IN THE SUPREME COURT OF MISSISSIPPI

MONTY FLETCHER	**APPELLANT**
V.	**Case #2007-CA-01247**
LIMECO CORPORATION	**APPELLEE**

Consolidated with

R. W. WHITAKER	**APPELLANT**
V.	**Case #2007-CA-01249**
LIMECO CORPORATION AND WILLIAM KIDD	**APPELLEE**
T-REX 2000, INC.	**APPELLANT**
V.	**Case #2007-CA-01262**
BRETT KIDD AND JAMIE KIDD	**APPELLEE**

On Appeal from the Circuit Court of Lee County, Mississippi

REPLY BRIEF OF APPELLANTS

Michael N. Watts, Esq.
[redacted]
R. Bradley Best, Esq.
[redacted]
Holcomb Dunbar, PA
1217 Jackson Avenue
Post Office Drawer 707
Oxford, Mississippi 38655
(662) 234-8775 - Telephone
(662) 238-7552 - Facsimile

Of counsel *pro hac vice*:
Julie Murphy Burnstein
Peter C. Sales
Boult, Cummings, Conners & Berry, PLC
Roundabout Plaza
1600 Division Street, Suite 700
Nashville, TN 37203
Telephone: (615) 244-2582
Facsimile: (615) 252-6380

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES AND RULES

MISCELLANEOUS

INTRODUCTION

The Defendants Brett Kidd, Jamie Kidd, William Kidd, and Limeco Corporation (sometimes collectively referred to as "Defendants") waived any defense related to insufficiency of process or insufficiency of service process when they served Answers without asserting these defenses. Contrary to Defendants' self-serving arguments, Defendants obviously relied on the served Answers in seeking to have the Default Judgments entered against them set aside. Although Defendants argue that no waiver occurred because Defendants failed to file the Answers, nothing in the law compels this result. In fact, as discussed further below, analysis of the applicable Rules of Civil Procedure demonstrates that the waiver occurred when Defendants failed to include the defenses in their responsive pleadings without regard to whether the Answers were filed. Further, when the Mississippi Rules of Civil Procedure are considered as a whole, it becomes readily apparent that when the drafters of the Rules intended to require a filing to accomplish a waiver, the Rules expressly require a filing. Defendants, notably, wholly fail to address this argument. In summary, and as set forth further below, Defendants waived their service and process related affirmative defenses by failing to assert them in Defendants' first responsive pleadings, the served Answers.

Because Defendants waived their service and process related affirmative defenses, Plaintiffs respectfully submit that the trial courts erred in dismissing Plaintiffs' Complaints because process and service of process were insufficient and the Complaints were not served within 120 days as required by Mississippi Rule of Civil Procedure 4(h). Accordingly, Plaintiffs respectfully request that the rulings of the trial courts be reversed and that the cases be remanded for trials on the merits.

ARGUMENT

1. Process and service of process were proper as to Limeco in the *Fletcher* and *Whitaker* cases.

Process on Limeco was proper in the Fletcher and Whitaker cases because the Summonses substantially complied with Mississippi Rule of Civil Procedure 4(b) and as evidenced by Defendants' Answer, Defendants had notice of the action. Mississippi Rule of Civil Procedure 4(b) provides as follows:

> The summons shall be dated and signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, list the plaintiff's address and the time within which these rules require the defendant to appear and defend and shall notify him that in case of his failure to do so judgment by default will be rendered against him for relief demanded in the complaint.... Summons served by process server shall substantially conform to Form 1A.

Summons Form 1A states that "[y]ou must also file the original of your response with the Clerk of this Court within a reasonable time afterward."

In these cases, the Summonses substantially complied with Rule 4(b). The Summonses were dated and signed by the clerk. (Fletcher R. 24; T-REX R. 23-24; Whitaker R. 45) The Summonses were under the seal of court. (Id.) The Summonses stated the names of the parties. (Id.) The Summonses stated the Plaintiffs' address. (Id.) The Summonses stated the time within which the Rules required the Defendants to appear and defend. (Id.) The Summonses stated that in the case of the Defendants' failure to appear and defend judgment by default would be rendered against them. (Id.)

The Summonses deviated from Form 1A in only one respect. The Summons served stated "[y]ou are not required to file an answer or other pleading but you may do so if you desire." (Fletcher R. 24-25; T-REX R. 23-24; Whitaker R. 45) In this respect, Defendants

complied with the Summonses and served their Answers on Plaintiffs' counsel. The fact that Defendants served Answers in response to the Summonses, demonstrates that the purpose of the Summonses was fulfilled.

A summons puts a defendant on notice of a proceeding against it. First Jackson Securities Corp. v. B.F. Goodrich Co., 176 So.2d 272, 277 (Miss. 1965). In this case, Defendants clearly had notice of the proceeding, as evidenced by the Answers they served on Plaintiffs' former counsel. For Defendants to claim now, over three years after they served Answers in response to the Complaints, that the Summonses did not substantially conform with Form 1A, is, at best, a stretch. Defendants served their Answers on Plaintiffs' former counsel. Accordingly, it is clear that not only did the Summonses substantially conform, but Defendants had notice of the proceeding and intended to defend the case on the merits. Accordingly, Plaintiffs respectfully submit that the trial court erred in dismissing the Fletcher and Whitaker cases against Limeco for insufficient process.

2. The Answers served on February 20, 2004, waived the defenses of insufficiency of process and insufficiency of service of process.

   a. By not including insufficiency of process or insufficiency of service of process defenses in the Answers served on February 20, 2004, Defendants waived these defenses.

Contrary to Defendants' arguments, because the Answers Defendants served on February 20, 2004 challenged neither the sufficiency of process nor sufficiency of service of process, Defendants waived these affirmative defenses. Mississippi Rule of Civil Procedure 12(h) establishes that the defenses of insufficiency of process or insufficiency of service of process are waived unless contained in a motion made under Rule 12, in a responsive pleading or in an amendment to a responsive pleading permitted by Rule 15(a) to be made as a matter of course. The requirement that a defendant assert its affirmative defenses in its first responsive

pleading ensures that all preliminary matters are resolved at the beginning of the suit and allows the court to proceed with deciding the case on the merits. Flory v. U.S., 79 F.3d 24, 25 (5th Cir. 1996); Manchester Knitted Fashions, Inc. v. Amalgamated Cotton Garment and Allied Industries Fund, 967 F.2d 688, 691 (1st Cir. 1992) ("The purpose of Rule 12 is to eliminate unnecessary delays in the early pleading stages of a suit so that all available Rule 12 defenses are advanced before consideration of the merits.") (internal citations omitted); 5 C Wright & Miller, Federal Practice and Procedure, § 1384 at 837 (3d ed. 2007).

In their Brief, Defendants do not challenge the assertion that the Answers served by Defendants in February 2004 constituted responsive pleadings. The term responsive pleading is defined by reference to the definition of pleading in Rule 7(a). Zaidi v. Ehrlich, 732 F.2d 1218, 1219 (5th Cir. 1984). Rule 7(a) provides that an answer is a responsive pleading. Rule 8 establishes the form of the answer. Specifically, Rule 8 provides that "a party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies ... a denial shall fairly meet the substance of the averments denied...." Further, Rule 8(e)(1) establishes "no technical forms of pleadings or motions are required."

Here, as Defendants essentially concede, the Answers served by William Kidd, Brett Kidd, Jamie Kidd, and Limeco evidence all the indicia of an answer contemplated by Rule 8. (Fletcher R. 28-29; T-REX R. 28-29; Whitaker R. 49-50) In each of the Answers, which, notably, Defendants titled "Answer," Defendants state in short and plain terms their defenses to each of the claims. (Id.) In fact, Defendants admitted or denied each of the allegations in the Complaints in paragraph form and stated a general denial. (Id.) Plainly, the served Answers constituted responsive pleadings and Defendants' first defensive move in the cases.

Unable to avoid the conclusion that the Answers constitute responsive pleadings, Defendants argue that their failure to file the Answers absolves them of the waiver. This argument fails for several reasons. First, application of Rule 12(h) establishes that a waiver occurred because Defendants did not include a defense of insufficiency of process or insufficiency of service of process in their first responsive pleading. Second, the cases cited by Defendants do not support their conclusions. Third, Defendants' argument that Mississippi Rule 5(d) establishes that a waiver occurs only upon the filing finds no support in the language of the Rule. Contrary to Defendants' unsupported arguments, Defendants' failure to file the Answers does not absolve Defendants of the waiver that occurred.

Rule 12(h) establishes that the defenses of insufficiency of process and insufficiency of service of process are waived if not included in a responsive pleading. Rule 12(h) does not contemplate that the waiver occurs only when the responsive pleading is filed with the court. Rather, by the plain language of Rule 12, the waiver occurs when the defendant fails to include the defenses in the responsive pleading. In their Brief, Defendants cite no authority to the contrary. Accordingly, Defendants waived any objection they may have had to the insufficiency of process or insufficiency of service of process.

In their Brief, Defendants simply refuse to acknowledge the plain language of Mississippi Rule of Civil Procedure 12. As noted in Plaintiffs' Brief, Rule 12(h)(1) provides,

> A defense of lack of jurisdiction over the person, improper venue, insufficiency of process or insufficiency of service of process is waived (a) if omitted from a motion in the circumstances described in subdivision (g), or (b) if it is neither made by a motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

The rules of statutory construction apply to the interpretation of the Rules of Civil Procedure. Diogenes Editions, Inc. v. State, 700 So.2d 316 (¶ 23) (Miss. 1997). Accordingly, the Rules

should be interpreted according to their plain language, and the Rules should be interpreted as a whole. Gannett River States Pub. Co. v. Entergy Mississippi, Inc., 940 So.2d 221 (¶ 11) (Miss. 2006). Defendants simply refuse to acknowledge that Rule 12 establishes by its plain language that waiver occurs upon exclusion of the service and process defenses from the responsive pleading not upon filing of the answer.

Further, Defendants ignore that when the drafters intended for a waiver to occur only upon filing, the drafters of the Rules of Civil Procedure explicitly imposed a filing requirement. As discussed in Plaintiffs' Brief, Mississippi Rule of Civil Procedure 38 establishes how parties waive their right to a jury trial. Specifically, Rule 38 provides as follows:

> **(b) Waiver of Jury Trial.** Parties to an action may waive their rights to a jury trial by filing with the court a specific, written stipulation that the right has been waived ....

Rule 38 makes clear that parties waive their right to a jury trial only upon a filing with the court. Conversely, Rule 12 contains no such requirement. Defendants' Response never addresses the clear distinction between Rule 38(b) and Rule 12(h). Comparison of the two Rules leads to the conclusion that waiver of the service and process defenses occurs upon exclusion from the responsive pleading, not exclusively upon filing of the responsive pleading.

Unable to escape the clear result of application of the language of Rule 12, Defendants cite to Burleson v. Latham, 968 So.2d 930, 934 (Miss. 2007) as support for the proposition that waiver occurs only upon filing. In Burleson, the Court quite naturally referred to waiver upon filing because the case addressed answers that were filed. Neither Burleson nor any other case cited by Defendants addresses the situation in this case: whether waiver of the service and process defenses occurs upon service of an answer without filing. Although the Mississippi courts have not addressed this issue, the plain language of Rule 12, particularly when

compared with Rule 38, demonstrates that waiver occurs upon exclusion of the defenses from the responsive pleading without regard to whether or when the responsive pleading is actually filed.

Additionally, Defendants argue that the served answers cannot accomplish a waiver with citation to Saulsberry v. Atlantic Richfield Co., 673 F. Supp. 811 (N.D. Miss. 1987), McLaurin v. Werner, 909 F. Supp. 447 (S.D. Miss. 1995) and Ryan v. Allen, 992 F. Supp. 152 (N.D.N.Y. 1998). None of these cases supports the result sought by Defendants.

All three of the cases upon which Defendants rely are easily distinguished. First, as discussed further below, Defendants relied upon the Answers served on February 20, 2004 in seeking to have the Default Judgments set aside. None of the parties in Saulsberry, McLaurin or Ryan[1] relied upon the documents they sought to exclude to their tactical advantage in an earlier stage in the litigation. Here, Defendants relied on their Answers in having the Default Judgments set aside, yet now argue the Answers should be disregarded as having no effect. This plainly distinguishes this case from the authorities relied on by Defendants.

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[1] Ryan also differs from this case because it does not involve a non-filing party seeking to disavow admissions contained in or a waiver resulting from a pleading served but not filed. See generally Ryan, 992 F. Supp. 152. In Ryan, the parties entered a stipulation permitting the plaintiff to file an amended complaint. The amended complaint was never filed, but the court held the plaintiff should still be allowed to file an amended complaint. Accordingly, Ryan has no application to the question presented here: whether a waiver occurs under Rule 12(h) upon service without regard to filing. It is also notable that the court in Ryan allowed the non-filing party to amend its original complaint on the grounds that the defendant would not suffer any prejudice by said amendment. Id. at 155. It is certain, if Defendants are found not to have waived the defenses of insufficiency of process or insufficiency of service of process, Defendants will argue Plaintiffs' claims are now barred by the statute of limitations. This likely argument further demonstrates why service related defenses should be asserted by a defendant in his first defensive move and the failure to do so should constitute a waiver. By delaying assertion of the defenses, a defendant may deprive a plaintiff of the ability to remedy the issue. A defendant should not be allowed to serve an answer without asserting service related defenses and then claim years later that the statute of limitations expired due to improper service.

Second, both Saulsberry and McLaurin involve the effectiveness of discovery responses, not a pleading as defined by Rule 7(a), as is the case here. Therefore, the value of these two cases is tenuous, at best.

Third, and most significantly, the rationale of Saulsberry and McLaurin is inapplicable and counterintuitive if applied to this case. In both Saulsberry and McLaurin, the court ruled that unfiled responses to requests for admission should be stricken from the record and the requests for admissions admitted as a result of a failure to file. Simply stated, the party failing to file the response was penalized as a result of the failure to file. Such is not the case here. Even though neither case addressed such a situation, in this case, Defendants ask the Court to apply Saulsberry and McLaurin to allow the non-filing party to escape the consequences of the served pleading. Under Defendants' application of Saulsberry and McLaurin, the responding party who failed to file the responses should be allowed to assert that actual admissions served on the opposing party were of no force and effect simply because they were not filed. Having failed to file the responses, the responding party would then be allowed to change the admissions to denials simply because the responding party failed to file the responses. Contrary to Defendants' attenuated logic, Saulsberry and McLaurin stand for no such proposition. Just as the party serving but not filing responses to requests for admissions should not escape the consequences of serving admissions, Defendants should not be allowed to escape the consequences of the waiver which occurred when they failed to include their defenses in their first responsive pleading.

Further, Defendants also erroneously argue that because Mississippi Rule of Civil Procedure 5(d) establishes that pleadings shall be filed, the absence of filing renders the served pleading ineffective. Contrary to Defendants' assertions, however, Rule 5(d) does not allow a

party serving an answer to wholly disavow its contents by a failure to file. Rule 5(d) does not state that a pleading served, but not filed, is of no force and effect as Defendants desperately argue.

Neither the cases cited by Defendants nor the language of Rule 5(d) provide any support for the basic premise advanced by Defendants here – that the proponent of a pleading can serve a pleading and then unilaterally disavow the pleading's contents when convenient after having relied on the pleading to seek affirmative relief. The law countenances no such result. Accordingly, Plaintiffs respectfully submit that Defendants' argument to the contrary should be rejected.

b. Defendants' reliance on the Answers served on February 20, 2004 in seeking to set aside the Default Judgments precludes Defendants from claiming that their Answers are of no effect.

Contrary to the statements contained in Defendants' Response, Defendants' Brief pp. 9, 25-26, Defendants explicitly relied upon their Answers in seeking to have the Default Judgments set aside. The papers submitted by Defendants in connection with the Motions to Set Aside the Default Judgments clearly evidence Defendants' reliance on the served Answers. For instance, Mr. Kidd's Motion to Set Aside the Default Judgment states as follows:

> 2.
>
> On January 23, 2004, the Complaint and Summons were served on William Kidd, as Managing Director of Limeco Corporation. See Exhibit C, Affidavit of William Kidd.
>
> 3.
>
> **Mr. Kidd drafted an Answer to the Complaint on behalf of Limeco.** See Exhibit C, Affidavit of William Kidd. On Friday, February 20, 2004, twenty-eight (28) days from the date which he was served, **Mr. Kidd timely served the Answer** via United States Mail, postage prepaid, to the law office of David Sparks. See Exhibit C, Affidavit of William Kidd; Exhibit D, Answer.

Mr. Kidd also personally hand delivered the Answer to the law office of David Sparks that same day. See Exhibit C, Affidavit of William Kidd; Exhibit D, Answer. Although Attorney Sparks was not present at his office at the time of the hand delivery, **the receptionist at his office was given the Answer**. See Exhibit C, Affidavit of William Kidd.

5.

Based on this language of the Summons [i.e. "[y]ou are not required to file an answer or other pleading but you may do so if you desire."], **Mr. Kidd believed after he mailed and hand delivered the Answer to Attorney Sparks, he had done everything he needed to do to preserve the rights of Limeco** and that he would be notified if any other pleadings were filed or if there was any other action taken in the lawsuit. See Exhibit C, Affidavit of William Kidd.

8.

Clearly, the judgment entered against Defendant is void under Rule 60(b) of the Mississippi Rules of Civil Procedure because the process was insufficient. . . .Additionally, **because Plaintiff's counsel had been served with the Answer**, he should have given Defendant notice of the application for judgment. Defendant was given no notice of the Motion for Default Judgment. Thus, the Court may also set aside the entry of the default for good cause shown.

9.

Defendant has, in fact, a colorable defense to the merits of the claims asserted in the Complaint. See Exhibit C, Affidavit of William Kidd.

(Fletcher R. 14-16)(emphasis added) The papers submitted by the other Defendants contain similar language. (T-REX R. 13-16; Whitaker R. 24-27) In further support of their Motions to Set Aside the Default Judgments and in addition to the language quoted above, Defendants actually attached a copy of their respective Answers as Exhibit D to their Motions to Set Aside the Default Judgments. (Fletcher R. 28-29; T-REX R. 28-29; Whitaker R. 49-50) Having attached the Answers to the Motions to Set Aside the Default Judgments and submitted the

Answers to the trial courts, it is difficult to conceive how Defendants can possibly claim they never relied on the Answers.

The language from Defendants' papers quoted above and Defendants' attachment of their Answers as Exhibits to their Motions to Set Aside the Default Judgments demonstrates that Defendants relied upon the Answers in connection with those motions. Despite the fact that Defendants served their Answers on opposing counsel and despite the fact that Defendants clearly relied upon their Answers when it was to their benefit, Defendants now, when convenient, claim their Answers are of absolutely no effect because Defendants failed to file the Answers. As set forth above, the law does not require a filing to accomplish a waiver. Accordingly, Defendants' reliance on the Answers to achieve their desired relief should further preclude their belated attempts to disavow the content of the Answers.

3. Defendants' service of the Answers combined with the passage of time constitutes a waiver.

Even if the Court finds that Defendants did not waive their affirmative defenses by serving the Answers on opposing counsel, under Schuste v. Buccaneer, Inc., 850 So.2d 209 (Miss. Ct. App. 2002), service of the Answers combined with the lapse of over two years in which Defendants took no steps to assert their affirmative defenses results in a waiver of Defendants' affirmative defenses.

In Schuste, the court held that an appearance made by filing a notice of appearance, combined with the lapse of twelve months before asserting the defense of insufficiency of process, waived the defense. Id. at ¶¶ 13, 20. Schuste also recognized that a defendant appearing and filing an answer or otherwise proceeding to defend the case on the merits in some way may not subsequently attempt to assert jurisdictional questions based on claims of defects in service of process. Id. at ¶ 15.

In this case, Defendants' actions evidenced their intent to defend the cases and constituted an appearance. Defendants prepared Answers, signed those Answers and served the Answers on opposing counsel. (Fletcher R. 28-29; T-REX R. 28-29; Whitaker R. 49-50) More than two years elapsed before Defendants took any other action and almost three years elapsed before Defendants bothered to challenge process or service of process. After Default Judgments were entered against them, Defendants relied on the Answers they served to set aside the Default Judgments. (Fletcher R. 14-16, 28-29; T-REX R. 13-16, 28-29; Whitaker R. 24-27, 49-50) Defendants stated that they thought the Answers that they served preserved all of their defenses. (Fletcher R. 15, 26; T-REX R. 14, 26; Whitaker R. 25-26, 47) Moreover, Defendants argued that those Answers constituted an appearance which entitled them to notice regarding the Default Judgments. (Fletcher R.15-16; T-REX R. 14-15; Whitaker R. 26-27) Now when faced with the possibility that the service of their Answers (in which Defendants did not contest the service of process or the sufficiency of process) could be held to have waived their affirmative defenses, Defendants claim that the Answers are of no effect. Quite simply, Defendants cannot have it both ways.

