DIVISION ONE
FILED: 3/12/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JUDITH WALKER, Plaintiff/Appellant, v. JULIE MADORSKY, M.D., an unmarried woman; MARC GONZALEZ and JANE DOE GONZALEZ; CYNTHIA M. LOPEZ aka CYNTHIA M. LOPEZ, an unmarried woman; JOHNNY TSANG and JANE DOE TSANG; HARRY ZELIG, an unmarried man; and the MEDICAL BOARD OF CALIFORNIA; and QUEST DIAGNOSTIC CLINICAL LABORATORIES, INC., Defendants/Appellees.	)	1 CA-CV 12-0395 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Yuma County

Cause No. CV S1400CV201100655

The Honorable John Neff Nelson, Judge

AFFIRMED

Judith Walker, Plaintiff/Appellant — Fort Mohave
In Propria Persona

Jennings, Strouss & Salmon, P.L.C. — Phoenix
by Richard K. Delo
Matthew L. Cates
Attorneys for Defendants/Appellees Medical Board of California, Julie Madorsky, M.D., Marc Gonzalez,

Cynthia M. Lopez, Johnny Tsang and Harry Zelig

Lewis Brisbois Bisgaard & Smith LLP Phoenix
by Kevin C. Nicholas
Bruce C. Smith
Attorneys for Defendant/Appellee Quest Diagnostics Clinical Laboratories, Inc.

H A L L, Judge

¶1 Judith Walker (Walker) appeals from the dismissal of her claims based upon lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process. For the reasons that follow, we affirm the dismissal.

BACKGROUND

¶2 Walker was a physician licensed by the California Medical Board (the Board) from 1981 to 1997. In November 1992, the Board initiated an investigation related to Walker's medical license.

¶3 During the course of the investigation, Walker submitted to lab testing. Medical records indicate that SmithKline Beecham Clinical Laboratories, Inc. tested Walker's urine specimen for drugs and pregnancy, and sent the result to the Board in care of Dr. Harry Zelig (Zelig). According to Walker, Zelig and a Board investigator then included false information in reports to the Board. The Board subsequently charged Walker with unprofessional conduct and a settlement was reached.

¶4 On May 4, 2011, Walker filed a complaint stemming from the California investigation in Yuma County Superior Court. Her nine causes of action are: libel per se, invasion of privacy, battery, conspiracy to defame, interference with business expectancy, fraudulent concealment, aiding and abetting defamation, breach of implied covenant of good faith and fair dealing, and equitable relief. The defendants identified in the caption are the Board, SmithKline Beecham Clinical Laboratories, and California residents Julie Madorsky (Madorsky), Marc Gonzalez (Gonzalez), and his spouse, Cynthia M. Lopez (Lopez), Zelig, and Johnny Tsang (Tsang) and his spouse (collectively, Appellees).

¶5 In the body of her complaint, Walker refers to "SmithKline Beecham, also known as GlaxoSmithKline." Walker's summons names "SmithKline Beecham [Corporation]" as the party for service. The certificate of service of process identifies the statutory agent for "Smithkline Beecham Corporation" (SBC) as the person served on August 25, 2011.

¶6 Next, Walker applied for entry of default against SBC, mailing the application to SBC's registered agent for service in Arizona and to a GlaxoSmithKline representative in Pennsylvania. Representatives of SBC, also known as GlaxoSmithKline, forwarded Walker's complaint and application for default to Quest Diagnostics, Inc. (QDI) for a response. The superior court

never entered the default. Ultimately, Quest Diagnostics Clinical Laboratories, Inc. (QDCL, Inc.), a Delaware corporation first known as SmithKline Beecham Clinical Laboratories, moved to dismiss the complaint pursuant to Arizona Rule of Civil Procedure (Rule) 12(b)(4) (insufficiency of process) and Rule (b)(5) (insufficiency of service of process).

