IN THE SUPREME COURT OF MISSOURI

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

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

APPELLANT'S SUBSTITUTE BRIEF

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	)	
Defendant/Appellant.	)	

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JURISDICTIONAL STATEMENT

Defendant Craig L. McGrain, a New York resident, appeals from a default judgment entered against him on July 21, 2000 in the amount of $122,649.38 plus accrued interest from and after March 30, 2000 at the rate of $30.92 per day and from the court's November 7, 2000 Amended Order and Judgment Denying Amended Motion to Set Aside Default Judgment, which reinstated the default judgment.

At the time the default judgment was entered on July 21, 2000, there was no affidavit or return of service in the file. Defendant's then attorney had filed a "Special Entry of Appearance to Contest Personal Jurisdiction" but had not filed an answer or a motion denominated as such. On that attorney's subsequent motion to set aside default judgment, the trial court set aside the default judgment, conditioned upon payment of partial attorney fees in the amount of $500. The court's order, drafted by plaintiff's counsel, and received by defendant's then attorney on September 14, 2000, required that the $500 be paid in fifteen days. On October 5, 2000, defendant first became aware that the $500 had not been paid and directed counsel to tender payment. All tenders were refused. On November 7, 2000 the trial court, on plaintiff's motion, entered an Amended Order and Judgment denying Amended Motion to Set Aside Default Judgment, stating that the default judgment of July 21, 2000 "is and shall be in full force and effect." Defendant timely filed his notice of appeal the same day.

The Missouri Court of Appeals, Western District, reversed the judgment against defendant, holding that "the record contains insufficient information for this court to evaluate the propriety of the circuit court's exercise of personal jurisdiction over Mr. McGrain." (Opinion, p. 10) The court remanded for further proceedings consistent with the opinion and directed the trial court "to determine whether there are sufficient minimum contacts with Missouri for the court to acquire personal jurisdiction over Mr. McGrain." (Opinion, pp. 10-11). The trial court was also directed to "liberally grant leave to amend the petition" so that plaintiff could address the issue of personal

jurisdiction. (Opinion, p. 11). This Court granted transfer on November 20, 2001, on plaintiff's application, and has jurisdiction to decide this cause the same as on original appeal, pursuant to Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

On April 20, 2000, plaintiff Joseph A. Lovenduski, a Missouri resident, filed a "Petition on Loan/Breach of Contract" in the Circuit Court of Platte County, Missouri against defendant Craig L. McGrain, a resident of New York. (L.F. 10-11). The two page, nine paragraph petition alleged that plaintiff had loaned defendant the sum of $120,000 in two separate transactions of $60,000 each on or about July 7, 1998 and September 9, 1998. (L.F.10, ¶ 3). Plaintiff further alleged that pursuant to the agreement between plaintiff and defendant, "the funds loaned to Defendant were advanced through an affiliated corporation, First Austin Funding Corporation," that defendant agreed to repay the loan, plus interest at the rate of prime plus one percent per annum in monthly installments, and that defendant had made some payments but had stopped making payments and had therefore defaulted. (L.F. 10-11, ¶¶ 4-6).

Plaintiff alleged that in order to lend the funds to defendant, "Plaintiff borrowed the sum of One Hundred Twenty Thousand Dollars ($120,000.00) from Citizens Bank and Trust located in Livingston County, Missouri and transferred the money directly to First Austin Financial from Citizens Bank and Trust" and that "the transaction described herein occurred in the State of Missouri." (L.F. 11, ¶ 7, 8). Plaintiff alleged that demand had been made on defendant for repayment and that there was due to plaintiff

$122,469.38 as of March 30, 2000 and interest thereafter at $30.92 per day. (L.F. 11, ¶ 9).

The record reflects that summons for personal service outside the State of Missouri was requested (L.F. 14-17), but no return of service appeared in the court file until April 17, 2001, two days before plaintiff filed his Respondent's Brief, with a Supplemental Legal File containing the recently filed return, which reflects service on April 28, 2000. (Supp. L.F. 2-3). On May 30, 2000, defendant's then attorney filed a document captioned "Special Entry of Appearance to Contest Personal Jurisdiction," stating: "Comes now Charles A. Hurth, III and hereby enters his Special Entry of Appearance to Contest Personal Jurisdiction on behalf of Defendant Craig L. McGrain in the above-styled matter, and hereby asserts that the Court herewith has no Personal Jurisdiction over Defendant." (L.F. 18).

No further pleadings, motions or memoranda were filed by either party until June 19, 2000, when plaintiff filed a motion for entry of default judgment (L.F. 21), with an attached affidavit signed by plaintiff Joseph A. Lovenduski in Monroe County, New York. (L.F. 22-24). The affidavit reasserted each of the allegations set forth in plaintiff's petition and repeated the statement that "the transaction described herein occurred in the State of Missouri." (L.F. 23, ¶ 8). The hearing on plaintiff's motion for default judgment was held on July 21, 2000, after a continuance requested by defendant's counsel. (L.F. 26-27).

Defendant's attorney appeared at the hearing on July 21, 2000 and opposed the entry of default. (Tr. 4-10). Plaintiff's counsel argued that service was had more than thirty days ago, the defendant had filed no answer and filed no motions which would delay the time the answer would be due and had not asked for an extension of time to file an answer. (Tr. 5). Defendant's attorney responded, stating in part: "Your Honor, and what he states is accurate, in the sense that I filed a Special Entry of Appearance denying jurisdiction. I don't believe there is jurisdiction over Mr. McGrain in this matter and I'm trying to protect my rights to continue to assert that." (Tr. 5). Defendant's attorney asked the court to note that the affidavit presented by plaintiff was a New York State affidavit" and added that "there is an ongoing battle between these parties in New York, which is the proper place for this lawsuit to be tried." (Tr. 6). He also observed that "in the affidavit, it asserts some unknown corporation named First Austin was involved in this litigation and is not a party to this particular suit. And so that I believe there is an issue of corporate responsibility versus personal responsibility, as well as one of jurisdiction." (Tr. 6).

Plaintiff's counsel had plaintiff's affidavit marked as an exhibit, and argued that "the jurisdiction is because the transaction occurred in the State of Missouri" (Tr. 7) and that "with no pleading, then all of the allegations of the petition are deemed admitted, including the jurisdictional allegations." (Tr. 8). The trial court entered default judgment, which was filed on July 24, 2000. (L.F. 28-30; Tr. 8-9).

On July 31, 2000, defendant's attorney filed an entry of appearance, a motion to set aside default judgment, a motion for leave to file answer out of time, and a notice of hearing for August 11, 2000. (L.F. 32-37). At the hearing on August 11, 2000, plaintiff's counsel argued that defendant's motion "does not plead a single fact relating to a meritorious defense." (Tr. 13-14). Defendant's attorney asked the court, if it agreed that the motion was not properly pleaded, to allow additional time in which he could amend the motion. (Tr. 16-18). The court allowed an amended motion (Tr. 18), which was filed on August 14, 2000. (L.F. 51-55). At the hearing on August 18, 2000, defendant's counsel argued that defendant had a meritorious defense, because: (1) there was no jurisdiction over defendant; (2) the wrong party had been sued, since plaintiff's own affidavit showed that the money was not transferred to defendant but to First Austin Corporation, which was not a party to the lawsuit; and (3) plaintiff had not established an agreement, since there was no loan or other document attached to the petition. (Tr. 22-23). Defendant's attorney then addressed the issue of good cause:

> Now Your Honor, the question of good cause comes before you. And I think, Your Honor, that the good cause issue falls squarely on my shoulders and not on the shoulders of Mr. McGrain. I understand that.
>
> * * * * *
>
> If there is fault here, the fault is not Mr. McGrain's to the sum of $120,000. The fault is in counsel's procedural approach to

this case.

