DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS HOLDINGS MEXICO, LLC., a corporate enterprise of the Lac Vieux Desert Band of Lake Superior Chippewa Indians, a federally recognized Indian Tribe; LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe, Plaintiffs/Appellants/ Cross-Appellees, v. ARTURO ROJAS CARDONA; JUAN JOSE ROJAS CARDONA; JUEGOS DE ENTRETENIMIENTO Y VIDEOS DE GUADALUPE; ENTRETENIMIENTO DE MEXICO; ATLANTICA DE INVERSIONES CORPORATIVAS; and GUADALUPE RECREATION HOLDINGS, L.L.C., Defendants/Appellees/ Cross-Appellants.	1 CA-CV 11-0128 Department D **MEMORANDUM DECISION** (Not for Publication Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-090935

The Honorable John Ditsworth, Judge
The Honorable Joseph Kreamer, Judge

Affirmed in part; Reversed and Remanded in part

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T H O M P S O N, Judge

¶1 Plaintiffs-Appellants Lac Vieux Desert Band of Lake Superior Chippewa Indians and Lac Vieux Desert Band of Lake Superior Chippewa Indians Holdings Mexico (collectively, the Tribe) appeal the trial court's dismissal of their Second Amended Complaint for insufficient service of process. We reverse and remand as to defendant Guadalupe Recreation Holding (GRH). As to all other defendants, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 This is a business case. In 2006, the Tribe[1] loaned $6.5 million dollars to defendants[2] in exchange for a 26 percent

[1] The Lac Vieux Desert Band of Lake Superior Chippewa Indians is a small federally recognized Indian Tribe located on its Reservation on the Upper Peninsula of Michigan where it operates a casino pursuant to the Indian Gaming Regulatory Act, 25 U.S.C § 2701, et seq.

share in the building and running of a casino venture in Guadalupe, Mexico. Among other claims, the Tribe asserts defendants failed to comply with the partnership agreement, failed to pay contractually obligated profits and converted funds.

¶3 As part of the transaction, the parties made a Master Term Sheet and ultimately signed a Security Agreement, a Depository Agreement and a Pledge Agreement. Other agreements, such as a Joint Venture Agreement and a Partnership Purchase Agreement, were contemplated by the Master Term sheet but never completed. The Master Term Sheet states the "Security and Depository Agreements shall be under the jurisdiction and laws of the State of Arizona, United States," but also states the parties will submit all disputes to binding and final arbitration in Mexico. The Security Agreement says the "Mexican Counterparts," a term defined as the defendants other than Juan Cardona, consent to "the jurisdiction of the courts of the State of Arizona" and agree "any action or claim arising out of, or any dispute in connection with, this Agreement . . . may be brought in the Courts of Arizona" and that service of process in any action may be made upon them by certified mail or

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[2] Six defendants are appellees in the current appeal: two individuals (the Cardona brothers), three foreign companies, and one Nevada corporation (GRH). Other defendants were dismissed earlier in this litigation for lack of personal jurisdiction.

international courier at a Nuevo Leon, Mexico address listed in the Security Agreement (the Mexican address).

¶4 The procedural history of this matter is complex. A related case was originally filed in the U.S. District Court, District of Arizona. The Tribe apparently served, or at least attempted to serve in person, the foreign defendants in Mexico during a meeting regarding this first federal suit.[3] Meanwhile, the Tribe had filed the instant matter, CV 2008-090935, in the Superior Court of Maricopa County, listing more than a dozen defendants. Defendants removed the superior court matter to district court on diversity grounds and motions to dismiss were filed in matter 2:08-cv-01067-ROS. The Tribe amended its federal complaint, defeated federal jurisdiction on the diversity claim and the matter was remanded to Maricopa County Superior Court.

¶5 In March 2009, after various service problems, Judge Kreamer approved the Tribe's request for alternative service. The methods authorized in his order included serving the defendants' attorneys of record via certified mail, serving Juan Cardona via his two known email addresses and serving all six defendants via Federal Express at the Mexican address, return

[3] The "foreign defendants" was the term used to indicate the three foreign corporations and the Cardona brothers. The record is not clear as to whether the Cardona brothers are, in fact, residents or citizens of either the U.S. or Mexico or both.

receipt requested.[4] Judge Kreamer deemed service on Arturo Cardona "complete" because he had been "served" by mail at three of his three last known U.S. addresses, but there was no return receipt. The Tribe filed an affidavit of service of completion of alternative service consistent with the trial court's order. The foreign defendants made a limited appearance to move to dismiss for insufficient service of process specifically, violation of Arizona Rule of Civil Procedure 4.2(i)(l) and the Hague Service Convention (Hague Convention);[5] defendants additionally asserted lack of personal jurisdiction and lack of subject matter jurisdiction.[6] The trial court denied the motions to dismiss for insufficient service of process and subject matter jurisdiction entirely. The trial court denied the motion to dismiss on personal jurisdiction grounds as to all signatories and, additionally, as to Juan Cardona, as a transactional participant. The non-signatory corporations were dismissed for lack of personal jurisdiction. This left the six defendants we have here.

