DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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LLC, a Nevada limited liability company, Defendants/Appellants.	1 CA-CV 10-0767 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2009-020325

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

VACATED AND REMANDED

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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"), against Appellants Wayne Moon, Leslie Moon, and GCR Capital Partners, LLC,[1] (unless separately referenced, collectively, "Defendants") of Nevada. Defendants argue we should vacate the default judgments because, *inter alia*, MJG failed to demonstrate it had exercised "due diligence" to serve them personally before serving them by publication. We agree, and hold MJG's failure to show it exercised due diligence to locate the Defendants to effect personal service rendered the default judgments void for lack of jurisdiction. We also hold MJG's publication was not sufficient notice under the Due Process Clause of the Fourteenth Amendment.

FACTS AND PROCEDURAL BACKGROUND

¶2 On July 30, 2009, a licensed Nevada process server, acting on behalf of MJG, attempted to serve GCR with a summons

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[1]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).

and complaint using three available addresses in Reno. The process server personally visited two of the addresses, but the properties were vacant. The process server called a phone number listed for the third address, but the phone was disconnected. The next day, the process server attempted to serve the Moons at a separate address in Reno, but the house was empty and had a "For Sale" sign in the front yard.

¶3 In October, MJG mailed a complaint and summons "postage prepaid, to the last known address[es]" of Defendants. The mailing was not returned to MJG as undeliverable. MJG then published the summons in a newspaper in Maricopa County once a week for four weeks in October and November. In February 2010, MJG asked the superior court to approve service of Defendants by publication. MJG attached affidavits to its motions attesting service had been attempted personally at each defendant's "last known address" and a copy of the summons had been mailed to those addresses. The affidavits did not describe what efforts had been made to locate the Defendants' current addresses. Nevertheless, on February 23, 2010, the superior court entered orders approving service by publication.

¶4 In March 2010, MJG filed an application for entry of default, and, in May, MJG moved for entry of default judgments against Defendants ("Default Judgment Motions"). MJG attached

affidavits to these 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 Defendants' last known addresses.

¶5 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."[2] He also stated he was "contesting Arizona jurisdiction" on the grounds he had "facilitated only two phone calls between the parties (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.

¶6 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 judge that were styled as motions to

[2]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."

reconsider for lack of jurisdiction and motions to dismiss for lack of jurisdiction.

¶7 On August 19, Defendants, now represented by counsel, filed a motion asking the superior court to reconsider its August 6 minute entry. This motion 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 "disputing the Court's jurisdiction." On September 1, the superior court, without directing MJG to respond, denied all of Defendants' motions and affirmed the granting of the Default Judgment Motions.

¶8 On September 22, a superior court commissioner signed and entered default judgments against Defendants, and Defendants timely appealed.[3]

DISCUSSION

¶9 Defendants argue the default judgments should be vacated because MJG did not exercise "due diligence" to serve

[3]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). However, a default judgment can 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 adequacy of service of process, which is required for a valid default judgment under Rule 55, this appeal is well-taken. *See id.* at ¶ 12.

them personally before resorting to service by publication. We agree. MJG's failure to provide evidence of a due diligence effort to personally serve Defendants rendered the default judgments entered by the superior court void for lack of jurisdiction. MJG's service by publication was also not adequate under the Due Process Clause of the Fourteenth Amendment.

¶10 Arizona Rule of Civil Procedure ("Rule") 4.2(f) permits service by publication when "the person to be served is one whose present residence is unknown but whose last known residence was outside the state . . . and service by publication is the best means practicable under the circumstances." The Rule requires that a party making service by publication "file an affidavit showing . . . the circumstances warranting utilization of [service by publication] which shall be prima facie evidence of compliance." *Id*. This affidavit must provide "facts indicating [the party] made a due diligent effort to locate an opposing party to effect personal service." *Sprang v. Petersen Lumber, Inc.*, 165 Ariz. 257, 261, 798 P.2d 395, 399 (App. 1990) (citations omitted). "[I]f the affidavit fails to indicate that due diligence was exercised to locate the defendant, the default judgment is void on its face for lack of jurisdiction." *Id.* at 262, 798 P.2d at 400.

¶11 Aside from the requirements of Rule 4.2(f), "a plaintiff seeking service by publication must also satisfy the due process minimums" required by the Fourteenth Amendment and articulated by the United States Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). *Master Fin., Inc. v. Woodburn*, 208 Ariz. 70, 73, ¶ 15, 90 P.3d 1236, 1239 (App. 2004); *see also* Ariz. R. Civ. P. 4.1 cmt. In *Mullane*, the Court explained "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." 339 U.S. at 315, 70 S. Ct. at 657.