Defendants' service of the Answers evidences an intent to defend the cases sufficient to constitute an appearance. King v. Sigrest, 641 So.2d 1158, 1162 (Miss. 1994) (recognizing that for purposes of Rule 55 even an unfiled motion constitutes an appearance); Schuste, 850 So.2d at ¶ 15 (recognizing that defending the case on the merits without asserting service defense constitutes a waiver); New York Life Ins. Co. v. Brown, 84 F.3d 137, 141 (5th Cir. 1996) (an appearance "is an indication in some way of an intent to pursue a defense"); Quaker Furniture House, Inc. v. Ball, 228 S.E.2d 475, 476 (N.C. App. 1976) (service of answer constitutes appearance for purpose of Rule 55); A.F. Dormyer Co., Inc. v. M.J. Sales & Dist.

Co., Inc., 461 F.2d 40, 41-43 (7th Cir. 1972) (service of answer on plaintiff's counsel but failure to file answer constituted an appearance for the purpose of 55(b)); Philip Morris USA Inc. v. Lee, 243 F.R.D. 261, 262-64 (W.D. Tex. 2007) (holding that affidavit to opposing counsel denying claims constituted an appearance, court expressly reserved whether letter constituted an answer). As recognized in Schuste, this appearance, combined with the passage of time, results in a waiver of the process and service of process defenses.[2]

In their response, Defendants argue that these cases do not apply here because the cases examine whether a party has made an appearance significant enough to require notice regarding a default judgment under Rule 55(b). Contrary to Defendants' argument, this distinction does not preclude the application of the principle that conduct may result in an appearance in this case. Because Defendants relied upon the Answers served on February 20, 2004 in requesting that the trial courts set aside the Default Judgments, the application of the principles contained in the cases discussed above addressing an appearance in the context of Rule 55 are of particular importance in this case.[3] Simply put, Defendants relied on the Answers

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[2] Now, in an attempt to explain away the passage of time between Defendants' service of their Answers in February 2004 and their belated and futile attempt to resurrect the defenses that they waived, Defendants cite Rockaway Commuter Line, Inc. Denham, 897 So.2d 156 (Miss. 2004). Unfortunately for Defendants, Rockaway does not support the argument advanced and presents an entirely different set of facts than this case. In Rockaway, the defendant had neither answered nor participated in the litigation in any way. Rockaway, 897 So.2d at ¶14. The Court recognized that due to the lack of any responsive pleading or conduct indicating that the defendant intended to defend on the merits of the action, no waiver of personal jurisdiction had occurred. Id. In this case, unlike Rockaway, Defendants served Answers on Plaintiffs' prior counsel and demonstrated every intent to defend the action on the merits. Unlike in Rockaway, this case does not involve the complete absence of a responsive pleading or intent to defend the case. Accordingly, Rockaway has no application to this case.

[3] Defendants incorrectly rely upon Broadcast Music v. M.T.S. Enterprises, Inc., 811 F.2d 278 (5th Cir. 1987) and Trustees of Central Laborers' Welfare Fund v. Lowery, 924 F.2d 731, 733 (7th Cir. 1991) for the proposition that the service of the Answers does not constitute an appearance under the court's analysis in Schuste. Both Broadcast Music and Trustees of Central Laborers recognize the underlying, bedrock principle that a defendant waives the defenses of insufficiency of process or insufficiency of

(footnote continued on following page ...)

to argue they should have received notice of the Default Judgments. (Fletcher R. 14-16, 28-29; T-REX R. 13-16, 28-29; Whitaker R. 24-27, 49-50) If so, the Answers constituted an appearance and, when combined with the passage of time, a waiver occurred. Schuste, 850 So.2d at ¶ 15.

The United States Court of Appeals for the Seventh Circuit recognized this very premise in Davis v. Carter, 61 Fed.Appx 277 (7th Cir. 2003).[4] In Davis, the district court entered a default against the defendants for failure to file an effective answer where two of the defendants sent letters to the court generally denying allegations and one of the defendants filed a Rule 12(b)(6) motion. Id. at *1. The district court also refused to allow the defendants who had sent letters to the court to file a motion to vacate pursuant to Federal Rule of Civil Procedure 55(c), thereby denying those defendants the right to defend on the merits, and refused to allow the defendants to challenge jurisdiction. Id. The Seventh Circuit overturned the district court's ruling and held:

> [T]here are two possibilities: (1) the letters served as answers, in which event any argument that the court lacks personal jurisdiction has been forfeited but [defendants] are entitled to defend on the merits; or (2) the letters were not answers, in which event

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(... footnote continued from previous page)
service of process by conduct far less formal than filing papers with the court or making an actual, physical appearance in court. Trustees of Central Laborers' Welfare Fund, 924 F.2d at 733 ("Where a defendant leads a plaintiff to believe that service is adequate and that no such defense will be interposed, for example, courts have not hesitated to conclude that the defense is waived."); Broadcast Music v. M.T.S. Enterprises, Inc., 811 F.2d at 281 ("An appearance may also arise by implication from a defendant's seeking, taking, or agreeing to some step or procedure in the case beneficial to himself or detrimental to plaintiff other than one contesting only the jurisdiction or by reason of some act or proceeding recognizing the case as in court."). Accordingly, and contrary to Defendants' arguments otherwise, Broadcast Music and Trustees of Central Laborers bolster Plaintiffs' argument that Defendants' appearance (through service of the Answer) combined with the passage of time constitutes a waiver of the defenses of insufficiency of process and insufficiency of service of process.

[4] All unreported cases are attached in alphabetical order in the Appendix.

> [defendants] have forfeited their opportunity to defend on the merits but are entitled to resolution of their contention that the court lacks personal jurisdiction. It is not possible for a federal court to treat an irregular response to the complaint as forfeiting both the merits and personal jurisdiction.

Id. Accordingly, the Seventh Circuit held that it was an either or proposition. The district court could not hold that the irregular response forfeited both the right to defend on the merits and the right to challenge jurisdiction. If the irregular response constituted an answer sufficient to require notice of the default, a waiver of the jurisdictional defenses occurred. Conversely, if there was no appearance through the irregular response, the plaintiff was entitled to a default and the defendant could then challenge jurisdiction.

As is evidenced by the holding in Davis, Defendants in these cases cannot have it both ways. Defendants successfully argued that the served Answers entitled them to notice of the Default Judgments. Having achieved such relief, the law does not allow Defendants to subsequently disavow the contents of the very pleading which afforded them such relief due to the irregularity of the response, in this case the failure to file.

4. Once Defendants waived their process and service of process defenses, the defenses were waived forever.

Although the trial courts ruled in all three cases that no waiver occurred, in the trial courts, Defendants argued that even if the waiver occurred through service of the Answers, the service related defenses were "revived" by entry of the Agreed Order. Although this argument was not reached by the trial courts, Defendants' Brief again demonstrates the fallacy of their argument.

The plain language of Rule 12 establishes that the process and service related defenses may be raised only in the first responsive pleading or in an amendment to those pleadings "permitted by Rule 15(a) to be made as a matter of course." Rule 15(a) establishes

that an amendment may only be made as a matter of course within thirty days after service. The language of Rule 15(a) establishes that amendments made with leave of court or upon the written consent of the adverse party are not amendments "permitted to be made as a matter of course" under Rule 15(a).

Defendants cite Burelson v. Latham, 968 So.2d 930, 936 (Miss. 2007) for the proposition that a defendant can amend his answer to assert the process and service defenses with permission of the court or agreement of the adverse party. In Burleson, the defendant did not amend as a matter of course and did not seek permission of the court or agreement of the adverse party to amend. Accordingly, it does not appear that the parties raised or the Court fully considered the language of Rule 12(h) stating that an amendment to assert the Rule 12 defenses may be made only as a matter of course under Rule 15(a), i.e. in an amendment made within thirty days of service of the responsive pleading.

The language of Mississippi Rule of Civil Procedure 12(h) is identical to that found in Federal Rule of Civil Procedure 12(h). As even Defendants recognize when convenient, Defendants' Brief p. 16 n. 9, this Court has stated that "because [the Mississippi] rules of civil procedure have been patterned after the Federal Rules of Civil Procedure, we look to authoritative constructions of the comparable federal rules for guidance in ... consideration of questions presented under [the Mississippi] rules." Stanton & Assoc., Inc. v. Bryant Constr. Co., Inc., 464 So.2d 499, 505 n. 5 (Miss. 1985); see also, White v. Stewman, 932 So.2d 27 (¶ 16) (Miss. 2006) (recognizing that federal practice provides guidance when considering questions arising under the Mississippi Rules of Civil Procedure). The advisory comments to the 1966 amendments to Federal Rule of Civil Procedure 12 make clear that the defenses are waived if not included in an amendment permitted as a matter of course, specifically providing that:

> ... [T]he specified defenses, even if not waived by (A) are waived by failure to raise them by a motion under Rule 12 or in the responsive pleading or any amendment thereof to which the party is entitled as a matter of course. The specified defenses are of such a character that they should not be delayed and brought up for the first time by means of an application to the court to amend the responsive pleading.

Further, decisions from the federal courts recognize that amendments to assert the process and service of process must be made as a matter of course. Ellibee v. Leonard, 2007 WL 837092 at *6 (5th Cir. March 15, 2007); Glater v. Eli Lilly & Co., 712 F.2d 735, 738 (1st Cir. 1983); Konigsberg v. Shute, 435 F.2d 551, 552 (3rd Cir. 1970) (recognizing that time for amendment as a matter of course ran from date of service not date of filing); Hartling v. Woodloch Pines, Inc., 1998 WL 575138 (Sept. 8, 1998 S.D.N.Y.); Gray v. Snow King Resort, Inc., 889 F. Supp. 1473, 1475 (D. Wyo. 1995); Seid v. Bishop, Rose & Co., Inc., 1986 WL 5384 (May 2, 1986 S.D.N.Y.); Lopulsky v. Boruchow, 545 F. Supp. 126, 128 (E.D.N.Y. 1982) (finding it would be an abuse of discretion to permit resurrection of waived defenses by way of an amendment where defenses were not included in original pleading or amendment permitted as a matter of course); Wurz v. Santa Fe International Corp., 423 F. Supp. 91, 93 (D.C. Del. 1976) (recognizing that time for amendment as a matter of course ran from date of service not date of filing). Additionally, § 1391 of Wright & Miller's Federal Practice and Procedure, cited in the Advisory Commission Comments to Mississippi Rule of Civil Procedure 12, recognizes the same principle stating:

> Until 1966 a party might have escaped the consequences of a failure to plead the defenses set forth in Rule 12(B)(2-12)(b)(5) by amending its pleadings. Presently, however, Rule 12(H)(1) severely restricts this practice. The court no longer has the authority to grant leave to amend in order to add one of these four defenses; according to the language of subdivision (H)(1), this may be done only by an amendment to the answer permitted as a matter of course under the first sentence of Rule 15(a) which requires the party to act very quickly.

5 C Wright & Miller, Federal Practice & Procedure Civil § 1391 at 514 (3d ed. 2007).

The Agreed Order entered by the parties concerning Defendants' ability to file a responsive pleading evidences the parties' intent that Defendants would face an argument that the served Answers waived the process and service of process defenses. Defendants' own proof demonstrates the parties agreed that Defendants would be subject to such an argument by Plaintiffs. Specifically, the record, through testimony of Defendants' counsel, establishes that in connection with the entry of the Agreed Order, Plaintiffs "agreed that [Defendants] could file an answer and proceed with each party free to raise any arguments, claims or defenses as they might wish." (Fletcher R. 236 ¶ 5; T-REX R. 321 ¶ 5; Whitaker R. 245 ¶ 5) (emphasis added) This testimony from Defendants' counsel evidences that there was no agreement to "revive" the defenses. As each party retained the right to assert "any argument," Plaintiffs retained the right to argue that a wavier occurred through service of the Answers. Further, at the hearing on the Motion to Dismiss in the Fletcher and Whitaker cases, Defendants' counsel conceded that the Agreed Orders were intended to reflect "nobody would waive anything" and that, upon the submission of the Agreed Order, the waiver issue was simply left open to preserve the status quo. (T-REX Plaintiffs' Exh. 2, pp. 27, 33-34) Defendants' Brief notably omits any discussion of these two stunning admissions – admissions completely contradictory to Defendants' position in their Brief. Defendants' own proof and statements of counsel reflect that, at a minimum, the parties agreed that Defendants could file a responsive pleading and be subject to an argument by Plaintiffs that a waiver occurred upon service of the Answers.

Further, Plaintiffs' responses in opposition to the Motions to Dismiss asserting that Defendants waived the defenses further confirms this understanding. (Fletcher R. 161-72; T-REX R. 167-78; Whitaker R. 215-27) Upon receipt of Defendants' Motion, Plaintiffs filed

responses asserting the defenses were waived. (Id.) Plaintiffs' actions in response to the Motions to Dismiss confirm the testimony of Defendants' counsel. The Agreed Order allowed Defendants to file an answer with "each party free to raise any arguments, claims or defenses as they might wish." (Fletcher R. 236 ¶ 5; T-REX R. 321 ¶ 58; Whitaker R. 245 ¶ 5) Plaintiffs raised just such an argument by asserting that Defendants' served Answers accomplished a waiver. Defendants' argument that Plaintiffs intended to allow Defendants to wholly escape the consequences of the served Answers by filing a "responsive pleading" defies logic and is contravened by Defendants' own proof.

Defendants also wholly fail to discuss Catlin v. Commissariat, 619 P.2d 1066, 1067 (Ariz. Ct. App. 1980) cited in Plaintiffs' Brief. As discussed in Plaintiffs' Brief, in Catlin, the Arizona Court of Appeals, interpreting Arizona Rule of Civil Procedure 12(h), which like Mississippi Rule of Civil Procedure 12(h) is identical to Federal Rule of Civil Procedure 12(h), concluded that the defendant's agreement that the plaintiff could file an amended answer could not revive a defense otherwise waived under Rule 12(h). Such is the case here.

Here, Defendants did not file an amended answer within thirty days of making their original answer. As recognized by the courts and leading commentators, the court lacks the authority to grant leave to amend to add the service or process defenses. Accordingly, Plaintiffs' agreement that Defendants could file a "responsive pleading," as in Catlin, could not revive the otherwise waived defenses. Although not reached by the trial courts, any argument by Defendants on appeal that the Agreed Order somehow "revived" the waiver defenses lacks merit.

5. Plaintiffs' challenge of Defendants' "Separate Answers and Defenses" was proper.

Contrary to Defendants' unsupported claims, Plaintiffs were not required to challenge Defendants' "Separate Answers and Defenses" by way of a motion to strike pursuant

to Mississippi Rule of Civil Procedure 12(f). Rule 12(f) itself does not require such a challenge, and Defendants have not cited any authority that supports such a conclusion.

In support of their argument, Defendants cite, without any discussion, Herrington v. State, 690 So.2d 1132 (Miss. 1997). Defendants' reliance upon Herrington is misplaced. In Herrington, this Court examined whether the exclusion of certain evidence in a criminal case warranted a new trial. See generally Herrington v. State, 690 So.2d 1132. In support of the trial court's exclusion of the evidence, the prosecution argued that the defendant had not timely noticed his intent to introduce the evidence. The Court ruled that because this objection was never made at the trial court level, the Court was barred from addressing the objection. Id. at 1137 ("The prosecution's failure to object bars this court from addressing this contention on appeal.").

Unlike Herrington, the issue of whether Defendants waived the defenses of insufficiency of process or insufficiency of service of process was fully briefed below. Furthermore, Herrington involves a determination on the admissibility of evidence in a criminal trial. Herrington does not involve a Rule 12(f) motion to strike at all. Herrington does not address whether a party is required to move to strike invalid defenses rather than respond to a motion to dismiss asserting the invalid defenses. The case law cited by Defendants does not support their argument that Plaintiffs were required to file a motion to strike Defendants' "Separate Answers and Defenses." Defendants cite no authority at all for such a novel concept. Accordingly, whether Plaintiffs' waiver argument was made in a motion to strike or in response to Defendants' Motion to Dismiss is immaterial. Plaintiffs were entitled to proceed just as they did, by addressing the Motions to Dismiss on the merits without proceeding under Rule 12(f). Nothing advanced by Defendants supports a contrary result.

CONCLUSION

In light of the foregoing, Plaintiffs request that the Orders dismissing the T-REX, Whitaker and Fletcher cases because process and service process were insufficient and the Complaints were not served within 120 days as required by Mississippi Rule of Civil Procedure 4(h), be reversed and that the cases be remanded to the trial courts to proceed on the merits.

Respectfully submitted this 16th day of April, 2008.

By: Michael N. Watts /mgs by permission
MICHAEL N. WATTS, [redacted]
R. BRADLEY BEST, [redacted]

Of counsel:
Holcomb Dunbar
A Professional Association
1217 Jackson Avenue East
Post Office Drawer 707
Oxford, Mississippi 38655
Telephone: (662) 234-8775
Facsimile: (662) 238-7552

Of counsel *Pro Hac Vice*:
Julie Murphy Burnstein
Peter C. Sales
Boult, Cummings, Conners & Berry, PLC
Roundabout Plaza
1600 Division Street, Suite 700
Nashville, TN 37203
Telephone: (615) 244-2582
Facsimile: (615) 252-6380

CERTIFICATE OF FILING

I, MICHAEL N. WATTS, do hereby certify that I have this day served, via United States mail, postage pre-paid, the original and three copies of the Reply Brief of Appellants and an electronic diskette containing same on April 16, 2008, addressed to Betty Sephton, Clerk, Mississippi Supreme Court, Carroll Gartin Justice Building, 450 High Street, Jackson, Mississippi 39205.

Michael N. Watts /jsb by permission

Michael N. Watts

CDavis v. Carter
C.A.7 (Ind.),2003.
This case was not selected for publication in the Federal Reporter.NONPRECEDENTIAL DISPOSITIONTo be cited only in accordance with Fed.R.App.P. 32.1.
United States Court of Appeals,Seventh Circuit.
Elliot DAVIS, Plaintiff-Appellee,
v.
Barbara CARTER, et al., Defendants-Appellants.
No. 02-1519.

Submitted Feb. 11, 2003.[FN*]

FN* After this case had been set for oral argument, the parties filed a joint motion waiving that part of the appellate process. The court granted that motion on November 1, 2002, and the appeal therefore is submitted for decision without argument.
Decided March 13, 2003.

Plaintiffs brought state court action alleging violations of Indiana Securities Act and breach of fiduciary duty. Defendants removed the action to federal court. The United States District Court for the Southern District of Indiana, Richard L. Young, J., entered defaults against most defendants and assessed damages of approximately $2 million. Three defendants appealed. The Court of Appeals held that: (1) allegation that one defendant had failed to attend a deposition did not excuse the district court from ruling on that defendant's motion to dismiss for lack of personal jurisdiction, and (2) district court could not treat two defendants' allegedly irregular response to the complaint as forfeiting both the merits and personal jurisdiction.

Vacated and remanded.

West Headnotes

[1] Federal Civil Procedure 170A ⚿1451

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)6 Failure to Appear or Testify; Sanctions
170Ak1451 k. In General. Most Cited Cases

Federal Civil Procedure 170A ⚿2416

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(B) By Default
170AXVII(B)1 In General
170Ak2416 k. Defenses and Objections. Most Cited Cases
Allegation that defendant had failed to attend a deposition did not excuse district court from ruling on defendant's motion to dismiss for lack of personal jurisdiction and did not allow the district court to decide the case on the merits by entering a default judgment against defendant; the district court could not enter a default judgment against the defendant if the district court lacked personal jurisdiction over her. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

[2] Federal Courts 170B ⚿95

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk95 k. Objections, Waiver and Consent. Most Cited Cases
District court could not treat defendants' allegedly irregular response to the complaint as forfeiting both the merits and personal jurisdiction; if the pro se defendants' letters to the district court served as answers, then defendants forfeited their objection to personal jurisdiction but were entitled to defend on the merits, and if their letters did not serve as answers, they were entitled to ignore the proceedings and contest jurisdiction later. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

***278** Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. IP 99-518-C-Y/K. Richard L. Young, Judge.

Before EASTERBROOK, ROVNER, and EVANS, Circuit Judges.

Order

**1 Elliot Davis brought this suit in Indiana state court against African-American Telecommunications ("AAT") plus several of its directors and officers, alleging violations of the Indiana Securities Act and breach of fiduciary duty. The original defendants removed the case to federal court, asserting that diversity of citizenship supplies federal jurisdiction. Two additional defendants were added after the case was in federal court. Eventually the district judge entered defaults against most defendants and assessed damages at approximately $2 million. Barbara Carter, Beatrice Murray, and Nichole Weedon have appealed from the final judgment; the other defendants have not.

