

IN THE SUPREME COURT OF MISSOURI

JOSEPH LOVENDUSKI,)
)
 Plaintiff/Respondent,)
)
 v.) Appeal No. SC83987
)
 CRAIG L. MCGRAIN,)
)
 Defendant/Appellant.)

APPEAL FROM THE CIRCUIT COURT OF PLATTE COUNTY, MISSOURI
HONORABLE ABE SHAFER, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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INTRODUCTION

Having failed to plead any facts that would confer jurisdiction over defendant, having failed to file a return or affidavit of service prior to the entry of the default judgment, and having filed only a conclusory affidavit in support of his claim that the trial court had jurisdiction over defendant, plaintiff now urges this Court to hold defendant to a strict standard of technical compliance with all procedural requirements, a standard plaintiff himself did not meet. In an effort to avoid addressing the jurisdictional issue on its merits, plaintiff contends that defendant waived the jurisdictional defense,

despite asserting it in the special entry of appearance and repeatedly thereafter. The trial court made no finding of waiver, nor would the record or Missouri case law support such a finding.

The Missouri courts look at the substance, rather than the form or the caption of a filing. *See Worley v. Worley*, 19 S.W.3d 127, 129 (Mo. banc 2000). The special entry of appearance filed by defendant's former attorney clearly asserted the issue of the trial court's lack of jurisdiction over defendant. In addition, defendant's former attorney repeatedly renewed his objection to the court's jurisdiction in subsequent appearances and filings. These actions would preclude a finding of waiver, even if the trial court had addressed that issue. *See Shapiro v. Brown*, 979 S.W.2d 526, 529 (Mo. App. 1998) (defense of personal jurisdiction was not waived, where defendant raised it repeatedly, although defendant did not call up her motion to dismiss).

Plaintiff's contention that his affidavit was sufficient to establish jurisdiction (Resp. Brf., p. 26) is unsupported either by the record or by Missouri law. Plaintiff relied entirely on conclusory assertions that an unspecified "transaction" took place in Missouri, and failed to identify any action that plaintiff claims defendant took in Missouri. The affidavit was insufficient to establish either that the trial court had jurisdiction over defendant under Missouri's long-arm statute or that defendant had the necessary minimum contacts with Missouri to satisfy due process requirements. In addition, plaintiff admittedly failed to file a return or affidavit of service until two days before filing his original brief in this appeal. (Supp. L.F. 2-3). This late filing of a return is not sufficient to confer jurisdiction on the court retroactively. Without a return or affidavit of service, and with only a special entry of appearance, asserting the court's lack of personal

jurisdiction over defendant, the trial court, for this additional reason, lacked jurisdiction at the time it entered the default judgment. *See Worley v. Worley*, 19 S.W.3d at 129; *Gerding v. Hawes Firearms Co.*, 698 S.W.2d 605, 607 (Mo. App. 1985).

Because the trial court lacked personal jurisdiction over defendant, the default judgment was void and a nullity, as were the order requiring defendant (over whom the court had no jurisdiction) to pay \$500 to plaintiff's attorneys, and the subsequent order reinstating the void default judgment. In the alternative, defendant respectfully submits that the trial court abused its discretion in reinstating the default judgment.

Plaintiff's reliance on several patently meritless arguments - that defendant should have appealed from a non-appealable order, the denial of his motion to dismiss for lack of personal jurisdiction; that defendant was required to file a motion under Rule 74.06 before appealing; and that the special entry of appearance was untimely filed – suggests a misunderstanding of basic principles of civil procedure and further illustrates the weakness of plaintiff's position. The trial court's judgment should be reversed and the cause remanded with directions to dismiss or, in the alternative, for further proceedings.

ARGUMENT

I THE TRIAL COURT LACKED PERSONAL JURISDICTION OVER DEFENDANT

Defendant Did Not Waive Personal Jurisdiction

Plaintiff relies on general statements in *Greenwood v. Schnake*, 396 S.W.2d 723, 726 (Mo. 1965), and *Crouch v. Crouch*, 641 S.W.2d 86 (Mo. 1982), to the effect that a defendant may waive the defense of lack of personal jurisdiction by failing to assert the defense within the time prescribed by the rules. (Resp. Brf., p. 19). In each case, the

court found that the defendant had properly raised the issue. Neither decision holds that a defendant who has raised the issue of lack of personal jurisdiction through a special entry of appearance irrevocably subjects himself to the court's jurisdiction for all purposes, by failing to file a motion or answer captioned as such. Neither decision – nor any other case cited by plaintiff - supports plaintiff's contention that the special entry of appearance was not enough to avoid a default judgment but was too much to allow the defendant to attack the default judgment as void after it was entered. Defendant did not waive his jurisdictional defense, because he never gave the court any indication that he acquiesced in its jurisdiction. To the contrary, he repeatedly objected to its jurisdiction, from the filing of the special entry of appearance to the entry of the final judgment.