(Tr. 23). Defendant's attorney argued further:

> If you were to deny my motion, the harm that would befall Mr. McGrain would be significant. The harm that would befall me would be significant. That goes to the issue of discretion.
>
> On the other hand, if you were to grant my motion, Your Honor, it is within your discretion to award fees against me for the trouble that has gone to the plaintiff's law firm to try to press me into this. And I understand that – that is within your power.
>
> * * * * *
>
> So by balancing the scales of justice to use the cliché, I ask you to use your discretion in my favor. I ask you to find that the good cause was that I attempted to show jurisdiction, although I may not have pled it in a way that opposing counsel would find appropriate.

(Tr. 24-25). Defendant's attorney concluded: "I'd ask you to, if you must wrap [sic] my knuckles or wrap [sic] me upside the head, to do that, but not to take the step against my client under these facts, at this time, and allow us to proceed through this case and that

you could then subsequently decide the issues that I have presented to you in my amended motion." (Tr. 27).

Over plaintiff's opposition, the trial court granted defendant's motion, stating: "The Court takes up Defendant's Motion to Set Aside Default Judgment and the same is sustained. And the judgment of July 21, 2000, is set aside, conditioned upon payment of partial, what I'm certain are partial attorney fees, in the amount of $500. Leave is granted to file Answer out of time." (Tr. 30). The court directed plaintiff's attorney "to prepare a new order setting the order aside, conditioned upon the payment of the $500." (Tr. 32).

Although the trial court had said nothing about requiring payment of the fee within any particular time frame, and the docket entry made no reference to any time requirement (L.F. 4), the order, as prepared by plaintiff's counsel and signed by the court on August 22, 2000, required payment within fifteen days from the date of the order. (L.F. 69).

On August 22, 2000, defendant's attorney, who had not received a copy of the order, wrote defendant, advising that the default had been set aside, and stating: "The Judge awarded $500 in fees to Plaintiffs counsel because of the Default. I have not seen the Courts order, as of this date. Such an award is allowable under Missouri Supreme Court Rules. I do not agree with the Judge on this award, but it is an allowable award." (L.F. 136). With the letter, defendant's attorney enclosed a bill, which showed, among other expenses, an item for "court awarded attorney fees" of $500. (L.F. 137). It was

defendant's understanding that the $500 in fees had been paid by his attorney. (L.F. 133, ¶ 4).

On August 25, 2000, defendant's attorney filed a motion to dismiss due to lack of personal jurisdiction. (L.F. 70-71). He attached an affidavit by defendant, in which defendant stated that: (1) he was and had been for the last fifteen years a resident of the State of New York and he had never been a resident of the State of Missouri; (2) he had never borrowed any money in the State of Missouri; (3) prior to 1998 he had never been in the State of Missouri, and during 1998 he was only in the State once, for a three hour business meeting unrelated to the matters involved in this litigation; and (4) he had no assets in the State of Missouri and no business interests in the State of Missouri. (L.F. 72). Defendant's counsel initially noticed the motion for hearing on September 8, 2000 (L.F. 75) and subsequently sent two amended notices of hearing, rescheduling first because of plaintiff's counsel's unavailability on September 8, and then because of the court's unavailability on the alternate date selected. The hearing was then set for October 6, 2000. (L.F. 76-77).

Although the court's docket sheets showed that the order of August 22, 2000 had been sent to counsel for both parties (L.F. 5), defendant's counsel did not receive a copy of the order until September 14, 2000, when it was faxed to him by plaintiff's attorney. (L.F. 160, ¶ 6-7). On October 5, 2000, defendant's attorney informed defendant that opposing counsel objected to the hearing of the motion to dismiss and intended to file a motion for entry of order denying amended motion to set aside default judgment. (L.F.

133-34, ¶ 5; 161, ¶ 8). Defendant's attorney further advised defendant that he had had a phone conversation with plaintiff's counsel, in which defendant's attorney had offered to pay the $500 on October 6, 2000, and that offer was refused. (L.F. 134, ¶ 6; 161, ¶ 9). Defendant was not aware until this conversation that there had been a time limitation on the payment of the $500 or that it had not been paid by his counsel. (L.F. 133, ¶ 5).

On October 5, 2000, defendant's attorney also wrote defendant, advising that it was his intention to withdraw from the case and to file a request for leave to withdraw. (L.F. 84). He filed his request for leave to withdraw that same day. (L.F. 82). His request was granted on October 13, 2000 (Tr. 36-37), and an order allowing his withdrawal was entered October 25, 2000. (L.F. 113). Defendant retained new counsel, who entered his appearance on October 6, 2000. (L.F. 93-94). Defendant's new counsel wrote plaintiff's attorney, offering payment of the $500 and advising that he would await wiring instructions. (L.F. 140).

On October 6, 2000, plaintiff filed a Motion for Entry of Order Denying Motion to Set Aside Default Judgment, with an attached Affidavit of Counsel. (L.F. 87-90). The motion alleged the nonpayment of the $500 in attorney's fees within fifteen days from the date of the order or the date of entry of the order and sought an order denying defendant's motion to set aside default judgment. (L.F. 87-88). On November 2, 2000, defendant's new counsel filed suggestions in opposition to plaintiff's motion (L.F. 114-32), with attached affidavits by defendant (L.F. 133-37), defendant's new counsel (L.F. 138-40) and defendant's former attorney (L.F. 160-62). The affidavits set forth: the information

provided to defendant by his former attorney concerning the order for payment of fees (L.F. 133, ¶ 3-4); defendant's understanding that the $500 in fees had been paid by his former attorney (L.F. 133, ¶ 4; L.F. 137); defendant's former attorney's lack of knowledge of the time limitation for payment of the $500 prior to receiving a faxed copy of the order on September 14, 2000 (L.F. 160-61, ¶ 5-7); defendant's lack of knowledge, prior to October 5, 2000, that there had been a time limitation on the payment of the $500 and that payment had not been made (L.F. 133-34, ¶ 5); and defendant's offers, through counsel, to pay the $500 on October 6, 2000 (L.F. 134, ¶ 6; L.F. 138-40; L.F. 161, ¶ 9). Defendant's new counsel also filed Suggestions in Support of Motion to Dismiss Due to Lack of Personal Jurisdiction. (L.F. 163-70).

At the hearing on November 3, 2000, defendant's new counsel appeared, tendered a check for $550 to cover the attorney's fee with interest, and opposed plaintiff's motion. (Tr. 39-41). Plaintiff's counsel agreed that payment had been tendered on October 6, 2000 but argued that such tender, twenty-two days after defendant's former attorney had received a copy of the order by fax from plaintiff's counsel's office, was too late. (Tr. 42-43). After hearing further argument (Tr. 44-51), the trial court found that defendant had failed to comply with the condition of the order setting aside judgment by failing to pay partial attorney's fees of $500 within fifteen days, overruled defendant's amended motion to set aside default judgment, and entered an order and judgment that the default judgment entered on July 21, 2000 "is and shall be in full force and effect." (L.F. 183; Tr. 51-52). Defendant appealed to the Missouri Court of Appeals, Western District,

which reversed and remanded on August 7, 2001. The Court of Appeals held that it was not required to determine the question of whether defendant waived the defense of lack of jurisdiction, because the trial court based its determination of personal jurisdiction on the long-arm statute rather than on waiver. (Opinion, pp. 6-7; 9). Finding that plaintiff's bare assertion that the "transaction occurred" in Missouri was an insufficient basis for the trial court's determination that it had personal jurisdiction (Opinion, p. 8), the Court of Appeals reversed the judgment and remanded with directions to the trial court "to determine whether there are sufficient minimum contacts with Missouri for the court to acquire personal jurisdiction over Mr. McGrain" and to liberally grant plaintiff leave to amend. (Opinion, pp. 10-11). This Court granted plaintiff's application for transfer, after the Court of Appeals' issuance of its opinion.

