NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 2004

GOLDEN STATE INDUSTRIES, INC.,

Appellant,

vs.

AMPARO CUETO,

Appellee.

CASE NO. 3D02-2965

LOWER TRIBUNAL NO. 99-20522

Opinion filed April 14, 2004.

An Appeal from the Circuit Court for Miami-Dade County, Ellen L. Leesfield, Judge.

Tobin & Reyes; Bunnell, Woulfe, Kirschbaum, Keller, McIntyre & Gregoire, for appellant.

Friedman & Friedman, and John Seligman; Lauri Waldman Ross, for appellee.

Before COPE, SHEVIN*, and RAMIREZ, JJ.

RAMIREZ, J.

Golden State Industries, Inc. appeals the denial of its motion to dismiss the complaint for lack of jurisdiction. We affirm the order denying dismissal.

*Judge Shevin did not hear oral argument.

I. FACTUAL BACKGROUND

Amparo Cueto sustained injuries when the pool deck she contracted for with Blue Haven Pools of Miami, Inc. collapsed on her foot. She sued Blue Haven and, after obtaining a default judgment, she also sued Golden State Industries, Inc. and Jeffrey D. Cohen. She alleged that Golden State conducted business in Florida under the trademark "Blue Haven Pools and Spas" and that Blue Haven Pools of Miami, Inc. "was a subsidiary of and/or part of this national pool building company."

On August 15, 2000, Cueto served Golden State with process in California through Golden State's "authorized agent," Phil Zamel. Golden State, however, did not answer the complaint nor did it file any other pleading. The trial court entered a default against Golden State on October 26, 2000. After Golden State received a notice for trial, it moved to set aside the default on August 15, 2001, arguing excusable neglect, meritorious defense, and due diligence. The motion did not challenge the court's jurisdiction.[1]

In support of its motion to set aside the default, Golden State relied upon the affidavit of Golden State's corporate

[1] The dissent takes issue with this statement because, in its proposed Answer and Affirmative Defenses, as a Second Affirmative Defense, Golden State alleged that the court did "not have jurisdiction over Golden State, a non-resident of Florida, which does not conduct business and does not have sufficient contacts in Florida to subject it to the jurisdiction of this Court." For the reasons we will explain later, this was insufficient to challenge the court's jurisdiction.

counsel, Daniel W. Schreimann, Esq., and a letter from Phil Zamel's physician. In the affidavit, Schreimann swore that Zamel inadvertently failed to forward the complaint and summons to Golden State's corporate counsel as a result of Zamel's medical condition which impaired his mental faculties. Golden State also filed its proposed answer and affirmative defenses, the latter of which included the defense of failure to state a cause of action, lack of personal jurisdiction, and absence of ownership of trademarks. The proposed answer did not set forth any facts to justify its allegation of lack of personal jurisdiction. Although there existed two Golden State Industries, Inc. corporations, one incorporated in California and one incorporated in Nevada, neither the motion nor the proposed answer made any reference to that fact. They simply referred to "Golden State Industries, Inc." The trial court denied the motion to vacate the default on October 10, 2001.

On February 6, 2002, Golden State renewed its motion to vacate default. In support of its renewed motion, Golden State again relied upon Schreimann's affidavit, as well as the affidavit of Zamel's physician, Colin Stokol, M.D. The new affidavit basically expanded on the prior affidavit, wherein Dr. Stokol swore that Zamel suffered from Parkinson's Disease and experienced memory difficulties, fatigability, deafness, and likely had a poor comprehension of questions and offered potentially unreliable answers. The motion also alleged that "Golden State" maintained

that they had no contacts whatsoever with the State of Florida. The Schreimann Affidavit referred to Golden State Industries, Inc., a California corporation, but did not intimate that there was another Golden State incorporated in the State of Nevada. The trial court denied the renewed motion to vacate default on April 22, 2002.

On February 12, 2002, six months after it had initially moved to set aside the default, Golden State for the first time moved to dismiss for lack of personal jurisdiction. Golden State again argued that it had no affiliation with Blue Haven and did not conduct business in Florida. In support of its motion to dismiss, Golden State relied upon the affidavit of California Golden State's secretary and director, Billy Eisman, as well as the affidavit of Schreimann. Eisman swore that California Golden State only conducts business in California, does not own the Blue Haven Pools and Spas trademark nor have they ever owned such a trademark, is a sub-franchiser only for the State of California, and that California Golden State has never constructed or built a swimming pool in California or in any other state. Eisman also swore that Zamel suffered from a severe medical condition. None of these documents mention the Nevada Golden State Industries, Inc.