Although plaintiff argues that defendant did not present his jurisdictional defense within the time specified in Rule 55.27 (Resp. Brf., p. 23), the records reflect that defendant's attorney asserted in the special appearance that "the Court herewith has no Personal Jurisdiction over Defendant." (L.F. 18). If, as plaintiff claims, defendant was served on April 28, 2000, the special entry of appearance was timely filed. May 28, 2000 was a Sunday, and May 29, 2000 was the Memorial Day holiday. Under Rule 44.01(a), when the last day of a period for taking action is a Saturday, Sunday or a legal holiday, "the period runs until the end of the next day which is neither a Saturday, Sunday nor a legal holiday."

Not only did the special entry of appearance clearly bring the jurisdictional issue to the court's attention, but every subsequent action taken by defendant's attorney was consistent with his assertion of lack of personal jurisdiction. For example, at the July 21,

2000 hearing on plaintiff's motion for default judgment, defendant's former attorney again advised the court that he was contesting its jurisdiction for defendant. (Tr. 4-8).

The cases cited by plaintiff (Resp. Brf., pp. 21-22) do not support his claim that defendant waived personal jurisdiction. In *Sullenger v. Cooke Sales & Service Co.*, 646 S.W.2d 85, 88 (Mo. banc 1983), this Court observed that personal jurisdiction may be waived "when a defendant makes no motion or pleading on the issues *but otherwise subjects itself to the jurisdiction of the court.*" (Emphasis added). In the present case, defendant did not at any point subject himself to the court's jurisdiction, but consistently asserted its lack of jurisdiction.

Chase v. Third Century Leasing Co., Inc. v. Williams, 782 S.W.2d 408 (Mo. App. 1990) involved a contractual forum selection clause, by which the parties waived personal jurisdiction in consenting to the personal jurisdiction of a court on which they agreed. It has no application to this case. *In re Adoption of J.P.S.*, 876 S.W.2d 762 (Mo. App. 1994) involved a situation in which a party appeared and participated in a hearing, without advising the court that he claimed it lacked jurisdiction. In contrast, defendant in the present case did not waive personal jurisdiction, because his attorney consistently informed the court that it lacked jurisdiction over defendant.

Plaintiff Did Not Establish Jurisdiction Over Defendant

Plaintiff's claim that the statements contained in his affidavit were sufficient to establish personal jurisdiction (Resp. Brf., p. 26) is contrary to Missouri law. "The proper function of an affidavit is to state facts, not conclusions." *Conway v. Royalite Plastics, Ltd.*, 12 S.W.3d 314, 318 (Mo. banc 2000). *See also Lindley v. Midwest Pulmonary Consultants*, 55 S.W.3d 906, (Mo. App. 2001). Plaintiff has not claimed, and

his affidavit does not state, that defendant took any action in Missouri. Instead, the affidavit asserts only conclusions and, in particular, the conclusion that “the transaction described herein occurred in the State of Missouri.” (L.F. 23 ¶ 8). What “transaction” is referred to is unclear. The only specific activity alleged to have occurred in Missouri is plaintiff’s borrowing money from Citizen’s Bank and Trust. (L.F. 23 ¶ 7). Plaintiff did not assert that defendant took any action in Missouri, and plaintiff’s activities in Missouri were insufficient to confer on the trial court jurisdiction over defendant, a New York resident. *See Elaine K. v. Augusta Hotel Associates, Ltd. Partnership*, 850 S.W.2d 376, 378 (Mo. App. 1993).

Plaintiff is also in error in asserting that this Court can consider only the information before the court on July 21, 2000 in determining whether the court had personal jurisdiction. The conclusory affidavit of plaintiff was insufficient to establish jurisdiction, and as a result the default judgment was void. *See West Publishing Corp. v. Phillips*, 31 S.W.3d 496 (Mo. App. 2000); *Hill Behan Lumber Co. v. Bankhead*, 884 S.W.2d 318, 322 (Mo. App. 1994). “A default judgment, being void due to lack of personal jurisdiction, remains void forever and any kind of proceeding to cancel it is proper.” *Shapiro v. Brown*, 979 S.W.2d at 528.

