airsplat in California.

¶3 When Airsplat failed to plead or otherwise defend, S&W filed an application for entry of default. *See* Ariz. R. Civ. P. 55(a)(2015).[1] When Airsplat did not timely plead or otherwise defend in response to the application, default against Airsplat became effective. *See* Ariz. R. Civ. P. 55(a)(3), (a)(4).

¶4 The day after default became effective, *see* Ariz. R. Civ. P. 6(a), Airsplat filed a motion to dismiss for lack of personal jurisdiction. S&W's opposition argued the motion to dismiss was untimely, given the default. S&W then argued that, because all allegations in the complaint "including the jurisdictional allegations, should be deemed admitted and binding in this case," Arizona could exercise personal jurisdiction over Airsplat. S&W's opposition did not attach or rely upon any evidentiary support.

[1] Because the Arizona Rules of Civil Procedure were amended effective January 1, 2017, this opinion cites these rules as they read at the time of the proceedings before the superior court.

¶5 Along with its reply in further support of the motion to dismiss, Airsplat filed a motion for enlargement of time, arguing its failure to timely respond to the complaint "was the result of excusable neglect." *See* Ariz. R. Civ. P. 6(b). Airsplat argued, with a supporting affidavit, that it "was prepared to file" the motion to dismiss in a timely fashion, but its law "firm's docketing system and entire computer system was attached [sic] by a virus and then crashed," meaning the motion to dismiss was filed after default became effective. S&W opposed the motion for enlargement of time, arguing Airsplat failed to promptly move to set aside the default, failed to show excusable neglect and failed to show a meritorious defense.

¶6 After full briefing, the superior court denied Airsplat's motion for enlargement of time. The court found that Airsplat's failure to timely respond to the complaint was caused by "mere carelessness and as such does not warrant a finding of excusable neglect." As a result, the default remained in place.

¶7 At the same time, the superior court addressed whether Arizona could exercise personal jurisdiction over Airsplat. The court first stated that specific personal jurisdiction was lacking, noting Airsplat "did not engage in purposeful conduct that targeted an Arizona company" and Airsplat "did not have sufficient contacts with [Arizona] to make the exercise of jurisdiction 'reasonable and just.'" Because the default meant Airsplat's motion to dismiss was untimely, however, the court "accept[ed] the jurisdictional facts [alleged in the complaint] as having been deemed admitted and binding on the parties." On that basis, the court retained personal jurisdiction over Airsplat and, after a hearing, entered a final default judgment against Airsplat. *See* Ariz. R. Civ. P. 54(c). This court has jurisdiction over Airsplat'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).[2]

DISCUSSION

¶8 Airsplat argues the superior court abused its discretion in denying its motion for enlargement of time and erred in exercising specific

[2] Although a default judgment generally is not appealable, appellate jurisdiction is appropriate here, where the issue to be resolved is whether personal jurisdiction is proper. *See Kline v. Kline*, 221 Ariz. 564, 568 ¶ 11 (App. 2009) (citing *Hirsch v. Nat'l Van Lines, Inc.*, 136 Ariz. 304, 311 (1983)).

personal jurisdiction over Airsplat. This court addresses these arguments in turn.

I. Airsplat Has Not Shown The Superior Court Abused Its Discretion In Denying Its Motion For Enlargement Of Time.

¶9 The superior court, "for cause shown," may extend the time for an act to be done on "motion made after the expiration of the specified period . . . where the failure to act was the result of excusable neglect." Ariz. R. Civ. P. 6(b)(1). For decades, the general test for excusable neglect has been "whether the neglect or inadvertence is such as might be the act of a reasonably prudent person under the same circumstances." *Coconino Pulp & Paper Co. v. Marvin*, 83 Ariz. 117, 120 (1957). The moving party has the burden of showing excusable neglect, *see Richas v. Superior Court*, 133 Ariz. 512, 515 (1982), and the superior court has substantial discretion in determining whether that burden has been met, *see Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 66 ¶ 24 (App. 2010); *see also Findlay v. Lewis*, 172 Ariz. 343, 346-47 (1992) ("A trial court has broad discretion over the management of its docket. Appellate courts do not substitute their judgment for that of the trial court in the day-to-day management of cases.").