¶7 Meanwhile, Zelig filed a "Demurrer and Denial of All Claims Made By Plaintiff Judith Walker" alleging that he had had no contact with Arizona persons or entities. The Board and the individual California defendants moved for dismissal under Rule 12(b)(2) (lack of personal jurisdiction).

¶8 Extensive litigation ensued. Following briefing and oral argument, the superior court granted all motions to dismiss and Zelig's dismissal request, in a signed dismissal order. The court deemed all other pending motions "moot," including (1) Walker's motion for summary judgment against Zelig, (2) Walker's motion for summary judgment against Lopez and the Board, and (3) Walker's motion to strike the defense of lack of personal jurisdiction. This appeal followed.

¶9 QDCL, Inc. filed a motion requesting (1) dismissal of the appeal for lack of jurisdiction, or (2) permission to intervene. This court denied the motion to dismiss but allowed QDCL, Inc. to intervene.

DISCUSSION

I. Arizona Lacks Personal Jurisdiction Over The Medical Board Of California And The Individual California Defendants.

¶10 This court reviews de novo a dismissal for lack of personal jurisdiction. *A. Uberti & C. v. Leonardo*, 181 Ariz. 565, 569, 892 P.2d 1354, 1358 (1995). The non-moving party must make a prima facie showing of jurisdiction. *Id.*

¶11 Rule 4.2(a) authorizes Arizona courts to assert personal jurisdiction over non-resident defendants to the maximum extent allowed by the United States Constitution. *Planning Group of Scottsdale, L.L.C. v. Lake Matthews Mineral Props., Ltd.*, 226 Ariz. 262, 265, ¶ 12, 246 P.3d 343, 346 (2011).

¶12 Walker concedes that Arizona courts lack general jurisdiction over the Board and individual California defendants. The basis for her specific jurisdiction argument is that she has been an Arizona resident since at least 2006, and suffered financial injury and reputational harm here as a result of certain information she claims was published in Arizona. Consequently, we must determine whether the superior court may exercise specific personal jurisdiction over the Board and individual California defendants and decide the nine causes of action asserted against them.

A. The Board And Individual California Defendants' Aggregate Contacts Fail To Support Personal Jurisdiction.

¶13 The Due Process Clause requires a showing that the defendant has minimum contacts with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The key issue in specific personal jurisdiction cases is "whether the aggregate of the defendants' contacts with the forum state makes it fair and reasonable to hale them into court in the forum state with respect to claims arising out of those contacts." *Planning Grp.*, 226 Ariz. at 268, ¶ 25, 246 P.3d at 349.

¶14 In resolving a Rule 12(b)(2) challenge to personal jurisdiction, the superior court may consider affidavits, depositions, and exhibits and, if necessary, conduct an evidentiary hearing to resolve the issue. *Gatecliff v. Great Rep. Life Ins. Co.*, 154 Ariz. 502, 506, 744 P.2d 29, 33 (App. 1987). To make the prima facie showing, the non-movant must produce evidence sufficient to avoid a directed verdict. *Bohreer v. Erie Ins. Exch.*, 216 Ariz. 208, 211, ¶ 7, 165 P.3d 186, 189 (App. 2007).

¶15 In *Planning Group*, the Arizona Supreme Court affirmed the dismissal of claims against two of the defendants. 226

Ariz. at 271, ¶ 40, 246 P.3d at 352. The plaintiff could identify no purposeful conduct by these defendants that occurred in Arizona or was directed at Arizona. *Id.* "Although Evers prepared the due diligence report, he did so before" the initial relevant events occurred, nor was there evidence "that he was aware that the report was to be sent to Arizona." *Id.* Likewise, Evers directed no communications into Arizona. *Id.* The involvement of Evers in California negotiations and the possibility of his receiving profits from the contemplated mining venture were also insufficient. *Id.*

¶16 This investigation occurred in California, when Walker was still practicing and living there. The Board employed Madorsky and Zelig, both California residents, to act as a medical expert reviewer and medical consultant, respectively. It also employed California residents Gonzalez and Tsang to act as investigators, albeit at different times, as Gonzalez retired years before Tsang began his employment. Lopez, a California resident and Deputy Attorney General, served as the Board's attorney.

