

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

HALINA AWSIENKO, surviving spouse;) 1 CA-CV 09-0590
NINA AWSIENKO, surviving child; and)
OLEG AWSIENKO, surviving child,) DEPARTMENT E
)
Plaintiffs/Appellants,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) Rule 28, Arizona Rules
ALEXIS WOODS, M.D.,) of Civil Appellate
) Procedure)
Defendant/Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-024190

The Honorable Robert H. Oberbillig, Judge

AFFIRMED

The Rosacci Law Firm, P.C. Phoenix
By Antonio M. Rosacci
Attorney for Appellants

Olson, Jantsch & Bakker, PA Phoenix
By Daniel P. Jantsch
and Sarah L. Sato-Brown
Attorneys for Appellee

H A L L, Judge

¶1 Halina Awsienko (Awsienko) appeals from the trial court's order dismissing her amended complaint as to Alexis Woods (Woods) because Awsienko failed to serve her with the original complaint. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Awsienko and her adult children named Woods as a defendant in a wrongful death complaint alleging medical malpractice in the treatment of Awsienko's husband, Filip, who died on May 11, 2006. After filing the complaint on May 6, 2008, Awsienko attempted to serve Woods with the complaint at her home address eleven times between June 21, 2008 and July 31, 2008, but failed to do so.¹

¶3 On April 7, 2009, Awsienko filed for leave to amend the complaint to (1) correct the mistaken naming of one of Woods' co-defendants, and (2) add a new claim against existing defendant Banner Health Medical Center. On May 12, 2009, the trial court issued an order allowing the amendment to substitute the mistakenly named party, but denying the addition of a new

¹ Awsienko claims that Woods "effectively evaded service," but does not support this claim with case law or facts establishing any intentional evasion. Woods correctly points out that Awsienko never attempted to serve Woods with the original complaint at work, and had no such trouble serving Woods with the amended complaint at her work address. In any event, Awsienko cites no legal authority supporting this argument and does not develop it on appeal. ARCAP 13(a)(6); see *Lohmeier v. Hammer*, 214 Ariz. 57, 64 n.5, 148 P.3d 101, 108 n.5 (App. 2006).

claim. Awsienko filed her first amended complaint on June 3, 2009, and served Woods with the amended complaint on June 9, 2009, over a year after the statute of limitations on the action had run.²

¶14 Woods filed a motion to dismiss the complaint for lack of service on June 29, 2009. In her response, Awsienko argued that Woods had evaded service, that she had waived her service-of-process objection by failing to file for dismissal or object to the amended complaint, and that the amended complaint related back to the date of the original complaint because it was transactionally related to that complaint. The court issued an order granting the motion to dismiss on August 11, 2009. Awsienko timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(B) (2003).

STANDARD OF REVIEW

¶15 Awsienko contends that we should review the record de novo for issues of material fact, as we would for a motion for summary judgment, because the trial court considered documents outside the pleadings (i.e. affidavits of service) in arriving at its ruling. We disagree. The rule that a motion to dismiss is treated as a summary judgment motion if the court considers

² The statute of limitations for a wrongful death suit is two years. Ariz. Rev. Stat. (A.R.S.) § 12-542(2) (2003).

matters outside the record applies only to motions filed pursuant to Arizona Rule of Civil Procedure 12(b)(6) (dismissal for failure to state a claim upon which relief can be granted), not Rule 12(b)(5) (dismissal for insufficiency of service of process). See Rule 12(b) ("If, on a motion asserting the defense [of] failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment"); see also *Green v. Garriott*, 221 Ariz. 404, 417, ¶ 50, 212 P.3d 96, 109 (App. 2009).

¶6 We will affirm the trial court's dismissal for insufficient service of process absent an abuse of discretion. *Toy v. Katz*, 192 Ariz. 73, 83, 961 P.2d 1021, 1031 (App. 1997). An abuse of discretion occurs if there is "no evidence to support the superior court's conclusion" or if the reasons given for the decision by the court are "clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983).

DISCUSSION

¶7 Awsienko claims that Woods waived any objection to defects in the service of the original complaint by failing to object to Awsienko's motion to amend or her amended complaint.

Awsienko argues that this waiver occurred because Woods had notice of these filings through her attorney, who also represents several of her co-defendants in the suit who were properly served. Awsienko further contends that Woods cannot invoke Rule 4(i) because the complaint against Woods was not dismissed before Awsienko filed and served the amended complaint.

¶18 A plaintiff seeking to bring a given defendant into an action must serve the defendant with a summons and complaint as specified in Rule 4(b). Service must be made "within 120 days after the filing of the complaint." Rule 4(i). If it is not, "the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time." *Id.*

¶19 A defendant seeking to raise insufficiency of service as a defense must raise it as specified in Rule 12(b)(5). A defendant waives the defense by failing to raise it in its first responsive pleading. *Id.* One may also waive the defense by seeking affirmative relief from the court. *National Homes Corp. v. Totem Mobile Home Sales, Inc.*, 140 Ariz. 434, 437, 682 P.2d 439, 442 (App. 1984) (citing 5 C. Wright & A. Miller, *Federal Practice & Procedure*, Civil § 1397 at 877 (1969)).

¶10 We conclude that Woods did not waive the insufficiency of service defense. Awsienko never brought Woods into the suit by serving process, and Woods never participated in the suit by filing a responsive pleading, making an appearance, or seeking any affirmative relief. We reject Awsienko's waiver argument because Woods had never been served a summons and complaint, and had therefore not been fully brought into the suit as a party. Although the court had not yet dismissed her from the suit, it was required to do so unless Awsienko showed good cause justifying an extension of time for service. See Rule 4(i). Awsienko never sought an extension of time or attempted to show good cause. Finally, although an attorney's knowledge of the suit is sometimes pertinent to an attempt to relate an amendment back to the date of the original complaint under Rule 15(c), it does not create a waiver of service, and Awsienko has abandoned her Rule 15(c) argument on appeal.

¶11 Alternatively, Awsienko claims that by filing and serving an amended complaint, she has effectively barred Woods from seeking dismissal for insufficiency of service. She contends that her amended complaint "supersedes the original complaint, which [is then] of no further effect or authority." *Francini v. Phoenix Newspapers, Inc.*, 188 Ariz. 576, 586, 937 P.2d 1382, 1392 (App. 1996). Thus, she claims that "any defect

in [the] original pleading, or the service thereof, has no substantive effect upon the amended pleading." We disagree.

¶12 Initially, we note that Awsienko waived this argument by failing to raise it before the trial court. We generally do not consider arguments raised for the first time on appeal. *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994).

¶13 In any event, Awsienko's reliance on *Francini* is misplaced. In that case, the court held that after amending his complaint, the plaintiff could not be bound by the factual representation in his original, pro se complaint that he "could not perform the duties" of his position as a machinist. *Francini*, 188 Ariz. at 586, 937 P.2d at 1392. Awsienko does not seek, as *Francini* did, to change a factual representation presented in her complaint. Rather, she claims that her amended complaint relieves her of her obligation under Rule 4(i) to serve Woods with the initial complaint within 120 days of filing it. We perceive no error in the trial court's rejection of this argument.

¶14 The rules for service of process exist to provide parties with adequate notice of the claims against them. *Safeway Stores, Inc. v. Ramirez*, 99 Ariz. 372, 380, 409 P.2d 292, 297 (1965). Allowing parties to avoid dismissal for lack

