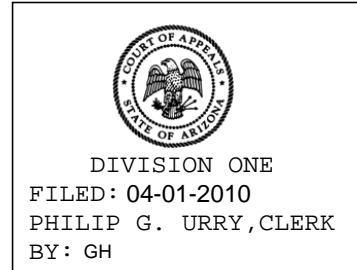


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS
 AUTHORIZED BY APPLICABLE RULES.
 See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
 Ariz. R. Crim. P. 31.24

IN THE
 COURT OF APPEALS
 STATE OF ARIZONA
 DIVISION ONE



JAMES MEDLOCK,)	1 CA-SA 10-0046
)	
Petitioner,)	DEPARTMENT E
)	
v.)	Maricopa County
)	Superior Court
THE HONORABLE HUGH HEGYI, Judge)	No. CV 2009-005696
of the SUPERIOR COURT OF THE)	
STATE OF ARIZONA, in and for the)	
County of MARICOPA,)	
)	
Respondent Judge,)	
)	
MIDFIRST BANK, a federally)	
chartered savings association,)	
as successor-in-interest to)	DECISION ORDER
COMMUNITY BANK OF ARIZONA, an)	
Arizona financial)	
Institution,)	
)	
Real Party in Interest.)	
_____)	

This special action came on regularly for conference this 31st day of March, 2010, before Presiding Judge Sheldon H. Weisberg and Judges Philip Hall and John C. Gemmill participating, and the matter was taken under advisement.

This matter arises out of a complaint filed by Midfirst Bank ("bank") against James Medlock. After the bank unsuccessfully attempted to personally serve the summons and complaint on Medlock, the court granted an extension of time to

serve him until August 3, 2009. The bank then took steps to serve Medlock by publication under Rule 4.1(n), Arizona Rules of Civil Procedure ("Rule").

After the bank applied for entry of default, Medlock's counsel filed a motion to strike the application for entry of default and motion to dismiss for insufficiency of service of process by publication. He argued that under the reasoning in *Schwartz v. Arizona Primary Care Physicians*, 192 Ariz. 290, 295, 964 P.2d 491, 496 (App. 1998) an action "automatically" abates if a summons and complaint is not served within the applicable time allowed. He contended that service by publication was insufficient, the action automatically abated on August 3, 2009, and the court had no jurisdiction to further extend the time for service. The bank filed a response and an amended complaint.

The trial court denied Medlock's motion to dismiss and ordered the bank to serve the amended complaint on Medlock no later than May 13, 2010. The court ruled that the action did not abate because former Rule 6(f) was abrogated by Rule 4(i) and that Rule 4(i) required action by the court for dismissal. Petitioner now argues that the trial court's ruling violates the holding in *Schwartz*. The bank argues that service by publication was sufficient to avoid abatement under *Schwartz*.

In *Schwartz*, the defendants argued that the repeal of former Rule 6(f), "eradicated the defense of abatement

entirely." In dicta, this court rejected that argument and held that the new rule shortened the time limit for service of process from one year to 120 days, but that an action still abates if a summons is not served within the time limits prescribed by the procedural rules. *Id.*, 192 Ariz. at 295, 964 P.2d at 496. The court noted that abatement did not apply anyway because defendant's defense "was not abatement, but insufficiency of process." *Id.* Contrary to Medlock's argument, there is nothing in the language of *Schwartz* that states an action "automatically" terminates if a complaint is not served within the prescribed time periods; it merely states that the doctrine of abatement was not eliminated by the rule change.

Former Rule 6(f) provided that "[a]n action shall abate if the summons is not issued and served, or the service by publication commenced within one year from the filing of the complaint." Despite that language, cases decided under former Rule 6(f), held that "Rule 6(f) is not self-executing, and the trial court may, where good cause is shown, extend the time within which a defendant may be served." *Grobe v. McBryde*, 105 Ariz. 577, 579, 468 P.2d 933, 935 (1970); *Air Power v. Superior Court*, 142 Ariz. 492, 494, 690 P.2d 793, 795 (App. 1984). Although Rule 6(f) was "couched in mandatory language", because the rule was not self-executing, failure to serve the summons after expiration of the prescribed time limit did not divest the

trial court of jurisdiction to extend the time for service for good cause. *Garcia v. Frey*, 7 Ariz. App. 601, 604-05, 442 P.2d 159, 162-63 (1968).

Rule 4(i) appears to have included clearer language that reflects the court holdings requiring a court order to dismiss a complaint because of abatement. Abatement under Rule 4(i) is not automatic. The trial court was correct in concluding that the action had not automatically abated and acted within its discretion in extending the time for service of the amended complaint.

IT IS ORDERED accepting jurisdiction of this special action but denying relief.

_____/S/_____
SHELDON H. WEISBERG
Presiding Judge