¶17 Walker settled with the Board. Walker claims that the Board and Tsang improperly published a "Supplemental Accusation," which she disputes and characterizes as defamatory, in Arizona during 2010.

1. Madorsky

¶18 Walker claims that Madorsky, the originator of the alleged libel, is liable for all its republications. The record reflects that Walker's case was the only one Madorsky reviewed for the Board. Madorsky wrote correspondence to the Board concerning the case in 1994. There is no evidence that Madorsky ever published information about Walker to anyone in Arizona. Nor is there any basis to believe that Madorsky targeted Walker or could foresee any effect of her action in Arizona in 1994, when Walker had not yet moved there.

2. Gonzalez

¶19 Similarly, Walker claims that investigator Gonzalez authored two investigative reports and was involved in ordering Walker's pregnancy test. Gonzalez and Zelig circulated these reports to a doctor in 1994, but Gonzalez maintains that disclosure was necessary to inform experts working on the investigation.

¶20 There is no evidence that Gonzalez published any of the allegedly defamatory information about Walker to anyone in Arizona. Further, Gonzalez retired in 2002, eight years before the alleged publications. Likewise, the record is devoid of evidence that Gonzalez and Zelig targeted Walker in Arizona when ordering the alleged pregnancy test.

3. Tsang

¶21 Tsang served as a Board investigator for three years, ending his employment in September 2011. Walker contends that Tsang authored a defamatory report in 2010, and then attached copies of the Supplemental Accusation to it. As evidence, she supplies a letter from Tsang addressed to her in Arizona, dated March 4, 2010, which merely requests Walker to schedule an interview. The letter indicates that Tsang is responding to Walker's petition to the Board for penalty relief. This communication establishes Tsang's knowledge of Walker's Arizona address, but also shows that Walker initiated the contact with a California resident. She has no evidence, however, that Tsang published any report as part of a purposeful forum-directed effort.

4. Lopez

¶22 Walker's claim against Lopez is based upon her execution of the 1995 Supplemental Accusation. She also claims that Lopez published the Supplemental Accusation to Alan Singer (Singer) by mailing it in an envelope addressed to Walker in Arizona. The exhibit indicates that Lopez sent the investigative file to Walker at the latter's request. These facts fail to establish that Lopez was targeting Walker in Arizona; rather, Walker herself initiated contact with a California resident, who then complied with her request.

5. Zelig

¶23 Zelig, a medical consultant for the Board from 1991 to 2004, was responsible for reviewing medical records and information related to complaints against California physicians. He obtained this information from California investigators. Zelig was a California resident during the investigation, and currently resides in a California prison.

6. The Board

¶24 In addition, Walker claims that the Board targeted her in Arizona because an attorney received a copy of the Supplemental Accusation from the Medical Board and published it to the State Bar of Arizona. During the motion to dismiss briefing, Walker provided envelopes in which she claims Singer and Darin Caragata (Caragata) received the Supplemental Accusation copies in 2010, but had no proof as to what they contained. Walker's evidence does not establish that an attorney received the document from the Board or the mode of transmission.[1]

[1] Nor can we agree that the circulation of Walker's information between lawyers for co-defendants somehow establishes jurisdictionally significant contacts. Such action is irrelevant to the jurisdictional analysis. *See Karsten Mfg. Corp. v. U.S.G.A.*, 728 F. Supp. 1429, 1434 (D. Ariz. 1990) (holding that personal jurisdiction is based upon forum-related acts personally committed by a defendant).