Copies of the Petition, Special Entry of Appearance to Contest Jurisdiction, the Default Judgment and Affidavits are included in the Appendix to this brief.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN ENTERING DEFAULT JUDGMENT, IN OVERRULING DEFENDANT'S AMENDED MOTION TO SET ASIDE DEFAULT JUDGMENT AND IN REINSTATING THE DEFAULT JUDGMENT, WHICH WAS VOID, BECAUSE: THE TRIAL COURT LACKED PERSONAL JURISDICTION OVER DEFENDANT IN THAT THERE WAS NO RETURN OR AFFIDAVIT OF SERVICE IN THE FILE AND NO INDICATION THAT DEFENDANT HAD BEEN SERVED WITH THE SUMMONS AND PETITION AS REQUIRED BY LAW; PLAINTIFF'S PETITION AND AFFIDAVIT FAILED TO ESTABLISH THAT DEFENDANT HAD TRANSACTED ANY BUSINESS OR MADE ANY CONTRACT WITHIN THE STATE OF MISSOURI, RELATING TO THE MATTERS INVOLVED IN PLAINTIFF'S LAWSUIT, OR THAT DEFENDANT HAD MINIMUM CONTACTS WITH THE STATE OF MISSOURI; DEFENDANT'S AFFIDAVIT, SHOWING THAT DEFENDANT, A NEW YORK RESIDENT, HAD BEEN IN THE STATE OF MISSOURI ONLY ONCE IN 1998 FOR A MEETING UNRELATED TO THE MATTERS INVOLVED IN PLAINTIFF'S LAWSUIT, HAD NEVER BORROWED MONEY IN THE STATE OF MISSOURI AND HAD NO ASSETS OR BUSINESS INTERESTS IN MISSOURI, ESTABLISHED THAT DEFENDANT HAD NOT ENGAGED IN ANY ACTIVITY

ENUMERATED IN § 506.500 RSMO. 1994 AND THAT DEFENDANT LACKED SUFFICIENT MINIMUM CONTACTS WITH THE STATE OF MISSOURI TO SATISFY THE REQUIREMENTS OF DUE PROCESS; AND THE TRIAL COURT NEITHER FOUND, NOR WAS THERE A BASIS FOR FINDING, THAT DEFENDANT, WHOSE ATTORNEY FILED A SPECIAL ENTRY OF APPEARANCE OBJECTING TO THE COURT'S JURISDICTION AND REASSERTED THE OBJECTION ORALLY AND IN SUBSEQUENT FILINGS, WAIVED THE DEFENSE OF LACK OF PERSONAL JURISDICTION.

Worley v. Worley, 19 S.W.3d 127 (Mo. banc 2000)

Bueneman v. Zykan, 52 S.W.3d 49 (Mo. App. 2001)

State ex rel. William Ranni Assocs., v. Hartenbach, 742 S.W.2d 134 (Mo. banc 1987)

Hill Behan Lumber Co. v. Bankhead, 884 S.W.2d 318 (Mo. App. 1994)

Section 432.010 RSMo. 1994

Section 506.500 RSMo. 1994

Rule 54.06 Mo.R.Civ.P.

Rule 54.20(b)(1) Mo.R.Civ.P.

II. THE TRIAL COURT ERRED IN ENTERING DEFAULT JUDGMENT, IN OVERRULING DEFENDANT'S AMENDED MOTION TO SET ASIDE DEFAULT JUDGMENT AND IN REINSTATING THE DEFAULT JUDGMENT, BECAUSE DEFENDANT DID NOT FAIL TO "PLEAD OR

OTHERWISE DEFEND" WITHIN THE MEANING OF RULE 74.05, IN THAT THE SPECIAL APPEARANCE CONTESTING JURISDICTION AND THE ARGUMENT OF DEFENDANT'S FORMER COUNSEL AT THE JULY 21, 2000 HEARING BROUGHT THE ISSUE OF THE COURT'S LACK OF PERSONAL JURISDICTION OVER DEFENDANT TO THE COURT'S ATTENTION BEFORE THE DEFAULT JUDGMENT WAS ENTERED, AND DEFENDANT REASSERTED HIS JURISDICTIONAL ARGUMENTS THROUGH SUBSEQUENTLY FILED MOTIONS AND AFFIDAVITS.

Worley v .Worley, 19 S.W.3d 127 (Mo. banc 2000)

Chapman v. Commerce Bank of St. Louis, 896 S.W.2d 85 (Mo. App. 1995)

Amon v. Bailey, 13 S.W.3d 305 (Mo. App. 2000)

State ex rel. Fisher v. McKenzie, 754 S.W.2d 557 (Mo. banc 1988)

Rule 55.27 Mo.R.Civ.P.

Rule 74.045 Mo.R.Civ.P. (1987)

Rule 74.05 Mo.R.Civ.P.

III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN OVERRULING DEFENDANT'S AMENDED MOTION TO SET ASIDE DEFAULT JUDGMENT AND IN REINSTATING THE DEFAULT JUDGMENT, BECAUSE DEFENDANT SHOWED A MERITORIOUS DEFENSE BY MOTIONS AND AFFIDAVITS SHOWING THAT THE COURT LACKED PERSONAL JURISDICTION OVER DEFENDANT, A

NEW YORK RESIDENT WHO HAD NEVER BORROWED MONEY IN THE STATE OF MISSOURI, HAD NO BUSINESS INTERESTS OR ASSETS IN MISSOURI, AND HAD BEEN TO MISSOURI ONLY ONCE, FOR REASONS UNRELATED TO THE MATTERS INVOLVED IN THIS LAWSUIT, AND BY POINTING OUT THE DEFICIENCIES IN PLAINTIFF'S PETITION AND AFFIDAVIT, INCLUDING THE ABSENCE OF ANY WRITTEN LOAN DOCUMENT AND PLAINTIFF'S OWN ALLEGATION THAT THE MONEY WAS ADVANCED TO A NON-PARTY TO THE LAWSUIT; AND DEFENDANT SHOWED GOOD CAUSE, BOTH FOR THE INITIAL FAILURE TO FILE AN ANSWER AND FOR THE FAILURE TO PAY ATTORNEY FEES WITHIN FIFTEEN DAYS, IN THAT THE AFFIDAVITS ESTABLISHED THAT BOTH FAILURES WERE DUE TO MISTAKE OR INADVERTENCE OF DEFENDANT'S FORMER ATTORNEY, WHO ATTEMPTED TO RAISE THE JURISDICTIONAL ISSUE BY A SPECIAL APPEARANCE AND ORAL ARGUMENT, AND WHO WAS NOT AWARE OF THE TIME REQUIREMENT FOR PAYING ATTORNEY'S FEES UNTIL AFTER THE TIME HAD EXPIRED, AND FURTHER ESTABLISHED THAT DEFENDANT WAS NOT AWARE OF THE TIME REQUIREMENT OR OF THE FACT THAT THE FEES HAD NOT BEEN PAID BY COUNSEL, UNTIL OCTOBER 5, 2000, AND THAT DEFENDANT THEN PROMPTLY

TENDERED PAYMENT.