Circuit Rule 28(a)(1) requires litigants to identify in their briefs the citizenship of each party to the case. The parties in this case did not do so. Both the appellants and the appellee told us in the jurisdictional sections of their briefs that the case had been removed because Davis was a resident of Indiana and three appealing defendants were residents of Georgia. But residence may differ from citizenship (which means domicile), see *Meyerson v. Harrah's East Chicago Casino*, 299 F.3d 616 (7th Cir.2002), and unless complete diversity of citizenship is established the case must be returned to state court. See *Steigleder v. McQuesten*, 198 U.S. 141, 25 S.Ct. 616, 49 L.Ed. 986 (1905); *Denny v. Pironi*, 141 U.S. 121, 11 S.Ct. 966, 35 L.Ed. 657 (1891); *Robertson v. Cease*, 97 U.S. 646, 24 L.Ed. 1057 (1878). Moreover, the jurisdictional statements did not mention the non-appealing parties, whose citizenship also matters. We therefore directed the parties to file supplemental memoranda (and, if appropriate, to amend the pleadings under 28 U.S.C. § 1653) to show the citizenship of all parties. Davis responded by filing a memorandum of law plus an amended complaint with appropriate jurisdictional allegations; appellants (the parties who want to be in federal court) perplexingly did nothing. The details that Davis supplied show complete diversity, so we address the merits.

[1] The district judge's rationale for entering default judgment against Carter, Murray, and Weedon is that none filed an effective answer to the complaint. All three filed documents that they thought would serve as responses: Murray and Weedon (then acting pro se) sent letters to the court generally denying Davis's allegations, while Carter filed through counsel a formal motion under Fed.R.Civ.P. 12(b)(2) to dismiss for lack of personal jurisdiction, a step that puts off the time to file an answer. The district court concluded that the letters did not comply with Fed.R.Civ.P. 10 and 12(a)(1), which left Murray and Weedon in default; the court refused to allow them to cure that default and, because they had not filed answers, also refused to allow them to contend, via a motion to vacate under Fed.R.Civ.P. 55(c), that the court lacks personal jurisdiction over them. (Carter, Murray, and Weedon live in North Carolina, and all three say that they have never done business in Indiana or conducted there any of the transactions that gave rise to this suit.) As for Carter: The district court ordered her to pay $2,000 to cover the costs of a deposition she missed, and when she did not pay promptly the judge struck her motion to dismiss, refused to accept any other pleading from her, and entered the *279 default judgment-again without deciding whether the court possesses jurisdiction over Carter's person.

**2 This gets things backward. A court lacks authority to enter a judgment binding persons over whom it lacks personal jurisdiction. Carter filed a motion to dismiss under Rule 12(b)(2) and was entitled to a decision on that issue. Doubtless she was obliged to cooperate in any discovery necessary to resolve the jurisdictional issue, and the district court was entitled to ensure compliance with its orders (through the contempt process if necessary), but until resolving the jurisdictional dispute the court could not wrap up the merits, as a default judgment does. It is not clear to us that Carter deserved the $2,000 sanction; she contends that she did not receive notice of the deposition that Davis's lawyers scheduled, and the district court seems not to have addressed this contention. But whether or not imposition of a sanction was proper, a debate about missing a deposition does not justify pretermitting an objection to jurisdiction, for until ensuring that it possesses personal jurisdiction a court is not entitled to resolve the merits. See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999).

It is not as if the jurisdictional objection were

frivolous. Given *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977), even the state of incorporation may have some difficulty obliging corporate directors or officers to appear and defend. AAT was incorporated and had its principal place of business in Georgia; it is far from clear that Indiana may subject AAT's officers and directors to process outside of their home states. Indeed, the district court dismissed Davis's claim against Peter Baker, AAT's president, after concluding that Indiana lacks personal jurisdiction with respect to him. (Davis has not appealed from this component of the judgment.) It is hard to see any material difference between Baker's situation and that of AAT's other directors and officers.

[2] Murray and Weedon, unlike Carter, did not move to dismiss at the outset. If they filed proper answers to the complaint, then the omission from the answers of a contention that the court lacks personal jurisdiction forfeits that line of argument. See Fed.R.Civ.P. 12(h)(1); *Swaim v. Moltan Co.*, 73 F.3d 711, 717 (7th Cir.1996). If, on the other hand, they did not file proper answers, then Rule 12(h)(1) is irrelevant. Persons sued in a court that lacks jurisdiction retain the option of ignoring the proceedings and contesting jurisdiction later, on collateral attack if need be. See *Earle v. McVeigh*, 91 U.S. 503, 507, 23 L.Ed. 398 (1875); *Robinson Engineering Co. Pension Plan v. George*, 223 F.3d 445, 448 (7th Cir.2000); *Swaim*, 73 F.3d at 716. Here the "later" was the motion under Rule 55(c).

Thus there are two possibilities: (1) the letters served as answers, in which event any argument that the court lacks personal jurisdiction has been forfeited but Murray and Weedon are entitled to defend on the merits; or (2) the letters were not answers, in which event Murray and Weedon have forfeited their opportunity to defend on the merits but are entitled to resolution of their contention that the court lacks personal jurisdiction. It is not possible for a federal court to treat an irregular response to the complaint as forfeiting *both* the merits and personal jurisdiction. Yet that is what occurred here.

**3 The judgment with respect to Carter, Murray, and Weedon is vacated, and the case is remanded for further proceedings consistent with this order.

C.A.7 (Ind.),2003.

Davis v. Carter
61 Fed.Appx. 277, 2003 WL 1225581 (C.A.7 (Ind.))

END OF DOCUMENT

CEllibee v. Leonard
C.A.5 (Tex.),2007.
This case was not selected for publication in the Federal Reporter.Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fifth Circuit Rules 28.7, 47.5.3, 47.5.4. (Find CTA5 Rule 28 and Find CTA5 Rule 47)

United States Court of Appeals,Fifth Circuit.
Nathaniel W. ELLIBEE., Plaintiff-Appellant,
v.
Michael LEONARD, Aramark Corp. Supervisor; B.C. Holmes, Aramark Corp. Supervisor; Leon Leday, Aramark Corp. District Supervisor; Lionel Johnson, Deputy Warden, Limestone County Detention Center; M. Holmes, Chief of Security, Limestone County Detention Center; Michael Sutton, Warden, Limestone County Detention Center, Defendants-Appellees.
No. 05-50637.

March 15, 2007.

Background: Kansas prisoner who was incarcerated in county detention center in Texas brought pro se § 1983 action against employees of private company that administered center and another company's employees who worked at center. The United States District Court for the Western District of Texas dismissed action for insufficiency of service of process. Prisoner appealed.

Holdings: The Court of Appeals held that:
(1) amended notice of appeal was sufficient for appeal from judgment in favor of administrator's employees;
(2) defendants were not properly served by certified mail under Texas law;
(3) inmate did not accomplish service of process through personal service;
(4) defendant waived defense based upon insufficiency of service of process that was raised for first time in amendment to answer; and
(5) dismissal of action for insufficiency of service of process was abuse of discretion.

Reversed and remanded.

West Headnotes

[1] Federal Courts 170B ⚿666

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(E) Proceedings for Transfer of Case
170Bk665 Notice, Writ of Error or Citation
170Bk666 k. Requisites and Sufficiency; Defects. Most Cited Cases
State inmate's amended notice of appeal designating order that directed entry of judgment in certain defendants' favor demonstrated inmate's intent to appeal judgment in such defendants' favor and thus was sufficient to appeal that judgment, given absence of prejudice to defendants, who briefed pertinent issues on appeal. F.R.A.P.Rule 3(c)(1)(B), 28 U.S.C.A.

[2] Process 313 ⚿135

313 Process
313II Service
313II(E) Return and Proof of Service
313k132 Form and Requisites of Return or Certificate
313k135 k. Substituted or Constructive Service. Most Cited Cases
Defendants in state inmate's civil rights action were not properly served by certified mail under Texas law, which required return of service that included certified mail receipt signed by addressee, given that certified mail receipts attached to returns of service were signed by employee of private company that administered detention center at which inmate was incarcerated, not by defendants themselves. 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 4(e), 28 U.S.C.A.; Vernon's Ann.Texas Rules Civ.Proc., Rules 106(a), 107.

[3] Federal Civil Procedure 170A ⚿413

170A Federal Civil Procedure
170AIII Process

170AIII(B) Service
170AIII(B)1 In General
170Ak413 k. Personal Service. Most Cited Cases

Process 313 ⚷64

313 Process
313II Service
313II(A) Personal Service in General
313k64 k. Mode and Sufficiency of Service. Most Cited Cases

Process 313 ⚷127

313 Process
313II Service
313II(E) Return and Proof of Service
313k127 k. Nature and Necessity in General. Most Cited Cases
State inmate did not accomplish service of process through personal service on defendants in his civil rights action, despite his contention that certain defendants, who were employees of private companies working at Texas detention facility housing inmate, were personally served by their co-worker and that another defendant was personally served by his mother, given absence of return of service made by co-worker or mother, and given evidence that service documents were found by two employees in their mailboxes at facility and that documents were forwarded by mother to third employee. 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 4(*l*), 28 U.S.C.A.; Vernon's Ann.Texas Rules Civ.Proc., Rule 107.

[4] Federal Civil Procedure 170A ⚷412

170A Federal Civil Procedure
170AIII Process
170AIII(B) Service
170AIII(B)1 In General
170Ak412 k. Mode and Sufficiency. Most Cited Cases
Actual notice of civil action is not sufficient service of process.

[5] Federal Civil Procedure 170A ⚷536

170A Federal Civil Procedure
170AIII Process
170AIII(C) Defects and Objections
170Ak535 Persons Who May Object
170Ak536 k. Waiver. Most Cited Cases
Defendants in state inmate's civil rights action did not waive defense based upon insufficiency of service of process when, after raising such defense, they moved to revoke inmate's in forma pauperis (IFP) status. 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 12(b), 28 U.S.C.A.

[6] Federal Civil Procedure 170A ⚷536

170A Federal Civil Procedure
170AIII Process
170AIII(C) Defects and Objections
170Ak535 Persons Who May Object
170Ak536 k. Waiver. Most Cited Cases

Federal Civil Procedure 170A ⚷845

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(E) Amendments
170Ak844 Answer
170Ak845 k. Time for Amendment. Most Cited Cases
Amendment to answer that was filed by defendant in state inmate's civil rights action more than 20 days after initial answer was filed was not amendment permitted as a matter of course, and therefore defendant waived defense based upon insufficiency of service of process that was raised for first time in amendment to answer. 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rules 7(a), 12(h)(1), 15(a), 28 U.S.C.A.

[7] Federal Civil Procedure 170A ⚷1751

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)2 Grounds in General
170Ak1751 k. Process, Defects In. Most Cited Cases
Dismissal for insufficiency of service of process of § 1983 case of state inmate proceeding pro se and in forma pauperis (IFP) was abuse of discretion, given that inmate, in addition to arguing that service of process was sufficient, also sent letter to United

States marshal, questioning whether marshal's attempt at service was sufficient, and filed numerous documents with court that reasonably could be construed as requesting court to order marshal to serve defendants by personal service, and given that marshal, in attempting to serve defendants by certified mail, did not restrict receipt to addressees only, a failure pointed out to marshal by inmate. 42 U.S.C.A. § 1983.

***352** Nathaniel W. Ellibee, pro se.
Timothy U. Stanford, Downs & Stanford, Dallas, TX, Marvin C. Moos, Deanna Dean Smith, Ebanks Smith & Carlson, Houston, TX, for Defendants-Appellees.

Appeals from the United States District Court For the Western District of Texas (04-CV-125).

Before DAVIS, DENNIS and PRADO, Circuit Judges.

PER CURIAM: [FN1]

> FN1. Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

****1** Plaintiff, Nathaniel Ellibee, a pro se prisoner, appeals the dismissal of his 42 U.S.C. § 1983 action for insufficiency of service of process. FED.R.CIV.P. 4(e). Based on our conclusion that the district court abused its discretion by dismissing the case for failure to effect service of process, we reverse and remand for further proceedings.

I.

Nathaniel W. Ellibee, Kansas prisoner # 55052, filed the present civil action pursuant to 42 U.S.C. § 1983. At the time he filed this civil action, Ellibee was in the custody of the state of Kansas but incarcerated at the Limestone County Detention Center (Limestone) in Groesbeck, Texas. Ellibee sued Michael Leonard, B.C. Holmes, and Leon LeDay, three employees***353** of Aramark Corp. who worked or previously worked at Limestone (the Aramark defendants) as well as Limestone Assistant Warden Lionel Johnson, Limestone Chief of Security M. Holmes, and Limestone Warden Michael Sutton, three employees of CiviGenics-Texas, Inc. (the CiviGenics defendants), the private company that administered Limestone.

Ellibee moved for leave to proceed in forma pauperis (IFP) and the district court granted the motion. The magistrate judge ordered the United States Marshal (USM) to serve process upon all of the defendants as directed by Ellibee. Ellibee requested that the USM serve all of the defendants at Limestone, even though he noted on the service request forms that M. Holmes and Leonard were no longer employed at Limestone and that LeDay did not primarily work at Limestone. He further noted that the staff at Limestone would know M. Holmes's home address and that M. Holmes's mother was a local judge. He stated that the staff at Limestone would have the correct home addresses or current employment addresses for Leonard and LeDay. The USM attempted to serve the defendants by certified mail addressed to Limestone, and Cynthia Carrillo, a CiviGenics employee at Limestone signed the return receipts for the certified mail service for all of the defendants on July 15, 2004.

B.C. Holmes filed an answer to Ellibee's complaint that did not raise any defense based upon insufficient service of process. The CiviGenics defendants filed a motion to dismiss Ellibee's complaint for insufficient service of process or alternatively to quash service of process pursuant to FED.R.CIV.P. 12(b)(5). The CiviGenics defendants asserted that service of process was insufficient because Carrillo did not have authority to sign for certified mail to them and had not been appointed as an authorized agent for accepting service of process for them. They further stated that an unknown CiviGenics employee had forwarded M. Holmes's summons and complaint to his mother and that M. Holmes had not appointed his mother as an authorized agent for accepting service of process.

Ellibee responded to the motion to dismiss by noting that the CiviGenics defendants did receive notice of the civil action and by arguing that he should not be held responsible for any failure of the USM to properly effectuate service. He also requested that Carrillo be investigated to determine whether she intentionally obstructed justice by signing the return receipts on behalf of the defendants without authorization. In this pleading, Ellibee pointed out

that defendant B.C. Holmes filed an answer without any objection to the service of process.

**2 Ellibee moved for a court order compelling the USM to verify that the defendants had been properly served with process. Ellibee moved for a default judgment against the CiviGenics defendants because they acknowledged that they had notice of the civil action but did not file an answer. Ellibee subsequently filed separate motions for default judgments against Leonard and LeDay. He moved for summary judgment against B.C. Holmes, arguing that B.C. Holmes's answer did not provide evidence or argument to counter his claims, and also that B.C. Holmes failed to raise any affirmative defense.

Service of process was returned upon Leonard and LeDay unexecuted. Leonard and LeDay then filed a motion to dismiss the complaint or, alternatively, to quash service of process. B.C. Holmes filed a motion to amend his answer and an amended motion to amend his answer, both seeking to raise a defense based upon insufficient service of process.

*354 Ellibee subsequently filed a motion requesting the court to address the service of process issue. He requested that the court either rule that service of process was sufficient or, in the alternative, order the USM to effect personal service upon the defendants.

The magistrate judge granted B.C. Holmes's motion to amend his answer. In that order, the magistrate judge noted that Ellibee had failed to properly serve the defendants and "belligerently refused to do so after becoming aware of the defects." The magistrate judge also denied Ellibee's motion for an order compelling the USM to verify that the defendants had been properly served with process, noting that while Ellibee was entitled to rely upon the USM to effect service, he was required to remedy any apparent defect in service and could not compel the USM to coach him in the proper manner of serving the defendants.

On November 1, 2004, the magistrate judge recommended that Ellibee's attempted service on all of the defendants be quashed, that Ellibee's motions for default judgment be denied, and that Ellibee's motion for summary judgment against B.C. Holmes be denied. He ruled that none of the defendants had been properly served and that Ellibee had refused to cure the defective service when notified of the problem. He instructed Ellibee to properly serve the defendants by November 26, 2004, and warned Ellibee that the case could be dismissed if he failed to properly serve the defendants.

Ellibee filed a timely objection to the magistrate judge's report and recommendation. In his objection, he stated that he had no ability to serve the defendants due to his incarceration and requested that the USM execute personal service on the defendants. Ellibee attached a letter he had sent to the USM on August 18, 2004, to his objection. In that letter, Ellibee questioned why the USM did not restrict delivery to the addressee only when attempting to serve the defendants by certified mail and why the USM did not use the information he gave them regarding Leonard and LeDay in order to obtain an address at which they could be served.

**3 On March 4, 2005, the district court adopted the report and recommendation of the magistrate judge, denied Ellibee's motions for default judgment, denied Ellibee's motion for summary judgment against B.C. Holmes, and dismissed Ellibee's claims against the CiviGenics defendants without prejudice for insufficiency of service of process. It ruled that Ellibee had been notified of the defects in service of process and had refused to properly cure them despite having ample time to do so. The district court did not address whether Ellibee had properly served the Aramark defendants.

Ellibee filed a motion to alter or amend judgment pursuant to FED.R.CIV.P. 59(e) on March 16, 2005. In that motion, he objected to the dismissal of his claims against the CiviGenics defendants and requested a clarification as to which claims had not been dismissed. Ellibee stated that he had given all the information regarding the defendants that he had to the USM, had written the USM, and had filed motions with the court once he learned that there was a problem with service of process. He further noted that the USM's original returns of service for all of the defendants indicated that the defendants had been served and argued that he was entitled to rely upon this representation by the USM. The district court denied Ellibee's motion on April 1, 2005. On April 8, 2005, Ellibee filed a notice of appeal from the district court's order denying his motion to alter or amend judgment.

***355** The CiviGenics defendants filed a motion for entry of a final judgment regarding Ellibee's claims against them pursuant to FED.R.CIV.P. 54(b) on March 24, 2005. On April 22, 2005, the district court granted the motion and at the court's direction, the clerk duly entered a final judgment in favor of the CiviGenics defendants on April 28, 2005. On May 12, 2005, Ellibee filed an amended notice of appeal, seeking to appeal from the district court's order denying his motion to alter or amend judgment, the district court's order directing entry of final judgment, and "any other despositive [sic] ruling entered by the district court."

On April 20, 2005, the Aramark defendants filed a motion for reconsideration and clarification of the district court's March 4, 2005 order, requesting that the claims against them also be dismissed for insufficiency of service of process. The district court granted the motion and ordered that the claims against all of the defendants be dismissed on May 26, 2005. On the same day, the clerk of court duly entered a final judgment in favor of all of the defendants. On June 8, 2005, Ellibee filed a second amended notice of appeal, seeking to appeal from "any and all dispositional orders of the district court," specifically including the May 26, 2005, order dismissing his claims against all of the defendants.

II.

[1] The CiviGenics defendants argue that this court does not have jurisdiction over Ellibee's appeal of the dismissal of his claims against them because he did not file a timely and proper notice of appeal from the judgment in their favor. They assert that while Ellibee filed three notices of appeal that specifically referenced many different orders and rulings being appealed, Ellibee never specifically designated that he was appealing from the April 28, 2005, judgment entered in their favor. While they acknowledge that Ellibee's second amended notice of appeal contains a provision seeking to appeal from all adverse rulings, they argue that it was not timely because it was filed more than 30 days after the judgment in their favor was entered.

****4** A notice of appeal is required to "designate the judgment, order, or part thereof being appealed." FED. R.APP. P. 3(c)(1)(B). This requirement, however, is not jurisdictional and "a mistake in designating a judgment appealed from should not bar an appeal as long as the intent to appeal a specific judgment can be fairly inferred and the appellee is not prejudiced by the mistake." *Turnbull v. United States*, 929 F.2d 173, 177 (5th Cir.1991). Such a mistake in designating the proper judgment can be corrected "by an indication of intent in the briefs or otherwise." *United States v. Rochester*, 898 F.2d 971, 976 n. 1 (5th Cir.1990).

On May 12, 2005, Ellibee filed an amended notice of appeal, appealing the denial of his motion to alter or amend judgment, the April 22, 2005, order directing that judgment be entered in favor of the CiviGenics defendants, and "any other despositive [sic] ruling entered by the district court." As Ellibee designated the order directing that judgment be entered in favor of the CiviGenics defendants as an order from which he was appealing, his intent to appeal the judgment in favor of the CiviGenics defendants can be easily and fairly inferred. *See Turnbull*, 929 F.2d at 177. The CiviGenics defendants have not argued that they suffered any prejudice from any mistake in designating the judgment and have briefed the underlying issues. Thus, Ellibee's amended notice of appeal was sufficient to appeal the judgment in favor of the CiviGenics defendants.***356***See Turnbull*, 929 F.2d at 177. While the CiviGenics defendants correctly note that Ellibee's second amended notice of appeal was not timely regarding the judgment in their favor, this is irrelevant as Ellibee's amended notice of appeal was sufficient. *See id.*; FED. R.APP. P. 4(a)(1)(A) (notice of appeal must be filed within 30 days of judgment). The argument is without merit.