¶25 After the motion to dismiss briefing had closed, Walker produced affidavits by Singer and Caragata in connection with her summary-judgment briefing. She never sought to incorporate these materials into her briefing on the motion to dismiss. Even assuming that they are relevant, Singer and Caragata's affidavits do not disclose the circumstances under which they received the Supplemental Accusations from the Board in 2007 and 2010, or negate the possibility that they came in response to valid public record requests. *See* Cal. Admin. Code tit. 16, § 1354.5(b) (permitting disclosure regarding any physician and surgeon licensed in California upon request of any public document, including accusations). The affidavits also fail to negate the possibility that the request was initiated by Walker or her agents.

¶26 Walker also complains about a publication by an attorney with whom she had a fee dispute and eventually reported to the State Bar. That attorney, she alleges, published defamatory information he had received from the Board to a State Bar official and a hearing officer in 2007. Again, Walker fails to detail the means by which the attorney acquired the information.

¶27 Walker further contends that the failure of the Board and other individual California Defendants to timely respond to her requests for admission conclusively establishes personal

jurisdiction. The superior court held, however, that Walker's motion on this issue, along with other pending motions, was moot. Furthermore, that court could properly view all Walker's requests for admissions as a nullity because she failed to seek leave of court to exceed the allotted number of requests. *See* Rule 36(b).

¶28 We conclude that Walker's evidence fails to establish a prima facie case of personal jurisdiction. As did the court in *Planning Group*, we hold that the aggregate of these contacts is insufficient to establish purposeful conduct conferring jurisdiction over the Board and individual California defendants. *See Planning Grp.*, 226 Ariz. at 271, ¶ 40, 246 P.3d at 352. The admissible evidence indicates that most of the actions of which Walker complains occurred years before Walker arrived in Arizona and thus fail to establish jurisdiction. *See Houghton v. Piper Aircraft Corp.*, 112 Ariz. 365, 368-69, 542 P.2d 24, 27-28 (1975) (holding that the post-plane crash move to Arizona by the victim's parents did not establish a damage-causing event out of which the claim arises for purposes of long-arm jurisdiction; a contrary result would encourage forum shopping).

¶29 Some of the alleged publications or transmissions of information were initiated by Walker herself. Further, any alleged harm or effect on Walker was insufficient to confer

jurisdiction. *See Planning Grp.*, 226 Ariz. at 271, ¶ 40, 246 P.3d at 352; *Cohen v. Barnard, Vogler & Co.,* 199 Ariz. 16, 19, ¶¶ 14-15, 13 P.3d 758, 761 (App. 2000) (holding that an audit performed in Nevada of a Nevada company by a Nevada auditor does not give Arizona jurisdiction over that auditor, even though the audit report caused harm to an Arizona resident). The mere fact that Walker allegedly suffered some of the alleged injuries based upon a few publications in Arizona is also unpersuasive. *See Planning Grp.*, 226 Ariz. at 271, ¶ 40, 246 P.3d at 352.

¶30 Finally, we reject Walker's argument based upon a conspiracy theory. As Appellees point out, an Arizona district court rejected a conspiracy theory, based upon forum-related conduct of any alleged conspirator, as a justification for vicarious personal jurisdiction. The court explained that "personal jurisdiction over any non-resident individual must be premised upon forum-related acts personally committed by the individual. Imputed conduct is a connection too tenuous to warrant the exercise of personal jurisdiction." *Karsten*, 728 F. Supp. at 1434 (quoting *Kipperman v. McCone*, 422 F. Supp. 860, 873 n.14 (N.D. Cal. 1976)).

¶31 In light of our conclusion that the Board and individual California defendants lacked sufficient minimum contacts, we need not address whether the assertion of

jurisdiction would be reasonable. *See Planning Grp.*, 226 Ariz. at 270, ¶ 37, 246 P.3d at 351.

