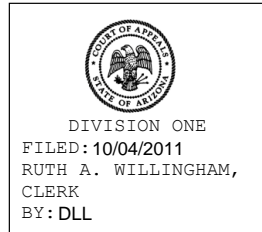


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



MJG ENTERPRISES, INC., an Arizona corporation,	)	1 CA-CV 10-0767
	)	
	)	DEPARTMENT C
Plaintiff/Appellee,	)	
	)	<b>MEMORANDUM DECISION</b>
	)	(Not for Publication
v.	)	- Rule 28, Arizona
	)	Rules of Civil
WAYNE RADFORD MOON and LESLIE MOON,	)	Appellate Procedure)
husband and wife; GCR CAPITAL	)	
PARTNERS, LLC, a Nevada limited	)	
liability company,	)	
	)	
Defendants/Appellants.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV 2009-020325

The Honorable Jay L. Davis, Commissioner  
The Honorable Eileen Willett, Judge

**VACATED AND REMANDED**

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Mitchell & Associates	Phoenix
By Robert D. Mitchell	
and Sarah K. Deutsch	
and Jamie Gill Santos	
Attorneys for Plaintiff/Appellee	
 Wayne Radford Moon, <i>In Propria Persona</i>	 Reno, NV
Defendant/Appellant	
 Leslie Moon, <i>In Propria Persona</i>	 Reno, NV
Defendant/Appellant	

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

¶1 This appeal arises out of default judgments entered in favor of Appellee MJG Enterprises, Inc. ("MJG"), of Arizona against Appellants Wayne Moon, Leslie Moon and GCR Capital Partners, LLC,<sup>1</sup> (unless separately referenced, collectively, "Defendants") of Nevada. Defendants argue we should vacate the default judgments because, *inter alia*, the superior court lacked personal jurisdiction over them. We agree the default judgments should be vacated, but for slightly different reasons. As we explain, MJG was not procedurally entitled to the default judgments because Defendants appeared and "otherwise defend[ed]" by challenging personal jurisdiction before the court entered the default judgments. Further, the record does not show the superior court ever decided whether it had personal jurisdiction over Defendants. Therefore, we vacate the default judgments and remand for further proceedings.

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<sup>1</sup>Wayne Moon was the managing member of GCR. After this appeal was at issue, this court granted Defendants' counsel's motion to withdraw as their counsel in this matter. We remind Defendants a corporation may not appear in court without an attorney. See *Boydston v. Strole Dev. Co.*, 193 Ariz. 47, 49, ¶ 7, 969 P.2d 653, 655 (1998).

## FACTS AND PROCEDURAL BACKGROUND

¶12 In March 2010, MJG filed an application with the clerk of the court for entry of default against Defendants. The record does not show the clerk ever entered a default. In May, MJG filed two separate motions for default judgment against Defendants -- one for the Moons and one for GCR ("Default Judgment Motions"). MJG attached affidavits to the Default Judgment Motions that stated the applications for entry of default had been filed with the clerk and a copy of those applications had been mailed to the last known addresses for Defendants. The Default Judgment Motions stated that "[m]ore than ten (10) judicial days [had] elapsed since the default was filed," but did not assert the clerk had entered the Defendant's default.

¶13 In a letter to the superior court judge assigned to the case, filed in the record July 13 but dated June 8, Wayne Moon stated he "had never been made aware" of the lawsuit and would be "hiring an attorney to make special appearances."<sup>2</sup> He also stated he was "contesting Arizona jurisdiction" on the grounds he "facilitated only two phone calls between the parties

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<sup>2</sup>While Wayne Moon did not specifically state the letter was sent on behalf of Leslie Moon and GCR as well, the first paragraph of the letter noted that Wayne Moon, Leslie Moon, and GCR had all been "included as defendants."

(MJG & Callahan/Tucker), as an intermediary" and "maintain[ed] no presence within the state of Arizona." The superior court treated the letter as a response to the Default Judgment Motions. The letter, however, contained no indication Moon had submitted it in response to the Default Judgment Motions or had ever seen the Default Judgment Motions. MJG filed a reply in which it did not respond to Moon's assertions about personal jurisdiction. Instead, the reply only argued the personal jurisdiction arguments raised in the letter "[did] not amount to demonstration of a meritorious defense."