III.

Ellibee argues that service of process upon the CiviGenics defendants and B.C. Holmes was sufficient given the circumstances. He asserts that these defendants each personally received a copy of the summons and complaint from a person who was not a party and was at least 18 years of age. He maintains that Johnson, Sutton, and B.C. Holmes all were served personally by Carrillo and that M. Holmes was served by his mother. He further contends that he sued all of the defendants in their personal and official capacities and that none of the defendants argued that service of process upon them in their official capacities was insufficient.

As the defendants were individuals within a judicial district of the United States, service upon them was governed by FED.R.CIV.P. 4(e). Pursuant to that rule, service of process may be effected by: (1) serving the defendant pursuant to the laws of the state in which he is located, in this case Texas; (2) personal service upon the defendant; (3) leaving copies of the service documents at the defendant's residence with a person of suitable age and discretion; or (4) delivering the service documents to an agent of the defendant authorized to accept service by appointment or by law. *Id.* Under Texas law, service of process may be effected by personal service upon the defendant or by mailing the service documents to the defendant by certified mail, return receipt requested. TEX.R. CIV. P. 106(a). If service by one of those two methods fails, Texas law allows for substituted service upon a motion supported by an affidavit by leaving a copy of the service documents at the defendant's residence or place of business or in any other manner deemed to be reasonably effective to give the defendant notice. TEX.R. CIV. P. 106(b). Whether service of process upon the defendants was sufficient is an issue of law that this court reviews de novo. *Maiz v. Virani*, 311 F.3d 334, 338, 340 (5th Cir.2002).

**5 Nothing in the record indicates that service of process was effectuated upon the CiviGenics defendants or B.C. Holmes by leaving copies of the service documents at their residences with a person of suitable age and discretion. Furthermore, the CiviGenics defendants averred that Carrillo was not appointed as their agent authorized to accept service of process and Ellibee points to no evidence showing that she was an agent authorized to accept service of process for any of the defendants or that any properly authorized agent of the defendants was served with process. Additionally, the record shows that Ellibee never filed a motion for substituted service under Texas law. Thus, the only remaining issues are whether the defendants were properly served by personal service or certified mail service under Texas law. *See*FED.R.CIV.P. 4(e); TEX.R. CIV. P. 106(a).

[2] Although the USM attempted to serve the defendants by certified mail, the certified mail receipts attached to the returns of service were signed by Carrillo, not the defendants. As Texas law requires a return of service to include a certified mail receipt signed by the addressee when service is effected by certified mail, none of the defendants were properly served by certified mail. *See**357TEX.R. CIV. P. 107; *Ramirez v. Consol. HGM Corp.*, 124 S.W.3d 914, 916 (Tex.App.-Amarillo 2004, no pet.).

[3] Pursuant to both Texas and federal law, if a defendant is personally served, the person who serves the defendant must make a return of service verifying that the defendant was personally served. FED.R.CIV.P. 4(*l*); TEX.R. CIV. P. 107. While Ellibee argues that Johnson, Sutton, and B.C. Holmes were all personally served by Carrillo and that M. Holmes was personally served by his mother, there is no return of service from Carrillo or M. Holmes's mother in the record. Additionally, while Ellibee argues that the CiviGenics defendants' own affidavits show that they were personally served by Carrillo or M. Holmes's mother, this is not the case; Johnson and Sutton averred that they found the service documents in their mailboxes at Limestone, and M. Holmes averred that the service documents were forwarded to him by his mother.

[4] Ellibee's remaining arguments are also without merit. Although all of the defendants may have received notice of the civil action, actual notice is not sufficient service of process. *Way v. Mueller Brass Co.*, 840 F.2d 303, 306 (5th Cir.1988). Additionally, while Ellibee asserts that the defendants did not object to the sufficiency of service of process in their official capacities, the record shows that the defendants were employees of private companies, not a state or local government, so the defendants had no official capacities in which they could be sued. Ellibee has not shown that the district court erred by ruling that he had not properly effected service of process upon the CiviGenics defendants and B.C. Holmes.

IV.

[5] For the first time on appeal, Ellibee argues that the CiviGenics defendants made a general appearance by filing a motion to revoke his IFP status, thereby waiving their insufficiency of service of process defense. Because Ellibee did not raise this argument below, this court reviews for plain error. *See Tilmon v. Prator*, 368 F.3d 521, 524 (5th Cir.2004). To demonstrate plain error, Ellibee must

show: "(1) that an error occurred; (2) that the error was plain, which means clear or obvious; (3) the plain error must affect substantial rights; and (4) not correcting the error would seriously affect the fairness, integrity or public reputation of judicial proceedings." *Highlands Ins. Co. v. Nat'l Union Fire Ins. Co.*, 27 F.3d 1027, 1032 (5th Cir.1994) (internal quotation marks and citation omitted).

**6Federal Rule of Civil Procedure 12(b) provides that jurisdictional defenses such as insufficiency of service of process are not "waived by being joined with one or more other defenses or objections in a responsive pleading or motion." The adoption of the Federal Rules of Civil Procedure thus "abrogated the long-standing waiver rule by permitting a defendant to seek affirmative relief without forfeiting an objection to jurisdiction." *Bayou Steel Corp. v. M/V Amstelvoorn*, 809 F.2d 1147, 1148 (5th Cir.1987). The CiviGenics defendants raised the insufficiency of service in a motion filed before the motion to revoke Ellibee's IFP status. Accordingly, the CiviGenics defendants' motion to revoke Ellibee's IFP status did not waive their insufficiency of service of process defense and Ellibee has not shown that the district court committed error, plain or otherwise, by not ruling that the defense was waived.

V.

[6] Ellibee also argues that B.C. Holmes waived his insufficiency of service of process defense because his initial answer***358** to the complaint did not raise the defense. A party waives a defense based upon insufficiency of service of process if the defense "is neither made by motion under [FED.R.CIV.P. 12] nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course." FED.R.CIV.P. 12(h)(1). B.C. Holmes's initial answer did not raise the defense of insufficiency of service of process and he did not raise the defense in a pre-answer motion. Thus, B.C. Holmes waived the defense unless the amendment to his answer, in which he first raised the defense, was permitted as a matter of course under FED.R.CIV.P. 15(a). *See*FED.R.CIV.P. 12(h)(1).

One amendment to a pleading is allowed as a matter of course "at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served." FED.R.CIV.P. 15(a). B.C. Holmes's answer was a pleading to which no responsive pleading was permitted, *see*FED.R.CIV.P. 7(a), so he had 20 days to amend the answer as a matter of course. *See*FED.R.CIV.P. 15(a). B.C. Holmes's initial answer was filed on August 13, 2004, and he first moved to amend it on September 27, 2004, far more than 20 days later. Accordingly, as the magistrate judge acknowledged, the amendment to B.C. Holmes's answer was not an amendment permitted as a matter of course. *See*FED.R.CIV.P. 15(a). As B.C. Holmes did not raise his insufficiency of service of process defense in a pre-answer motion, in his original answer, or in an amendment to his answer allowed as a matter of course, he waived the defense. *See*FED.R.CIV.P. 12(h)(1); *Kersh v. Derozier*, 851 F.2d 1509, 1511-12 (5th Cir.1988). Accordingly, the district court erred by failing to rule that B.C. Holmes had waived his insufficiency of service of process defense. *See Kersh*, 851 F.2d at 1511-12.

VI.

**7[7] Ellibee argues that the district court abused its discretion by dismissing his civil action for insufficiency of service of process.[FN2] He asserts that as a pro se prisoner proceeding IFP, he was entitled to rely upon the USM to effect service of process and that he provided the USM with sufficient information to serve the defendants. He further maintains that the district court erroneously concluded that he had done nothing to correct the insufficient service of process when he had done everything that he could to serve the defendants. This court reviews a dismissal for insufficiency of service of process for an abuse of discretion. *Lindsey v. U.S. R.R. Ret. Bd.*, 101 F.3d 444, 445 (5th Cir.1996).

FN2. Ellibee styles this argument in numerous ways. To the extent that Ellibee separately argues that the USM was in contempt, that he was denied access to the courts, or that the clerk of the district court should be sanctioned in some way, these claims are raised for the first time on appeal and have no basis in the record. Furthermore, as these arguments require the resolution of factual issues, Ellibee cannot show plain error. *See Robertson v. Plano*

City, 70 F.3d 21, 23 (5th Cir.1995).

A plaintiff proceeding IFP "is entitled to rely upon service by the U.S. Marshals and should not be penalized for failure of the Marshal's Service to properly effect service of process, where such failure is through no fault of the litigant." *Rochon v. Dawson*, 828 F.2d 1107, 1110 (5th Cir.1987). Nevertheless, once such a plaintiff is aware of possible defects in service of process, he must attempt to remedy them. *Id.*

***359** In *Rochon*, this court upheld the dismissal of the plaintiff's case for failure to effect service of process because the plaintiff did not request that the USM serve the proper defendant after he became aware that the first attempt at service was unsuccessful. *Id.* Because the plaintiff did not attempt to remedy the problem with service of process, this court concluded that his case was dismissed because of his failure to prosecute not because of the failure of the USM to properly effect service of process and upheld the dismissal. *Id.*

In *Lindsey*, the other main case in this circuit on this issue, the court reached the opposite conclusion. *Lindsey*, 101 F.3d at 446-48. In that case, the district court did not provide the plaintiff with summons forms and never appointed the USM, or anyone else, to serve process for the plaintiff, who was a pro se prisoner proceeding IFP. *Id.* at 445-46. Although the plaintiff did not provide the proper service addresses for all of the defendants in his complaint, the court found that this defect was not fatal and that the district court had abused its discretion by dismissing the case because the plaintiff had diligently attempted to serve the defendants and the district court had not appointed the USM to effect service of process. *Id.* at 447-48.

In the present case, the district court found that Ellibee, upon being made aware of the defects in service of process, had not attempted to remedy the situation and instead had argued that service of process was sufficient. It concluded that Ellibee, like the plaintiff in *Rochon*, was to blame for the failure to effect service of process and dismissed the case.

The record does not support the findings of the district court. Although Ellibee did argue that service of process was sufficient, the record also shows that Ellibee sent a letter to the USM questioning whether the attempt at service was sufficient and filed numerous documents with the court which could be reasonably construed as requesting the court to order the USM to serve the defendants by personal service. Additionally, when the USM attempted to serve the defendants via certified mail, the certified mail was not restricted to receipt by the addressee only, a failure that Ellibee did point out to the USM. While the district court faulted Ellibee for instructing the USM to serve the defendants at their place of business, it is unclear how Ellibee could have obtained the defendants' residence addresses given that he was a prisoner and they were prison employees.

****8** On these particular facts, we find that the district court erred in dismissing Ellibee's case for insufficiency of service of process.

VII.

For the foregoing reasons, the judgment of dismissal is reversed and this case remanded to the district court for further proceedings. The district court should direct the USM to use due diligence to obtain personal addresses for the defendants and serve the individuals at those addresses.

REVERSED and REMANDED.

C.A.5 (Tex.),2007.
Ellibee v. Leonard
226 Fed.Appx. 351, 2007 WL 837092 (C.A.5 (Tex.))

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CHartling v. Woodloch Pines, Inc.
S.D.N.Y.,1998.
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.
Erma HARTLING and Henry Hartling, Plaintiffs,
v.
WOODLOCH PINES, INC., Defendant.
No. 97 Civ. 2587(JSM).

Sept. 8, 1998.

Francis X. Young, Elmsford, NY, for plaintiff.
Jody Benard, Bell, Benard, Kahan & Abamont, New York, NY, for defendant.

OPINION AND ORDER

MARTIN, J.
***1** Woodloch Pines is a resort in Hawley, Pennsylvania owned by the defendant, Woodloch Pines, Inc., a corporation of that state. Plaintiff Erma Hartling, a resident of New York, alleges that she fell and injured herself there as a result of the defendant's negligence. She and her husband filed suit in New York state supreme court and served the defendant on March 20, 1997. The defendant removed the action to this Court by notice dated and served April 4, alleging diversity jurisdiction. The defendant also served an answer the same day. The answer does not object to personal jurisdiction or to improper venue. The defendant now moves for leave to amend its answer to include those two defenses and moves to dismiss on those grounds.

A defendant who wishes to raise the defense of no personal jurisdiction or improper venue must do so in its first defensive move, be it a Rule 12 motion or an answer. *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 738 (1st Cir.1983); *Rauch v. Day and Night Mfg. Corp.*, 576 F.2d 697, 701 (6th Cir.1978); *Konigsberg v. Shute*, 435 F.2d 551, 552 (3d Cir.1970); *I. Oliver Engebretson, Inc. v. Aruba Palm Beach Hotel & Casino*, 575 F.Supp. 1262, 1263-64 (S.D.N.Y.1984); *National Fire & Marine Ins. Co. v. Railroad Resource and Recovery, Inc.*, 1994 WL 606049 (S.D.N.Y.1994); 5A Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1391 at 752 (2d ed.1990). If it fails to do so, the only way to save the defenses is to make an amendment "as a matter of course." Rule 12(h)(1); *e.g.*, *Glater*, 712 F.2d at 738. Rule 15(a) states that a party may amend an answer "as a matter of course" only within 20 days of the answer. Therefore, a defendant may only amend his answer to include a Rule 12(h)(1) defense such as lack of personal jurisdiction or improper venue within 20 days of service of the answer. *E.g.*, *Glater*, 712 F.2d at 738; *I. Oliver Engebretson*, 575 F.Supp. at 1264.

The defendant did not seek to amend within those 20 days and has therefore waived the defenses of no personal jurisdiction and improper venue.

The defendant argues, however, that this case falls into an exception recognized by the courts. "[A] party cannot be deemed to have waived objections or defenses which were not known to be available at the time they could first have been made, especially when it does raise the objections as soon as their cognizability is made apparent." *Holzsager v. Valley Hosp.*, 646 F.2d 792, 796 (2d Cir.1981); *see also*, *Glater*, 712 F.2d at 738. In *Holzsager*, for example, the Supreme Court issued a decision, after the defendant had answered, that provided the grounds for the defendant's personal jurisdiction defense. The court held that the defendant had not waived the defense because he could not waive a right he was unaware of.

In *Glater*, the plaintiff sued in New Hampshire and alleged in her complaint that she was a resident of that state. The legal standard for personal jurisdiction over the defendant in that case took the plaintiff's residence into account. Had she lived in another state, she would have had more difficulty obtaining personal jurisdiction over the defendant. Only after it answered did the defendant discover evidence that the plaintiff actually resided in Massachusetts. The defense was not waived. "It could not waive a defense involving facts of which it was not, and could not have been expected to have been, aware." The court's decision was reinforced by the fact that the defendant raised the defense immediately upon learning of the new information.

*2 The defendant here does not fall into this exception. It does not fall into the situation described by *Holzsager* because there has been no change in the law. It does not fall into the situation described by *Glater* because the operative facts at issue here are the *defendant's* contacts with New York. These are facts naturally within the defendant's knowledge. The defendant seems to be arguing that the defendant's lawyer did not have time to research these facts. However, every lawyer in every case could make that argument.

In fact, in its motion to dismiss for lack of jurisdiction and improper venue, the defendant relied entirely upon facts contained either in the complaint itself or in the deposition of Lois Eltz, executive assistant of the defendant. The defendant cannot argue that there were facts relevant to the omitted defenses of which it was unaware or could not have reasonably been aware when its very motion on the merits of those defenses relies almost entirely upon facts provided from the defendant itself. Moreover, the defendant has not shown that it attempted to raise the defense as soon as it discovered the relevant facts, and did not raise the defense until the following September when it raised it orally during a conference. Even if it had, this could not overcome the fundamental problem that the defendant knew or reasonably could have known the facts relevant to the defenses when it made its answer.

The exception in *Glater* came in response to facts far different from those here. For in *Glater,* the complaint affirmatively misled the defendants into believing that there was personal jurisdiction premised upon facts that turned out to be untrue, facts that initially at least were clearly not within the defendant's ken. Here, by contrast, the complaint did not allege facts that were untrue that misled defendants into believing that there were no grounds for an objection to personal jurisdiction or improper venue. For these several reasons, therefore, it is clear that the defendant cannot take refuge in the exception set forth in *Glater.*

It is interesting to note that although the defendant argues that its lawyer did not have enough time to investigate the facts surrounding jurisdiction and venue, the defendant did not take all the time it could have in which to prepare its answer. For example, under New York law the defendant could have taken 30 days to return the acknowledgment of service by mail and another 20 days to answer after that. C.P.L.R. § 312-a. As regards removal, the defendant had 30 days after the service of the complaint to remove the case and another 5 days after that to answer. 28 U.S.C. § 1446; Rule 81(c). If service was effected March 20, 1997, then the defendant could have answered on April 25 instead of April 4. The defendant would have had another 20 days after April 25 to amend as a matter of course. Rule 15(a). There is no evidence defendant attempted to use this extra 41 days to investigate personal jurisdiction and make a timely attempt to raise the defenses.

*3 Finally, the fact that this case was removed does not change the analysis.[FN1] Rule 81(c) states that the Federal Rules of Civil Procedure "govern procedure after removal." In this case, both the notice of removal and the answer were served on April 4 and both were filed with the court on April 11.[FN2] However, the answer here must be deemed filed "after removal" for two reasons. First, the defendant's answer was filed in federal court, not state court. Second, the defendant's notice of removal stated that the only proceeding that had occurred prior to removal was the complaint. Thus, the answer was filed after removal and Rule 81(c) requires that Rules 12(h)(1) and 15(a), as interpreted by the courts, be applied here. *See also Wurtenberger v. Cunard Lines Ltd.*, 370 F.Supp. 342, 343 (S.D.N.Y.1974) ("F.R.Civ.P.81(c) specifically provides that the federal rules apply to civil cases removed to federal court, and the courts have consistently held that federal law will be applied to the issue of waiver.") (citing *Cain v. Commercial Publ'g*, 232 U.S. 124, 34 S.Ct. 284, 58 L.Ed. 534 (1914).

FN1. A notice of removal by itself does not waive the Rule 12(b) defenses. *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 157 n .4 (2d Cir.1996).

FN2. The notice of removal filed with the court was dated April 8, whereas the notice served upon plaintiffs was dated April 4. The two notices do not differ in relevant ways, however.

It is true that when the answer is filed in state court prior to removal and that answer fails to raise the defense of improper venue, the defense has not been

waived. *Family Realty & Constr. Co., Ltd. v. Manufacturers and Traders Trust Co.*, 931 F.Supp. 141, 145 (N.D.N.Y.1996). That case has no bearing here, however, because the defendant had already removed the case when it served its answer.

Conclusion

The defendant's motion for leave to amend its complaint must therefore be denied. Consequently, pursuant to Rule 12(h)(1), the defenses of no personal jurisdiction and improper venue have been waived, and the defendant's motions to dismiss under Rule 12(b)(2) and (3) must also be denied.

SO ORDERED.

S.D.N.Y.,1998.
Hartling v. Woodloch Pines, Inc.
Not Reported in F.Supp.2d, 1998 WL 575138 (S.D.N.Y.)

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CSeid v. Bishop, Rose & Co., Inc.
S.D.N.Y.,1986.
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.
Melvin SEID, Plaintiff,
v.
BISHOP, ROSE & CO., INC. and William Goldman, Defendant,
andMelanie Seid Goldman and National Union Fire Insurance Company, Third-Party Defendants.
No. 85 Civ. 8773 (CBM).

May 2, 1986.

Mergel & Tubman by Irwin D. Tubman, New York City, for third party defendant Melanie Seid Goldman.
Hendler & Murray, P.C. by Alan M. Goldberg, New York City, for defendant and third party plaintiff Biship, Rosen & Co., Inc.

MEMORANDUM OPINION AND ORDER
MOTLEY, Chief Judge.
*1 Third party defendant Melanie Seid Goldman has moved to amend her answer filed February 14, 1986 to the third party complaint of Bishop, Rosen & Co., Inc. Goldman wishes to amend her answer to include the defenses of improper service of process and lack of personal jurisdiction. For the reasons that follow this motion is denied.

Fed.R.Civ.P.(h)(1) provides that

A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g) [consolidation of defenses in motion], or (B) if it is neither made by motion under this rule nor included in a responsive pleading or amendment thereof permitted by Rule 15(a) to be made as a matter of course.

Third party defendant Goldman made no Rule 12 motion asserting the defenses of lack of personal jurisdiction or insufficiency of process nor did she raise these defenses in her answer to defendant's third party complaint. Furthermore, because a trial date was previously set in this action, Goldman is not entitled to amend her answer as a matter of right under Fed.R.Civ.P. 15(a) (in the case of pleadings to which no responsive pleading is permitted, Rule 15(a) allows amendment as a matter of course only where the action has not been placed upon the trial calendar).

