

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

PAUL W. MCKIRAHAN, a single man, ) 1 CA-CV 09-0589  
)  
) DEPARTMENT B  
Plaintiff/Appellant, )  
) **MEMORANDUM DECISION**  
v. ) (Not for Publication -  
) Rule 28, Arizona Rules of  
ADVANCED PROPERTY TAX LIENS, INC., ) Civil Appellate Procedure)  
an Arizona corporation, )  
)  
)  
Defendant/Appellee. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CV 2009-014061

The Honorable Robert H. Oberbillig, Judge

**REVERSED; REMANDED WITH INSTRUCTIONS**

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**N O R R I S**, Judge

¶1 The superior court dismissed plaintiff/appellant Paul  
W. McKirahan's complaint concluding it was an impermissible

collateral attack on a default judgment entered in a prior tax lien foreclosure case. Because McKirahan asserted in his complaint the lien foreclosure judgment was void for lack of personal jurisdiction, the superior court should not have dismissed it. We thus reverse and remand for further proceedings.

#### **FACTS AND PROCEDURAL BACKGROUND**

¶2 In June 2009, McKirahan sued defendant/appellee Advanced Property Tax Liens, Inc. ("APTL") to quiet title to certain real property and obtain reimbursement of attorneys' fees and costs, pursuant to Arizona Revised Statutes ("A.R.S.") section 12-1103(B) (2003).<sup>1</sup> According to his complaint, Augustina T. Artates originally held title to the property and on or about October 3, 2002, sold the property to another person who, in turn, sold the property to McKirahan, as evidenced by a quit claim deed recorded in the Maricopa County Recorder's Office on September 16, 2004. McKirahan further alleged that on July 16, 2008, APTL had filed suit in Maricopa County Superior Court (No. CV 2008-091928) to foreclose a tax lien it claimed to have purchased on the property but neither named nor served him

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<sup>1</sup>In reviewing the complaint's dismissal, we assume all properly pleaded matters therein are true. *Schwamm v. Superior Court*, 4 Ariz. App. 480, 481, 421 P.2d 913, 914 (1966) (applying the standard and affirming the denial of a motion to dismiss an action used to attack a judgment rendered without personal jurisdiction).

as a defendant. Because of these deficiencies, McKirahan alleged the court did not have personal jurisdiction over him and, accordingly, did not have jurisdiction to enter an October 6, 2008 default judgment against him and in APTL's favor foreclosing the tax lien (the "lien foreclosure judgment").<sup>2</sup> As relief, McKirahan sought (1) a declaration he was the rightful owner of the property, (2) an order compelling APTL to transfer legal title and possession of the property to him, (3) a judgment enjoining APTL from claiming any interest in the property, (4) an award of attorneys' fees and costs, and (5) "such other and further relief" as proper.

¶13 APTL moved to dismiss McKirahan's complaint under Arizona Rule of Civil Procedure 12(b), asserting, in part, it was an impermissible collateral attack on the lien foreclosure judgment. The superior court agreed. This appeal followed.

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<sup>2</sup>McKirahan alleged:

Failure to inform Plaintiff, Paul W. McKirahan, that he was being served as a defendant in the foreclosure action under a fictitious name prevented the court in the foreclosure action from having personal jurisdiction over Plaintiff. Consequently, the court did not have jurisdiction to enter a default judgment against Plaintiff in the tax lien foreclosure action.

## DISCUSSION

¶14 On appeal, McKirahan argues that because he was asserting the lien foreclosure judgment was void for lack of personal jurisdiction, he was entitled to file an independent action to set aside the lien foreclosure judgment under Rule 60(c), and therefore, the superior court should not have dismissed his complaint.<sup>3</sup> We agree.

¶15 Rule 60(c) provides:

On motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: . . . (4) the judgment is void; . . . . *This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant served by publication as provided by Rule 59(j) or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.*

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<sup>3</sup>We review de novo the superior court's interpretation of procedural rules. *In re Marriage of Reeder v. Johnson*, 224 Ariz. 85, \_\_\_, ¶ 6, 227 P.3d 492, 494 (App. 2010). Accordingly, we disagree with APTL the standard of review is for an abuse of discretion. APTL's reliance on *Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 836 P.2d 404 (App. 1991), is misplaced. The issue in *Osterkamp* was whether the superior court abused its discretion in refusing to vacate a default judgment for either excusable neglect or insufficient service of process, see *id.* at 193, 836 P.2d at 406; in contrast, the issue here is whether Rule 60(c) authorized McKirahan to bring an independent action to set aside the lien foreclosure judgment. That issue requires us to interpret Rule 60(c) and thus presents an issue for de novo review.