The existence of two Golden State Industries, Inc., both bearing the same name, with different states of incorporation, was revealed for the first time at the deposition of Phil Zamel, which

was taken on March 22, 2002. Zamel testified that he bought the trade name Blue Haven Pools and Spas from its parent company in 1975 and that he was the president of "Golden State" since 1981. He also testified that there were two Golden State Industries, the one located in California and the other located in Nevada, that bore the same corporate name; that California Golden State is only registered to do business in California; *and that he was not connected with the Nevada Golden State*. It turns out that Zamel was not only connected with the Nevada Golden State, he was its *president.*

At the subsequent evidentiary hearing, the trial court considered the testimony of various witnesses, including the Schreimann Affidavit; the Eisman Affidavit; Cueto's deposition; the testimony of Cueto's counsel John Seligman, Esq.; and the testimony of Ronald Zaberer, the Chief Financial Officer of both the California Golden State and Nevada Golden State. Zaberer admitted that Phil Zamel was the president of both corporations; that Nevada Golden State conducts business all over the United States; and that California Golden State conducts business only in California. Schreimann testified that he was counsel for both corporations. The trial court denied the motion to dismiss for lack of personal jurisdiction and this order forms the basis of Golden State's appeal.

II. WAIVER OF PERSONAL JURISDICTION

The first issue we must consider is whether the defendant waived the issue of personal jurisdiction. Because personal jurisdiction is intended to protect a defendant's liberty interests, the defense is a personal right and may be obviated by consent or otherwise waived. Babcock v. Whatmore, 707 So. 2d 702, 704 (Fla. 1998). As the Florida Supreme Court stated in Babcock, "a defendant may manifest consent to a court's in personam jurisdiction in any number of ways, from failure seasonably to interpose a jurisdictional defense, to express acquiescence in the prosecution of a cause in a given forum, to submission implied from conduct." Id. (quoting from General Contracting & Trading Co. v. Interpole, Inc., 940 F.2d 20, 22 (1st Cir. 1991)). Here, Golden State pursued its motion to set aside the default, but not the lack of jurisdiction, until months later when it had been repeatedly unsuccessful in obtaining the requested relief.

In Rojas v. Rojas, 723 So. 2d 318 (Fla. 3d DCA 1998), the wife filed a dissolution of marriage action and obtained a default against the husband, a Mexican national. Counsel for the husband filed a "Notice of Limited/Special Appearance" announcing the husband's intent to contest personal jurisdiction. The husband next filed a motion to set aside default and to dismiss the petition for dissolution of marriage. He argued that the trial court should defer to an earlier-filed proceeding in Mexico, and

that the Florida action should be dismissed. We concluded that, because the husband's motion to dismiss did not challenge personal jurisdiction, the defense was waived. Similarly, in Consolidated Aluminum Corp. v. Weinroth, 422 So. 2d 330, 331 (Fla. 5th DCA 1982), the court stated that 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 defendant has submitted himself to the court's jurisdiction.

We thus conclude that Golden State waived the issue of personal jurisdiction by not raising it initially, but instead pursuing its motion to set aside the default based on excusable neglect, due diligence and meritorious defense. The fact that the proposed answer made a vague, conclusory reference to the lack of personal jurisdiction, without setting forth any factual support, does not change the outcome that the issue was waived.

The dissent takes issue with this conclusion. Apparently, the dissent finds that the general denial of personal jurisdiction in the Second Affirmative Defense, included with ten other general, boiler-plate affirmative defenses, was sufficient to challenge personal jurisdiction because rule 1.140(h)(1) specifically allows the defense of lack of jurisdiction over the person to be presented in a responsive pleading. We cannot agree. Rule 1.140(h)(1) states:

> (1) A party waives all defenses and objections that the party does not present either by motion under subdivisions (b), (e), or (f) of this rule or, if the party has made no motion, in a responsive pleading except as provided in subdivision (h)(2).

Because Golden State made a motion, we cannot see how the language of the rule supports the dissent.[2] Such an approach would allow a party to attack service of process first, obtain a ruling on that issue, then depending on the outcome, bring up the personal jurisdiction issue, followed perhaps by a motion attacking venue. The transgression which the dissent does not address is Golden State's silence about the existence of two corporations. Golden State raised only one issue, which it unsuccessfully litigated, and then raised the issue of the two corporations with the same name from different states months after it unsuccessfully litigated its motion to set aside default.