By the unequivocal language of Fed.R.Civ.P. 12(h)(1) therefore, and by the well established reading of Rule 12 that a party wishing to raise one of the defenses listed therein " 'must do so in [his] first defensive move, be it a Rule 12 motion or a responsive pleading,' "*Index Fund, Inc. v Hagopian*, 107 F.R.D. 95 (S.D.N.Y.1985) (quoting *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 738 (1st Cir.1983)), it is beyond dispute that third party defendant Goldman has waived her defenses regarding personal jurisdiction and service of process. Accordingly, third party defendant Goldman's motion to amend her answer pursuant to Fed.R.Civ.P. 15(a) is denied.

So ordered.

S.D.N.Y.,1986.
Seid v. Bishop, Rose & Co., Inc.
Not Reported in F.Supp., 1986 WL 5384 (S.D.N.Y.)

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Federal Practice & Procedure
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Federal Rules Of Civil Procedure
The Late Charles Alan Wright[FNa12], Arthur R. Miller[FNa13]

Chapter 4. Pleadings and Motions
Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing
H. Consolidation Of Defenses In Motion

Link to Monthly Supplemental Service

§ 1384History and Purpose of Rule 12(g)

Primary Authority

Fed. R. Civ. P. 12

Forms

West's Federal Forms § 2461

Rule 12, along with all of the Federal Rules of Civil Procedure, was amended in 2007 to update and unify the style of the rules. As part of this effort, the Advisory Committee made some minor changes to the language of Rule 12(g) and also created two subdivisions. Part 1 deals with the "Right to Join," and part 2 addresses "Limitations on Further Motions." The Advisory Committee intended that the amendments have no substantive effect on the rules. For a full text of the re-stylized rule, see the beginning of this Pocket Part.

When the Federal Rules of Civil Procedure took effect in 1938, Rule 12(g) allowed the defendant, before answering, to present certain defenses and objections by motion in two stages.[FN1] The first motion could consist solely of the jurisdiction and related defenses contained in Rules 12(b)(1) through 12(b)(5). If the initial challenge to jurisdiction, venue, or form or service of process was denied, or its disposition was delayed until trial, the moving party then could make a second motion and raise any of the remaining defenses and objections authorized by Rule 12,[FN2] but this second motion could not raise any of the first five Rule 12(b) defenses.[FN3] An illustration of this two-step process is provided by the early case of Martin v. Moery,[FN4] in which the plaintiff moved to strike his opponent's Rule 12(b)(6) motion arguing that inasmuch as the court had denied an earlier motion to dismiss, the defendant should not be permitted to move pre-answer a second time. The district court denied the motion and stated:

> Defendants were not required to consolidate the sixth defense specified in Rule 12(b) with defenses one to five or any of them, but were permitted, should they so desire, to defer the presentation of the sixth defense by motion until disposition had been made of the motion presenting defenses one to five or any of them. This is the course that has been followed by defendants here and their motion to dismiss on the ground of the insufficiency of the statement of claim is properly presented to the court.[FN5]

Of course, there was no requirement that two rounds of motions be used; the defending party could assert all his defenses and objections simultaneously.[FN6] It soon became apparent that since nothing was waived by joining all defenses and objections in one motion,[FN7] the two-motion option was unnecessary and promoted delay. In 1948 an amendment to Rule 12(g) therefore eliminated the provision for successive motions.[FN8] The 1966 amendments to the rules made only minor modifications in the language of Rule 12(g) that were designed to conform the provision to the revision of Rule 12(h), a subject discussed in later sections;[FN9] the substance of the subdivision was not altered.[FN10]

In considering the operation of Rule 12(g), it is advisable to keep in mind that Rule 12 was drafted by the Advisory Committee to prevent the dilatory motion practice fostered by common law procedure and many of the codes under which numerous pretrial motions could be made, many of them in sequence—a course of conduct that was pursued often for the sole purpose of delay.[FN11] At the same time, Rule 12 is designed to protect parties from the unintended waiver of any legitimate defense or objection. Indeed, the only persons to whom Rule 12(g) presents a hazard are motion minded lawyers who, from force of habit or lack of good faith, cannot close their pleadings or come to issue without attempting to make numerous motions.[FN12]

Simply stated, the objective of the consolidation rule is to eliminate unnecessary delay at the pleading stage.[FN13] Subdivision (g) contemplates the presentation of an omnibus pre-answer motion in which the defendant advances every available Rule 12 defense and objection he may have that is assertable by motion. The defendant cannot delay the filing of a responsive pleading by interposing these defenses and objections in piecemeal fashion, but must present them simultaneously. Any defense that is available at the time of the original motion, but is not included, may not be the basis of a second pre-answer motion.[FN14] Furthermore, if the omitted defense is one of the four listed in Rule 12(h)(1), it is waived and the defendant may not assert it even in the responsive pleading or at trial.[FN15]

[FNa12] Charles Alan Wright Chair in Federal Courts, The University of Texas.

[FNa13] Bruce Bromley Professor of Law, Harvard University.

[FN1]

Rule 12(g) as promulgated

"A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except that prior to making any other motions under this rule he may make a motion in which are joined all the defenses numbered (1) to (5) in subdivision (b) of this rule which he cares to assert."

[FN2]

Successive motions permitted

Bowles v. Sunshine Packing Corp., D.C.Pa.1946, 5 F.R.D. 282.

A motion to dismiss an action for insufficiency of the complaint made after denial of a motion to dismiss on jurisdictional grounds does not violate Rule 12(g), which requires the consolidation of motions,

although the defense raised by the second motion was available at the time of the prior motion, in view of the provision that motions concerning jurisdiction may be made before other motions. Equitable Life Assur. Soc. v. Saftlas, D.C.Pa.1940, 35 F.Supp. 62.

See also

The history of Rule 12 is discussed in vol. 5B, § 1341.

[FN3]

Successive motions prohibited

Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp., D.C.Pa.1940, 31 F.Supp. 403 (dictum).

[FN4]

Martin case

D.C.Ill.1939, 1 F.R.D. 127.

[FN5]

Quotation

Id. at 128.

[FN6]

Two motions not necessary

Thorne, Neale & Co. v. Coe, D.C.D.C.1943, 3 F.R.D. 259, modified on other grounds C.A.1944, 143 F.2d 155, 79 U.S.App.D.C. 122.

Devine v. Griffenhagen, D.C.Conn.1940, 31 F.Supp. 624.

But see

Smith v. Belmore, D.C.Wash.1941, 1 F.R.D. 633 (court erroneously holding that defendant had to employ two motions if he wished to avoid waiver of dilatory defenses).

[FN7]

Joinder of defenses

See § 1362.

[FN8]

1948 amendment

See the Advisory Committee Note accompanying the 1948 amendment to Rule 12(g), which is set out in vol. 12A, App. C.

[FN9]

Rule 12(h)

See §§ 1390 to 1397.

[FN10]

1966 amendment

See the Advisory Committee Note accompanying the 1966 amendment to Rule 12(g), which is set out in vol. 12A, App. C.

[FN11]

Prevent delay

"You notice that (g) is a provision for consolidation of motions, and that was an attempt to speed things up by requiring in general that you make all your dilatory motions or motions of form at one time." Proceedings, Cleveland Institute on the Federal Rules, 1938, p. 243 (comment by Dean (later Judge) Clark).

[FN12]

Hazard

Carter v. American Bus Lines, Inc., D.C.Neb.1958, 22 F.R.D. 323.

[FN13]

Eliminate delay

Flory v. U.S., C.A.5th, 1996, 79 F.3d 24.

Pilgrim Badge & Label Corp. v. Barrios, C.A.1st, 1988, 857 F.2d 1, 3, **quoting Wright & Miller.**

Marcial Ucin, S.A. v. SS Galicia, C.A.1st, 1983, 723 F.2d 994, 997, **citing Wright & Miller.**

Jetform Corp. v. Unisys Corp., D.C.Va.1998, 11 F.Supp.2d 788, **citing Wright & Miller** (allowing defendant's second motion because no delay occurred by considering second motion simultaneously with defendant's first motion).

U.S. v. Islip, C.I.T.1998, 18 F.Supp.2d 1047, **citing Wright & Miller.**

Britton v. Cann, D.C.N.H.1988, 682 F.Supp. 110, 113, **citing Wright & Miller.**

FRA, S.p.A. v. Surg-O-Flex of America, Inc., D.C.N.Y.1976, 415 F.Supp. 421, 427, **quoting Wright & Miller.**

The purpose of Rule 12(g) is the avoidance of time-consuming, piece-meal litigation of pretrial motions. Tiernan v. Dunn, D.C.R.I.1969, 295 F.Supp. 1253.

"Rule 12(g) is intended to require consolidation of defenses and thus discourage delay and dilatory tactics." Printing Plate Supply Co. v. Curtis Publishing Co., D.C.Pa.1968, 278 F.Supp. 642, 644.

Bowles v. Sunshine Packing Corp., D.C.Pa.1946, 5 F.R.D. 282.

Thorne, Neale & Co. v. Coe, D.C.D.C.1943, 3 F.R.D. 259, modified on other grounds C.A.1944, 143 F.2d 155, 79 U.S.App.D.C. 122.

Martin v. Moery, D.C.Ill.1939, 1 F.R.D. 127.

Tatum v. R.J. Reynolds Tobacco Co., D.C.N.C.2007, 2007 WL 1612580 (slip op.).

Norwood v. Raytheon Co., D.C.Tex.2006, 455 F.Supp.2d 597.

Association of Irritated Residents v. C & R Vanderham Dairy, D.C.Cal.2006, 2006 WL 2644896 (slip op.).

[FN14]

Second motion unavailable

If the defendant makes a Rule 12 motion but omits its objection to the timeliness or effectiveness of service, that objection is waived, despite Rule 4(m)'s requirement that a court may dismiss an action if service is not effected within 120 days of filing the complaint. Rule 12(h) trumps Rule 4(m). However, if a court dismisses the case for lack of personal jurisdiction, the defendant may claim later that service of process in the new forum was insufficient. Furthermore, if a defendant moves to dismiss for lack of personal jurisdiction due to insufficiency of service of process, the defendant effectively raises the defense that service of process was insufficient. McCurdy v. American Bd. of Plastic Surgery, C.A.3d, 1998, 157 F.3d 191, **quoting Wright & Miller.**

English v. Dyke, C.A.6th, 1994, 23 F.3d 1086.

Rauch v. Day & Night Mfg. Corp., C.A.6th, 1978, 576 F.2d 697, 701 n. 3, **quoting Wright & Miller.**

Union Camp Corp. v. Dyal, C.A.5th, 1972, 460 F.2d 678, certiorari denied 93 S.Ct. 56, 409 U.S. 849, 34 L.Ed.2d 90.

Hays v. United Fireworks Mfg. Co., C.A.9th, 1969, 420 F.2d 836.

Zisman v. Sieger, D.C.Ill.1985, 106 F.R.D. 194.

In a declaratory judgment action concerning the plaintiff railroad's rate-making activities, the district court found that the defendant railroad's failure to question personal jurisdiction when it filed its first motion to dismiss constituted waiver and barred present consideration of the issue, despite the defendant's assertions that the later motion should have been treated as an amendment to the first motion to dismiss, and the first motion to dismiss was not based upon one of the defenses enumerated in the rule governing defenses which may be asserted by motion prior to filing the answer. Consolidated Rail Corp. v. Grand Trunk W. R.R. Co., D.C.Pa.1984, 592 F.Supp. 562.

Standard Oil Co. v. Montecatini Edison S.p.A., D.C.Del.1972, 342 F.Supp. 125.

Roller Derby Associates v. Seltzer, D.C.Ill.1972, 54 F.R.D. 556 (Rule 12(e) mistakenly cited).

When the defendant moved to dismiss for failure to state a claim for relief and omitted from his motion any objection with respect to personal jurisdiction, the objection was waived. Ryan v. Glenn, D.C.Miss.1971, 52 F.R.D. 185, 189 n. 6, **citing Wright & Miller.**

Tiernan v. Dunn, D.C.R.I.1969, 295 F.Supp. 1253.

Elbinger v. Precision Metal Workers Corp., D.C.Wis.1956, 18 F.R.D. 467.

If a party makes a motion under Rule 12 and omits therefrom some defense or objection that could have been included, he may not thereafter make a motion based on that defense or objection. P. Beiersdorf & Co. v. Duke Labs., Inc., D.C.N.Y.1950, 10 F.R.D. 282.

Federal Landlords Committee, Inc. v. Woods, D.C.N.Y.1949, 9 F.R.D. 622.

Birnbaum v. Birrell, D.C.N.Y.1948, 9 F.R.D. 72.

Food, Tobacco, Agricultural & Allied Workers Union of America, Local 186 v. Smiley, D.C.Pa.1946, 74 F.Supp. 823, affirmed on other grounds C.A.3d, 1947, 164 F.2d 922.

Keefe v. Derounian, D.C.Ill.1946, 6 F.R.D. 11.

Broomfield v. Doolittle, D.C.N.Y.1942, 2 F.R.D. 517, 519.

U.S. v. Columbia Gas & Elec. Corp., D.C.Del.1941, 1 F.R.D. 606.

Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp., D.C.Pa.1940, 31 F.Supp. 403.

See also

Varone v. Varone, C.A.7th, 1968, 392 F.2d 855, certiorari denied 89 S.Ct. 162, 393 U.S. 872, 21 L.Ed.2d 141.

But see

Garrett v. Miller, D.C.Ill.2003, 2003 WL 1790954 (court refused to allow defendants' attempt in reply brief to convert their Rule 12(b)(5) motion into broader motion under Rules 12(b)(4) and 12(b)(6) as well, but then inexplicably encouraged defendants to submit subsequent motion explicitly on those grounds).

Steele v. Stephan, D.C.Kan.1986, 633 F.Supp. 950.

Cohen v. Beneficial Indus. Loan Corp., D.C.Del.1950, 93 F.Supp. 418.

[FN15]

Waiver of defense

See §§ 1390 to 1397.

5C FPP § 1384

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Federal Rules Of Civil Procedure
The Late Charles Alan Wright[FNa12], Arthur R. Miller[FNa13]

Chapter 4. Pleadings and Motions
Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing
I. Waiver And Preservation Of Defenses

Link to Monthly Supplemental Service

§ 1391Waiver of Certain Defenses—Rule 12(h)(1)

Primary Authority

Fed. R. Civ. P. 12

Forms

West's Federal Forms § 2461

According to Federal Rule 12(h)(1), the threshold defenses of lack of personal jurisdiction,[FN1] improper venue,[FN2] insufficiency of process,[FN3] and insufficiency of service of process[FN4]—Rule 12(b)(2) through Rule 12(b)(5)—are waived if they are not included in a preliminary motion under Rule 12 as required by Rule 12(g) or, if no such motion is made, they are not included in the responsive pleading or an amendment as of right to that pleading under Rule 15(a). In order to understand the present operation of Rule 12(h) on these particular defenses it is necessary to consider the consolidation requirements of Rule 12(g)[FN5] and the history of subdivision (h).

Almost since its adoption, Rule 12(g) has been understood to require a party moving under Rule 12 before submitting a responsive pleading to consolidate all Rule 12 defenses and objections that are "then available" to the party.[FN6] One serious question of construction arose shortly after the adoption of the federal rules. Prior to 1966 the relevant portion of Rule 12(h) read as follows: "A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply." It was not clear from this language whether a movant's failure to consolidate an available Rule 12(b)(2) through Rule 12(b)(5) defense pursuant to Rule 12(g) not only prevented that party from making the omitted defense the basis of an additional motion but also foreclosed it from raising the matter in its responsive pleading.

A number of federal courts followed the Ninth Circuit's reading of the passage, articulated in Phillips v. Baker,[FN7] and held that the omitted defense could be interposed in the answer.[FN8] In the Phillips opinion, the court stated that to preclude the defendant from raising the defense of improper venue in its answer simply because it had not joined it in its pre-answer motion raising another issue would give Rule 12(h)

a narrow, rigid and illiberal construction, which frequently would result in injustice and which in this case

> would deprive defendants of a valuable right. Evidently, the paragraph was intended to provide that any defense permitted to be made by motion at the option of the defendant, and which is not raised *either* by motion *or* by the answer, will be deemed to have been waived.[FN9]

However, a majority of the courts that dealt with the problem interpreted Rule 12(h) more restrictively, holding that a party making a pre-answer motion under Rule 12 irrevocably waived any enumerated defense that was not properly consolidated.[FN10] A fairly typical analysis of the problem was provided in Keefe v. Derounian,[FN11] in which the court stated:

> It hardly seems reasonable first to deny that a defendant can raise this dilatory defense at this stage by one type of pleading called a motion, and then allow him to raise it by another type of pleading called the answer. To lay such emphasis on formalism seems contrary to the purpose for which the Rules of Civil Procedure were adopted.[FN12]

Rule 12(h) was amended in 1966 to resolve this controversy. The rulemakers clearly indicated their agreement with the result, reached in the majority of pre-amendment decisions, that omitted defenses cannot be raised in the answer. A portion of the Advisory Committee's Note to the amended subdivision makes this clear and reads as follows:

> Amended subdivision (h)(1)(A) eliminates the [former] ambiguity, and states that certain specified defenses which were available to a party when he made a preanswer motion, but which he omitted from the motion, are waived. ... A party who by motion invites the court to pass upon a threshold defense should bring forward all the specified defenses he then has and thus allow the court to do a reasonably complete job. The waiver reinforces the policy of subdivision (g) forbidding successive motions.[FN13]

Thus, it now is settled that any time a defendant makes a pre-answer Rule 12 motion, he or she must include, on penalty of waiver, the defenses set forth in subdivisions (2) through (5) of Rule 12(b). If one or more of these defenses are omitted from the initial motion but were "then available" to the movant, they are permanently lost. Not only is the defendant prevented from making it the subject of a second preliminary motion, but—as the cases in the note below make clear—the defendant may not even assert the defense in the answer.[FN14] Courts have continued to maintain that if the defendant has properly raised a defense by motion or in the answer, even though the defendant participates in the litigation on the merits, the defense still can be preserved and reasserted later in the action.[FN15] In some cases the enforcement of a forum selection clause has been analogized to a venue defense for purposes of Rule 12(h) analysis, thereby widening the ambit of that subdivision's waiver principle.[FN16]

The waiver principle embodied in the current language of Rule 12(h)(1) is illustrated by Tiernan v. Dunn.[FN17] In that case, the defendant initially moved to dismiss for failure to state a claim for relief. A second motion raising the defenses of improper service of process and lack of in personam jurisdiction followed. The court held that under Rule 12(g) the defendant no longer could raise these defenses by motion and that under Rule 12(h)(1) the defenses had been waived:

> Whatever may have been the defendant's reason for not raising her additional defenses on her initial motion, the fact remains that she did not do so. She could have saved all her grounds by making a consolidated motion and still have obtained the expeditious dismissal on the 12(b)(6) basis she now claims to have been seeking. To permit this defense to be raised now would undermine the very purpose of Rule 12(g), (h), which is the avoidance of time-consuming, piece-meal litigation of pre-trial motions.[FN18]

If a party does not make a preliminary motion or if a defense was not available at the time he first moved,[FN19] that party is not vulnerable to a waiver argument and may present a Rule 12(b)(2) through Rule 12(b)(5) challenge but it must be included in the responsive pleading.[FN20] The penalty for failing to raise any of

these defenses at this point is waiver as numerous federal courts have held, as the illustrative case citations in the note below from throughout the federal judicial system demonstrate, and as the text of the rule makes clear.[FN21]

However, as already noted, Rule 12(h)(1) does not provide for waiver if the omitted defense was unavailable when the party answered,[FN22] as might be the case if the complaint does not give the defendant sufficient notice that the plaintiff is making a certain type of claim.[FN23] For example, a failure to object to venue initially will not bar an assertion of the defense when the defendant finally is apprised of the nature of the claim against him and it reveals a lack of venue; a few cases illustrating situations in which a defense was not held to have been waived are cited in the note below.[FN24] Except for this qualification, a court will not entertain a motion to dismiss based on a personal jurisdiction, venue, or service of process defect after the responsive pleading has been filed.

Two cases illustrate waiver under Rule 12(h)(1) in this context. In Bethlehem Steel Corporation v. Devers,[FN25] the defendant alleged that the court lacked jurisdiction over his person and moved to rescind a partial summary judgment order entered against him. The Fourth Circuit affirmed the district court's denial of the defendant's motion: "[S]ince no attack on personal jurisdiction was made in a pre-answer motion or in the answer itself, the defense of lack of jurisdiction over the person is waived."[FN26] In the second case, United States v. Article of Drug Designated B-Complex Cholinos Capsules,[FN27] a party sought to raise the defense of lack of personal jurisdiction for the first time after trial. The Third Circuit rejected the attempt stating:

> An extensive trial was had and the appellant raised this question for the first time in its post-trial brief. It is unnecessary to cite cases for the proposition that, if a defendant goes to trial on the merits without raising the question of personal jurisdiction, any defects in that connection are waived.[FN28]

Until 1966 a party might have escaped the consequences of a failure to plead the defenses set forth in Rules 12(b)(2) through 12(b)(5) by amending its pleadings.[FN29] Presently, however, Rule 12(h)(1) severely restricts this practice. The court no longer has the authority to grant leave to amend in order to add one of these four defenses; according to the language of subdivisions (h)(1), this may be done only by an amendment to the answer permitted as a matter of course under the first sentence of Rule 15(a),[FN30] which requires the party to act very quickly.