Billingsley v. Ford Motor Co., 939 S.W.2d 493 (Mo. App. 1997)

Myers v. Pitney Bowes, Inc., 914 S.W.2d 835 (Mo. App. 1996)

Young v. Safe-Ride Services, 23 S.W.3d 730 (Mo. App. 2000)

Continental Basketball Ass'n v. Harrisburg Professional Sports, Inc., 947 S.W.2d 471 (Mo. App. 1997)

Rule 74.05 Mo. R. Civ. P.

Rule 74.06 Mo. R. Civ. P.

ARGUMENT

I. THE TRIAL COURT ERRED IN ENTERING DEFAULT JUDGMENT, IN OVERRULING DEFENDANT'S AMENDED MOTION TO SET ASIDE DEFAULT JUDGMENT AND IN REINSTATING THE DEFAULT JUDGMENT, WHICH WAS VOID, BECAUSE: THE TRIAL COURT LACKED PERSONAL JURISDICTION OVER DEFENDANT IN THAT THERE WAS NO RETURN OR AFFIDAVIT OF SERVICE IN THE FILE AND NO INDICATION THAT DEFENDANT HAD BEEN SERVED WITH THE SUMMONS AND PETITION AS REQUIRED BY LAW; PLAINTIFF'S PETITION AND AFFIDAVIT FAILED TO ESTABLISH THAT DEFENDANT HAD TRANSACTED ANY BUSINESS OR MADE ANY CONTRACT WITHIN THE STATE OF MISSOURI, RELATING TO THE MATTERS INVOLVED IN PLAINTIFF'S LAWSUIT, OR THAT DEFENDANT HAD MINIMUM CONTACTS WITH THE STATE OF MISSOURI; AND DEFENDANT'S AFFIDAVIT, SHOWING THAT DEFENDANT, A NEW YORK RESIDENT, HAD BEEN IN THE STATE OF MISSOURI ONLY ONCE IN 1998 FOR A MEETING UNRELATED TO THE MATTERS INVOLVED IN PLAINTIFF'S LAWSUIT, HAD NEVER BORROWED MONEY IN THE STATE OF MISSOURI AND HAD NO ASSETS OR BUSINESS INTERESTS IN MISSOURI, ESTABLISHED THAT DEFENDANT HAD NOT ENGAGED IN ANY ACTIVITY

ENUMERATED IN § 506.500 RSMO. 1994 AND THAT DEFENDANT LACKED SUFFICIENT MINIMUM CONTACTS WITH THE STATE OF MISSOURI TO SATISFY THE REQUIREMENTS OF DUE PROCESS; AND THE TRIAL COURT NEITHER FOUND, NOR WAS THERE A BASIS FOR FINDING, THAT DEFENDANT, WHOSE ATTORNEY FILED A SPECIAL ENTRY OF APPEARANCE OBJECTING TO THE COURT'S JURISDICTION AND REASSERTED THE OBJECTION ORALLY AND IN SUBSEQUENT FILINGS, WAIVED THE DEFENSE OF LACK OF PERSONAL JURISDICTION.

Standard of Review

Where an appellant argues that a default judgment was void on jurisdictional grounds, the issue is a question of law which is reviewed de novo. *See Laser Vision Centers, Inc. v. Laser Vision Centers Intern., SpA*, 930 S.W.2d 29, 31 (Mo. App. 1996) (issue whether default judgment was void for lack of personal jurisdiction was reviewed "independently on appeal").

"A judgment entered against a defendant by a court lacking personal jurisdiction over that defendant is void." *Cook v. Polineni*, 967 S.W.2d 687, 690 (Mo. App. 1998); *K and K Invs., Inc. v. McCoy*, 875 S.W.2d 593, 596 (Mo. App. 1994). In order for a Missouri court to subject a non-resident defendant to long arm jurisdiction, two elements must be present: the suit must arise out of the activities enumerated in the long-arm statute, § 506.500 RSMo. 1994; and the defendant must have sufficient minimum

contacts with the State of Missouri to satisfy due process requirements. *Capitol Indem. Corp. v. Citizens Nat. Bank of Fort Scott, N.A.*, 8 S.W.3d 893, 899 (Mo. App. 2000). In addition, the defendant must be served with process in the manner authorized by statute or rule. *See Worley v. Worley*, 19 S.W.3d 127, 129 (Mo. banc 2000). In the present case, plaintiff failed to establish that both requirements for personal jurisdiction – an action arising out of the activities enumerated in the long-arm statute and sufficient minimum contacts between defendant and the State of Missouri – were satisfied. In addition, at the time the default judgment was entered, there was nothing in the record to show that defendant was served with process in compliance with the applicable rules and statutes. For all of these reasons, the default judgment entered against defendant is void.

Defendant Did Not Waive Personal Jurisdiction

Throughout this appeal, and in his application for transfer, plaintiff has argued that because defendant's former attorney did not file a timely motion or answer captioned as such, his "Special Entry of Appearance to Contest Personal Jurisdiction" was not sufficient to raise the issue of personal jurisdiction and prevent a default judgment but was just enough activity to prevent defendant from attacking the default judgment as void after it was entered. The Missouri courts have never adopted that position, and to do so would exalt form over substance. In making this argument, plaintiff has relied on a statement in *State ex rel. White v. Marsh*, 646 S.W.2d 357 (Mo. banc 1983) and given it an expansive interpretation far beyond what this Court held in that case or what the Missouri courts have held in any case.

In *State ex rel. White v. Marsh*, the defendant's attorney had obtained additional time to plead without advising the court that he intended to assert lack of personal jurisdiction. The issue, then, was whether the attorneys' action in seeking and obtaining an extension of time without specifically reserving a right to raise the jurisdictional defense submitted his client to the court's jurisdiction and waived the defense of lack of personal jurisdiction. This Court held that it did not. In discussing the issues, this Court said that a "defendant who obtains an extension of time to respond undoubtedly recognizes that the case is in court so that the option of testing personal jurisdiction by submitting to a default judgment was no longer available." 646 S.W.2d at 362. This statement was dicta, because no default judgment had been taken in *White*. The plaintiff sought mandamus, arguing that the trial court had a ministerial duty to proceed with the case. This Court rejected that contention and quashed the alternative writ. The case did not present any issue of attacking a default judgment after its entry.

Even considering the dicta in *White*, it is clear that the phrase "recognizes that the case is in court" refers to the taking of some action or the making of some request without in any way indicating an objection to personal jurisdiction. Nothing of that sort occurred in the present case. Defendant's former attorney did not request additional time. From the very outset, in his "special entry of appearance to contest personal jurisdiction," he asserted the lack of personal jurisdiction, and he renewed this objection in his appearances before the court.

Moreover, the phrase "recognizes that the case is in court" is just part of a longer statement made by this Court in *State ex rel. Sperandio v. Clymer*, 581 S.W.2d 377, 384 (Mo. banc 1979). There, this Court acknowledged the general principle that "if a party takes any action which recognizes that the cause is in court *and assumes an attitude that the jurisdiction of the court has been acquired*, he is bound thereby and the action amounts to a general appearance." *Id.* (Emphasis added). It is clear from this language that the phrase "recognizes that the case is in court" means more than just acknowledging that suit has been filed or that proceedings are taking place. Rather, it means acquiescing in the court's jurisdiction by taking some action in court without objecting to the court's jurisdiction.

In the present case, defendant did not at any time "assume an attitude" that the trial court had acquired jurisdiction. The first thing his former attorney did was to assert lack of personal jurisdiction in his "Special Entry of Appearance to Contest Personal Jurisdiction" and he continued to assert lack of jurisdiction throughout the proceedings.

