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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 10/23/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

RUSSELL JONES,) No. 1 CA-CV 12-0627 EL
)
Plaintiff/Appellee,) DEPARTMENT A
)
v.) MEMORANDUM DECISION
) Not for Publication
) (Rule 28, Arizona Rules
DARIN MITCHELL; KEN BENNETT, in) of Civil Appellate Procedure
his official capacity as Arizona)
Secretary of State; HELEN)
PURCELL, in her official)
capacity as Recorder for)
Maricopa County; FULTON BROCK,)
ANDREW KUNASEK, DONALD T.)
STAPLEY, JR., MARY ROSE WILCOX,)
MAX WILSON, in their official)
capacities as members of the)
Board of Supervisors for)
Maricopa County; ROBYN POUQUETTE,)
in her official capacity as)
Recorder for Yuma County; LENORE)
LORONA, RUSSELL MCCLOUD, KATHRYN)
PROCHASKA, MARCO A. REYES,)
GREGORY S. FERGUSON, in their)
official capacity as members of)
the Board of Supervisors for)
Yuma County,)
)
Defendants/Appellants.)

)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2012-095855

The Honorable Robert H. Oberbillig, Judge

VACATED

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G E M M I L L, Judge

¶1 Defendant/Appellant Darin Mitchell appeals the superior court's judgment in favor of Plaintiff/Appellee Russell Jones. The superior court found Mitchell was ineligible for consideration as the District 13 State Representative on the November general election ballot due to his failure to satisfy the residency requirement under Arizona law. Because Mitchell was not properly served with the summons and complaint in this case, we conclude that the superior court lacked personal jurisdiction over Mitchell and we therefore vacate its judgment.

¶2 In the Republican primary election held on August 28, 2012, Mitchell was elected to be placed on the general election ballot as a Legislative District 13 candidate for the Arizona

House of Representatives. On September 7, 2012, Jones filed a complaint alleging Mitchell was not eligible to represent Legislative District 13 because he did not reside within the District. The complaint was amended on September 11, 2012. Also on September 11, 2012, Jones served the summons and amended complaint on Jim Drake, a person authorized to accept and receive service of process on behalf of the Arizona Secretary of State. The summons noted that the entity to be served was "Darin Mitchell, c/o Ken Bennett, Secretary of State." That same day, the Attorney General's office notified Mitchell's attorney by email and phone of the documents served and forwarded copies to the attorney.

¶3 Prior to the hearing scheduled on September 13, 2012, Mitchell filed a motion to dismiss asserting he had not been legally served. At the beginning of the hearing on September 13, Mitchell's motion to dismiss was denied. On September 17, 2012, the superior court ruled in favor of Jones and issued an injunction preventing Mitchell's name from appearing on the general election ballot.

¶4 Mitchell appealed and sought a stay from this court. After a telephonic stay hearing on September 18, 2012, we issued a stay of the superior court's injunction. This appeal has proceeded as an accelerated election appeal. We have jurisdiction under Article 6, Section 9, of the Arizona

Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003) and 12-2101(A)(1) (2011).

¶5 "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). "Consequently, 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.*; see also *Kadota v. Hosogai*, 125 Ariz. 131, 134, 608 P.2d 68, 71 (App. 1980) ("[T]he law is clear that a judgment is void if the trial court did not have jurisdiction because of a lack of proper service."). Whether the court has personal jurisdiction over the defendant is a question of law that we review de novo. *Bohreer v. Erie Ins. Exch.*, 216 Ariz. 208, 211, ¶ 7, 165 P.3d 186, 189 (App. 2007).

¶6 Mitchell contends that service of process was not properly effectuated prior to the superior court hearing on September 13, 2012. Because the issue of personal jurisdiction is determinative of this appeal, we limit our analysis to this issue.

¶7 Jones prepared a summons for Mitchell and served the summons and amended complaint upon the Secretary of State. Service of process on the Secretary of State, however, was ineffective to accomplish service on Mitchell. Under A.R.S. § 16-351(D) (2011), service of process may be served upon the

Secretary of State as the candidate's statutory agent for nomination petition challenges. The challenge here, however, does not involve a nomination petition, but instead challenges the results of the primary election on the basis that Mitchell was not a resident of the Legislative District. On appeal, Jones acknowledges that service of process on the Secretary of State was not sufficient.