B. The Board And Individual California Defendants Did Not Waive Their Personal Jurisdiction Defenses.

¶32 Walker argues that Appellees waived their personal jurisdiction defenses by making a general appearance prior to the ruling on their motion to dismiss. She bases this argument on (1) motions for extension of time to file a reply; (2) two motions to strike Walkers' motions for summary judgment; (3) Zelig's request for an extension of time to respond to a motion for summary judgment; (4) responses to Walker's requests for admission; and (5) Zelig's "Demurrer and Denial of All Claims Made by Plaintiff Judith Walker."

¶33 Apart from Zelig, none of the individual California Defendants or the Board ever filed an Answer, and they only participated in jurisdiction-related discovery in which their responses preserved objections to personal jurisdiction. Walker fails to establish that motions for extensions and to strike premature motions for summary judgment constitute general appearances. Unlike the defendant in *Skates v. Stockton*, none of these parties filed motions requesting affirmative relief, but rather sought to preserve these defenses. 140 Ariz. 505, 506-07, 683 P.2d 304, 305-06 (App. 1984) (holding that a member of the military made a general appearance by requesting a stay).

Nor can we agree that filing responses to a request for admission, assuming that they were proper under Rule 36(b), is a general appearance when the responding party reasserts the personal jurisdiction objection.

¶34 As to Zelig, the superior court recognized that his demurrer, while not artfully worded, did allege that he had no contact with Arizona persons or entities. Thus, the superior court properly considered the Rule 12(b)(2) argument with respect to Zelig because his filing preserved this defense. Walker had an opportunity to address this argument in the superior court, and her arguments about the summary judgment motions are not properly raised on appeal, as they were mooted by the dismissals under Rule 12(b).

¶35 In any event, the record remains devoid of evidence that Zelig published information in Arizona or purposefully targeted Walker there. Accordingly, we affirm the superior court's Rule 12(b)(2) dismissal as to the Board and all individual California defendants.[2]

[2] We deny "Appellant's Motion To Strike Pages 9-12, 14-18 and 19-29 Of Respondents' Brief of Appellees Zelig, Madorsky, Tsang, Lopez And Gonzalez For Failure To Comply With ARCAP 13(b)."

II. Walker's Service of Process Upon SmithKline Beecham Corporation Was Insufficient.

¶36 QDCL, Inc. also moved to dismiss Walker's complaint for battery and invasion of privacy (Second and Third Causes of Action) based upon insufficiency of process under Rule 12(b)(4) and insufficiency of service of process under Rule 12(b)(5). Rule 12(b)(4) deals with defects in the form of the papers, *Schwartz v. Ariz. Primary Care Physicians*, 192 Ariz. 290, 295, ¶ 17, 964 P.2d 491, 496 (App. 1998), and Rule 12(b)(5) covers the mode of delivery, or lack of delivery, of the summons and complaint. *Snow v. Steele*, 121 Ariz. 82, 86, 588 P.2d 824, 828 (1978); *accord* 5B Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1353 (3d ed. 2012).

¶37 The parties contend that this court should review the dismissal pursuant to Rules 12(b)(4) and 12(b)(5) for abuse of discretion. We note that the Ninth Circuit has reviewed a Rule 4 dismissal under this standard rather than under a de novo standard. *See Townsel v. Contra Costa County*, 820 F.2d 319, 320 (9th Cir. 1987). It is not necessary to resolve this issue because we can uphold the dismissal pursuant to Rule 12(b)(5) under either standard.

¶38 "Proper service of process is essential for the court to have jurisdiction over the defendant." *Koven v. Saberdyne Sys., Inc.*, 128 Ariz. 318, 321, 625 P.2d 907, 910 (App. 1980).