The court in *Bueneman v. Zykan*, 52 S.W.3d 49 (Mo. App. 2001) recently addressed the issue of waiver of the defense of lack of personal jurisdiction. A default judgment was entered against two defendants, who had been served only by publication. Counsel for these defendants filed a special limited entry of appearance and motion to set aside the default judgment on the basis that the trial court lacked personal jurisdiction over them. The trial court set aside the default judgment based on lack of personal jurisdiction but found that the special entry of appearance, motion and challenge to the

default judgment conferred personal jurisdiction and ordered these defendants to respond within thirty days. When they failed to do so, the trial court entered a second default judgment against them. The Court of Appeals reversed, holding that the trial court lacked personal jurisdiction over these defendants, who had not been properly served. The court noted that the defendants clearly stated that they were not consenting to the trial court's jurisdiction but were contesting it. 52 S.W.3d at 58. The court held that the defendants "did not waive the insufficient service of process by making a special appearance to set aside the default judgment based on lack of personal jurisdiction." *Id*. As a result, the second default judgment was void from its inception.

In the present case also, the defendant did not waive the defense of lack of personal jurisdiction, and the trial court erred in asserting jurisdiction over him.

The Trial Court Lacked Personal Jurisdiction Over Defendant

When a nonresident defendant raises the issue of lack of personal jurisdiction, the plaintiff has the burden of making a prima facie showing of jurisdiction by pleading and proving both that the suit arises out of an activity covered by the long-arm statute, § 506.500 RSMo. 1994 and Rule 54.06, and that defendant had sufficient minimum contacts with Missouri to satisfy due process requirements. *State ex rel. William Ranni Associates, Inc. v. Hartenbach*, 742 S.W.2d 134, 137 (Mo. banc 1987); *Farris v. Boyke*, 936 S.W.2d 197, 200 (Mo. App. 1996).

In the present case, the issue was raised initially by the Special Entry of Appearance to Contest Personal Jurisdiction and thereafter by defendant's former

attorney's arguments to the court. There is no support for the trial court's apparent conclusion that while a non-appearance would not admit jurisdiction, a special appearance, expressly objecting to the court's jurisdiction, should be deemed an admission of plaintiff's jurisdictional allegations. (L.F. 28-29; Tr. 8). To the contrary, the Missouri courts have held that an appearance to object to jurisdiction does not waive personal jurisdiction. *See Chapman v. Commerce Bank of St. Louis*, 896 S.W.2d 85, 87 (Mo. App. 1995).

Plaintiff had the burden of establishing that both requirements for personal jurisdiction were satisfied. *See Osage Homestead, Inc. v. Sutphin*, 657 S.W.2d 346, 350 (Mo. App. 1983) (where defendant raised issue of lack of personal jurisdiction by motion to set aside default judgment, plaintiff was required to establish a prima facie case for jurisdiction). Plaintiff failed to show that either requirement was met.

Plaintiff Failed to Establish Jurisdiction Under the Long Arm Statute

It is not clear from plaintiff's petition upon what basis the plaintiff contends personal jurisdiction exists over defendant. Jurisdiction must be based on § 506.500 RSMo. 1994, which provides in part that: "Any person or firm, … or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits… to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any such acts: (1) The transaction of any business within this state; (2) The making of any contract within this state."

Both in his petition and in his affidavit in support of the motion for default judgment, plaintiff has relied entirely on the bald assertion that "the transaction described herein occurred in the State of Missouri." (L.F. 11, ¶ 8; L.F. 23, ¶ 8). As the Court of Appeals concluded, this bare contention was insufficient to establish jurisdiction over defendant. (Opinion, p. 8). "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). It is unclear to what "transaction" plaintiff refers. The only specific activity alleged to have occurred in Missouri is plaintiff's borrowing the money that he transferred to First Austin Financial from Citizens Bank and Trust in Livingston County, Missouri. (L.F. 11, ¶ 7; L.F. 23, ¶ 7). Plaintiff's activities in Missouri are insufficient to confer on a Missouri court jurisdiction over defendant, a resident of New York. *See Elaine K. v. Augusta Hotel Associates Ltd. Partnership*, 850 S.W.2d 376, 378 (Mo. App. 1993) (jurisdiction may not be predicated "upon the unilateral activity of those who claim some relationship with the non-resident defendant"), *citing Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

Plaintiff did not allege that defendant made any contract within the State of Missouri or transacted in Missouri any business out of which this action arises. In fact, plaintiff has not alleged, nor did he attach to his petition, any written contract. An oral agreement by defendant to repay money advanced by plaintiff to First Austin Funding Corporation would not be enforceable under the applicable Statute of Frauds. § 432.010 RSMo. 1994. Moreover, plaintiff has neither pled nor shown that any alleged contract (enforceable or not) was "made" in the State of Missouri. "A contract is made where the

last act necessary to form a binding contract occurs." *State ex rel. Career Aviation Sales, Inc. v. Cohen*, 952 S.W.2d 324, 326 (Mo. App. 1997). The essential elements of a valid contract are: offer, acceptance and bargained for consideration. *Id.* For purposes of long-arm jurisdiction, a contract is made where acceptance occurs. *Id.* Plaintiff failed to plead, and his conclusory affidavit failed to show, that the acceptance requisite to a valid contract occurred in the State of Missouri.

When the trial court entered its amended judgment reinstating the default judgment on November 7, 2000, it still lacked any facts from which it could find personal jurisdiction over defendant. The only factual materials in the file at the time the trial court entered the final judgment, from which this appeal is taken, were defendant's affidavits. These negated any contention that defendant engaged in any activities that could subject him to personal jurisdiction under the Missouri long-arm statute. The affidavits demonstrated that defendant, a New York resident, has never resided in Missouri, has never borrowed money in Missouri, had never been to Missouri prior to 1998, was in Missouri only once during 1998 for a three hour business meeting unrelated to the matters involved in this litigation, and has no assets and no business interests in the State of Missouri. (L.F. 72-73). In these circumstances, where plaintiff has failed to establish that defendant engaged in any activity enumerated in the long-arm statute, the trial court lacked jurisdiction over defendant, and the default judgment is void. *See Osage Homestead, Inc. v. Sutphin*, 657 S.W.2d at 350-53 (default judgment reversed

where plaintiff did not make a prima facie showing that a contract was made within the State of Missouri or that defendant transacted business within the State of Missouri).

Plaintiff Failed to Show Sufficient Minimum Contacts

Even if plaintiff's allegations were sufficient to establish that a contract between plaintiff and defendant was made in Missouri, plaintiff has failed to prove the necessary minimum contacts to satisfy the requirements of due process. To subject an out-of-state defendant to *in personam* judgment, due process requires that the defendant have sufficient minimum contacts with the forum state that personal jurisdiction does not "offend the notions of fair play and substantial justice." *Int'l. Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945); *Elaine K. v. Augusta Hotel Associates Ltd. Partnership*, 850 S.W.2d at 378. The defendant's contacts with forum state must be such that the defendant "should reasonably anticipate being haled into court there." *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). In reviewing minimum contacts to determine whether they satisfy the due process requirements, the court must focus on the relationship between the defendant, the forum and the litigation. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1997); *State ex rel. William Ranni Associates, Inc. v. Hartenbach*, 742 S.W.2d at 138; *State ex rel. Auburn Ford, Inc. v. Westbrooke*, 18 S.W.3d 143, 146 (Mo. App. 2000).