Thus, the message conveyed by the present version of Rule 12(h)(1) seems quite clear. It advises a litigant to exercise great diligence in challenging personal jurisdiction, venue, or service of process. If that party wishes to raise any of these defenses, that must be done at the time the first significant defensive move is made—whether it be by way of a Rule 12 motion or a responsive pleading.[FN31] Furthermore, a party can be held to have waived a defense listed in Rule 12(h)(1) through conduct, such as extensive participation in the discovery process or other aspects of the litigation of the case even if the literal requirements of Rule 12(h)(1) have been met, although the cases are far from uniform on the subject; the result seems to turn on the particular circumstances of an individual case.[FN32]

As a general rule, federal courts will consider a Rule 12(b) motion by a party in default as untimely and therefore as having been waived.[FN33] Several courts have gone further, however, and held that a venue or service of process objection is waived if not asserted within twenty days after the service of the summons and complaint.[FN34] These courts appear to reason that because Rule 12(a) requires the responsive pleading to be served within twenty days of the service of the summons and the complaint (or sixty days when the Rule 4(d) waiver of formal service is used or ninety days in the case of service outside the United States), that period also delimits the time for interposing those defenses that must be asserted by motion or in the responsive pleading.[FN35]

Although this approach has the desirable effect of compelling the early assertion of the Rule 12(b)(2) through Rule 12(b)(5) defenses, it is premised on an overly strict interpretation of the language of Rule 12(a) and Rule 12(h)(1). The former provision only deals with the time at which the pleading must be served and is silent on the question of waiver. The latter provision does not call for the assertion of the defense within the time provided in

Rule 12(a) for serving a responsive pleading; it merely dictates waiver if the defense is not made by motion or included in the responsive pleading, presumably whenever it may happen to be served.[FN36] There do not appear to be any recent cases applying the Rule 12(a) benchmark for waiver.

Perhaps a line can be drawn between waiver of the right to present the omitted defense by pre-answer motion and the total waiver of the defense. Conceivably, it would be appropriate for a district court to conclude that a motion based upon one of the Rule 12(b)(2) through Rule 12(b)(5) defenses is untimely if more than twenty days have passed since the service of the summons and complaint; even in this context, however, the second sentence of Rule 12(b) allows a motion to be "made before pleading," and does not limit the period to twenty days, a period frequently extended by stipulation between opposing counsel. In any event, if the passage of time is not serious enough to justify denying the defendant the right to respond, then her right to include a Rule 12(b)(2) through Rule 12(b)(5) defense in the answer should not be extinguished.

Another group of cases, illustrated by Seman v. Pittsburgh Brewing Company,[FN37] poses an interesting question as to what constitutes a waiver of improper service. In Seman, service was made outside the state, contrary to the text of Rule 4(f) as it existed at that time. The defendant moved to dismiss, apparently under Rule 12(b)(5), for insufficient service of process. The plaintiff claimed that the defendant had waived the right to make this objection by not asserting it within twenty days of service. The court rejected this argument, and sustained the motion to dismiss, saying that the "defendant cannot waive lack of service by non-appearance because, there being no jurisdiction over the person, the twenty-day period cannot begin to run."[FN38]

The Seman court's argument, however, cannot carry the full weight of the issue presented to it. The court is correct that if a party is never served at all, he or she cannot be held to have waived the right to object to a lack of jurisdiction over the person by nonassertion within twenty days;[FN39] due process would preclude the result and the rules themselves prevent it, by Rule 12(a) making the twenty-day period run from the date of service. But when the party has received actual notice of the commencement of the suit, there is no due process problem in requiring that party to object to the ineffective service within the period prescribed by Rule 12(h)(1) and the defense is one that the defendant certainly can waive if he or she wishes to do so.[FN40] In other words, many defenses that are waivable under Rule 12(h)(1), such as venue objections, do not implicate whether the district court has personal jurisdiction over the defendant. In those cases, the Seman court's argument that the twenty-day period cannot begin to run simply does not hold up to scrutiny.

The Seman court would have done better to recognize that the premise of the plaintiff's argument was simply unmoored from the text of the rule. As indicated earlier in this section, the construction of Rule 12(a) and Rule 12(h)(1) claiming that waiver should occur automatically after twenty days seems dubious. Although the text of Rule 12(h)(1) appears to be clear that waiver occurs after the filing of a responsive pleading, rather than the Rule 12(a) time limit for such a filing, an amendment of Rule 12 to clarify this issue might be desirable.

A distinction should be drawn, however, between service of process objections and personal jurisdiction objections. An objection to personal jurisdiction may raise constitutional issues, and the non-appearance of the defendant should not constitute a waiver of that defense.[FN41] Indeed, if there has been a failure of due process, that objection may permit relief from any judgment that has been entered[FN42] or may be raised on collateral attack. Some personal jurisdiction objections are not so compelling, however. If the defendant is merely arguing that there is no jurisdiction because service of process or the content of the papers was defective or improper and thus did not effectuate jurisdiction over his person, then the objection is not of a constitutional dimension and Rule 12(h)(1) waiver principles clearly should apply.

[FNa12] Charles Alan Wright Chair in Federal Courts, The University of Texas.

[FNa13] Bruce Bromley Professor of Law, Harvard University.

[FN1]

Personal jurisdiction

See vol. 5B, § 1351.

See also

Boston Telecommunications Group, Inc. v. Deloitte Touche Tohmatsu, C.A.9th, 2007, 2007 WL 2827681 (for citation rules see Ninth Circuit Rule 36-3).

Hamilton v. Willms, D.C.Cal.2007, 2007 WL 2904286 (slip op.).

Griffin v. Lincoln Nat. Corp., D.C.Ariz.2007, 2007 WL 2713237 (slip op.).

Hargrove & Costanzo v. U.S., D.C.Cal.2007, 2007 WL 2409590 (slip op.).

Dekalb Genetics Corp. v. Syngenta Seeds, Inc., D.C.Mo.2007, 2007 WL 1223510 (slip op.).

Reed v. City of Cleveland, D.C.Ohio 2007, 2007 WL 30286 (slip op.).

Cline v. Hanby, D.C.W.Va.2006, 2006 WL 3692647 (slip op.).

Lietzke v. County of Montgomery, D.C.Ore.2006, 2006 WL 2947118 (slip op.).

[FN2]

Venue

See vol. 5B, § 1352.

[FN3]

Process

See vol. 5B, §§ 1353 to 1354.

[FN4]

Service of process

See vol. 5B, §§ 1353 to 1354.

[FN5]

Rule 12(g)

See § 1385.

[FN6]

"Then available"

See § 1388.

[FN7]

Phillips case

C.A.9th, 1941, 121 F.2d 752, certiorari denied 62 S.Ct. 301, 314 U.S. 688, 86 L.Ed. 551.

[FN8]

No waiver in answer

The defenses of lack of jurisdiction over the persons of nonresident defendants and insufficiency of service of process were not waived by being omitted from the defendants' original motion to dismiss and could be presented in the answer. Crum v. Graham, D.C.Mont.1963, 32 F.R.D. 173.

When no objection as to the court's venue was raised by the defendants at the time a motion to dismiss the complaint for lack of diversity of citizenship was made and denied, the right to object to venue by motion was waived, although the question might be raised in the answer. Birnbaum v. Birrell, D.C.N.Y.1948, 9 F.R.D. 72.

Hoyle v. United Auto Workers Local Union 5285, D.C.N.C.2006, 444 F.Supp.2d 467.

Killion v. Commonwealth Yachts, D.C.Mass.2006, 421 F.Supp.2d 246.

Strong Pharmaceutical Laboratories, LLC v. Trademark Cosmetics, Inc., D.C.Md.2006, 2006 WL 2033138.

See also

Johnson v. Joseph Schlitz Brewing Co., D.C.Tenn.1940, 33 F.Supp. 176, 182 (dictum), affirmed per curiam C.A.6th, 1941, 123 F.2d 1016.

[FN9]

Narrow, rigid, and illiberal

121 F.2d at 755 (Garrecht, J.).

[FN10]

Defense waived

Graff v. Nieberg, C.A.7th, 1956, 233 F.2d 860 (personal jurisdiction defense waived).

Food, Tobacco, Agricultural & Allied Workers Union of America, Local 186 v. Smiley, D.C.Pa.1946, 74 F.Supp. 823 (personal jurisdiction and venue defenses waived), affirmed on other grounds C.A.3d, 1947, 164 F.2d 922.

Branic v. Wheeling Steel Corp., C.A.3d, 1945, 152 F.2d 887 (service of process and personal jurisdiction defenses waived), certiorari denied 66 S.Ct. 902, 327 U.S. 801, 90 L.Ed. 1026.

Huber v. Bissel, D.C.Pa.1965, 39 F.R.D. 346 (service of process and personal jurisdiction defenses waived).

Rensing v. Turner Aviation Corp., D.C.Ill.1958, 166 F.Supp. 790, 799 (venue objection waived).

Elbinger v. Precision Metal Workers Corp., D.C.Wis.1956, 18 F.R.D. 467 (improper venue and lack of jurisdiction over person waived).

Neset v. Christensen, D.C.N.Y.1950, 92 F.Supp. 78 (improper venue waived).

P. Beiersdorf & Co. v. Duke Labs., Inc., D.C.N.Y.1950, 10 F.R.D. 282.

Keefe v. Derounian, D.C.Ill.1946, 6 F.R.D. 11 (service of process defense waived).

Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp., D.C.Pa.1940, 31 F.Supp. 403, 408 (venue defense waived).

e360 Insight v. The Spamhaus Project, C.A.7th, 2007, 500 F.3d 594.

The Ninth Circuit construes the provisions of Rule 12(h) strictly, observing that a "fundamental tenet" of the Federal Rules is that "certain defenses ... must be raised at the first available opportunity or, if they are not, they are forever waived." Boston Telecommunications Group, Inc. v. Deloitte Touche Tohmatsu, C.A.9th, 2007, 2007 WL 2827681 (for citation rules see Ninth Circuit Rule 36-3).

Hamilton v. Willms, D.C.Cal.2007, 2007 WL 2904286 (slip op.).

Binns v. City of Marietta Housing Authority, D.C.Ga.2007, 2007 WL 2746695 (slip op.).

See also

Concession Consultants, Inc. v. Mirisch, C.A.2d, 1966, 355 F.2d 369 (service of process defect waived).

Stavang v. American Potash & Chem. Corp., C.A.5th, 1965, 344 F.2d 117 (personal jurisdiction defense waived).

[FN11]

Keefe case

D.C.Ill.1946, 6 F.R.D. 11.

[FN12]

Hardly seems reasonable

Id. at 13 (Campbell, J.).

[FN13]

Advisory Committee Note

The full text of the Advisory Committee Note is set out in vol. 12A, App. C.

See also

Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (II), 1968, 81 Harv.L.Rev. 591, 604–608.

[FN14]

Waiver of defenses

Particular defenses

—personal jurisdiction

Mattel, Inc. v. Barbie-Club.com, C.A.2d, 2002, 310 F.3d 293 (to preserve defense of lack of personal jurisdiction, defendant need only state defense in its first responsive filing and need not articulate defense with any rigorous degree of specificity).

A national professional dentists association, which failed to include an objection to the court's exercise of personal jurisdiction in its motion to dismiss, and which proceeded solely on the basis that venue was improper, waived its right to challenge personal jurisdiction notwithstanding the plaintiff's failure to raise the issue of waiver of the defense before the district court. Myers v. American Dental Ass'n, C.A.3d, 1982, 695 F.2d 716, certiorari denied 103 S.Ct. 2453, 462 U.S. 1106, 77 L.Ed.2d 1333.

In a case before a state court judge, the judge waived any claim that the federal district court lacked in personam jurisdiction over him, with respect to the federal court's order, when he filed a reply to the motion of the state court defendant. The defendant had moved to require the state court judge to comply with a federal court order that would require the judge to examine certain federal grand jury materials to determine which were relevant to the defendant's case. In re Grand Jury Proceedings, C.A.3d, 1981, 654 F.2d 268, certiorari denied 102 S.Ct. 671, 454 U.S. 1098, 70 L.Ed.2d 639.

Rauch v. Day & Night Mfg. Corp., C.A.6th, 1978, 576 F.2d 697.

"A motion or plea objecting to venue, unless venue by statute is itself jurisdictional, does not preserve a

jurisdictional issue." Guardian Title Co. v. Sulmeyer, C.A.9th, 1969, 417 F.2d 1290, 1292.

The defendant waived his objection to personal jurisdiction by failing to include the defense with his initial motion under Rule 12(b)(6). Varone v. Varone, C.A.7th, 1968, 392 F.2d 855, certiorari denied 89 S.Ct. 162, 393 U.S. 872, 21 L.Ed.2d 141.

Johnson v. Bryco Arms, D.C.N.Y.2004, 304 F.Supp.2d 383.

General Design Sign Co. v. American Gen. Design, Inc., D.C.Tex.2003, 2003 WL 251931 (filing Rule 12(b)(3) improper venue defense is insufficient to preserve Rule 12(b)(2) personal jurisdiction defense, despite two being related under particular venue statute, since nothing in motion to dismiss based on venue explicitly raised issue of personal jurisdiction; however, this result is extremely harsh since by finding waiver of personal jurisdiction, court basically mooted defendant's venue objection since venue statute permitted venue wherever there was personal jurisdiction).

Roll v. Tracor, Inc., D.C.N.Y.1998, 26 F.Supp.2d 482 (personal jurisdiction defense waived because not raised in first response, which was summary judgment motion).

Gray v. Snow King Resort, Inc., D.C.Wyo.1995, 889 F.Supp. 1473.

L & L Oil Co. v. Hugh Mac Towing Corp., D.C.La.1994, 859 F.Supp. 1002.

By failing to raise the issue of personal jurisdiction on a motion to dismiss, the defendant waived the defense of lack of personal jurisdiction. Forti v. Suarez-Mason, D.C.Cal.1987, 672 F.Supp. 1531.

Heise v. Olympus Optical Co., D.C.Ind.1986, 111 F.R.D. 1.

Transamerica Ins. Co. v. U.S., 1986, 9 Cl.Ct. 316, 318, citing Wright & Miller, affirmed sub nom. U.S. v. Rush, C.A.Fed., 1986, 804 F.2d 645.

Ruggieri v. General Well Serv., Inc., D.C.Colo.1982, 535 F.Supp. 525.

Although an objection to jurisdiction through the attachment process would not have succeeded at the time the answer was filed, the defendant's failure to assert therein the lack of in personam jurisdiction was a waiver of the issue and the defense could not be asserted later after a United States Supreme Court decision indicated that the attachment process was not permissible. Zets v. Scott, D.C.N.Y.1980, 498 F.Supp. 884.

Metz v. Unizan Bank, D.C.Ohio 2006, 416 F.Supp.2d 568.

Renaissance Pen Co. v. Krone LLC, D.C.Mo.2006, 2006 WL 2092424.

Eastern Bridge, LLC v. Bette & Cring, LLC., D.C.N.H.2006, 2006 WL 1428275.

Prime Lending, Inc. v. Moyer, D.C.Tex.2004, 2004 WL 1194461.

MCW, Incorporated v. Badbusinessbureau.com, L.L.C., D.C.Tex.2004, 2004 WL 833595, **quoting Wright & Miller.**

Comcast of Illinois X, LLC v. TKA Electronics, Inc., D.C.Neb.2004, 2004 WL 628222.

Compare

"[F]iling a counterclaim, compulsory or permissive, cannot waive a party's objections to personal jurisdiction, so long as the requirements of Rule 12(h)(1) are satisfied." William Ryan Homes of Wisconsin, Inc. v. Heritage Dev. of Wisconsin, LLC, D.C.Wis.2007, 2007 WL 1960625 (slip op.).

—venue

The defense of improper venue was waived when the motion for change of venue was not filed until eight days after the filing of the motion to dismiss for want of personal jurisdiction. Club Assistance Program, Inc. v. Zukerman, D.C.Ill.1984, 594 F.Supp. 341.

—service of process

If the defendant makes a Rule 12 motion but omits its objection to the timeliness or effectiveness of service, that objection is waived, despite Rule 4(m)'s requirement that a court may dismiss an action if service is not effected within 120 days of filing the complaint. Rule 12(h) trumps Rule 4(m). However, if a court dismisses the case for lack of personal jurisdiction, the defendant may claim later that service of process in the new forum was insufficient. Furthermore, if a defendant moves to dismiss for lack of personal jurisdiction due to insufficiency of service of process, the defendant effectively raises the defense that service of process was insufficient. McCurdy v. American Bd. of Plastic Surgery, C.A.3d, 1998, 157 F.3d 191.

RTC v. Starkey, C.A.5th, 1995, 41 F.3d 1018.

Grimaldo v. Reno, D.C.Colo.1999, 189 F.R.D. 617 (defendants waived their Rule 12(b)(5) defense because they failed to support their argument properly by neglecting either to cite case that supported defense or to inform court that rule on which they relied was formerly found elsewhere).

The defendant asserted the defenses of improper venue and lack of personal jurisdiction, but not the defense of insufficiency of service of process. Thus, the defense of insufficiency of service of process was waived. Furthermore, the defendant's motion to dismiss pursuant to Rule 12(b)(5) was untimely. Daniel v. American Bd. of Emergency Medicine, D.C.N.Y.1997, 988 F.Supp. 127.

The defendant's motion to dismiss for insufficiency of service must be rejected because it was not raised in a timely manner, as it was raised nineteen months after the filing of an appearance and nine months after the entry of default, and because it was omitted in a previously filed motion to dismiss. Bentley v. Raveh, D.C.Conn.1993, 151 F.R.D. 515.

Zisman v. Sieger, D.C.Ill.1985, 106 F.R.D. 194.

A nonprofit religious corporation sought damages and an injunction against present and former FBI agents and the Department of Justice for alleged violations of its First and Fourth Amendment rights, in connection with a search and seizure operation conducted by the FBI. The defendants filed a motion to dismiss for failure to state a claim for relief without asserting the personal defenses of two individual defendants that service of process was insufficient. Those defenses therefore were waived permanently, and waiver was not prevented by the fact that the religious corporation filed a "very different" amended

complaint, or by the fact that these defendants were not parties to the prior motion to dismiss. Church of Scientology of California v. Linberg, D.C.Cal.1981, 529 F.Supp. 945, 967, **citing Wright & Miller.**

By filing her cross-claim and later obtaining the court's approval to file a third-party claim, the defendant waived her otherwise timely objection to the manner in which she was served with process. Merz v. Hemmerle, D.C.N.Y.1981, 90 F.R.D. 566.

Candido v. District of Columbia, D.C.D.C.2007, 242 F.R.D. 151.

Binns v. City of Marietta Housing Authority, D.C.Ga.2007, 2007 WL 2746695 (slip op.).

Tate v. Waller, D.C.Miss.2007, 2007 WL 2688532 (slip op.).

Curley v. Radow, D.C.Mass.2007, 2007 WL 2060015 (slip op.).

High Island Health, LLC v. Libertybelle Marketing Ltd., D.C.Tex.2007, 2007 WL 1173631 (slip op.).

Moore v. Cross, D.C.Minn.2007, 2007 WL 835417 (slip op.).

Harris v. Herbik, D.C.Pa.2006, 2006 WL 3694500 (slip op.) (for citation rules see Third Circuit Rule 28.3(a)).

In general

Central Laborers' Pension, Welfare, & Annuity Funds v. Griffee, C.A.7th, 1999, 198 F.3d 642.

Albany Ins. Co. v. Almacenadora Somex, S.A., C.A.5th, 1993, 5 F.3d 907.

EF Operating Corp. v. American Bldgs., C.A.3d, 1993, 993 F.2d 1046, citing Wright & Miller, certiorari denied 114 S.Ct. 193, 510 U.S. 868, 126 L.Ed.2d 151.

FDIC v. Oaklawn Apartments, C.A.10th, 1992, 959 F.2d 170.

Mitchell v. Hobbs, C.A.1st, 1991, 951 F.2d 417.

Pusey v. Dallas Corp., C.A.4th, 1991, 938 F.2d 498, 501, **citing Wright & Miller.**

SEC v. Cherif, C.A.7th, 1991, 933 F.2d 403, certiorari denied 112 S.Ct. 966, 502 U.S. 1071, 117 L.Ed.2d 131.

Sanderford v. Prudential Ins. Co. of America, C.A.11th, 1990, 902 F.2d 897.