¶4 In an unsigned minute entry filed August 6, the superior court granted the Default Judgment Motions. Following the issuance of this minute entry, Defendants sent letters to the superior court that were styled as motions to reconsider for lack of jurisdiction and motions to dismiss for lack of jurisdiction.<sup>3</sup>

¶5 On August 19, Defendants, now represented by counsel, filed a motion for reconsideration seeking to set aside the granting of the Default Judgment Motions. This motion for reconsideration included an affidavit from Wayne Moon, stating that when he was first informed in June that he, Leslie Moon, and GCR were defendants in the case, he promptly sent a letter

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<sup>3</sup>These "motions" were not placed in the superior court record until September 1, 2010, the same day they were denied.

"disputing the Court's jurisdiction." On September 1, the superior court, without directing MJG to respond, denied all of the Defendants' motions and affirmed the granting of the Default Judgment Motions.

¶16 On September 22, the superior court entered default judgments against Defendants, and Defendants timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes section 12-2101(B) (2003).<sup>4</sup>

#### DISCUSSION

¶17 Obtaining a default judgment against a party who has failed to "plead or otherwise defend" under Arizona Rule of Civil Procedure 55 is a two-step process. The first step is securing an entry of default:

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these Rules, the clerk *shall enter* that party's default in accordance with the procedures set forth below. All requests for entry of default shall be by written

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<sup>4</sup>Generally, a default judgment is not appealable; rather, parties can appeal only an order setting aside or refusing to set aside a default judgment. *Kline v. Kline*, 221 Ariz. 564, 568, ¶ 11, 212 P.3d 902, 906 (App. 2009). A default judgment can nevertheless be appealed "when there is a question regarding personal or subject matter jurisdiction, or when there is a question regarding the validity of the default judgment pursuant to Ariz. R. Civ. P. 55." *Id.* Because Defendants attack the validity of the default judgments on jurisdictional grounds, we have jurisdiction to consider these issues.

application to the clerk of the court in which the matter is pending.

Ariz. R. Civ. P. 55(a) (emphasis added). The "procedures set forth below" include notice to the defendant of the request for entry of default and a 10-day period after the default is "entered by the clerk" before the default becomes effective. *Id.* (emphasis added). An entry of default, as the name suggests, is premised on the actual entry of a default in the court record. *Ramada Franchise Sys. v. Baroda Enters.*, 220 F.R.D. 303, 305 (N.D. Ohio 2004) (entry of default is prerequisite to granting of default judgment); *Brooks v. United States*, 29 F. Supp. 2d 613, 618 (N.D. Cal. 1998); 10A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, & Richard L. Marcus, *Federal Practice and Procedure* § 2682, at 13 (3d ed. 1998).<sup>5</sup>

¶8 The second step is obtaining a default judgment. According to Rule 55(b)(1),

[w]hen the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain,

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<sup>5</sup>Because the Arizona Rules of Civil Procedure were adopted from the Federal Rules of Civil Procedure, "we give great weight to interpretations given to similar federal rules." *Jenney v. Ariz. Express, Inc.*, 89 Ariz. 343, 349, 362 P.2d 664, 668 (1961). The subsections of Arizona and Federal Rule 55 relevant here are similar, so the federal cases are highly persuasive because "uniformity in interpretation of our rules and federal rules is highly desirable." *Orme Sch. v. Reeves*, 166 Ariz. 301, 304, 802 P.2d 1000, 1003 (1990).

the Court upon motion of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, *if the defendant has been defaulted for failure to appear* and is not an infant or incompetent person.

(emphasis added). To obtain a default judgment, the defendant must have previously been "defaulted." Ariz. R. Civ. P. 55(b). Also, the court must have personal and subject-matter jurisdiction over the defendant. See *Patray v. Northwest Pub., Inc.*, 931 F. Supp. 865, 869 (S.D. Ga. 1996); 10A Wright, Miller, Kane & Marcus, § 2682, at 14 n.4. Generally, to have personal jurisdiction over a defendant, the defendant must have sufficient contacts with the forum state. See generally *Planning Grp. of Scottsdale, L.L.C. v. Lake Mathews Mineral Props., Ltd.*, 226 Ariz. 262, 246 P.3d 343 (2011).