¶8 In an election contest such as this, the challenger (Jones) must serve the contestee (Mitchell) in accordance with applicable statutes and rules. See A.R.S. § 16-675(A) (2006) ("Upon filing of the statement of contest, the clerk of the superior court shall issue a summons to be served on the contestee as summons in civil actions are served"); Ariz. R. Civ. P. 4.1(d).¹ Jones concedes that the language of A.R.S. §

¹ Rule 4.1(d) states:

Service of Summons Upon Individuals. Service upon an individual from whom a waiver has not been obtained and filed, other than those specified in paragraphs (e), (f) and (g) of this Rule 4.1, shall be effected 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 or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the pleading to an agent authorized by appointment or by law to receive service of process.

16-675(A) refers to personal service within the meaning of Rule 4.1(d). Because Mitchell was not personally served with the summons and amended complaint, the superior court did not obtain personal jurisdiction over Mitchell unless he has, by his subsequent conduct, waived his objection.

¶9 Although Mitchell received actual notice of Jones's lawsuit, such knowledge is insufficient to satisfy the requirement of personal service. *See Melton v. Superior Court*, 154 Ariz. 40, 42, 739 P.2d 1357, 1359 (App. 1987) (holding actual notice resulting from delivery of summons and complaint to defendant's employer and then to defendant did not constitute valid service of process); *Smith v. Smith*, 117 Ariz. 249, 252, 571 P.2d 1045, 1048 (App. 1977) (explaining that a defendant's knowledge of a pending lawsuit "will not operate to cure a defect in service"). We would be abandoning the rule of law if we held that actual notice, by itself, substituted for proper service of process.

¶10 Jones argues, however, that Mitchell submitted to the jurisdiction of the court and thereby waived his personal jurisdiction objection. Although a party may waive personal jurisdiction objections by making an appearance in court without asserting the absence of personal jurisdiction, we conclude that Mitchell's actions in this proceeding did not constitute a waiver.

¶11 A "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." *Montano v. Scottsdale Baptist Hosp., Inc.*, 119 Ariz. 448, 452, 581 P.2d 682, 686 (1978). Mitchell initially appeared by filing a motion to dismiss prior to the superior court hearing on September 13, 2012. This motion simultaneously challenged the superior court's jurisdiction for lack of personal service and the application of the contest statutes to an election of legislators. The motion also sought, in the alternative, a postponement of the hearing. Mitchell's motion to dismiss was considered and denied by the court at the beginning of the September 13, 2012 hearing.

¶12 When a defendant initially asserts a jurisdictional defense and seeks a dismissal that is denied by the superior court, that defendant has not waived his jurisdictional defense even though he then proceeds to trial on the merits and judgment is entered against him. *Ariz. Real Estate Inv., Inc. v. Schrader*, 226 Ariz. 128, 129-130, ¶ 7, 244 P.3d 565, 566-67 (App. 2010); see also *Desarrollo Inmobiliario y Negocios Industriales De Alta Tecnologia De Hermosillo, S.A. De C.V. v. Kader Holdings Co.*, ___ Ariz. ___, ___, ¶ 10, 276 P.3d 1, 4 n.4 (App. 2012) (finding personal jurisdiction defense not waived when filing of cross-claim and counterclaim occurred after court's ruling on jurisdictional issue); *Nat'l Homes Corp. v.*

Totem Mobile Home Sales, Inc., 140 Ariz. 434, 437, 682 P.2d 439, 442 (App. 1984) ("[A] defendant who has obtained an adverse ruling on its jurisdictional defense has not waived that defense on appeal even though he proceeds to trial on the merits and a judgment has been entered against him."). Because Mitchell asserted from the beginning that he had not been properly and personally served, he did not waive his personal jurisdiction objection.