On July 21, 2000, the trial court had no facts before it from which it could find personal jurisdiction. Neither plaintiff’s petition nor his affidavit identified any action by defendant that would subject him to the jurisdiction of a Missouri court under § 506.500, nor did plaintiff show that defendant had minimum contacts with the State of Missouri. The trial court did have before it defendant’s special entry of appearance and defendant’s

attorney's oral objections to personal jurisdiction, which plaintiff admits "apprised the Trial Court of his claim to a personal jurisdiction defense." (Resp. Brf., p. 37).

At the time the trial court entered its final judgment, reinstating the default judgment, it still had no showing that defendant had taken any action in Missouri would subject him to long arm jurisdiction. Nor did it have any indication that defendant had purposefully availed himself of the privilege of doing business in Missouri. In addition, the court then had before it defendant's affidavits showing that he had no assets in Missouri, had no business interests in Missouri, had never borrowed money in Missouri, and had never been in Missouri before 1998, when he was there once for a three hour business meeting unrelated to the matters involved in this litigation. These affidavits were the only factual materials in the file and before the trial court at the time it reinstated the default judgment. This Court can and should consider the affidavits before the trial court at the time it entered its final judgment, from which this appeal is taken. They demonstrate that the trial court lacked jurisdiction over defendant at all times in this litigation, that it should not have entered the default judgment, and that it lacked jurisdiction to reinstate the default judgment.

Plaintiff's argument that the judgment should be affirmed because defendant did not appeal the denial of his motion to dismiss for lack of personal jurisdiction (Resp. Brf., p. 27) is meritless on its face. The denial of a motion to dismiss for lack of personal jurisdiction is not an appealable order under § 512.020 RSMo. 2000. *See Morrison v. Martin's Estate*, 427 S.W.2d 783, 784 (Mo. App. 1968) ("absent specific authority, appeals do not lie from rulings on motions which do not constitute a final disposition of the cause..."). Defendant properly appealed from the trial court's final judgment.

Plaintiff's contention that defendant was required to file a Rule 74.06 motion before appealing is equally meritless. Rule 74.06, governing relief from judgments, "is not intended as an alternative to a timely appeal." *Love v. Board of Police Commissioners*, 943 S.W.2d 862, 863 (Mo. App. 1997). Rule 74.06 provides for relief from a judgment even in situations where the time for an appeal has expired. It is in no way a prerequisite to an appeal.

Defendant argued before the trial court that the July 22, 1999 judgment was void for lack of personal jurisdiction and therefore could not be reinstated. (L.F. 123-24). A timely appeal is a proper method of preserving the claim that a default judgment is void. *See Bueneman v. Zykan*, 52 S.W.3d 49, 58 (Mo. App. 2001) (rejecting contention that defendant was required to move to set aside a second default judgment at the trial court level before appealing).

Because the trial court lacked personal jurisdiction over defendant, the default judgment was void and must be reversed.

**II THE SPECIAL APPEARANCE AND DEFENDANT'S FORMER ATTORNEY'S
SUBSEQUENT ACTIONS WERE SUFFICIENT TO CONSTITUTE PLEADING
OR OTHERWISE DEFENDING AND TO PRECLUDE DEFAULT JUDGMENT**

Plaintiff argues that defendant elected to challenge jurisdiction by "coming to court and actively attacking personal jurisdiction" but contends that the special appearance subjected defendant to the court's jurisdiction for all purposes when it was not accompanied by a motion or answer denominated as such. (Resp. Brf., p. 24). There is neither logic nor case authority to support that argument. Plaintiff relies on dicta in *State ex rel. White v. Marsh*, 646 S.W.2d 357, 362 (Mo. banc 1983). There, the Court

raised the possibility that a defendant who obtained an extension of time, as the defendants in that case had done, without objecting to the court's jurisdiction, might be held to be in court for all purposes if the defenses relating to personal jurisdiction or venue were not presented within the time specified in the court's order.

Here, however, the special entry of appearance raised the issue of lack of jurisdiction from the very beginning. In fact, plaintiff admits that plaintiff's former attorney's special entry of appearance and statements in court "sufficiently apprised the Trial Court of his claim to a personal jurisdiction defense." (Resp. Brf., p. 37). Plaintiff argues, however, that defendant was required to file a motion or answer and that the special entry of appearance cannot be considered a motion or other defense because it does not contain a prayer for relief. (Resp. Brf., p. 32). The Missouri courts have not applied such a technical approach to pleadings and motions. *See State ex. rel. Fisher v. McKenzie*, 754 S.W.2d 557, 561 (Mo. banc 1988) (oral statement was sufficient to constitute an objection to jurisdiction). The relief requested by the special appearance is implicit - dismissal for lack of personal jurisdiction.