(Emphasis added.)

¶16 On its face, the rule authorized McKirahan to bring an "independent action" to vacate the lien foreclosure judgment because he was contending the judgment was void for lack of personal service.<sup>4</sup> See generally *Walker v. Davies*, 113 Ariz. 233, 235, 550 P.2d 230, 232 (1976) (judgment is not void unless superior court lacked jurisdiction over the subject matter, the parties, or to render the particular judgment); *Master Fin.*, 208 Ariz. at 74, ¶ 19, 90 P.3d at 1240 (judgment is void if court lacked jurisdiction over the subject matter, a person, or the particular order or judgment entered); see also *Am. Sur. Co. v. Mosher*, 48 Ariz. 552, 558, 64 P.2d 1025, 1028 (1936) (party may obtain relief from judgment either by motion to vacate the judgment or by an independent action to have it set aside);

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<sup>4</sup>If the defendant appears and contests jurisdiction and then loses, the court's jurisdiction cannot subsequently be questioned. *Lofts v. Superior Court*, 140 Ariz. 407, 410, 682 P.2d 412, 415 (1984). The key issue is not whether McKirahan was in fact properly served, but whether he appeared and litigated the jurisdiction issue or other issues in the prior action. See *Master Fin., Inc. v. Woodburn*, 208 Ariz. 70, 74, ¶ 19, 90 P.3d 1236, 1240 (App. 2004) ("[A] party seeking relief from a void judgment need not show that their failure to file a timely answer was excusable, that they acted promptly in seeking relief from the default judgment, or that they had a meritorious defense."). Because the lien foreclosure judgment was entered by default, McKirahan is entitled to raise the jurisdictional issue in this separate action. See *id.*; see also *Schwamm*, 4 Ariz. App. at 483, 421 P.2d at 916 (action for declaratory judgment may be used to attack a judgment as void for lack of jurisdiction).

Daniel J. McAuliffe & Shirley J. Wahl, 2A Arizona Practice: Civil Trial Practice § 29.2, at 199 (2d ed. 2001) (judgment is void on its face when the court lacked jurisdiction over the defendant).

¶17 Further, even if McKirahan's complaint constituted a collateral attack on the lien foreclosure judgment because it requested additional relief, as APTL argued in the superior court and argues here,<sup>5</sup> a void judgment may, nevertheless, be collaterally attacked. *E.g., Walker*, 113 Ariz. at 235, 550 P.2d at 232 (judgment may not be attacked collaterally even for fraud unless it is void on its face); *Cooper v. Commonwealth Title of Ariz.*, 15 Ariz. App. 560, 564, 489 P.2d 1262, 1266 (1971) (judgment which is void on its face may be attacked at any time, collaterally or otherwise); *Dockery*, 45 Ariz. at 446-49, 45 P.2d at 660-62.

¶18 Here, although McKirahan's complaint asserted other issues and sought other relief, because it alleged the lien foreclosure judgment was void, whether McKirahan was collaterally attacking that judgment was immaterial. The

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<sup>5</sup>When "an action has for its primary purpose the obtaining of independent relief, and the vacating or setting aside of a judgment is merely incidental thereto, such action is not a direct, but a collateral, attack upon the judgment." *Dockery v. Cent. Ariz. Light & Power Co.*, 45 Ariz. 434, 445, 45 P.2d 656, 660 (1935); accord *Cox v. Mackenzie*, 70 Ariz. 308, 312, 219 P.2d 1048, 1051 (1950) (collateral attack on judgment is "an effort to obtain another and independent judgment which will destroy the effect of the former judgment").

superior court did not need to decide whether McKirahan's complaint constituted a collateral attack on the lien foreclosure judgment, and thus, should not have dismissed his complaint on that basis.<sup>6</sup>

¶19 APTL argues, nevertheless, A.R.S. § 42-18204(B) (Supp. 2009) limited McKirahan's ability to seek relief under Rule 60(c) from a tax lien foreclosure judgment.<sup>7</sup> The statute provides:

After entering judgment the parties whose rights to redeem the tax lien are thereby foreclosed have no further legal or equitable right, title or interest in the property subject to the right of appeal and stay of execution as in other civil actions.