III. PERSONAL JURISDICTION

Even if the issue had not been waived, we find that the trial

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[2] The dissent also cites M.T.B. Banking Corp. v. Bergamo Da Silva, 592 So. 2d 1215 (Fla. 3d DCA 1992), but in that case the defendant raised the lack of personal jurisdiction in its answer and in its motion for judgment on the pleadings. Likewise, in Cumberland Software, Inc. v. Great American Mtg. Corp., 507 So. 2d 794 (Fla. 4th DCA 1987), the defendant only filed an answer and a counterclaim, but did not file a motion.

court properly denied the motion to dismiss. In determining whether there is personal jurisdiction, a two-part inquiry is required. First, the reviewing court must determine whether the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of Florida's long-arm statute, section 48.193, Florida Statutes (1999). See Venetian Salami Co. v. Parthenais, 554 So. 2d 499, 502 (Fla. 1989). Under section 48.193, Florida Statutes (1999), a person subjects themselves to the jurisdiction of Florida courts, as follows:

> (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subdivision thereby submits himself or herself ... to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:
>
> (a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an officer of agency in this state.
>
> (b) Committing a tortious act within this state.

Second, if the allegations in the complaint fall within the ambit of Florida's long-arm statute, the court must then determine whether the exercise of jurisdiction is consistent with due process. Venetian Salami, 554 So. 2d at 502. The exercise of personal jurisdiction comports with the requirements of due process so long as the defendant purposefully established "minimum contacts" in the forum state. See Burger King Corp. v. Rudzewicz, 471 U.S. 462 (Fla. 1985). We find the allegations in the complaint

in this case are sufficient to invoke personal jurisdiction under Florida's long-arm statute. See § 48.193(1)(a), 1(g), Fla. Stat. (1999). Additionally, these allegations show the constitutionally required minimum contacts with the State of Florida so as to satisfy due process requirements.

In addition to the allegations in the complaint regarding Golden State's business activities in Florida through the "Blue Haven Pools and Spas" trademark and Blue Haven Pools of Miami, Inc.'s subsidiary status, the complaint makes various other allegations. The complaint alleges as follows:

> Defendants and/or their agents and/or their employees ... negligently failed to adequately and reasonably inspect and build a pool deck; these defendants negligently failed to properly and reasonably supervise the actions of their agents and/or employees, failed to make sure that their agents and/or employees were properly trained in the installation of the subject decking and/or failed to properly and adequately provide sufficient information to [Cueto] so that she could know that the defendants' agents and/or employees were not properly trained, did not know how to build a pool deck, and/or may not have been affiliated with this national organization.

Furthermore, the complaint alleges that Cueto injured herself as a direct, proximate, and reasonably foreseeable result of the defendants' negligence.

IV. SERVICE OF PROCESS

We turn now to the issue of service of process. Section 48.081, Florida Statutes (1999), permits service of process upon a

corporation to be served on the corporation's authorized agent. That section provides as follows:

> (1) Process against any private corporation, domestic or foreign, may be served:
>
> > (a) On the president or vice president, or other head of the corporation.

A corporation's president is its authorized agent for service of process. See § 607.0504(2), Fla. Stat. (1999). In the absence of the corporation's president, vice president, or the corporation's head, process may be served upon a variety of other persons. See § 48.081(1)b-d, (2) Fla. Stat. (1999). Process may be served on the corporation's designated agent. See § 48.081(3), Fla. Stat. (1999).

In this case, it is undisputed that Phil Zamel was the president of both Nevada Golden State and California Golden State at the time in which Cueto effectuated service of process. Notwithstanding the different states of incorporation of Golden State, Phil Zamel was the authorized agent of both corporations under section 48.081, Florida Statutes (1999). Additionally, Phil Zamel was the designated agent of California Golden State under section 48.081(3), Florida Statutes (1999).

The denial of Golden State's motion to vacate default is not before us for review. Golden State argues, however, that the parties agree that Nevada Golden State, as opposed to California Golden State, is the appropriate party defendant. It thus urges us

to reverse based on this Court's long standing policy that favors the resolution of matters on the merits, see Integrated Transaction Servs., Inc. v. Bahama Sun-n-Fun Travel, Inc., 766 So. 2d 269, 271 (Fla. 4th DCA 2000). Notwithstanding this policy, to reverse for a trial on the merits, we would have to ignore our prior law on waiver, personal jurisdiction and service of process. We cannot in fairness do that. The plaintiff here was injured over seven (7) years ago. Golden State was served on August 15, 2000, almost four (4) years ago. It filed no pleadings for a year, then, for months tried to dance around the fact that there were two corporations with the same name, the same president, the same legal counsel, and the same chief financial officer. Enough is enough.