I. Due Diligence

¶12 In *Sprang*, a party seeking to foreclose on real property mailed a copy of the summons and complaint to the defendant's post office box, but the defendant later testified he did not receive them. 165 Ariz. at 261, 798 P.2d at 399. A sheriff then attempted personal service at the defendant's home, but, after finding the house vacant, the foreclosing party served the defendant by publication. *Id.* This court held the foreclosing party failed to exercise due diligence in its search: "[a] 'due diligent effort' requires such pointed measures as an examination of telephone company records, utility

company records, and records maintained by the county treasurer, county recorder, or similar record keepers." *Id.; cf. Roberts v. Robert*, 215 Ariz. 176, 180, ¶ 19, 158 P.3d 899, 903 (App. 2007) (to conduct a "diligent search and inquiry . . . similar to the type of diligence required to justify and effect service of process by publication," a tax lien holder "may need to examine public records or court records, or may need to ask relatives, friends or neighbors" to discover unknown heirs.)

¶13 Here, as in *Sprang*, the record does not demonstrate MJG's search for Defendants rose to the level of a "due diligent effort." In July 2009, MJG attempted to serve the Moons at one address, attempted to serve GCR at two addresses, and then called a third address for GCR but did not visit it. Two months later, MJG mailed the summons and complaint to the same addresses that had previously been unsuccessful, assumed that because they were not returned as undeliverable they were received -- even though the fact they were not returned is insufficient proof the intended recipients received them -- and then began service by publication. Just as in *Sprang*, MJG attempted personal service once (although one address was not even physically visited) and service by mail once before resorting to publication. MJG's affidavits do not assert it took the "pointed measures" of examining telephone, county, or

other records.[4] Further, although according to MJG's affidavits, an individual in an office suite neighboring the vacant suite listed for GCR told MJG's process server "that the business that was in [GCR's suite] had been gone for a couple of weeks," there is no evidence the process server made any effort to ascertain where GCR had moved. Instead, MJG's affidavits "asserted in conclusory fashion that [a due diligent] effort had been made." *Barlage v. Valentine*, 210 Ariz. 270, 273, ¶ 8, 110 P.3d 371, 374 (App. 2005). The record reveals that the search undertaken did not meet the standards for due diligence necessary before using service by publication.

¶14 MJG argues Defendants have not overcome the "prima facie evidence of compliance" created by the affidavits it filed because Defendants have not presented evidence that a diligent search would have revealed their addresses. *See* Rule 4.2(f) ("The party . . . making service shall file an affidavit showing

[4]In its answering brief on appeal, MJG asserts it obtained the addresses for Defendants where personal service was attempted "from the Nevada Secretary of State and comprehensive Lexis public record reports that include information from various public record sources, including county records, court records and motor vehicle registrations." The record on appeal, however, contains no evidence MJG actually took any of these steps. *See Pingitore v. Town of Cave Creek*, 194 Ariz. 261, 264, ¶ 20, 981 P.2d 129, 132 (App. 1998) ("The record on appeal consists of all 'original papers, exhibits, minute entries, and other objects filed with the clerk of the superior court.'" (quoting Arizona Rule of Civil Appellate Procedure ("ARCAP") 11(a)(1)).

the manner and dates of publication and mailing, and the circumstances warranting [service by publication] which shall be prima facie evidence of compliance herewith."). This argument is unavailing. Because MJG's affidavits did not set forth "facts indicating it made a due diligent effort to locate [the Moons and GCR]," *Sprang*, 165 Ariz. at 261, 798 P.2d at 399, it failed to meet the requirements of Rule 4.2(f) and thus failed to present prima facie evidence of compliance with the Rule. *See Barlage*, 210 Ariz. at 273, ¶ 8, 110 P.3d at 374 (explaining requirements of Rule 4.2(f) and holding that a "conclusory" affidavit is "insufficient" to meet those requirements). It is only after the plaintiff files an affidavit sufficiently demonstrating a due diligent search has been performed that the defendant is presumed to have an unknown address; the defendant can then rebut that presumption by demonstrating his or her address was, in fact, knowable. *See Preston v. Denkins*, 94 Ariz. 214, 222, 382 P.2d 686, 691 (1963) ("It is not the *allegation* that the residence is unknown which confers jurisdiction upon service by publication but the *existence of the jurisdictional fact* that the residence is unknown."); *Barlage,* 210 Ariz. at 277, ¶¶ 26-28, 110 P.3d at 378 (affidavit that was compliant with rule for service by mail "constituted 'prima facie evidence of personal service' . . . and thereby

created a presumption of that fact" (citation omitted)). Because MJG's insufficient affidavits never properly raised the presumption Defendants' addresses were unknown, they were jurisdictionally deficient, and therefore Defendants were not required to present evidence that a diligent search would have revealed their addresses.