¶10 Airsplat argues the computer system crash is excusable neglect, adding that the motion to dismiss was filed one day after default became effective. This argument, however, ignores Airsplat's failure to timely respond to the complaint before S&W even sought entry of default, as the rules require. *See* Ariz. R. Civ. P. 12(a) & (b). Similarly, the fact that Airsplat's response to the complaint was due before S&W sought entry of default negates Airsplat's claim that it first discovered "that the deadline had passed" the day it filed the untimely motion to dismiss, which was after default became effective.

¶11 S&W filed its application for entry of default after Airsplat failed to timely respond to the complaint. S&W's application put Airsplat on notice that, if it did not file a responsive pleading or otherwise defend within ten days, default would become effective. *See* Ariz. R. Civ. P. 55(a)(3). This ten-day "grace period gives the party claimed to be in default a second chance." Daniel J. McAuliffe & Shirley J. McAuliffe, Arizona Civil Rules Handbook 703 (2017 ed.). A party failing to timely take advantage of this second chance does so at its own peril.

¶12 Here, S&W filed its application for entry of default and ten days passed with Airsplat failing to timely plead or otherwise respond. As a result, default became effective. Only then did Airsplat file the untimely motion to dismiss. On this record, Airsplat has not shown that the superior court abused its discretion in finding Airsplat had not shown excusable neglect and, as a result, the court did not err in denying Airsplat's motion for enlargement of time. *See 7th & Roosevelt Partners, LLC*, 224 Ariz. at 66 ¶ 24.

II. The Entry Of Default Does Not Negate The Superior Court's Finding That Arizona Could Not Exercise Specific Personal Jurisdiction Over Airsplat.

¶13 Arizona may exercise personal jurisdiction over a party to the maximum extent permitted by due process. *See* Ariz. R. Civ. P. 4.2(a). Due process permits the exercise of specific jurisdiction over Airsplat, a non-resident defendant, if: (1) Airsplat purposefully availed itself of the privilege of conducting business in Arizona; (2) the claim asserted "arises out of or relates to" Airsplat's contact with Arizona; and (3) "the exercise of jurisdiction is reasonable." *Williams v. Lakeview Co.*, 199 Ariz. 1, 3 ¶ 7 (2000). S&W had the burden to show Arizona properly could exercise personal jurisdiction over Airsplat. *See, e.g., Maloof v. Raper Sales, Inc.*, 113 Ariz. 485, 487 (1976); *Arizona Tile, L.L.C. v. Berger*, 223 Ariz. 491, 493 ¶ 8 (App. 2010). This court reviews de novo whether Arizona can exercise personal jurisdiction over a party. *Beverage v. Pullman & Comley, LLC*, 232 Ariz. 414, 417 ¶ 10 (App. 2013).

¶14 Airsplat argues the "bare allegations in the complaint," deemed admitted by the entry of default, failed to show Arizona properly could exercise specific personal jurisdiction in this case. An entry of default serves as a "judicial admission of . . . all well-pleaded facts in the complaint." *Reed v. Frey*, 10 Ariz. App. 292, 294 (1969). A party against whom default is entered, however, "is not held to admit facts that are not well-pleaded or to admit conclusions of law." *S. Ariz. Sch. For Boys, Inc. v. Chery*, 119 Ariz. 277, 281-82 (App. 1978) (citation omitted). If a complaint does not include well-pleaded facts for a required showing, entry of default does not mean that required showing has been made; any resulting default judgment to the contrary would be void. *See Walls v. Stewart Bldg. & Roofing Supply, Inc.*, 23 Ariz. App. 123, 126 (1975); *accord* 46 AM. JUR. 2d Judgments § 26 (2017) ("[B]ecause a judgment entered by default without personal jurisdiction over a defendant who has not appeared is void, a default judgment entered without personal jurisdiction cannot be deemed valid if

the defendant filed an untimely responsive pleading asserting that defense.").