*Id.*

¶10 Section 42-18204(B) does not replace the Arizona Rules of Civil Procedure; in fact, the legislature made the tax lien foreclosure statutes subject to the "provisions of law relating to civil actions" and specified the "rules of civil procedure

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<sup>6</sup>APTL's reliance on *Jacobs v. Jacobs*, 3 Ariz. App. 436, 415 P.2d 151 (1966), is misplaced. In that case, the court held the plaintiffs could not, in a new action, attack a prior judgment quieting title to property in favor of the defendants. Unlike the facts here, the *Jacobs* plaintiffs made no assertion the prior judgment was void and indeed, never moved to have it set aside. Accordingly, the court concluded the judgment could not be collaterally attacked. *Id.* at 439-40, 415 P.2d at 153-54.

<sup>7</sup>We review de novo the interpretation of statutes. *Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. 24, \_\_\_, ¶ 17, 226 P.3d 411, 416 (App. 2010).

control the proceedings in an action to foreclose the right to redeem." A.R.S. § 42-18203(A) (2006); see also *Lewis v. Palmer*, 67 Ariz. 189, 194, 193 P.2d 456, 459 (1948) (tax lien foreclosure action is civil action and under predecessor of A.R.S. § 42-18201, subject to "the broad powers of the Superior Court, and hence governed by its general rules").<sup>8</sup>

¶11 Moreover, *Roberts v. Robert*, 215 Ariz. 176, 158 P.3d 899 (App. 2007), undercuts APTL's argument the tax lien statutes limit the operation of Rule 60(c). In *Roberts*, we recognized a party entitled to redeem a tax lien could move to set aside a default lien foreclosure judgment because it was void for lack of personal jurisdiction. 215 Ariz. at 180, ¶ 17, 158 P.3d at 903.

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<sup>8</sup>In *Lewis*, the plaintiff sued to quiet title to property, asserting a prior judgment foreclosing a tax lien was invalid because his property had been improperly taxed. Our supreme court held the plaintiff could not attack the foreclosure judgment because the superior court in that action had subject matter jurisdiction, jurisdiction over the plaintiff (who had been personally served), and jurisdiction to render the foreclosure judgment. 67 Ariz. at 195, 193 P.2d at 459-60. In so holding, the court explained the plaintiff's objection to the validity of the foreclosure judgment should have been raised in that action and because he had failed to do so, the "judgment in that cause, over which the court unquestionably had jurisdiction" had become final and could not be collaterally attacked. *Id.* at 195, 193 P.2d at 460. *Lewis* is distinguishable from this case, as here, McKirahan is asserting the lien foreclosure judgment is void for lack of personal jurisdiction, and as discussed above, he may collaterally attack it.



¶12 APTL further contends McKirahan was not entitled to challenge the lien foreclosure judgment because he should have challenged APTL's efforts to foreclose the tax lien before the lien foreclosure judgment was entered and his rights foreclosed. Even after entry of a judgment foreclosing a tax lien, however, parties with the right to redeem may collaterally attack the judgment based upon lack of jurisdiction. *Sprang v. Petersen Lumber, Inc.*, 165 Ariz. 257, 262, 798 P.2d 395, 400 (App. 1990) (lien foreclosure judgment void; treasurer's deed to tax purchaser based on void judgment conveyed nothing).<sup>9</sup>

¶13 Finally, APTL's answering brief raises several factual and legal issues that have yet to be addressed in the superior court. These issues include whether McKirahan acquired record title, whether he was personally served, the validity of the lien foreclosure judgment, and service procedures for fictitiously named defendants. Because the superior court has not yet addressed these issues, we decline to do so.

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<sup>9</sup>APTL's answering brief appears to suggest McKirahan is collaterally estopped from challenging the lien foreclosure judgment as being void for lack of personal jurisdiction. Collateral estoppel, known as issue preclusion, is only applicable when the issue or fact in dispute was actually litigated in the prior litigation. *E.g.*, *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986). When, as here, judgment in the prior litigation was entered by default, no issue or fact was actually litigated, the default judgment cannot have collateral estoppel effect. *State ex rel. Dep't of Econ. Sec. v. Powers*, 184 Ariz. 235, 237-38, 908 P.2d 49, 51-52 (App. 1995) (no collateral estoppel when paternity not actually litigated in default marriage dissolution action).

**CONCLUSION**

¶14 We reverse the dismissal of McKirahan's independent action and remand for further proceedings consistent with this decision. On remand, the superior court must determine whether the court entering the lien foreclosure judgment had personal jurisdiction over McKirahan.

/s/

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PATRICIA K. NORRIS, Judge

CONCURRING:

/s/

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JOHN C. GEMMILL, Presiding Judge

/s/

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MAURICE PORTLEY, Judge