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[4] The motion for alternative service only discusses the foreign defendants; it does not mention GRH.

[5] Entitled "Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters," Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

[6] GRH did not move to dismiss for insufficient service of process nor for lack of personal jurisdiction, but only moved to dismiss for lack of subject matter jurisdiction.

¶6 Defendants filed a special action in this Court. We declined jurisdiction in December 2009 in 1 CA-SA-09-0281. Defendants filed a petition for review raising the three procedural/jurisdictional issues from their motions to dismiss.

¶7 The Arizona Supreme Court took jurisdiction to address only the issue related to service in Mexico and issued an opinion in CV-10-0017-PR on July 30, 2010. The Court found, pursuant to the Hague Convention, service via the Mexican Ministry of Foreign Affairs to be the only valid means of obtaining service in Mexico and therefore vacated the order denying foreign defendants' motion to dismiss for insufficient service of process, and remanded to the trial court. *See Cardona v. Kreamer*, 225 Ariz. 143, 235 P.3d 1026 (2010).

¶8 Upon the foreign defendants' return to the trial court, a new trial judge heard arguments and took extensive supplemental briefing on the motion to dismiss for insufficient service of process. The trial court found insufficient service and dismissed as to all defendants, including GRH, in a signed minute entry stating "The Court finds that the Plaintiff was required to utilize the requirements under the Hague convention to serve process and they did not." Alternate issues of personal jurisdiction, subject matter jurisdiction and issues related to arbitration were not addressed. There was no motion for reconsideration. The Tribe did not ask for additional time

to perfect service nor did it attempt to serve any of the foreign defendants by use of the Mexican Ministry for Foreign Affairs. The Tribe timely appealed.[7]

DISCUSSION

¶9 The Tribe raises four issues on appeal:

1. It was error for the trial court to *sua sponte* dismiss the suit in its entirety, as GRH was not a party to the insufficient service motion, was properly served and therefore remained a defendant in the suit.

2. It was error to find the Hague Convention applied to service within the United States.

3. It was error for the trial court to determine that service was insufficient on foreign defendants' domestic counsel given that service was court-ordered as "other means" service under Rule 4.2(i)(3) on domestic counsel. The Tribe asserts such service was valid and effective even if Attorney Davis was not an authorized agent.

4. It was error to dismiss the suit instead of permitting appellants to attempt re-service as there is no time deadline for foreign service.

We review de novo whether the trial court erred in granting the motion to dismiss pursuant to Rule 12(b)(6). *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7, 284 P.3d 863, 866 (2012). We review questions of law de novo. *Phx. Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 244, 934 P.2d 801, 808 (App. 1997).

[7] Defendants filed a notice of cross-appeal. The Tribe filed a motion to dismiss the cross-appeal which was not defended. This court dismissed the cross-appeal as unnecessary, as defendants had been the wholly successful party below.

A. Guadalupe Recreation Holding[8]

¶10 The Tribe asserts that even if the defendants were properly dismissed, GRH should remain as it was never a party to the motion to dismiss for insufficient service of process and service was completed pursuant to Arizona Rule Civil Procedure 4.2(h) and 4.1(k) for direct service on a U.S. corporation outside of Arizona. We agree.

1. Service

¶11 As a Nevada corporation, Arizona Rules of Civil Procedure 4.2(h) and 4.1(k), apply. Service on GRH was made on May 15, 2008, by service on its resident agent in Nevada and the affidavit of such service is in the record on appeal. Such service on an agent "authorized by statute to receive service" complies with Rules 4.1(k) and 4.2(h). The Hague Convention does not apply to this Nevada corporation.[9] The trial court erred in dismissing GRH for insufficient service of process.

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[8] GRH is, according to the Second Amended Complaint, a Nevada Corporation. The complaint alleges half of GRH's shares are owned by Arturo Cardona, personally, with the other half owned by co-defendant Atlantica. Atlantica is alleged to be wholly owned by Arturo Cardona. We note that defendants spend very little, if any, time on the remaining issues as they apply to GRH specifically.