In determining the sufficiency of a nonresident's contacts with Missouri, the court should consider: "1) the nature and quality of the contact; 2) the quantity of the contacts; 3) the relationship of the cause of action to the contacts; 4) the interest of Missouri in

providing a forum for its residents; and 5) the convenience or inconvenience to the parties. *Conway v. Royalite Plastics, Ltd.*, 12 S.W.3d at 318. Random, fortuitous, or attenuated contacts with the forum state cannot create jurisdiction. *Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985). The basic due process test is whether the defendant has "purposefully availed itself of the privilege of conducting activities within the forum state." *State ex rel. Wichita Falls General Hospital v. Adolf*, 728 S.W.2d 604, 607 (Mo. App. 1987).

The Missouri courts have held repeatedly that contacts more substantial than any shown here were insufficient to establish personal jurisdiction. *See State ex rel. Auburn Ford, Inc. v. Westbrooke*, 18 S.W.3d 143 (Mo. App. 2000) (Nebraska car dealership which advertised in Missouri, made some purchases in Missouri, and had some Missouri customers lacked sufficient minimum contacts to be subject to a Missouri court's jurisdiction where Missouri contacts were unrelated to plaintiffs' cause of action); *Capitol Indemnity Corp. v. Citizens Nat. Bank of Fort Scott, N.A.*, 8 S.W.3d at 902-03 (Kansas bank lacked minimum contacts with the State of Missouri although it forwarded a letter to a city in Missouri in connection with the loan at issue); *Farris v. Boyke*, 936 S.W.2d at 201 (trustees' physical presence in Missouri on four occasions in compliance with the directives of an Illinois trust did not establish minimum contacts such that they should reasonably anticipate being haled into court in Missouri); *Elaine K. v. Augusta Hotel Associates Ltd. Partnership*, 850 S.W.2d at 379 (defendant's conduct in making phone calls and mailing brochures to corporation in Missouri did not supply required

minimum contacts); *Mead v. Conn*, 845 S.W.2d 109, 112-13 (Mo. App. 1993) (doctor who transmitted information to another doctor in Missouri for analysis lacked minimum contacts with the State of Missouri); *State ex rel. Wichita Falls General Hosp. v. Adolf*, 728 S.W.2d 604, 607-09 (Mo. App. 1987) (Texas hospital that provided heart used for transplant in Missouri lacked sufficient minimum contacts for personal jurisdiction).

In the present case, plaintiff has not established that defendant had even random, fortuitous or attenuated contacts with the State of Missouri. Plaintiff has not alleged, nor does his affidavit show, that defendant took any action in Missouri with respect to the subject of plaintiff's lawsuit. Defendant's affidavit demonstrates a complete absence of the minimum contacts necessary for a Missouri court to exercise jurisdiction over him. Defendant never borrowed money in the State of Missouri, never resided in the State of Missouri, was never in the State of Missouri prior to 1998, when he was there only once for a three hour business meeting unrelated to the matters involved in plaintiff's lawsuit, and has no assets and no business interests in the State of Missouri. (L.F. 72-73). Nothing in the record would support a conclusion that defendant purposefully availed himself of the privilege of conducting activities in Missouri to invoke the protection and benefits of its laws. *See State ex rel. Sperandio v. Clymer*, 581 S.W.2d 377, 383 (Mo. banc 1979).

Because plaintiff failed to establish that defendant had sufficient minimum contacts with Missouri to satisfy the requirements of due process, the court lacked personal jurisdiction over defendant. The default judgment was void and must be

reversed. The case should be remanded with directions to set aside the default judgment and to grant defendant's motion to dismiss for lack of personal jurisdiction. *See Osage Homestead, Inc. v. Sutphin*, 657 S.W.2d at 354 (remanding with directions to sustain motion to set aside default judgment for lack of jurisdiction and to quash service of process). In the alternative, if the Court concludes that the issues concerning personal jurisdiction require further consideration by the trial court, the case should be remanded with directions to set aside the default judgment and to consider the motion to dismiss for lack of personal jurisdiction.

Without a Return of Service, the Trial Court Lacked Jurisdiction

The trial court lacked personal jurisdiction over defendant for an additional reason. Plaintiff, although insisting on defendant's strict technical compliance with all procedural requirements, made no such compliance himself. It is undisputed that at the time the trial court entered the default judgment, there was no return or affidavit of service in the file. "Service of process is a prerequisite to jurisdiction over either the person or property of the defendant." *Walker v. Gruner*, 875 S.W.2d 587 (Mo. App. 1994). "The court's jurisdiction is determined by the return of service, not by after the fact evidence of actual knowledge." *Hill Behan Lumber Co. v. Bankhead*, 884 S.W.2d 318, 323 (Mo. App. 1994). "If the return or proof of service is deficient on its face, the court acquires no jurisdiction over the party allegedly served." *Gerding v. Hawes Firearms Co.*, 698 S.W.2d 605, 607 (Mo. App. 1985). Actual notice of the lawsuit is insufficient to confer jurisdiction. *Worley v. Worley*, 19 S.W.3d 127, 129 (Mo. banc 2000).

Rule 54.20(b)(1) requires an affidavit from an officer serving a summons outside the State of Missouri stating the time, place and manner of service, the official character of the affiant, and the affiant's authority to serve process in civil actions in the state where service was made. No such affidavit was filed in this case prior to the entry of the default judgment.

At the time the trial court entered the default judgment on July 21, 2000, defendant had entered only a special appearance, objecting to the court's jurisdiction. This special appearance did not waive service of process. *See Shapiro v. Brown*, 979 S.W.2d 526, 529 (Mo.App. 1998) (insufficient service of process was not waived by defendant's special appearance and motion to dismiss, where defendant clearly stated she was not consenting to the trial court's jurisdiction); *State ex rel. Sperandio v. Clymer*, 581 S.W.2d 377, 384 (Mo. banc 1979) (defendant did not waive service of process by special appearance and motion to dismiss which did not recognize court's jurisdiction).

In the present case, the trial court, having no affidavit or return of service, and having before it only defendant's counsel's special appearance and arguments objecting to the court's jurisdiction, had no personal jurisdiction to enter judgment against defendant. The default judgment entered without jurisdiction was void. *West Publishing Corp. v. Phillips*, 31 S.W.3d 496 (Mo. App. 2000); *Hill Behan Lumber Co. v. Bankhead*, 884 S.W.2d at 322. "A default judgment, being void due to lack of jurisdiction, remains void forever and any kind of proceeding to cancel it is proper." *Shapiro v. Brown*, 979 S.W.2d at 528. Because the default judgment was void and remained void, it could not

be reinstated, and the Amended Order and Judgment of November 7, 2000 is likewise void.

The default judgment must be reversed and the cause remanded, either with directions to grant defendant's motion to dismiss for lack of personal jurisdiction or, if the Court concludes that further consideration by the trial court is necessary, with directions to rule on the motion to dismiss for lack of personal jurisdiction and for further proceedings thereafter.

II. THE TRIAL COURT ERRED IN ENTERING DEFAULT JUDGMENT, IN OVERRULING DEFENDANT'S AMENDED MOTION TO SET ASIDE DEFAULT JUDGMENT AND IN REINSTATING THE DEFAULT JUDGMENT, BECAUSE DEFENDANT DID NOT FAIL TO "PLEAD OR OTHERWISE DEFEND" WITHIN THE MEANING OF RULE 74.05, IN THAT THE SPECIAL APPEARANCE CONTESTING JURISDICTION AND THE ARGUMENT OF DEFENDANT'S FORMER COUNSEL AT THE JULY 21, 2000 HEARING BROUGHT THE ISSUE OF THE COURT'S LACK OF PERSONAL JURISDICTION OVER DEFENDANT TO THE COURT'S ATTENTION BEFORE THE DEFAULT JUDGMENT WAS ENTERED, AND DEFENDANT REASSERTED HIS JURISDICTIONAL ARGUMENTS THROUGH SUBSEQUENTLY FILED MOTIONS AND AFFIDAVITS.