There is neither logic nor case authority to support plaintiff's claim that treating the special entry of appearance as a motion asserting the defense of personal jurisdiction would have denied plaintiff his procedural due process rights. (Resp. Brf., pp. 33-34). The special entry of appearance was sufficient to preclude the entry of a default judgment. Treating it as a motion would not have required the court to decide on July 21, 2000 whether to dismiss plaintiff's petition that day. The trial court should have denied the motion for default judgment and deferred argument on the jurisdictional issue to

another time, giving both parties an opportunity to present evidence and argument on these issues.

Plaintiff also argues that merely stating that the court has no personal jurisdiction should not be sufficient to “stop all court proceedings.” (Resp. Brf., p. 26). When considered according to its substance, rather than its form, however, the special appearance was sufficient to constitute a motion or other defense. *See Chapman v. Commerce Bank of St. Louis*, 896 S.W.2d 85, 87 (Mo. App. 1995); *State ex. rel. Fisher v. McKenzie*, 754 S.W.2d 557, 561 (Mo. banc 1988). Because defendant had raised the jurisdictional issue, plaintiff was not entitled to a default judgment but should have been required to establish his case, perhaps by a summary judgment motion, supported by affidavits establishing the facts necessary to confer jurisdiction over defendant.

**III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN
REINSTATING THE DEFAULT JUDGMENT**

Plaintiff is in error in asserting that the only evidence before the court was that McGrain did not offer to pay the attorney’s fee allowed within fifteen days of the hearing at which the default was conditionally set aside, within fifteen days of the date the order was entered, or within fifteen days after his former attorney acknowledged receipt of the order. (Resp. Brf., p. 47). The court also had before it affidavits establishing that defendant thought the amount had been paid by his former attorney, and that he was not aware until October 5, 2000 that it had not been paid or that there was a time limitation on the payment. (L.F. 133-34, ¶ 5). After learning that the payment had not been made, defendant repeatedly offered to pay the \$500, both through his former attorney and through his new counsel. (L.F. 133-34, ¶ 6, 161, ¶ 9, 138-40). The failure to pay the

\$500 promptly, like defendant's former attorney's failure to file an answer captioned as such, was not intentional or reckless behavior designed to impede the judicial process. Rather, it was the type of mistake or misunderstanding that the courts have held constitutes good cause. *See Young v. Safe-Ride Services*, 23 S.W.3d 730, 734 (Mo. App. 2000) (reversing default judgment which resulted from a "chain of errors"); *Billingsley v. Ford Motor Co.*, 939 S.W.2d 493, 494 (Mo. App. 1997) (reversing default judgment that was entered when "the ball was dropped" by defendant's attorneys).

Plaintiff's reliance on *Cotleur v. Danziger*, 870 S.W.2d 234 (Mo. banc 1994) is misplaced, because the judgment entered in that case was a judgment on the merits and not a default judgment. *Cotleur*, 870 S.W.2d at 237. Because the judgment was on the merits, Ms. Cotleur was required to demonstrate "excusable neglect" in order to have the judgment set aside under Rule 74.06(b). *Id.* at 238. In the present case, defendant's motion was based on Rule 74.05(d), and defendant was not required to show excusable neglect.

Under all of these circumstances, the trial court abused its discretion in overruling defendant's amended motion to set aside default judgment and in reinstating the default judgment.

CONCLUSION

For all of the foregoing reasons, the default judgment was void, could not be reinstated and must be reversed. Defendant respectfully suggests that the cause should be remanded with directions to set aside the default judgment and dismiss for lack of personal jurisdiction. If, however, the Court should conclude that there are questions that should be addressed by the trial court, the judgment should be reversed and the cause

remanded with directions to set aside the default judgment and to rule on the motion to dismiss for lack of personal jurisdiction or, in the alternative, to set aside the default judgment and for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies and a disk of the foregoing Appellant's Reply Brief were mailed, first class mail, postage prepaid on this 31st day of January, 2002, to Keith W. Hicklin, Esq., Joseph W. Vanover, Esq., Fourth Street at Main, P.O. Box 1517, Platte City, Missouri 64079, Attorneys for Respondent.

CERTIFICATE OF COMPLIANCE

In accordance with Rule 84.06, the undersigned certifies that Appellant's Substitute Reply Brief complies with the limitations contained in Rule 84.06(b) and that the number of words in this Brief is 3,435 words, as counted by the word processing system used in preparing this Brief, Microsoft Word '97. The undersigned further certifies that the disk accompanying this Brief has been scanned for viruses and that it is virus-free.

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