¶15 S&W argues the terms of the Settlement Agreement and paragraphs 3-5, 8 and 14 of the complaint show personal jurisdiction over Airsplat is proper. Examining that agreement and those allegations, however, does not show that Arizona properly could exercise jurisdiction over Airsplat in this case.[3]

¶16 Even if the entry of default required the superior court to accept all statements in the Settlement Agreement as true, those statements do not show personal jurisdiction over Airsplat in Arizona is proper. The Settlement Agreement states Smith & Wesson Corp. is a Delaware corporation with its principal place of business in Massachusetts and Smith & Wesson Holding Corporation is a Nevada corporation "with a place of business" in Arizona. The Settlement Agreement states Airsplat is a California corporation with its principal place of business in California. Although resolving a patent dispute S&W filed in United States District Court for the District of Arizona, the Settlement Agreement required Airsplat to deliver payments to a Pennsylvania address and to deliver inventory to a Massachusetts address. The Settlement Agreement does not include a forum selection clause or choice of law provision and the signature blocks do not indicate where it was signed.

¶17 S&W cites to *Manufacturers' Lease Plans, Inc. v. Alverson Draughon College* for the proposition that entering into a contract "is by its nature an intentional, purposeful act." 115 Ariz. 358, 360 (1977). But the Settlement Agreement does not state where that intentional act occurred. Moreover, the Settlement Agreement is not akin to the lease in *Alverson*, where an Alabama corporation "tied itself commercially with Arizona" by signing an agreement with an Arizona entity that agreed to use "its best efforts in Arizona to supply spare parts" in exchange for monthly payments. 115 Ariz. at 360-61.

¶18 S&W also relies on *Planning Group of Scottsdale, L.L.C. v. Lake Mathews Mineral Properties, Ltd.*, which found proper the exercise of specific jurisdiction over California defendants that "actively sought . . . to make a

[3] In the superior court, S&W did not submit factual support for its jurisdictional claim. Accordingly, the issue on appeal is whether the superior court could conclude that jurisdiction was proper based on the Settlement Agreement and the relevant well-pleaded facts in the complaint, which were deemed admitted given the entry of default.

deal with the Arizona plaintiffs." 226 Ariz. 262, 270 ¶ 34 (2011). *Planning Group,* however, noted the California defendants sent a due diligence report to Arizona and "directed a series of telephone calls, e-mails, faxes, and letters to the Arizona plaintiffs," adding "[t]his case in the end involves an alleged loan by Arizona corporations to a California venture, with repayment to be made in Arizona." *Id.* at 268-69 ¶¶ 26, 33. None of those factors are present here. The Settlement Agreement does not indicate that Airsplat actively pursued a contractual relationship in Arizona or that it had any ongoing obligations in Arizona. Moreover, and as more analogous here, *Planning Group* refused to exercise personal jurisdiction over other California residents who allegedly knew they were dealing with Arizona residents in California, adding "the requisite activity must instead be purposefully directed at the forum." *Id.* at 271 ¶ 41. For these reasons, the Settlement Agreement does not show that Airsplat was subject to specific jurisdiction in Arizona. *See Williams*, 199 Ariz. at 3 ¶ 7.