¶19 Here, MJG and the superior court failed to follow this two-step process. As an initial matter, the clerk never entered Defendants' default, although the superior court and MJG acted as though this had happened. Because the clerk never entered Defendants' default, the necessary prerequisite to a default judgment was missing. *Ramada*, 220 F.R.D. at 305. Accordingly, Moon was still entitled to "plead or otherwise defend" under Rule 55(a) when he submitted his June 8 letter to the superior court, and the court should have treated it as an appearance to "otherwise defend" as it challenged, *inter alia*, personal

jurisdiction. *Bass v. Hoagland*, 172 F.2d 205, 210 (5th Cir. 1949) ("The words 'otherwise defend' refer to attacks on the service, or motions to dismiss, or for better particulars, and the like, which may prevent default without presently pleading to the merits."); 10A Wright, Miller, Kane & Marcus, § 2682, at 17 n.14; see *McClintock v. Serv-Us Bakers*, 103 Ariz. 72, 74, 436 P.2d 891, 893 (1968) (in determining whether a party has appeared, court should consider substance, rather than form, as well as other circumstances).

¶10 Rather than treating the letter as an appearance to "otherwise defend" on the grounds of personal jurisdiction, the superior court treated the letter as a response to the Default Judgment Motions, despite no indication Moon had ever seen the Default Judgment Motions or was responding to them. The superior court's treatment of the letter is not surprising when one considers that it -- like MJG -- was acting under the assumption the clerk had entered a default. Generally, entry of default precludes a defendant from participating in further court proceedings, except a hearing on damages or a motion to set aside the default or a similar action that does not go to the merits of the claim. Ariz. R. Civ. P. 55(b); *Martin v. Sears*, 45 Ariz. 414, 419, 44 P.2d 526, 528 (1935); *U-Totem Store v. Walker*, 142 Ariz. 549, 553, 691 P.2d 315, 319 (App. 1984).



But because the clerk had not entered a default, the door had not closed on Defendants and they remained free to "plead or otherwise defend."

¶11 As noted, the superior court treated the letter as a response to the Default Judgment Motions and authorized MJG to reply to it. MJG's reply focused on the requirements for setting aside an entry of default or a default judgment, see *Richas v. Superior Court*, 133 Ariz. 512, 514, 652 P.2d 1035, 1037 (1982) (good cause necessary for setting aside or vacating entry of default is same as required for relief from default judgment), not on the "otherwise defend" issue of lack of personal jurisdiction raised in Moon's letter. Indeed, MJG's reply never addressed personal jurisdiction at all.

¶12 Because the door remained open for Defendants to "otherwise defend," the superior court should have considered the letter's substance, rather than its form, *McClintock*, 103 Ariz. at 74, 436 P.2d at 893, and treated it as either a responsive pleading asserting lack of personal jurisdiction or a motion asserting lack of personal jurisdiction. When a responsive pleading or motion challenges personal jurisdiction, Rule 12(d) requires that the responsive pleading or motion "be heard and determined before trial on application of any party." Thus, either party was entitled to request court determination

of personal jurisdiction, and MJG would bear the burden of demonstrating the superior court had personal jurisdiction over Defendants. See *Houghton v. Piper Aircraft Corp.*, 112 Ariz. 365, 367, 542 P.2d 24, 26 (1975) ("When the existence of personal jurisdiction under the long arm statute is appropriately challenged . . . the party asserting jurisdiction has the burden of establishing it."); *Ariz. Tile, L.L.C. v. Berger*, 223 Ariz. 491, 493, ¶ 8, 224 P.3d 988, 990 (App. 2010) ("When a defendant challenges the existence of personal jurisdiction, the plaintiff must come forward with facts establishing a *prima facie* showing of jurisdiction, at which time the burden shifts to the defendant to rebut the showing.").

¶13 On appeal, Defendants ask this court to decide whether the superior court had personal jurisdiction over them, but the record has not been properly developed to allow us to make that determination. Because Defendants "otherwise defend[ed]" by raising the issue of personal jurisdiction while the door was still open, we must vacate the default judgments and remand for further proceedings.

¶14 In the June 8 letter and on appeal, Wayne Moon also challenged service of process. Because we vacate the default judgments on other grounds, we need not consider personal service. We note, however, that MJG, which now has accurate

addresses for Defendants, could re-serve Defendants, thus eliminating any possible issue regarding service on remand.

#### CONCLUSION

¶15 For the foregoing reasons, we vacate the superior court's default judgments against Defendants and remand for further proceedings consistent with this decision.

/s/  
\_\_\_\_\_  
PATRICIA K. NORRIS, Judge

CONCURRING:

/s/  
\_\_\_\_\_  
MICHAEL J. BROWN, Presiding Judge

/s/  
\_\_\_\_\_  
PHILIP HALL, Judge