Pardazi v. Cullman Medical Center, C.A.11th, 1990, 896 F.2d 1313, **citing Wright & Miller.**

Chilicky v. Schweiker, C.A.9th, 1986, 796 F.2d 1131, 1136, quoting Wright & Miller, reversed on other grounds 1988, 108 S.Ct. 2460, 487 U.S. 412, 101 L.Ed.2d 370.

Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., C.A.5th, 1977, 549 F.2d 368.

Union Camp Corp. v. Dyal, C.A.5th, 1972, 460 F.2d 678, certiorari denied 93 S.Ct. 56, 409 U.S. 849, 34 L.Ed.2d 90.

Union Planters Bank, N.A. v. EMC Mortgage Corp., D.C.Tenn.1999, 67 F.Supp.2d 915, motion to dismiss denied following transfer D.C.Tex.2000, 2000 WL 622075.

Committe v. Dennis Reimer Co., D.C.Vt.1993, 150 F.R.D. 495.

Omni Video Games, Inc. v. Wing Co., D.C.R.I.1991, 754 F.Supp. 261, 264, **quoting Wright & Miller.**

Gear v. Constantinescu, D.C.N.J.1990, 741 F.Supp. 525.

P & E Electric, Inc. v. Utility Supply of America, Inc., D.C.Tenn.1986, 655 F.Supp. 89.

Martin v. Delaware Law School of Widener Univ., D.C.Del.1985, 625 F.Supp. 1288, 1296 n. 5.

Madden v. Cleland, D.C.Ga.1985, 105 F.R.D. 520.

Defenses based on a lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process were waived by the failure to assert those defenses in the first motion to dismiss, even though they were included in a second motion to dismiss. U.S. v. Tomasello, D.C.N.Y.1983, 569 F.Supp. 1.

See also

Tuckman v. Aerosonic Corp., Del.Ch.1978, 394 A.2d 226, 232, **citing Wright & Miller.**

Compare

Although the defenses of improper venue and lack of personal jurisdiction are waived if not raised in a timely manner, this does not automatically preclude an appellate court from affirming the sua sponte dismissal of a complaint under Section 1915(e) of Title 28 on the basis of those defenses. Since a sua sponte dismissal may leave a plaintiff without an opportunity to be heard, the appellant may raise arguments supporting venue or personal jurisdiction, and even proffer evidence, for the first time, on appeal. Only if the appellants can make the relevant showing will the appellees be required to enter an appearance and respond to an order to show cause why the district court's dismissal order should not be vacated and the case remanded. Buchanan v. Manley, C.A.1998, 145 F.3d 386, 330 U.S.App.D.C. 259.

But compare

A motion to dismiss did not waive the defense of lack of personal jurisdiction, although the defense was not developed in the supporting brief. The motion was filed pro se, the defense was in the title of the motion, and the defendant subsequently moved to amend in order to fully argue the defense. Polaroid Corp. v. Feely, D.C.Mass.1995, 889 F.Supp. 21, **citing Wright & Miller.**

Beck v. Jones & Co., D.C.Ill.1990, 735 F.Supp. 903, 904, **citing Wright & Miller.**

When the only fact of which an alleged taxpayer was aware, of record, was the denial of his motion seeking

to prevent his joinder as a defendant, and he had no reason to know that joinder had, in fact, been granted to the government, his original motion to dismiss did not waive his right to raise defects in service at a later time. Zeigler v. U.S., D.C.Pa.1980, 86 F.R.D. 703.

Holman v. Califano, D.C.Pa.1979, 83 F.R.D. 488 (venue waived).

A nonresident third-party defendant in a diversity action reserved the defense of lack of in personam jurisdiction after he attempted service under the Mississippi long-arm statute, by setting up in his answer that specific objection as a ground for dismissal, but he chose not to pursue that course and elected first to file a fourth-party complaint thereby expressly invoking the court's jurisdiction and moved for a default judgment against the fourth-party defendant. The third-party defendant therefore affirmatively waived the right to raise for the first time, just prior to trial, the claims of insufficiency of service of process. R. Clinton Constr. Co. v. Bryant & Reaves, Inc., D.C.Miss.1977, 442 F.Supp. 838.

U.S. for Use & Benefit of Kashulines v. Thermo Contracting Corp., D.C.N.J.1976, 437 F.Supp. 195, 197 n. 1 (venue waived).

The third-party defendant did not waive its objections to the transferee jurisdiction of the district court in Mississippi by failing to submit a brief or otherwise state its position to the Ninth Circuit Court of Appeals at the time the plaintiffs' petition for a writ of mandamus restraining transfer was denied, when the third-party defendant had filed its motion to dismiss in a timely fashion, almost three months prior to the Ninth Circuit's ruling on the plaintiffs' petition, and prosecuted its motion in a timely fashion, but at the original hearing thereon, the transferee court reserved the ruling in the interest of judicial economy and in order to avoid potentially inconsistent results. Hospes v. Burmite Div. of Whittaker Corp., D.C.Miss.1976, 420 F.Supp. 806.

Far-Mar-Co. v. Schultz Cattle Co., D.C.Okl.1976, 71 F.R.D. 225.

Sangdahl v. Litton, D.C.N.Y.1976, 69 F.R.D. 641.

Standard Oil Co. v. Montecatini Edison S.p.A., D.C.Del.1972, 342 F.Supp. 125.

Jones v. Bales, D.C.Ga.1972, 58 F.R.D. 453 (venue objection).

Home Indem. Co. v. U.S., D.C.Mo.1970, 313 F.Supp. 212 (venue waived).

Tiernan v. Dunn, D.C.R.I.1969, 295 F.Supp. 1253.

The defendant, by contesting venue by pre-answer motion, waived the right subsequently to question jurisdiction. Guenther v. Morehead, D.C.Iowa 1967, 272 F.Supp. 721, 724.

But see

In an action by the holder of some cashier's checks against the Federal Deposit Insurance Corporation, as the receiver for a national bank that had dishonored the checks, the court held that the FDIC did not waive any objection based on improper venue by moving first to dismiss for a lack of personal jurisdiction. The decision was based on the court's belief that since the venue of the action was provided for specifically by the Federal Deposit Insurance Act, the broader language in the general venue provisions should not be allowed to govern, even though it was literally applicable. Thus, it transferred the case to the proper district.

TPO Incorporated v. FDIC, D.C.N.Y.1971, 325 F.Supp. 663.

Venue

Berry v. Deutsche Bank Trust Co. Americas, D.C.Haw.2007, 2007 WL 2363366 (slip op.).

Danny's Constr. Co. v. Travelers Cas. & Sur. Co. of America, D.C.Ill.2006, 2006 WL 3370487 (slip op.).

[FN15]

Litigation on merits

At the outset, the defendants filed a motion to dismiss for lack of personal jurisdiction, which was denied. The defendants failed to contest personal jurisdiction any further in the proceedings before the district court but raised the issue on appeal. The court of appeals held that the defendants had not waived the defense and could raise the issue on appeal. The court of appeals also held that any objection to the district court's contempt proceedings based on lack of notice had been waived. Peterson v. Highland Music, Inc., C.A.9th, 1998, 140 F.3d 1313, certiorari denied 119 S.Ct. 446, 525 U.S. 983, 142 L.Ed.2d 401.

The defendant did not waive its defense to personal jurisdiction by participating in the litigation on the merits since it did so at the direction of the district judge after having raised the defense in a timely fashion. IDS Life Ins. Co. v. SunAmerica Life Ins. Co., C.A.7th, 1998, 136 F.3d 537.

Willis v. Tarasen, D.C.Minn.2005, 2005 WL 1705839 (defendant did not waive his insufficient process defense by participating in pretrial scheduling conference).

But see

Because Rule 12(b) defenses should be presented at the first available opportunity, a party may waive a defense of lack of personal jurisdiction by its conduct in the litigation. Pulse v. Larry H. Miller Group, D.C.Colo.2005, 2005 WL 1563222.

A defendant who objects to personal jurisdiction in his answer but does not reraise his objections as he fully participates in the litigation on the merits of the case waives personal jurisdiction objections. Maxwell v. Vertical Networks, Inc., D.C.Ill.2005, 2005 WL 950634.

[FN16]

Forum selection

Although a forum selection clause differs in some respects from an argument that statutory venue does not lie in the district the plaintiff has chosen, the two are sufficiently close—and the need for prompt determination of a suit's location sufficiently great—that forum selection clauses are grouped with statutory venue issues for purposes of Rule 12(h)(1). Sharpe v. Jefferson Distributing Co., C.A.7th, 1998, 148 F.3d 676 (seven-month delay in asserting forum selection clause of contract was too long, resulting in waiver, especially because earlier answer to complaint had conceded venue).

The court of appeals held that any objection to the entertainment of the petition before the court was waivable and had been waived: provisions specifying where a suit shall be filed, as distinct from specifying

what kind of court or other tribunal it shall be filed in, generally are considered to be specifying venue rather than jurisdiction. New York v. EPA, C.A.7th, 1998, 133 F.3d 987 (Clean Air Act).

But compare

Abiola v. Abubakar, D.C.Ill.2003, 267 F.Supp.2d 907 (although defense of improper venue can be waived under Rule 12(h)(1), motion for forum non conveniens dismissal was not waived, even when styled by defendant as challenge of "improper venue based on forum non conveniens").

Chateau Des Charmes Wines Ltd. v. Sabate USA, Inc., D.C.Cal.2003, 2003 WL 22682483 (forum non conveniens motion is not motion for improper venue and therefore is not subject to consolidation under Rule 12(g) or waiver under Rule 12(h)(1)).

[FN17]

Tiernan case

D.C.R.I.1969, 295 F.Supp. 1253.

[FN18]

Quotation

Id. at 1256 (Pettine, J.).

[FN19]

Defense not available

See § 1388.

[FN20]

Defense in responsive pleading

The defense preserved the right to contest personal jurisdiction even though it had participated in pretrial proceedings, when it objected to personal jurisdiction in a motion to dismiss, in its answer, and in opposition to the plaintiff's motion for summary judgment. Media Duplication Servs., Ltd. v. HDG Software, Inc., C.A.1st, 1991, 928 F.2d 1228.

In an action instituted by foreign attachment, a foreign corporation challenged the constitutionality of the foreign attachment procedures in a motion to dissolve the attachment, in the answer, and in a subsequent motion to substitute security in the form of United States Treasury notes. The defense of lack of jurisdiction was not waived by the foreign corporation's acts in filing the security or conducting discovery for over one year before bringing the jurisdictional issue to a head by motion. Jonnet v. Dollar Savs. Bank of the City of New York, C.A.3d, 1976, 530 F.2d 1123, 1125 n. 5.

The defendants filed for an extension of time to answer and then began discovery. Later, the defendants

raised the lack of personal jurisdiction as an affirmative defense in their answer. The court held that the defendants had not waived the defense of personal jurisdiction. Terzano v. PFC, D.C.Puerto Rico 1997, 986 F.Supp. 706.

FDIC v. Cheng, D.C.Tex.1993, 832 F.Supp. 181.

Classic Motel, Inc. v. Coral Group, Ltd., D.C.Miss.1993, 149 F.R.D. 528, **quoting Wright & Miller.**

The participation of nonresident defendants in pre-answer discovery did not, of itself, constitute a waiver of any objection they might have as to a lack of federal court jurisdiction in a diversity action. National Expositions, Inc. v. DuBois, D.C.Pa.1983, 97 F.R.D. 400.

The defendants did not waive the defense of improper venue by asserting it in an amended answer filed twenty days after the original answer was filed, rather than moving to dismiss the complaint on that ground. Sherman v. Moore, D.C.N.Y.1980, 86 F.R.D. 471.

M. Lowenstein & Sons, Inc. v. Austin, D.C.N.Y.1977, 430 F.Supp. 844 (Rule 12(b)(2) defense).

When the defendants did not make a motion before serving their answer, but included in their answer the affirmative defense that the district court did not have jurisdiction over the persons of either defendant, the defendants did not waive their defense of lack of in rem jurisdiction. Fish v. Bamby Bakers, Inc., D.C.N.Y.1977, 76 F.R.D. 511.

Bailey v. Transportation-Communication Employees Union, D.C.Miss.1968, 45 F.R.D. 444.

See also

Restrepo v. Colgate Univ., D.C.N.Y.1993, 149 F.R.D. 17 (defendant's failure to respond to sua sponte Order to Show Cause to dismiss action for lack of personal jurisdiction did not waive sufficiency of service of process defense since defendant had no obligation to respond).

Compare

U.S. v. One 1978 Piper Cherokee Aircraft, Tail No. N 5538V, Including its Tools & Appurtenances, C.A.9th, 1994, 37 F.3d 489.

Brownlow v. Aman, C.A.10th, 1984, 740 F.2d 1476, 1483 n. 1, **citing Wright & Miller.**

Network Professionals, Inc. v. Network Int'l Ltd., D.C.Minn.1993, 146 F.R.D. 179 (if defendants had properly raised personal jurisdiction defense in answer, their "strategy of delay," which "violated the spirit of Rule 12," waived defense).

[FN21]

Defense omitted from answer

First Circuit

Pila v. G.R. Leasing & Rental Corp., C.A.1st, 1977, 551 F.2d 941, 943, **citing Wright & Miller.**

Zelman v. U.S., D.C.Me.1995, 893 F.Supp. 78 (improper venue waived).

J. Slotnik Co. v. Clemco Indus., D.C.Mass.1989, 127 F.R.D. 435.

First Nat. City Bank v. Gonzalez & Co. Sucr. Corp., D.C.Puerto Rico 1970, 308 F.Supp. 596.

Campbell v. Maine Cent. Transp. Co., D.C.Me.1957, 20 F.R.D. 629.

Second Circuit

Jurisdiction was obtained in civil contempt proceedings when all the defendants appeared at trial and failed to interpose any objections to the court's personal jurisdiction as required in Rule 12(h)(1). Backo v. Local 281, United Bhd. of Carpenters & Joiners of America, C.A.2d, 1970, 438 F.2d 176, certiorari denied 92 S.Ct. 110, 404 U.S. 858, 30 L.Ed.2d 99.

Concession Consultants, Inc. v. Mirisch, C.A.2d, 1966, 355 F.2d 369.

Engineers Ass'n v. Sperry Gyroscope Co., Div. of Sperry Rand Corp., C.A.2d, 1957, 251 F.2d 133, certiorari denied 78 S.Ct. 774, 356 U.S. 932, 2 L.Ed.2d 762.

Drabik v. Murphy, C.A.2d, 1957, 246 F.2d 408.

Sears Petroleum & Transp. Corp. v. Ice Ban America, Inc., D.C.N.Y.2003, 217 F.R.D. 305 (lack of personal jurisdiction waived due to prior filing of answer).

Roll v. Tracor, Inc., D.C.N.Y.1998, 26 F.Supp.2d 482 (venue objection waived if not in answer).

Rohrer v. FSI Futures, Inc., D.C.N.Y.1997, 981 F.Supp. 270.

Arkwright Mut. Ins. Co. v. Scottsdale Ins. Co., D.C.N.Y.1995, 874 F.Supp. 601 (personal jurisdiction and service of process).

American Cablevision of Queens v. McGinn, D.C.N.Y.1993, 817 F.Supp. 317.

Seward & Kissel v. Smith Wilson Co., D.C.N.Y.1993, 814 F.Supp. 370.

Federal Home Loan Mortgage Corp. v. Dutch Lane Associates, D.C.N.Y.1991, 775 F.Supp. 133.

The defendant in an action for wrongful death and for decedent's pain and anguish waived its claim for lack of personal jurisdiction by failing to assert it in a motion or in its answer to the original complaint, and the fact that the plaintiff thereafter filed an amended complaint did not revive the right to assert the defense. Brohan v. Volkswagen Mfg. Corp. of America, D.C.N.Y.1983, 97 F.R.D. 46.

The nonresident defendant waived the defense of lack of in personam jurisdiction by failing to raise that defense in his answer, and the defendant would not be permitted to resurrect the defense by way of amendment. Copulsky v. Boruchow, D.C.N.Y.1982, 545 F.Supp. 126.

National Am. Corp. v. Federal Republic of Nigeria, D.C.N.Y.1978, 448 F.Supp. 622, affirmed on other grounds C.A.2d, 1979, 597 F.2d 314.

Spearing v. Manhattan Oil Transp. Corp., D.C.N.Y.1974, 375 F.Supp. 764.

Paragon Int'l, N.V. v. Standard Plastics, Inc., D.C.N.Y.1973, 353 F.Supp. 88.

U.S. ex rel. Flemings v. Chafee, D.C.N.Y.1971, 330 F.Supp. 193 (venue), affirmed on other grounds C.A.2d, 1972, 458 F.2d 544, reversed on other grounds sub nom. Warner v. Flemings, 1973, 93 S.Ct. 2926, 413 U.S. 665, 37 L.Ed.2d 873.

O'Connor v. Western Freight Ass'n, D.C.N.Y.1962, 202 F.Supp. 561.

Spencer v. Northwest Orient Airlines, Inc., D.C.N.Y.1962, 201 F.Supp. 504.

Croney v. Louisville & N.R. Co., D.C.N.Y.1953, 14 F.R.D. 356.

Third Circuit

Empire Kosher Poultry, Inc. v. Hallowell, C.A.3d, 1987, 816 F.2d 907 (insufficiency of process defense waived when not raised at district court level).

Plum Tree, Inc. v. Stockment, C.A.3d, 1973, 488 F.2d 754 (service objections waived).

Konigsberg v. Shute, C.A.3d, 1970, 435 F.2d 551.

If a defendant goes to trial on the merits without raising the question of personal jurisdiction, any defects in that connection are waived and may not be presented in a post-trial brief. U.S. v. Article of Drug Designated B-Complex Cholinos Capsules, C.A.3d, 1966, 362 F.2d 923, 927.

Corestates Leasing, Inc. v. Wright-Way Express, Inc., D.C.Pa.2000, 190 F.R.D. 356.

Zhang v. Southeastern Fin. Group, Inc., D.C.Pa.1997, 980 F.Supp. 787.

South Seas Catamaran, Inc. v. Motor Vessel Leeway, D.C.N.J.1988, 120 F.R.D. 17, 21, **citing Wright & Miller** (venue waived).

Abady v. Macaluso, D.C.Pa.1981, 90 F.R.D. 690 (personal jurisdiction waived).

Wurz v. Santa Fe Int'l Corp., D.C.Del.1976, 423 F.Supp. 91.

When there was a general entry of appearance by the defendant and a failure on his part to contest jurisdiction, he waived the invalidity of substituted service under the Pennsylvania statute. Phillips v. Flynn, D.C.Pa.1974, 61 F.R.D. 574.

Sellers v. McCrane, D.C.Pa.1972, 55 F.R.D. 466, 469, **citing Wright & Miller.**

United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO, Local 102 v. Lee Rubber & Tire Corp., D.C.N.J.1967, 269 F.Supp. 708, 714–715, affirmed C.A.3d, 1968, 394 F.2d 362, certiorari denied 89 S.Ct. 108, 393 U.S. 835, 21 L.Ed.2d 105.

Rodriguez v. American Export Lines, Inc., D.C.Pa.1966, 253 F.Supp. 36.

Weigand v. Long Transp. Co., D.C.Pa.1960, 25 F.R.D. 496.

Ginn v. Biddle, D.C.Pa.1945, 60 F.Supp. 530.

Bogar v. Ujlaki, D.C.Pa.1945, 4 F.R.D. 352.

Fourth Circuit

A defense of lack of personal jurisdiction was waived when an attorney had appeared for the defendant and had filed an answer and two summary judgment motions from which the defense was omitted. Bethlehem Steel Corp. v. Devers, C.A.4th, 1968, 389 F.2d 44.

Lanehart v. Devine, D.C.Md.1984, 102 F.R.D. 592, 594, **citing Wright & Miller** (venue).

Evans v. Rushing, D.C.S.C.1959, 175 F.Supp. 90.

Fifth Circuit

Broadcast Music, Inc. v. M.T.S. Enterprises, Inc., C.A.5th, 1987, 811 F.2d 278 (personal jurisdiction and insufficiency of service of process).

Giannakos v. M/V Bravo Trader, C.A.5th, 1985, 762 F.2d 1295 (personal jurisdiction).

Golden v. Cox Furniture Mfg. Co., C.A.5th, 1982, 683 F.2d 115.

Stavang v. American Potash & Chem. Corp., C.A.5th, 1965, 344 F.2d 117.

Carter v. Powell, C.A.5th, 1939, 104 F.2d 428, certiorari denied 60 S.Ct. 173, 308 U.S. 611, 84 L.Ed. 511.

Schwartz v. M/V GULF SUPPLIER, D.C.Tex.2000, 116 F.Supp.2d 831 (defendant complied with Rule 12(h), but violated spirit of rule by filing motion to dismiss on eve of trial, and thus delay resulted in waiver of defense).