"[A] judgment would be void and subject to attack if the court that rendered it was without jurisdiction because of lack of proper service." *Id.*

¶39 To effect service, Walker was required to serve the person authorized to accept service on behalf of the correct corporation. Rule 4.1(k) (service on an in-state corporation); Rule 4.2(h) (Rule 4.1(k) applies to service on out-of-state corporations). Intervenor QDCL, Inc. successfully argued to the superior court that Walker was required to serve it or SmithKline Beecham Laboratories, Inc., but instead served her complaint on an entity unrelated to QDCL, Inc. that had nothing to do with the lab tests. Because Walker did not serve the proper party within 120 days of filing of this action, dismissal was warranted under Rule 4(i).

¶40 Walker argues that she properly sued and served SBC because SmithKline Beecham Clinical Laboratories is an unincorporated entity and it was responsible for her lab test in 1992. She premises this argument on the assumption that this unincorporated entity is an asset to be sold. The record offers no support for this assertion.

¶41 In 1999, QDI purchased the shares of SBCL, Inc., which were then owned by SBC. SBCL, Inc., a Delaware corporation, was the sole shareholder of SmithKline Beecham Clinical Laboratories, Inc., also a Delaware corporation and the entity

that performed the lab tests. QDI thus became the sole owner of SBCL, Inc. and its subsidiary, SmithKline Beecham Clinical Laboratories, Inc. Following the purchase of its parent company, the SmithKline Beecham Clinical Laboratories, Inc.'s Board of Directors changed the company's name to Quest Diagnostic Clinical Laboratories, Inc., or QDCL, Inc. Thus, SmithKline Beecham Laboratories, Inc. continued to exist as a separate entity, but under a different name.

¶42 Nevertheless, Walker insists that a press release proves that SBC somehow retained the pre-acquisition liabilities of SmithKline Beecham Clinical Laboratories, Inc. Publicity materials are not probative evidence. *See Adams v. AlliedSignal Gen. Aviation Avionics*, 74 F.3d 882, 885 (8th Cir. 1996).

¶43 Walker likewise offers no factual basis for piercing the corporate veil in order to sustain her suit against SBC and its liability for acts of its former subsidiaries. Nor are we bound by liability determinations of other courts. As a matter of law, Walker cannot properly serve SBC with a complaint alleging misconduct of SmithKline Beecham Clinical Laboratories, Inc. *See Horizon Res. Bethany Ltd. v. Cutco. Indus., Inc.* 180 Ariz. 72, 75, 881 P.2d 1177, 1180 (App. 1994); *see also Adams*, 74 F.3d at 885-86 (holding that service on a subsidiary's officer is not effective service on a parent company and affirming a dismissal for failure to serve the proper entity).

¶44 Walker alternatively argues that SmithKline Beecham Clinical Laboratories was a fictitious name for SBC. Walker cited no factual or legal support for this argument in the superior court, and raised it well after the motion to dismiss briefing had closed. Further, the evidence fails to support it.

¶45 As did the superior court, we conclude that Walker failed to complete service on a proper party. We therefore affirm its dismissal of the complaint's second and third causes of action against "SmithKline Beecham."

III. Walker's Failure To Identify The Proper Party In the Summons Further Supports Dismissal.

¶46 Walker's failure to name the proper party in the summons also supports the dismissal. A summons is defective under Rule 12(b)(4) if it does not provide notice to the party to be sued. The superior court properly dismissed Walker's complaint because the summons did not identify QDCL, Inc. or SmithKline Beecham Laboratories, Inc. as the party to be served. *See Safeway Stores, Inc. v. Ramirez*, 99 Ariz. 372, 379-81, 409 P.2d 292, 296-98 (1965) (holding that the summons was defective because it failed to alert a defendant that he was served in his individual capacity, instead of as the defendant corporation's manager). We affirm the dismissal of the Second and Third Causes of Action on this basis as well.

CONCLUSION

¶47 We affirm the superior court's order of dismissal in all respects. Appellees are entitled to recover their costs on appeal.

_/s/_____
PHILIP HALL, Judge

CONCURRING:

_/s/_____
MARGARET H. DOWNIE, Presiding Judge

_/s/_____
MAURICE PORTLEY, Judge