Standard of Review

The standard of review for determining whether a defendant failed to "plead or otherwise defend" within the meaning of 74.05(a) is the standard set forth in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). The trial court's order and judgment will be sustained unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *See Amon v. Bailey*, 13 S.W.3d 305, 306 (Mo. App. 2000). In the present case, the trial court's conclusion that defendant had failed to plead or otherwise defend, despite his former attorney's filing a

special entry of appearance to contest jurisdiction and orally objecting to the court's jurisdiction, erroneously declared and applied the law and reached a conclusion against the weight of the evidence. *See Amon v. Bailey*, 13 S.W.3d at 307 (default judgment was improper where defendant had filed timely answer but had not served it on opposing counsel). Accordingly, the default judgment must be reversed and the cause remanded with directions to set aside the default judgment and for further proceedings.

Defendant Did Not Fail to Plead or Otherwise Defend

The entry of the default judgment on July 21, 2000, and the trial court's subsequent actions in overruling defendant's amended motion to set aside default judgment and in reinstating the default judgment were error for the additional reason that defendant had not "failed to plead or otherwise defend" within the meaning of Rule 74.05. Rule 74.05 provides:

> When a party against whom a judgment for affirmative relief is sought has *failed to plead or otherwise defend* as provided by these rules, upon proof of damages or entitlement to other relief, a judgment may be entered against the defaulting party. The entry of an interlocutory order of default is not a condition precedent to the entry of a default judgment.

(Emphasis added). Rule 74.05's predecessor, Rule 74.045 (1987) provided:

> If a defendant *shall fail to file his answer or other pleading* within the time prescribed by law or the rules of practice of

> the court, and serve a copy thereof upon the adverse party, or his attorney, when the same is required, an interlocutory judgment shall be given against him by default.

(Emphasis added).

The change in wording indicates a recognition that a default judgment had in practice been prevented by filings or actions other than pleadings, despite the language of the former rule. *See* Paula R. Hicks, Comment, Balancing Finality, Efficiency, and Truth when a Party fails to Appear for Trial: Missouri Clarifies the Meaning of "Otherwise Defend" in Its New Default Judgment Rule, 60 Mo.Law Rev. 485, 503 (1995). Rule 55.04 specifically mandates that technical forms shall not be required in pleadings. Consistent with that rule, the Missouri courts have looked at the substance, rather than the form or caption of a filing. *See Worley v. Worley*, 19 S.W.3d 127, 129 (Mo. banc 2000) ("A pleading is judged by its subject matter – not its caption."). The court in *Worley v. Worley* looked to the substance of a filing made after the entry of default judgment and styled "special entry of appearance for the purpose of quashing service" and found that it not only sought an order quashing service but also sought a ruling that the default judgment was null and void. As a result, the court held that the trial court's order, denying the motion to quash service and refusing to set aside the default judgment, was an appealable order.

In the present case, the Special Entry of Appearance to Contest Personal Jurisdiction stated that "the Court herewith has no Personal Jurisdiction over Defendant."

(L.F. 18). Regardless of its form, the filing plainly raised the defense of lack of personal jurisdiction. As a result, the court erred in finding that defendant had not filed any responsive pleading, defense or objection by motion (L.F. 28) and erred in entering the default judgment. *See Amon v. Bailey*, 13 S.W.3d at 307.

In addition, defendant's former attorney, at the default hearing on July 21, 2000 advised the court that he was contesting the court's jurisdiction over defendant. (Tr. 4-8). In *Chapman v. Commerce Bank of St. Louis*, 896 S.W.2d 85, 87 (Mo. App. 1995), the court held that counsel's oral statement contesting service at a hearing on a motion to revive judgment adequately raised the issue of the court's lack of personal jurisdiction. "Although a written motion is preferred, an oral motion in open court is sufficient." *Id*. *See also State ex rel. Fisher v. McKenzie*, 754 S.W.2d 557, 561 (Mo. banc 1988) (oral statement by plaintiffs' counsel, objecting to proceedings after plaintiffs' voluntary dismissal, was sufficient to constitute an objection to jurisdiction).

In the present case, as in *Chapman* and *McKenzie*, defendant's former attorney's oral objections at the default hearing adequately raised the issue of the court's lack of personal jurisdiction and should have been considered a motion contemplated by Rule 55.27. The instant case presents stronger facts than those in *Chapman* or *McKenzie*, because defendant's former attorney's oral statements supplemented his Special Entry of Appearance to Contest Jurisdiction, which also should have been considered a Rule 55.27 motion. The special appearance was filed prior to any motion for default and informed

the court of defendant's position that it had no jurisdiction over him. The objections to personal jurisdiction were again stated orally at the hearing.

Under these circumstances, the court erred in entering the default judgment initially on July 21, 2000 and in overruling defendant's amended motion to set aside default and reinstating the default judgment in its amended judgment and order of November 5, 2000. The judgment must be reversed and the case remanded with directions to set aside the default judgment and for further proceedings.

III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN OVERRULING DEFENDANT'S AMENDED MOTION TO SET ASIDE DEFAULT JUDGMENT AND IN REINSTATING THE DEFAULT JUDGMENT, BECAUSE DEFENDANT SHOWED A MERITORIOUS DEFENSE BY MOTIONS AND AFFIDAVITS SHOWING THAT THE COURT LACKED PERSONAL JURISDICTION OVER DEFENDANT, A NEW YORK RESIDENT WHO HAD NEVER BORROWED MONEY IN THE STATE OF MISSOURI, HAD NO BUSINESS INTERESTS OR ASSETS IN MISSOURI, AND HAD BEEN TO MISSOURI ONLY ONCE, FOR REASONS UNRELATED TO THE MATTERS INVOLVED IN THIS LAWSUIT, AND BY POINTING OUT THE DEFICIENCIES IN PLAINTIFF'S PETITION AND AFFIDAVIT, INCLUDING THE ABSENCE OF ANY WRITTEN LOAN DOCUMENT AND PLAINTIFF'S OWN ALLEGATION THAT THE MONEY WAS ADVANCED TO A NON-

PARTY TO THE LAWSUIT; AND DEFENDANT SHOWED GOOD CAUSE, BOTH FOR THE INITIAL FAILURE TO FILE AN ANSWER AND FOR THE FAILURE TO PAY ATTORNEY FEES WITHIN FIFTEEN DAYS, IN THAT THE AFFIDAVITS ESTABLISHED THAT BOTH FAILURES WERE DUE TO MISTAKE OR INADVERTENCE OF DEFENDANT'S FORMER ATTORNEY, WHO ATTEMPTED TO RAISE THE JURISDICTIONAL ISSUE BY A SPECIAL APPEARANCE AND ORAL ARGUMENT, AND WHO WAS NOT AWARE OF THE TIME REQUIREMENT FOR PAYING ATTORNEY'S FEES UNTIL AFTER THE TIME HAD EXPIRED, AND FURTHER ESTABLISHED THAT DEFENDANT WAS NOT AWARE OF THE TIME REQUIREMENT OR OF THE FACT THAT THE FEES HAD NOT BEEN PAID BY COUNSEL, UNTIL OCTOBER 5, 2000, AND THAT DEFENDANT THEN PROMPTLY TENDERED PAYMENT.