V. TWO GOLDEN STATE INDUSTRIES, INC.

The problem in this case all stems from the defendant incorporating in two different states under the exact same name, then using the same registered agent for both. We agree with the dissent that when the plaintiff served "Golden State Industries, Inc.," it was not serving both the California and the Nevada corporations. Where we disagree is with the conclusion that the plaintiff was serving the California corporation. We conclude that the plaintiff served the Nevada corporation.

"When a default is entered, the defaulting party admits all well-pled factual allegations of the complaint." Fiera.com, Inc. v. DigiCast New Media Group, Inc., 837 So. 2d 451, 452 (Fla. 3d DCA

2002), quoting State Farm Mut. Auto. Ins. Co. v. Horkheimer, 814 So. 2d 1069, 1072 (Fla. 4th DCA 2001). Thus, the defendant admitted that it was doing business in Dade County, Florida under a trademark which they owned as "Blue Haven Pools and Spas." They admitted that they had been in business since 1954, that they were experienced contractors, that they were the "world's largest pool builder;" and that Blue Haven Pools of Miami, Inc. was a subsidiary of and/or part of this national pool building company. As it turns out, these allegations apply only to the Nevada Golden State, not the California Golden State. When you consult http://www.bluehaven.com, you see a presence in almost every state in the country. The trademark office lists Golden State Industries, Inc., with an address in San Diego, California, as the owner. Thus, when the defendant served "Golden State Industries, Inc.," why should we assume, as the defendant suggests, that the plaintiff was serving the wrong Golden State, to which the allegations in the complaint did not apply, as opposed to the correct Golden State, to which the allegation did apply?

VI. CONCLUSION

We conclude, as the trial court did, that the defendant created the confusion between the two corporations. The obvious purpose for using the same corporate name in two states is to confuse creditors. The defendant continued the tactic during this litigation by keeping this information hidden from the plaintiff and the court for months

while it unsuccessfully litigated the issue of the service of process, using perjured testimony. Only after the motion to vacate and its motion for reconsideration were both denied did the defendant raise the issue that there were two corporations with the same name in two different states.

We therefore affirm the order denying dismissal for lack of personal jurisdiction.

SHEVIN and RAMIREZ, JJ., concur.

COPE, J. (dissenting).

Respectfully, the majority opinion's analysis is contrary to established precedent. The majority also overlooks a simple fact about this case: Nevada Golden State Industries, Inc. **is registered to do business in Florida**. The majority opinion goes to great lengths to criticize the defendants--and they are subject to criticism because they should not be using identical names for two corporations in adjacent states. But the fact remains that Nevada Golden State properly registered with the Florida Secretary of State. Thus, if there is blame to be assessed regarding service on the wrong corporation, the plaintiff must share equal, or more, blame for failure to conduct the appropriate inquiry with the Florida Secretary of State.

I.

The majority opinion says that California Golden State waived its objection to personal jurisdiction. Majority opinion at 7. That is not so. The plaintiff served the complaint on Phil Zamel in California. There was no timely response and the court entered a default.

Subsequently California Golden State filed a Motion to Vacate Default, attached to which was a proposed answer and affirmative defenses. Golden State's Second Affirmative Defense says: "This

Court does not have personal jurisdiction over Golden State, a non-resident of Florida, which does not conduct business and does not have sufficient contacts in Florida to subject it to the jurisdiction of this Court." App. 8.

The majority opinion inexplicably finds that Golden State waived the jurisdictional objection. The majority is wrong about that.