[9] In the motion to dismiss hearing below, defendants asserted that GRH was dissolved at the time of service. Defendants have not made this assertion on appeal and have presented no argument or authority as to the significance, if any, of GRH's asserted dissolution. This argument is waived.

2. Subject Matter and Personal Jurisdiction

¶12 Defendants generally assert the dismissal is also affirmable due to a lack of personal and subject matter jurisdiction. Defendants argue there is no personal or subject matter jurisdiction over the foreign defendants because they have had no contacts in or with Arizona, the casino is located in Mexico, and the parties agreed to arbitrate in Mexico.[10] They assert that the Security Agreement is the only document which mentions that Arizona law controls and it is an "ancillary" document, not at issue in the litigation, with narrow application including prerequisites that have not been met.

¶13 "Subject matter jurisdiction is 'the power of a court to hear and determine a controversy.'" *State v. Bryant*, 219 Ariz. 514, 517, ¶ 14, 200 P.3d 1011, 1014 (App. 2008) (quoting *Marks v. LaBerge*, 146 Ariz. 12, 15, 703 P.2d 559, 562 (App. 1985)); *see also State ex rel. Milstead v. Melvin*, 140 Ariz. 402, 404, 682 P.2d 407, 409 (1984) ("Subject matter jurisdiction means the power to hear and determine a general class of cases to which a particular proceeding belongs."). "The jurisdiction of the superior court is conferred upon it by the state constitution and statutes." *Schoenberger v. Bd. of Adjustment*

[10] Defendants further assert that the trial court's determination of personal jurisdiction over Juan Cardona as a beneficial transactional participant is unsupported by either the facts or law. We need not reach this issue.

of the City of Phx., 124 Ariz. 528, 530, 606 P.2d 18, 20 (1980); *see* Ariz. Const. art. VI, § 14 (specifying scope of superior court's jurisdiction, which includes in subsection (11), "such other jurisdiction as may be provided by law"); A.R.S. §§ 12-121 to -136 (establishing county superior courts and prescribing such courts' authority and jurisdiction). Jurisdiction is a question of law we review de novo. *See Mitchell v. Gamble*, 207 Ariz. 364, 367, ¶ 6, 86 P.3d 944, 947 (App. 2004).

¶14 GRH was a party to the motion to dismiss for lack of subject matter jurisdiction. The trial court found subject matter jurisdiction. Defendants argue that the instant lawsuit was not brought to enforce the Security Agreement, therefore the agreement's Arizona forum selection clause is inapplicable and Arizona lacks subject matter jurisdiction. We disagree. The second-amended complaint explicitly brings claims related to the Security Agreement as well as other agreements, and various business tort claims. Arizona courts routinely deal with contract and business matters. We have subject matter jurisdiction.

¶15 Defendants broadly assert a lack of personal jurisdiction. GRH was not a party to the motion to dismiss for lack of personal jurisdiction. The trial court found personal jurisdiction over all contract signatories, including GRH. Parties may contract to select a forum for litigation and doing

so creates personal jurisdiction. *Morgan Bank (Del.) v. Wilson*, 164 Ariz. 535, 537, 794 P.2d 959, 961 (App. 1990) (enforcing forum selection clause and resulting personal jurisdiction over parties). To the extent that personal jurisdiction is an issue, we find GRH has submitted to the personal jurisdiction of this court. GRH signed the Security Agreement which contained the forum selection clause naming Arizona as the proper forum for litigating disputes. The Security Agreement formed a part of the transaction that GRH signed.

3. Defendants' Arbitration Claims Do Not Nullify Subject Matter Jurisdiction

¶16 Defendants assert, as part of their jurisdiction argument, that any dispute was subject, first and foremost, to arbitration. Defendants assert that the trial court should have enforced the arbitration clause and dismissed the matter and that the arbitration agreement "stripped" Arizona of subject matter jurisdiction. This assertion comes from their position that the instant case does not follow from the Security Agreement, and is therefore not subject to Arizona law. We disagree.

¶17 Although it is commonly said that the law favors arbitration, it is more accurate to say that the law favors arbitration of disputes that the parties have agreed to arbitrate. *See Clarke v. ASARCO Inc.*, 123 Ariz. 587, 589, 601

P.2d 587, 589 (1979); *see also Pima Cnty. by Tucson v. Maya Const. Co.*, 158 Ariz. 151, 154, 761 P.2d 1055, 1058 (1988).