¶19 Turning to the allegations in the complaint, paragraph 3 alleges Smith & Wesson Holding Corporation is a Nevada corporation "with a place of business" in Arizona. An allegation that a plaintiff has contact with a forum, however, is not relevant to whether personal jurisdiction can be exercised over a non-resident defendant like Airsplat. *See Planning Group*, 226 Ariz. at 266 ¶ 16 ("Nor can the requisite contacts be established through the unilateral activities of the plaintiff; they must instead arise from the defendant's 'purposeful' conduct.") (citations omitted); *Batton v. Tenn. Farmers Mut. Ins. Co.*, 153 Ariz. 268, 272 (1987) ("[S]tate jurisdiction over foreign defendants is impermissible unless the defendant, not the plaintiff, has purposefully directed its activities at the forum state.").[4] Paragraph 8 of the complaint alleges S&W and Airsplat entered into the Settlement Agreement, which is undisputed but does not show that Airsplat was subject to personal jurisdiction in Arizona. Similarly, although the allegation in paragraph 14 that "Airsplat has not made any settlement payments to" S&W is essential to a breach of contract claim, such inaction does not support personal jurisdiction over Airsplat.

¶20 Paragraph 4 of the complaint alleges Airsplat is a California corporation with its principal place of business in California and that "[t]hrough its website, Airsplat conducts business throughout the United

[4] Because the proper focus is Airsplat's contact with Arizona, the court need not address the difference between the complaint's allegation that the Nevada holding company plaintiff has "a place of business" in Arizona and S&W's argument on appeal that the Nevada holding company is "an Arizona entity."

States, including in Arizona." Airsplat's being a California corporation with its principal place of business in California does not show conduct by Airsplat directed at Arizona. And accepting as true the allegation regarding Airsplat's website does not evidence purposeful conduct directed at Arizona. *See Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 415 (9th Cir. 1997) (holding personal jurisdiction over non-resident defendant was improper when defendant "[had] no contacts with Arizona other than maintaining a home page that [was] accessible to Arizonans, and everyone else, over the Internet").

¶21 Paragraph 5 of the complaint (the final paragraph relied upon by S&W) alleges "[t]he events giving rise to this case, including the underlying litigation in the United States District Court that resulted in the parties entering the Settlement Agreement, took place in Arizona." On its face, it is unclear whether this allegation includes any well-pleaded facts. *See Chery*, 119 Ariz. at 281-82. Even assuming it contains well-pleaded facts, it does not show that Airsplat purposefully availed itself of the privilege of conducting business in Arizona, as is required to exercise personal jurisdiction. *See Williams*, 199 Ariz. at 3 ¶ 7. Similarly, it does not show that the exercise of personal jurisdiction over Airsplat would be reasonable, another required showing to exercise personal jurisdiction. *Id.*

¶22 Although discussed separately, "jurisdictional contacts are to be analyzed not in isolation, but rather in totality." *Planning Group*, 226 Ariz. at 269 ¶ 29. Collectively, the Settlement Agreement and the complaint's well-pleaded facts (accepted as true given the entry of default) do not satisfy S&W's burden of showing that Airsplat purposefully availed itself of the privilege of conducting business in Arizona or that the exercise of jurisdiction in Arizona would be reasonable. *Williams*, 199 Ariz. at 3 ¶ 7. On this record,[5] even accepting as true the well-pleaded jurisdictional facts alleged in the complaint, those facts do not support the exercise of personal jurisdiction over Airsplat. Accordingly, because Arizona lacks personal jurisdiction over Airsplat, the superior court erred in concluding to the contrary and in later entering default judgment against Airsplat. *See Walls*, 23 Ariz. App. at 126; 46 AM. JUR. 2d Judgments § 26.

¶23 S&W and Airsplat seek their attorneys' fees incurred on appeal, and Airsplat seeks its taxable costs incurred on appeal. *See* A.R.S.

[5] S&W argues with some force that the superior court erred in considering an affidavit attached to Airsplat's untimely motion to dismiss regarding its lack of contacts with Arizona. The analysis on appeal is undertaken without considering any aspect of that affidavit.

§§ 12-341.01, -342. The requests for fees are denied without prejudice. Airsplat is awarded its taxable costs on appeal contingent upon its compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶24 The superior court properly denied Airsplat's motion for enlargement of time. On the record presented, however, the court erred in exercising personal jurisdiction over Airsplat. Accordingly, the default judgment is vacated and this action is dismissed without prejudice for lack of personal jurisdiction.

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