¶13 Jones cites *State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, 29, 66 P.3d 70, 72 (App 2003), *Tarr v. Superior Court*, 142 Ariz. 349, 351, 690 P.2d 68, 70 (1984), and *Austin v. State ex rel. Herman*, 10 Ariz. App. 474, 477, 459 P.2d 753, 756 (1969) in support of the proposition that "any action on the part of a party except to object to personal jurisdiction that recognizes the case as in court" constitutes a general appearance and a submission to the court's jurisdiction. This proposition and these cases are distinguishable. *Tarr* and *Austin* address what constitutes an "appearance" in the context of the requirement for a default judgment under Rule 55(b). *Tarr*, 142 Ariz. at 350, 690 P.2d at 69; *Austin*, 10 Ariz. App. at 475, 459 P.2d at 754. The issue before us – the circumstances under which a party waives his objection to the absence of personal jurisdiction – was not presented in *Tarr* or *Austin*. In *Burton*, which addresses jurisdiction under the Uniform

Interstate Family Support Act, the defendant initially requested a modification of his child support obligations without asserting a jurisdictional objection. *Burton*, 205 Ariz. at 28, ¶¶ 2-3, 66 P.3d at 71. Only after wife sought unpaid arrearages did husband raise a personal jurisdiction defense. *Id.* In contrast, Mitchell objected to the lack of personal service at his first appearance, thereby preserving his jurisdictional defense.

¶14 Jones further argues that Mitchell was required to present his objection to the lack of service as the sole argument in his motion to dismiss. We disagree. Arizona Rule of Civil Procedure 12 and the pertinent case law mandate the opposite conclusion. See *D. W. Onan & Sons, Inc. v. Superior Court*, 65 Ariz. 255, 259, 179 P.2d 243, 245-46 (1947) (explaining that an objection to personal jurisdiction is not waived simply because it is asserted along with other objections or defenses).

¶15 The Arizona Supreme Court long ago explained the importance of jurisdictional notice:

This Court has held that, where a jurisdictional notice is required to be given in a certain manner, any means other than that prescribed is ineffective. This is so even though the intended recipient of that notice does in fact acquire the knowledge contemplated by the law. Such a rule is no mere 'legal technicality'; rather it is a fundamental safeguard assuring each

citizen that he will be afforded due process of law. Nor may the requirement be relaxed merely because of a showing that certain complaining parties did have actual notice of the proceeding.

Hart v. Bayless Inv. & Trading Co., 86 Ariz. 379, 388, 346 P.2d 1101, 1108 (1959) (citation omitted).² Our supreme court has also emphasized that election contestants must "strictly comply" with applicable statutory requirements. *Donaghey v. Attorney Gen.*, 120 Ariz. 93, 95, 584 P.2d 557, 559 (1978). Applying these principles from *Hart* and *Donaghey*, we conclude that the lack of personal service of process on Mitchell prevented the superior court from exercising personal jurisdiction over Mitchell.

¶16 To summarize, Jones did not personally serve Mitchell. Mitchell moved to dismiss on the basis of lack of service of process. The court denied his motion to dismiss. By then participating in the hearing before the superior court, Mitchell did not waive his objection to the absence of personal jurisdiction. "If a defendant has not been properly served, and the defect in service has not been waived, any resulting judgment is void and must be vacated on request." *Arizona Real Estate*, 226 Ariz. at 129, ¶ 6, 244 P.3d at 566 (citing *Hilgeman*

² Although our supreme court's statements in *Hart* addressed a different category of jurisdictional notice requirements, the same principles apply here. See *Smith*, 117 Ariz. at 252, 571 P.2d at 1048 (applying the above principles from *Hart* to service of process).

v. Am. Mortg. Sec., Inc., 196 Ariz. 215, 220, ¶ 14, 994 P.2d 1030, 1035 (App. 2000)). Because the superior court did not have personal jurisdiction over Mitchell, we vacate the judgment of the superior court entered in favor of Jones.

/s/

JOHN C. GEMMILL
Presiding Judge

CONCURRING:

/s/

MARGARET H. DOWDIE, Judge

/s/

LAWRENCE F. WINTHROP, Chief Judge