¶18 Defendants assert that the parties' arbitration agreement strips Arizona of subject matter jurisdiction. The cases cited by defendants, including *Medasys Acquisition Corp. v. SDMS, P.C.*, 203 Ariz. 420, 423-24, ¶¶ 15-17, 55 P.3d 763, 766-67 (2002) (discussing legal versus equitable remedies) and *Greater Arizona Savings and Loan Ass'n v. Tang*, 97 Ariz. 325, 327, 400 P2d 121, 123 (1965) (petitioners sought a writ of mandamus seeking to correct summary judgment ruling), do not support defendants' argument that an arbitration agreement deprives this court of jurisdiction. The federal district court cases cited by defendants, including *Ripmaster v. Toyoda Gosei, Co.*, 824 F. Supp. 116 (E.D. Mich. 1993) (citing *Siderius, infra*) and *Siderius, Inc. v. Campainia de Acero del Pacifico S.A.*, 453 F. Supp. 22 (S.D.N.Y. 1978), in ostensible support of the claim of lack of subject matter jurisdiction, are both distinguishable[11] and unpersuasive. At least two federal circuit courts have found no lack of subject matter jurisdiction when international arbitration may be pending. *See, e.g., Rhone Mediterranee Compagnia Francese Di Assicurazioni E*

[11] The cases are distinguishable as the matters involved were assertedly referred with "finality" to arbitration without further judicial involvement. *See e.g. Siderious,* 453 F. Supp. at 25. Under Arizona provisions, arbitration matters are stayed pending further judicial enforcement. *See* A.R.S § 12-1502.

Riassicurazoni v. Lauro, 712 F.2d 50, 54-55 (3d Cir. 1983); *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 826 (2d Cir. 1990), *cert. denied*, 500 U.S. 953 (1991); *see also Filanto, S.p.A. v. Chilewich Intern. Corp.*, 789 F. Supp. 1229, 1241-42 (S.D.N.Y. 1992) (finding the proposition that the federal court lacks subject matter jurisdiction in the face of an arbitration agreement "facially absurd because the enabling legislation [9 U.S.C. § 206 (1988)] gives the district court the power at least to compel arbitration. How could even this limited power be exercised without subject matter jurisdiction?"). We agree that the assertion that Arizona lacks subject matter jurisdiction due to the existence of an arbitration agreement is, indeed, "absurd."

¶19 If GRH wishes to compel arbitration it may file a motion with the trial court. *See* A.R.S. § 12-1502(A) (2003). The trial court's review on a motion to compel arbitration is limited to the determination as to whether an arbitration agreement exists under the facts of this case and does not implicate the case's merits. *See* A.R.S. § 12-1502(A)-(B); *Foy v. Thorp*, 186 Ariz. 151, 153-54, 920 P.2d 31, 33-34 (App. 1996). The trial court may then enter a stay of the proceedings as required by A.R.S. § 12-1502(D).

B. The Other Defendants

¶20 The Tribe never served any of the remaining parties in this litigation in accordance with Rule 4.2(b)(direct service) or 4.2(c)(service by mail), Arizona Rules of Civil Procedure. The Tribe did not attempt service by publication pursuant to Rule 4.2(f). Following the *Cardona* opinion, the Tribe did not attempt to serve the foreign corporations or the foreign defendants via the Mexican Ministry of Foreign Affairs as required by our supreme court in *Cardona* or attempt any further service on any party.[12] The Tribe had previously complied with the alternative service guidelines provided by the trial court originally pursuant to Rule 4.2(i)(3) (for service upon individuals in a foreign country).

¶21 The Tribe makes a number of claims as to why its service attempts should be sufficient to withstand the motion to dismiss for insufficient service as to the remaining five defendants. Those claims boil down to an assertion that it tried to effect service and did what the trial court told it to do, including serving Juan Cardona via email, serving the defendants' lawyers and mailing documents to Arturo. Ultimately, the Tribe falls back on the claim that defendants had notice.

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[12] The Tribe has not argued that its service by FedEx in Mexico complied with the terms of the contract with defendants, thereby altering the standard service requirements, and we do not address that possibility.

¶22 Service is a formal requirement. Proper service of process is essential for the court to obtain jurisdiction. *Koven v. Saberdyne Sys., Inc.*, 128 Ariz. 318, 321, 625 P.2d 907, 910 (App. 1980); *see Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344, 350 (1999). Amended complaints must be served. *See* Ariz. R. Civ. P. 15. The Tribe's attempt to bootstrap the service of one defendant, or one representative, into sufficient service of all defendants fails.

