NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

CENTURY-NATIONAL INSURANCE COMPANY, Appellant, v. JACOB D. FRANTZ, Appellee.	)	Case No. 2D20-522

Opinion filed May 12, 2021.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Sarasota County; Stephen M. Walker, Judge.

Joseph Clancy and William J. McFarlane, III, of McFarlane Law McFarlane, Dolan & Prince, Coral Springs, for Appellant.

Inguna Varslavane-Callahan and Michael T. Callahan of Callahan Law Firm, LLC, St. Petersburg, for Appellee.

NORTHCUTT, Judge.

Century-National Insurance Company appeals the circuit court's nonfinal order finding that the court lacks personal jurisdiction over appellee Jacob Frantz and therefore denying Century-National's motion for entry of a final default judgment against

Frantz. We reverse because the record establishes that Frantz had waived his objection to personal jurisdiction.

Frantz was insured under a Florida auto insurance policy issued by Century-National. Century-National sued Frantz in Florida, seeking a declaratory judgment that the policy did not include bodily injury liability coverage and consequently did not furnish coverage for an accident Frantz had in Pennsylvania or obligate Century-National to defend him in the resulting lawsuit. When Frantz failed to respond to the suit, Century-National obtained a clerk's default and moved for entry of a default judgment. The circuit court rendered an order granting the motion and determining that the subject insurance policy did not provide coverage for the accident or the resulting lawsuit.

For reasons we need not describe here, two years later Century-National filed another request for a default judgment, seeking a version containing "language of finality."[1] Frantz opposed the motion. He moved instead to have the prior default set aside under Florida Rule of Civil Procedure 1.500, alleging that his father had accepted service of the complaint on his behalf at a time when Frantz did not reside at that address. As a result, he claimed, he did not have knowledge of the declaratory judgment proceedings and did not have an opportunity to be heard.

Importantly, Frantz's motion did not seek to quash service of process, nor did he otherwise object to the exercise of personal jurisdiction over him. Rather, he raised the defects in the service of process as a basis for establishing excusable

[1]For the sake of clarity, we have forgone a detailed description of this tortuous litigation.

neglect for his failure to respond to the complaint. Frantz further argued that an affidavit filed by Century-National in support of its initial motion for entry of a default judgment was misleading and false, justifying relief under rule 1.540(b)(3) on the basis of fraud. Frantz later filed an additional motion, under rule 1.540(b)(4), arguing that the defective service precluded the establishment of personal jurisdiction over him, thus rendering any judgment in the proceeding void.

Following a hearing on the pending motions, the circuit court denied Frantz's motion to set aside the default under rule 1.500, determining that Frantz had failed to act with due diligence. After allowing Frantz to file another supplemental motion that essentially realleged the rule 1.540(b)(4) argument he had raised in his previous one, the circuit court issued the order appealed here. It denied Century-National's motion for entry of a final default judgment and found that the court lacked personal jurisdiction over Frantz because the service of process upon him via his father was ineffective. As mentioned, this was error.

"A defendant wishing to contest personal jurisdiction must do so in the first step taken in the case, whether by motion or in a responsive pleading, or that issue is waived and [the] defendant has submitted himself to the court's jurisdiction." Consol. Aluminum Corp. v. Weinroth, 422 So. 2d 330, 331 (Fla. 5th DCA 1982) (first citing Fla. R. Civ. P. 1.140(b), 1.140(h); then citing Miller v. Marriner, 403 So. 2d 472 (Fla. 5th DCA 1981)).

In Weinroth, the defendant moved to set aside a default based on a defect in the service of process. Id. Critically, the insufficiency of service of process was "asserted in the motion to vacate, not as a ground for quashing the process, but in an

attempt to demonstrate excusable neglect which would justify vacating the default." Id. The Fifth District held that in those circumstances the defendant had waived any subsequent objection to personal jurisdiction. Id.

The salient facts are almost identical here. The circuit court accurately noted that Frantz "raised the service of process issue" in his initial, unsuccessful, motion to vacate the default under rule 1.500. But asserting that service of process was defective did not ipso facto constitute a challenge to personal jurisdiction. In fact, Frantz's initial motion did not dispute the court's exercise of jurisdiction over him or otherwise seek to quash service of process. To the contrary, his principal complaint was that he had been denied an opportunity to contest Century-National's allegations and he argued that public policy favored an adjudication on the merits. As in Weinroth, the failure to challenge personal jurisdiction waived the issue. See also S.B. Partners v. Holmes, 479 So. 2d 280, 281, 284 (Fla. 2d DCA 1985) (holding that a motion to set aside default that failed to raise personal jurisdiction waived the issue, even when the defendant's attached proposed answer raised the defense of insufficient service of process).

Frantz cites Babcock v. Whatmore, 707 So. 2d 702 (Fla. 1998), and Berne v. Beznos, 819 So. 2d 235 (Fla. 3d DCA 2002), for the proposition that, in the absence of a request for affirmative relief, a party's purely defensive action does not waive its challenge to personal jurisdiction. But those cases apply when a defendant initially objects to jurisdiction, such as by motion to quash service of process or motion to dismiss for lack of personal jurisdiction, and thereafter proceeds to defend on the merits. See Babcock, 707 So. 2d at 705 (holding that a timely motion to dismiss for lack

of personal jurisdiction is not waived by the simultaneous filing of a motion to declare a prior judgment void); Berne, 819 So. 2d at 238 ("[S]o long as the defending party makes a timely objection to personal jurisdiction, the defendant may defend the case without waiving the objection." (citing Babcock, 707 So. 2d at 704)). Those authorities are inapplicable where, as here, the defendant failed to timely object to personal jurisdiction.

Accordingly, we reverse the circuit court's order determining that it lacks personal jurisdiction and remand for further proceedings.

Reversed and remanded.

KHOUZAM, C.J., and BLACK, J., Concur.