The majority says that "Golden State pursued its motion to set aside the default, but not the lack of jurisdiction, until months later . . . ." Majority opinion at 6. The majority misapprehends the record. In moving to set aside a default, the moving party must demonstrate (among other things) that the moving party has a meritorious defense. See Cinkat Transp. Inc. v. Maryland Cas. Co., 596 So. 2d 746, 747 (Fla. 3d DCA 1992). In order to demonstrate the existence of such defenses, Golden State filed an answer and affirmative defenses which included the absence of personal jurisdiction as one of several defenses. See id.; Pieco, Inc. v. Sunset Amoco West, Inc., 597 So. 2d 972, 973 (Fla. 3d DCA 1992). Rule 1.140(h)(1) specifically allows the defense of lack of jurisdiction over the person to be presented in a responsive pleading, i.e., an answer. See M.T.B. Banking Corp. v. Bergamo Da Silva, 592 So. 2d 1215 (Fla. 3d DCA 1992); Cumberland Software, Inc. v. Great American Mtg. Corp., 507 So. 2d 794, 795 (Fla. 4th DCA 1987). The defendant's filings were a timely and appropriate way

to raise the objection to personal jurisdiction.

The majority opinion also says, "The fact that the proposed answer made a vague, conclusory reference to the lack of personal jurisdiction, without setting forth any factual support, does not change the outcome that the issue was waived." Majority opinion at 7. There are two problems with this analysis.

First, the defendant's affirmative defense is clear on its face and puts the plaintiff on fair notice of the defense of lack of personal jurisdiction.

Second, the majority's analysis is contrary to this court's decision in Calero v. Metropolitan Dade County, 787 So. 2d 911 (Fla. 3d DCA 2001). There we said that where an affirmative defense is insufficiently particularized, it is "subject to being stricken with leave to replead. See Fla. R. Civ. P. 1.140(b)." 787 So. 2d at 914.

Contrary to what the majority opinion says, there is no rule that an insufficiently pled affirmative defense is waived. The majority cites no authority for that proposition. Instead, as stated in Calero, if the affirmative defense is insufficiently pled, the plaintiff may attack it by a motion to strike and, if the motion is well taken, then the defending party must be given leave to replead with more particularity.

II.

The majority opinion rules alternatively that the trial court correctly denied the motion to dismiss for lack of jurisdiction on the merits. Respectfully, that is not so.

The problem here is that the majority opinion treats the issue purely as a matter of pleading. The majority says that the complaint makes sufficient allegations to invoke personal jurisdiction under Florida's long arm statute. Majority opinion at 9. The majority thus rules that, **as matter of pleading**, the plaintiff has alleged sufficient facts to bring the defendant within the ambit of Florida's long arm statute.

The majority opinion has, however, failed to address Golden State's actual claim in the trial court: that **as a matter of fact**, there is no long-arm jurisdiction over California Golden State. Under Venetian Salami Co. v. Parthenais, 554 So. 2d 499 (Fla. 1989), "A defendant wishing to contest the allegations of the complaint concerning jurisdiction or to raise a contention of minimum contacts **must file affidavits in support of his position**." Id. at 502 (emphasis added). In this case the defendant filed such affidavits and the trial court referred the matter to a retired judge for "a limited evidentiary hearing in order to determine the jurisdiction issue." Id. at 503.

On appeal from the order denying the motion to dismiss for lack of personal jurisdiction, the question before us is whether the

order is supported by competent substantial evidence. In the present case there is no evidence to support the order.

It is clear in the record that the California Golden State corporation does business only in California. Nevada Golden State is the corporation which is doing business in Florida. Indeed, Nevada Golden State corporation is registered to do business in Florida--a point the plaintiff overlooked. App. 19, at 34.

Since there is no evidence which supports the proposition that California Golden State has long arm contact with Florida, it follows that the order now before us must be reversed.

III.

I am in agreement with the majority opinion in rejecting the plaintiff's "two for one" theory of personal jurisdiction. At oral argument, the plaintiff announced her theory that when the plaintiff served Mr. Zamel in California, the plaintiff had effectively accomplished service of process on **both** California Golden State **and** Nevada Golden State. Further, it is the plaintiff's position that when the default was entered, the default applies to **both** the California and Nevada companies.

The terminology used on the summons in this case corresponds to the terminology and identification of officers for the California corporations. It is clear that the plaintiff has served **only** California Golden State, not Nevada Golden State.

IV.

In conclusion, the evidence of record demonstrates that there is no long arm jurisdiction over California Golden State. We should reverse the order now before us.

Because the plaintiff did not know of the existence of two Golden State corporations, the complaint has been addressed to Golden State without differentiation between the two companies. The complaint is thus legally sufficient to state a claim against Nevada Golden State. Golden State's counsel agreed with this point at oral argument.

That being so, the current complaint is sufficient to stop the running of the statute of limitations as to Nevada Golden State. Thus, while service of process should be quashed as to California Golden State, the plaintiff remains free to serve Nevada Golden State.