1. GRH

¶23 The Tribe asserts that GRH is "the parent company, subsidiary, or partner of every other corporate Appellee." Proper service on GRH does not substitute for serving the balance of the defendants, regardless of their inter-relatedness. *See* Ariz. R. Civ. Proc. 4.1(d), (k), 4.2(a)-(e).

2. The Lawyers

¶24 Service of defendants' lawyers, absent consent by their clients, is not sufficient. *See Kline v. Kline*, 221 Ariz. 564, 570, ¶¶ 19-20, 212 P.3d 902, 908 (App. 2009). An attorney does not automatically qualify as an authorized agent to receive service, even if the attorney has been retained by the individual. *Rotary Club of Tucson v. Chaprales Ramos de Pena*, 160 Ariz. 362, 365, 773 P.2d 467, 470 (App. 1989). We do not find service on defendants' lawyers sufficient.

3. Arturo Cardona

¶25 Service by mail on a person outside Arizona is governed by Arizona Rule of Civil Procedure 4.2(c). That rule expressly permits service to be completed by the use of "any form of mail requiring a signed and returned receipt." Certified mail with a return postal receipt would fall within this definition. "Therefore, to effect proper mail service outside the state, the serving party must . . . obtain the signed postal receipt and then . . . prepare and file an affidavit, as described in Rule 4.2(c), to which the receipt must be attached." *Postal Instant Press, Inc. v. Corral Rests., Inc.*, 186 Ariz. 535, 537, n.2, 925 P.2d 260, 262 (1996). "[A]s long as service remains incomplete, or is defective, the court never acquires jurisdiction. When a serving party elects to serve process by mail, we believe the rule which regulates the method of sending and receiving service, and the return and filing thereof, must be followed." *Id.* at 537, 925 P.2d at 262. The attempted service on Arturo Cardona did not comply with the Arizona Rules of Civil Procedure and, as such, was not effective.

4. Jose Cardona

¶26 The trial court allowed alternative service on Jose Cardona via email to two known email addresses. The *Cardona* opinion does not permit alternative service in Mexico. The

Rules of Civil Procedure do permit alternate service by methods such as email to persons in the United States but outside Arizona.

5. **Additional Time to Serve**[13]

¶27 The general rule that service must be complete within 120 days for timely domestic service is found in Rule 4(i); additional time may be granted for "good cause." By its terms Rule 4(i) does not apply "to service in a foreign country." Defendants argue that the service window is not open "forever" and that Judge Ditsworth acted within his discretion to dismiss this matter. The Tribe argues that it should have been given additional time to complete service, rather than dismiss the case. To this end, the Tribe cites *Stinson v. Johnson*, 3 Ariz. App. 320, 323, 414 P.2d 169, 172 (1966).

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[13] Section 12-504(A), the Arizona saving statute, reads:

> If an action is commenced within the time limited for the action, and the action is terminated in any manner other than by abatement, voluntary dismissal, dismissal for lack of prosecution or a final judgment on the merits, the plaintiff ... may commence a new action for the same cause after the expiration of the time so limited and within six months after such termination. If an action timely commenced is terminated by abatement, voluntary dismissal by order of the court or dismissal for lack of prosecution, the court in its discretion may provide a period for commencement of a new action for the same cause, although the time otherwise limited for commencement has expired. Such period shall not exceed six months from the date of termination.

¶28 The trial court has discretion to allow more time for service or dismiss when it determines that process has not been served. *See Riley v. Superior Court*, 116 Ariz. 89, 91, 567 P.2d 1218, 1220 (App. 1977). The non-complying plaintiff has the burden to show due diligence in trying to timely serve. *Id.* Here, the Tribe did not argue below that, if the court found the service of process insufficient, the court should simply quash service and allow additional time to accomplish proper service. This argument is waived, and we do not address it on appeal. *See Ames v. State*, 143 Ariz. 548, 552, 694 P.2d 836, 840 (App. 1981) ("It is well established that matters not presented to the trial court cannot be raised for the first time on appeal.").

FEES

¶29 The Tribe and defendants each request fees and costs on appeal pursuant to A.R.S. § 12-341, 12-341.01 and Arizona Rule of Civil Appellate Procedure 21. Defendants are granted reasonable fees upon compliance with Rule 21, ARCAP, to the extent they were successful herein.

CONCLUSION

¶30 For the above stated reasons, the judgment of the trial court is reversed as to GRH and affirmed as to all other defendants.

/s/
_____
JON W. THOMPSON, Judge

CONCURRING:

/s/
_____
PETER B. SWANN, Presiding Judge

/s/
_____
MICHAEL J. BROWN, Judge