II. Due Process

¶15 As mentioned above, a party seeking service by publication must meet both the requirements of Rule 4.2(f) and the requirements of the Due Process Clause of the Fourteenth Amendment, as articulated by the United States Supreme Court in *Mullane. Master Fin., Inc.*, 208 Ariz. at 73, ¶ 15, 90 P.3d at 1239. In *Mullane,* the Court emphasized

> [i]t would be idle to pretend that publication alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed.

339 U.S. at 315, 70 S. Ct. at 658. The general inadequacy of service by publication to acquaint "interested parties of the fact that their rights are before the courts" is assuredly behind Rule 4.2(f)'s language specifying that the person to be served must be one "whose present residence is unknown but whose last known residence was outside the state . . . *and* service by publication is *the best means practicable under the circumstances* for providing notice." (emphasis added). *Cf*. Ariz. R. Civ. P. 4.1 cmt. ("service by publication [of in-state defendants] must also satisfy due process standards" articulated in *Mullane*). Here, although MJG's search for Defendants focused on their last known addresses in Reno, Nevada, it published the summons only in Maricopa County, the "county where the action [was] pending," as required by Rule 4.2(f). This was not "the best means practicable under the circumstances."

¶16 Before 1994, Rule 4.2(f) included an "out-of-state publication requirement." Our supreme court amended the Rule in 1994 to remove this requirement. The court comment to the amended rule explains the court "acted out of concern for the unnecessary expense in the vast majority of cases in which out-of-state publication is ineffective as a means of providing notice." Rule 4.2(f) Court cmt. 1994 Amendment. The court also explained, however, it was "aware that in a small category of

cases out-of-state publication might yield the best practicable notice under the circumstances" and emphasized "[c]ounsel should always consider whether, in a given case, out-of-state publication may nevertheless be indicated." *Id.*

¶17 Here, publication in a Reno-area newspaper, in addition to the Maricopa County publication required by the Rule, would have been the "means employed . . . one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315, 70 S. Ct. at 657. There is nothing in the record indicating MJG could reasonably expect Defendants would be informed of the lawsuit through the publication in the Maricopa County newspaper. In its answering brief, MJG recognizes Defendants' contacts with Arizona –- and we express no opinion on whether Defendants did in fact have "contacts" with the state for purposes of personal jurisdiction –- were limited to facilitating telephone calls between MJG and out-of-state parties and were specific to the transaction involved in this lawsuit. Thus, as the Court recognized in *Mullane*, the odds were "large indeed" out-of-state parties such as Defendants would come across a legal notice published in an Arizona newspaper. A notice published in a major Reno-area paper, on the other hand, could "be defended on the ground that it [was] in itself reasonably certain to inform those affected."

Id. We therefore conclude that publishing the summons only in the Maricopa County newspaper was not "the best means of notice under the circumstances," *Master Fin., Inc.*, 208 Ariz. at 73, ¶ 15, 90 P.3d at 1239, or "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *Mullane*, U.S. 339 at 314, 70 S. Ct. at 657, and thus did not comply with the notice requirements of the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

¶18 Because MJG's Rule 4.2(f) affidavits did not sufficiently demonstrate MJG had exercised due diligence in searching for the whereabouts of Defendants, and because MJG's service by publication did not meet the requirements of the Due Process Clause, we hold the default judgments entered by the superior court were void for lack of jurisdiction and, accordingly, we vacate them and remand for further proceedings consistent with this decision. MJG must obtain jurisdiction over Defendants through proper service of process before it can seek to prosecute this case against them. *See Sprang*, 165 Ariz.

at 265, 798 P.2d at 403. Defendants, as the prevailing parties on appeal, are entitled to costs on appeal subject to their compliance with ARCAP 21.

__/s/_____
PATRICIA K. NORRIS, Judge

CONCURRING:

__/s/__ _____
MICHAEL J. BROWN, Presiding Judge

__/s/_____
PHILIP HALL, Judge