Standard of Review

The trial court's ruling on a motion to set aside a default judgment is reviewed for abuse of discretion. *See Keltner v. Lawson*, 931 S.W.2d 477 (Mo. App. 1996). However, the court's discretion not to set aside a default judgment "is a good deal narrower than the discretion to set it aside." *Brueggemann v. Elbert*, 948 S.W.2d 212, 214 (Mo. App. 1997). Because of the law's distaste for default judgments and its preference for adjudications on the merits, the appellate courts are more likely to reverse a judgment

which fails to set aside a default judgment. *Billingsley v. Ford Motor Co.*, 939 S.W.2d 493, 498 (Mo. App. 1997). In the present case, the trial court abused its discretion in overruling defendant's amended motion to set aside default judgment and in reinstating the default judgment, because defendant showed a meritorious defense and showed good cause, both for the initial failure to file an answer and for the subsequent failure to pay the attorney's fees to plaintiff's counsel within fifteen days.

Defendant Showed a Meritorious Defense and Good Cause

Because the trial court lacked personal jurisdiction over defendant, the default judgment was subject to a motion under Rule 74.06(b)(4) for relief from a void judgment. Under that rule, no showing of good cause or meritorious defense was necessary. Defendant's former attorney, however, filed a motion pursuant to Rule 74.05(d), under which a default judgment may be set aside upon "motions stating facts constituting a meritorious defense and for good cause shown." Defendant showed several meritorious defenses. First, defendant repeatedly asserted the court's lack of personal jurisdiction and supported that assertion with affidavits showing that defendant, a New York resident with no assets and no business interests in the State of Missouri, had never been in the State of Missouri prior to 1998 and was in the State only once during 1998 for a three hour business meeting unrelated to the matters involved in this lawsuit. (L.F. 72-73). In addition, the arguments made and the motions and suggestions filed by defendant's former attorney and new counsel raised the defenses that: the obligation in question was not a personal obligation of defendant but a corporate obligation, so that plaintiff had

sued the wrong party; and the statute of frauds barred enforcement of the alleged contract, since plaintiff had not attached a note or any loan document obligating defendant to repay money loaned by plaintiff to First Austin Funding Corporation. (Tr. 22-23, 26-27; L.F. 124). Defendant sufficiently established a meritorious defense. A defendant is not required to present "extensive evidence or a full blown defense" but is only required to make "some showing" of an "arguable theory" of defense." *See Keltner v. Lawson*, 931 S.W.2d at 480. Defendant met that requirement.

Defendant also showed good cause. Good cause is defined to include "a mistake or conduct that is not intentionally or recklessly designed to impede the judicial process." The Missouri courts have held that "good cause" is to be interpreted liberally, "not only to prevent a manifest injustice but to avoid a threatened one especially in cases tried without a jury where evidence on one side only is presented." *Brueggemann v. Elbert*, 948 S.W.2d at 214, *quoting Dattilo v. American Family Insurance*, 902 S.W.2d 361 (Mo. App. 1995). Mistakes that are not the result of intentional or reckless conduct constitute good cause. *See Myers v. Pitney Bowes, Inc.*, 914 S.W.2d 835, 839 (Mo. App. 1996).

Defendant's former attorney's failure to file an answer was not intentional or reckless behavior designed to impede the judicial process but was the result of his belief that his Special Entry of Appearance to Contest Jurisdiction was sufficient. At most, that belief was a mistake, constituting good cause to set aside the default judgment. *See Continental Basketball Ass'n v. Harrisburg Professional Sports, Inc.*, 947 S.W.2d 471, 474 (Mo. App. 1997) (defendants showed good cause for failure to answer where

defendants' attorneys mistakenly believed that answers had been filed). *See also Keltner v. Lawson*, 931 S.W.2d 477, 481 (Mo. App. 1996) (insurer's mishandling of suit papers was good cause requiring that default judgment be set aside).

Because the trial court lacked jurisdiction over defendant, it had no power to order defendant to pay $500. Moreover, the non-payment of the $500 within fifteen days was due to inadvertence or mistake on the part of defendant's former attorney and not to any conduct intentionally or recklessly designed to impede the judicial process. The trial court, in ordering payment of the $500, had said nothing about the time in which the payment should be made. (Tr. 30). The docket entry made no reference to any time requirement. (L.F. 4). Although the order, as drafted by plaintiff's counsel and signed by the court on August 22, 2000, required payment within fifteen days (L.F. 69), defendant's counsel did not receive that order until plaintiff's counsel faxed it to him on September 14, 2000. (L.F. 161, ¶ 5-7). At that time, the fifteen days had already expired.

Defendant was not aware that there was a time limitation on the payment of the $500 or that it had not been paid by his counsel until his attorney so advised him on October 5, 2000. (L.F. 133-34, ¶ 5). Prior to that conversation, it was defendant's understanding that his then attorney had paid the $500 in fees, because his billing reflected a charge for those fees, among other expenses. (L.F. 133, ¶ 4; L.F. 137). Defendant's understanding was consistent, not only with the billing statement, but also with the attorney's statements to the trial court: "[I]t is within your discretion to award fees against *me*…" (Tr. 25) (Emphasis added). After learning that the payment had not

been made, defendant, both through his former attorney and through his new counsel, repeatedly offered to pay the $500, and on November 3, 2000, tendered a check for $550 to cover the attorney's fee with interest. (L.F. 133-34, ¶ 6, 161, ¶ 9, 138-40; Tr. 39-41).

The failure to pay the $500 in a timely fashion was not the result of conduct intentionally or recklessly designed to impede the judicial process. As the court observed in *Billingsley v. Ford Motor Co.*, 939 S.W.2d at 498, a finding of recklessness requires something more than mistake, inadvertence, or even negligence: "'… A person is negligent, if his inadvertence, incompetence, unskillfullness or failure to take precautions precludes him from adequately coping with a possible or probable future emergency.' Restatement, § 500, Comment g. To be reckless, a person makes a conscious choice of his course of action, 'either with knowledge of the serious danger to others involved in it or with knowledge of the facts which would disclose the danger to any reasonable man.'" *See also Gibson by Woodall v. Elley*, 778 S.W.2d 851, 854-55 (Mo. App. 1989).

In the present case, there is no indication that defendant's former attorney made a conscious choice to disregard a court order. There is certainly no indication that defendant did so. Rather, there were a series of mistakes and misunderstandings of the type that the courts have held constitute 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" that "were not in accord with sound business procedures, but were not intentional or reckless"); *Billingsley v. Ford Motor Co.*, 939 S.W.2d 493, 499 (Mo. App.

1997) (reversing default judgment that resulted when "the ball was dropped" by defendant's attorneys).

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 should be reversed. Because the trial court lacked personal jurisdiction over defendant, the judgment should be reversed and remanded with directions to set aside the default judgment and grant defendant's motion to dismiss for lack of personal jurisdiction. In the alternative, if the Court should conclude that there remain questions concerning personal jurisdiction that should be resolved by the trial court, the default judgment should be reversed and the cause remanded to the trial court with directions to set aside the default judgment and to rule on the motion to dismiss for lack of personal jurisdiction. Finally, if the Court should conclude that directions to consider the motion to dismiss for lack of personal jurisdiction are not appropriate, the cause should be remanded with directions 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 Brief were mailed, first class mail, postage prepaid on this 29th day of December, 2001, 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 Brief complies with the limitations contained in Rule 84.06(b) and that the number of words in this Brief is 10,893 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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