Ball v. Wal-Mart Stores, Inc., D.C.Miss.1998, 34 F.Supp.2d 424 (defense of insufficient service of process waived when not included in pre-answer motion or answer).

Cargill, Inc. v. S.S. Nasugbu, D.C.La.1975, 404 F.Supp. 342, 350, **citing Wright & Miller.**

Textron, Inc. v. Maloney-Crawford Tank & Mfg. Co., D.C.Tex.1966, 252 F.Supp. 362.

Prime Lending, Inc. v. Moyer, D.C.Tex.2004, 2004 WL 1194461.

Sixth Circuit

Preferred RX, Inc. v. American Prescription Plan, Inc., C.A.6th, 1995, 46 F.3d 535 (personal jurisdiction).

Wausau Benefits v. Progressive Ins. Co., D.C.Ohio 2003, 270 F.Supp.2d 980 (venue objection raised for first time in motion for summary judgment was waived).

Napier v. Hawthorn Books, Inc., D.C.Mich.1978, 449 F.Supp. 576.

James v. Norfolk & W. Ry. Co., D.C.Ohio 1976, 430 F.Supp. 1317 (Rule 12(b)(3) defense).

Seventh Circuit

LINC Finance Corp. v. Onwuteaka, C.A.7th, 1997, 129 F.3d 917.

O'Brien v. R.J. O'Brien & Associates, Inc., C.A.7th, 1993, 998 F.2d 1394 (blatant defects in process made defense available to defendant at time of first motion; thus, defendant waived defense by not raising it in that motion).

Varone v. Varone, C.A.7th, 1968, 392 F.2d 855, certiorari denied 89 S.Ct. 162, 393 U.S. 872, 21 L.Ed.2d 141.

Crest Auto Supplies, Inc. v. Ero Mfg. Co., C.A.7th, 1966, 360 F.2d 896.

Abiola v. Abubakar, D.C.Ill.2003, 267 F.Supp.2d 907.

Harris Bank Naperville v. Pachaly, D.C.Ill.1995, 902 F.Supp. 156.

Leslie v. St. Vincent New Hope, Inc., D.C.Ind.1995, 873 F.Supp. 1250 (service of process).

Caterpillar Inc. v. Jerryco Footwear, Inc., D.C.Ill.1994, 880 F.Supp. 578 (personal jurisdiction).

Hall v. Sanchez, D.C.Ill.1989, 708 F.Supp. 922 (personal jurisdiction waived).

Levine v. Arnold Transit Co., D.C.Ill.1978, 459 F.Supp. 233.

Eighth Circuit

Alger v. Hayes, C.A.8th, 1972, 452 F.2d 841.

The defendants waived the objection that the Internal Revenue Service, in seeking to enforce a summons issued by the service, had not properly invoked the in personam jurisdiction of the federal district court when they did not assert the objection by motion or responsive pleading, fully participated in a hearing before the court, and first raised the objection in their second motion for relief from a compliance order. U.S. v. Gajewski, C.A.8th, 1969, 419 F.2d 1088, certiorari denied 90 S.Ct. 1361, 397 U.S. 1040, 25 L.Ed.2d 651.

U.S. v. Missco Homestead Ass'n, Inc., C.A.8th, 1950, 185 F.2d 283.

Buffington v. Vulcan Furniture Mfg. Corp., D.C.Ark.1950, 94 F.Supp. 13.

Ninth Circuit

American Ass'n of Naturopathic Physicians v. Hayhurst, C.A.9th, 2000, 227 F.3d 1104, certiorari denied 121 S.Ct. 1735, 532 U.S. 1008, 149 L.Ed.2d 659 (motion to set aside default judgment based on improper service constituted waiver of defendant's challenge to personal jurisdiction, because it was not raised in motion to set aside judgment, notwithstanding defendant's pro se status or fact that defendant's pleading was not made under Rule 12).

U.S. v. One 1978 Piper Cherokee Aircraft, Tail No. N 5538V, Including its Tools & Appurtenances, C.A.9th, 1996, 91 F.3d 1204, appeal after remand C.A.9th, 2000, 229 F.3d 1160.

Misch v. Zee Enterprises, Inc., C.A.9th, 1989, 879 F.2d 628.

Savarese v. Edrick Transfer & Storage, Inc., C.A.9th, 1975, 513 F.2d 140, 145, **citing Wright & Miller.**

Individual defendants in a civil antitrust action did not assert in their motion to dismiss that the action had abated against them because service was not made within three months after the filing of the complaint nor did they include the defense in their answer. They therefore waived that defense. Hays v. United Fireworks Mfg. Co., C.A.9th, 1969, 420 F.2d 836.

Guardian Title Co. v. Sulmeyer, C.A.9th, 1969, 417 F.2d 1290.

Heywood v. Samaritan Health Sys., D.C.Ariz.1995, 902 F.Supp. 1076 (service of process).

Meaamaile v. American Samoa, D.C.Haw.1982, 550 F.Supp. 1227.

Aznavorian v. Califano, D.C.Cal.1977, 440 F.Supp. 788 (venue waived), reversed on the merits 1978, 99 S.Ct. 471, 439 U.S. 170, 58 L.Ed.2d 435.

Knowles v. Butz, D.C.Cal.1973, 358 F.Supp. 228.

U.S. v. Burlington Truck Line, Inc., D.C.Mo.1973, 356 F.Supp. 582 (venue).

Doering v. Scandinavian Airlines Sys., D.C.Cal.1971, 329 F.Supp. 1081.

Tenth Circuit

U.S. v. 51 Pieces of Real Property, Roswell, New Mexico, C.A.10th, 1994, 17 F.3d 1306 (defendant waived defense of lack of personal jurisdiction by failing to include it in response to plaintiff's motion for default).

Williams v. Life Savs. & Loan, C.A.10th, 1986, 802 F.2d 1200, 1202.

ORI, Incorporated v. Lanewala, D.C.Kan.2001, 147 F.Supp.2d 1069, **citing Wright & Miller.**

Wilkerson Shoe Co. v. Underwriters Ins. Co., D.C.Okl.1974, 65 F.R.D. 65 (personal jurisdiction).

Eleventh Circuit

Office of Thrift Supervision v. Paul, D.C.Fla.1997, 985 F.Supp. 1465 (venue).

BankAtlantic v. Coast to Coast Contractors, Inc., D.C.Fla.1996, 947 F.Supp. 480.

Barmat, Inc. v. U.S., D.C.Ga.1994, 159 F.R.D. 578 (personal jurisdiction and service of process).

In re Air Crash Disaster Near Brunswick, Georgia April 4, 1991, D.C.Ga.1994, 158 F.R.D. 693 (service of process).

D.C. Circuit

Chatman-Bey v. Thornburgh, C.A.1988, 864 F.2d 804, 813, 274 U.S.App.D.C. 398, **citing Wright & Miller.**

North Branch Prods., Inc. v. Fisher, C.A.1960, 284 F.2d 611, 109 U.S.App.D.C. 182, certiorari denied 81 S.Ct. 713, 365 U.S. 827, 5 L.Ed.2d 705.

Barnstead Broadcasting Corp. v. Offshore Broadcasting Corp., D.C.D.C.1994, 869 F.Supp. 35.

Bremier v. Volkswagen of America, Inc., D.C.D.C.1972, 340 F.Supp. 949 (personal jurisdiction).

See also

Nestor v. Hershey, C.A.1969, 425 F.2d 504, 138 U.S.App.D.C. 73.

Zelson v. Thomforde, C.A.3d, 1969, 412 F.2d 56.

Tyco Int'l Ltd. v.Walsh, D.C.N.Y.2003, 2003 WL 553580 (defendant cannot move to convert Rule 12(b)(2) motion filed after answer into Rule 12(c) motion since defense of lack of personal jurisdiction is waived if not stated in answer or earlier motion).

Bartlett v. U.S., D.C.Wash.1993, 835 F.Supp. 1246 (failure to raise Rule 12(b)(3) defense before filing of summary judgment motion and/or trial is deemed waiver).

Compare

Davis v. Carter, C.A.7th, 2003, 61 Fed.Appx. 277 (not selected for publication in Federal Reporter; not to be cited per Seventh Circuit Rule 53) (defendants responded to complaint with letters to judge and court concluded that they were in default since they did not file answer and further refused to let them move to vacate judgment, under Rule 55(c), on basis of lack of personal jurisdiction; appellate court reversed on grounds that irregular response to complaint either could waive jurisdictional defense or merits but never both since if letters were answers, then default was inappropriate but jurisdictional grounds were waived under Rule 12(h)(1) whereas if letters were not answers, then default was correct but jurisdictional defense still could be raised under Rule 55(c) motion to vacate).

MEI International, Inc. v. Schenkers Int'l Forwarders, Inc., D.C.N.Y.1992, 807 F.Supp. 979 (although defendant pleaded statute of limitations defense in answer, since defense was not included in joint pretrial order, which superseded the pleadings, and was not raised until after trial, defense was waived).

O & G Carriers, Inc. v. Smith, D.C.N.Y.1992, 799 F.Supp. 1528 (answering initial complaint does not waive right to move to dismiss for failure to plead fraud with sufficient particularity).

Hendon v. Marathon-LeTourneau, D.C.Miss.1976, 414 F.Supp. 1282 (defense raised in answer, but failure to raise at trial).

When nonresident attorneys opposed a motion to disqualify them in a bankruptcy proceeding without advancing any jurisdictional defense, they submitted to the jurisdiction of the court and could not later dispute the enforceability of the disqualification order. E.F. Hutton & Co. v. Brown, D.C.Tex.1969, 305 F.Supp. 371.

[FN22]

Defense unavailable

Transaero v. La Fuerza Aerea Boliviana, C.A.2d, 1998, 162 F.3d 724, certiorari denied 119 S.Ct. 2022, 526 U.S. 1146, 143 L.Ed.2d 1033 (noting that litigant preserves Rule 12(b)(2) defense when precluded by prior judgment from arguing point pending appeal).

Glater v. Eli Lilly & Co., C.A.1st, 1983, 712 F.2d 735, 738, **quoting Wright & Miller.**

Espaillat v. Rite Aid Corp., D.C.N.Y.2003, 2003 WL 721566 (although 120-day period within which plaintiff could have remedied initial improper service had not passed, when defendant filed answer that did not move to dismiss based on original improper service, defense was waived despite defendant's contention that it did not raise defense because it was unavailable since plaintiff still had time to remedy improper service at time of filing of answer; court responded that fact that plaintiffs potentially could remedy improper service in future did not render improper service proper and thus defense was then available and now waived).

When the defendant, prior to removal, appeared through counsel to oppose the plaintiff's motion for a temporary restraining order, he could not have challenged personal jurisdiction, because the plaintiff's claims were unknown to him at that time. Northeastern Land Servs., Ltd. v. Schulke, D.C.R.I.1997, 988 F.Supp. 54.

See also

Harvard Trust Co. v. Bray, 1980, 413 A.2d 1213, 1216, 138 Vt. 199, **citing Wright & Miller.**

[FN23]

No waiver

Jackson v. Hayakawa, C.A.9th, 1982, 682 F.2d 1344, 1349, citing Wright & Miller, appeal after remand C.A.9th, 1985, 761 F.2d 525.

[FN24]

Defense not waived

Phat Fashions, L.L.C. v. Phat Game Athletic Apparel, D.C.N.Y.2001, 2001 WL 1041990, **citing Wright & Miller** (denial of complaint's allegation of jurisdiction in answer avoids waiver).

Kelso Enterprises, Ltd. v. M/V Wisida Frost, D.C.Cal.1998, 8 F.Supp.2d 1197 (by withdrawing its initial ex parte application to dismiss based on forum selection clause in bills of lading, so that it could file noticed motion to dismiss on identical grounds, vessel owner did not waive its venue objection; if vessel owner had not withdrawn ex parte application, district court would have denied application and required it to file just noticed motion).

Although the defendant did not raise the venue issue through a motion to dismiss, the defense of improper venue was properly asserted in the answer. Rogen v. Memry Corp., D.C.N.Y.1995, 886 F.Supp. 393.

Lantz v. Private Satellite Television, Inc., D.C.Mich.1994, 865 F.Supp. 407 (right to challenge personal jurisdiction was not waived by delay in filing responsive pleading).

An action on a promissory note was commenced in state court by service of summons and a motion for summary judgment rather than by service of summons and complaint. In his petition for removal and response to the motion for summary judgment, the maker's general partner did raise the "answer" when the summary judgment motion was denied, and thus the failure of the partner to move to dismiss the complaint for lack of personal jurisdiction or to mention the defense as a ground for directed verdict at trial did not waive the defense. Plaza Realty Investors v. Bailey, D.C.N.Y.1979, 484 F.Supp. 335.

Although no motion to dismiss for failure to make proper and sufficient service of process upon the defendant dairy company was made until seven months after the responsive pleading, the service of process issue was preserved when the subject was raised in the answer by the dairy company and all rights to assert this defense, subsequent to the court-imposed discovery period concerning the dairy company's "last usual place of business," were preserved by court order. Snodgrass v. Roberts Dairy Co., D.C.Neb.1979, 82 F.R.D. 626.

Technical compliance with the rules mandated the conclusion that the defendants, by filing an answer without any objection to jurisdiction before joining the other defendants on a motion to dismiss, waived the jurisdictional defense, but the breach of the rules was excused, since the defendant's answer was filed pro se and, apparently, in order to come within the requirements of Rule 12(a). United Advertising Agency, Inc. v. Robb, D.C.N.C.1975, 391 F.Supp. 626.

Frank v. Brownell, D.C.D.C.1957, 149 F.Supp. 928.

Williams v. Brown Family Communities, D.C.Cal.2005, 2005 WL 1651049 (defendant's choice to remove an action to federal court before seeking to challenge personal jurisdiction does not constitute waiver of objections to personal jurisdiction).

[FN25]

Bethlehem case

C.A.4th, 1968, 389 F.2d 44.

[FN26]

Quotation

Id. at 46 (Sobeloff, J.).

[FN27]

Article of Drug case

C.A.3d, 1966, 362 F.2d 923.

[FN28]

Third Circuit rejected

Id. at 926–927 (Kirkpatrick, J.).

See also

Hays v. United Fireworks Mfg. Co., C.A.9th, 1969, 420 F.2d 836.

[FN29]

Amendment permitted

MacNeil v. Whittemore, C.A.2d, 1958, 254 F.2d 820.

Saper v. Hague, C.A.2d, 1951, 186 F.2d 592.

Martin v. Lain Oil & Gas Co., D.C.Ill.1941, 36 F.Supp. 252.

Amendment denied

O'Connor v. Western Freight Ass'n, D.C.N.Y.1962, 202 F.Supp. 561.

Zabin v. Buxton, D.C.Vt.1954, 121 F.Supp. 720.

[FN30]

Rule 15(a)

Glater v. Eli Lilly & Co., C.A.1st, 1983, 712 F.2d 735, 738, **citing Wright & Miller.**

When the defendant's original answer was served on September 11, and the defendant did not file an amended answer until December, his right to assert the defenses of lack of personal jurisdiction and insufficiency of process in an amendment without leave of the court was waived. Konigsberg v. Shute, C.A.3d, 1970, 435 F.2d 551.

The plaintiffs argued that the defendant had waived any jurisdictional defense because none was in his answer, but the court considered the defendant's motion to dismiss for lack of personal jurisdiction because he was a foreign pro se defendant, and leave to amend his answer would have been readily available. Local 875 I.B.T. Pension Fund v. Pollack, D.C.N.Y.1998, 992 F.Supp. 545.

Rule 15(a) is discussed in vol. 6, §§ 1473 to 1490.

Lyons v. Brandly, D.C.Ohio 2006, 2006 WL 2709792 (defense of improper venue waived because plaintiffs failed to amend the answer under rule 15(a)) (slip op.).

See also

J. Slotnik Co. v. Clemco Indus., D.C.Mass.1989, 127 F.R.D. 435.

Catlin v. Commissariat, Ct.App.1980, 619 P.2d 1066, 1067, 127 Ariz. 289, **quoting Wright & Miller.**

Compare

General Design Sign Co. v. American Gen. Design, Inc., D.C.Tex.2003, 2003 WL 251931 (amendment as matter of course avoids waiver pursuant to Rule 12(h)(1)(B) only if no pre-answer motion is filed and defense is omitted from answer; however, if pre-answer Rule 12(b) motion was made that omitted defense, it is waived regardless of subsequent amendment since "Rule 12(h)(1) provides multiple ways of waiving defense, not alternate methods of un-waiving it").

But see

Kennedy Ship & Repair, LP v. Loc Tran, D.C.Tex.2003, 256 F.Supp.2d 678 (when plaintiff did not oppose filing of amended answer, court then held that inclusion of personal jurisdiction defense in amended answer meant defense was not waived, even though amendment was not within 20 days of original answer's filing as required to be amendment as matter of course under Rules 12(h) and 15(a)).

[FN31]

Diligence

Fisher v. Merryman, C.A.6th, 2002, 32 Fed.Appx. 721, **quoting Wright & Miller** (unpublished).

Transaero v. La Fuerza Aerea Boliviana, C.A.2d, 1998, 162 F.3d 724, quoting Wright & Miller, certiorari denied 119 S.Ct. 2022, 526 U.S. 1146, 143 L.Ed.2d 1033.

Schneider v. National R.R. Passenger Corp., C.A.2d, 1995, 72 F.3d 17.

The defendant's failure to pursue and produce evidence to challenge personal jurisdiction, on the ground that he was protected by the fiduciary shield doctrine, constituted waiver of that defense; his initial motion

to dismiss for lack of personal jurisdiction was unsupported by affidavits or other evidence and therefore must be construed as having been directed at the adequacy of the pleading and not at the actual existence of personal jurisdiction. Rice v. Nova Biomedical Corp., C.A.7th, 1994, 38 F.3d 909, certiorari denied 115 S.Ct. 1964, 514 U.S. 1111, 131 L.Ed.2d 855.

Once a defense has been waived under Rule 12(h), the court cannot raise it on its own initiative. Pardazi v. Cullman Medical Center, C.A.11th, 1990, 896 F.2d 1313.

T & R Enterprises, Inc. v. Continental Grain Co., C.A.5th, 1980, 613 F.2d 1272, 1277, **quoting Wright & Miller.**

Espaillat v. Rite Aid Corp., D.C.N.Y.2003, 2003 WL 721566, **quoting Wright & Miller.**

General Design Sign Co. v. American Gen. Design, Inc., D.C.Tex.2003, 2003 WL 251931, **quoting Wright & Miller.**

Rohrer v. FSI Futures, Inc., D.C.N.Y.1997, 981 F.Supp. 270, **quoting Wright & Miller.**

Mummelthie v. City of Mason City, Iowa, D.C.Iowa 1995, 873 F.Supp. 1293, affirmed C.A.8th, 1996, 78 F.3d 589.

Index Fund, Inc. v. Hagopian, D.C.N.Y.1985, 107 F.R.D. 95, 101, **quoting Wright & Miller.**

Bodenhamer Bldg. Corp. v. Architectural Research Corp., D.C.Mich.1985, 106 F.R.D. 521, 523, **citing Wright & Miller.**

Church of Scientology of California v. Linberg, D.C.Cal.1981, 529 F.Supp. 945, 967, **citing Wright & Miller.**

Marquest Medical Prods. v. EMDE Corporation, D.C.Colo.1980, 496 F.Supp. 1242, 1245, **citing Wright & Miller.**

Home Funding Group, LLC v. Kochmann, D.C.Conn.2007, 2007 WL 1670148 (slip op.), **quoting Wright & Miller.**

Cline v. Hanby, D.C.W.Va.2006, 2006 WL 3692647 (slip op.), **quoting Wright & Miller.**

See also

Taubman Co. v. Webfeats, C.A.6th, 2003, 319 F.3d 770 (pro se status does not excuse failure to comply with Rule 12(h)(1) requirements).

The defendants did not waive their personal jurisdiction defense by filing a notice of appearance, opposing motions for consolidation, and joining a motion to disqualify one of the plaintiff's experts, because they promptly challenged the court's jurisdiction and their participation followed that assertion. Michelson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., D.C.N.Y.1989, 709 F.Supp. 1279.

Shaw v. U.S., D.C.N.Y.1976, 422 F.Supp. 339.

Joiner, The New Civil Rules: A Substantial Improvement, 1966, 40 F.R.D. 359, 360.

[FN32]

Waiver by conduct

Mattel, Inc. v. Barbie-Club.com, C.A.2d, 2002, 310 F.3d 293 (although court did not reach conduct issue since defendant did vigorously assert personal jurisdiction defense, it noted Second Circuit rule that to preserve defense of lack of personal jurisdiction, defendant need only state defense in its first responsive filing and need not articulate defense with any rigorous degree of specificity).

Hamilton v. Atlas Turner, Inc., C.A.2d, 1999, 197 F.3d 58, certiorari denied 120 S.Ct. 2691, 530 U.S. 1244, 147 L.Ed.2d 962 (defendant forfeited defense of lack of personal jurisdiction under long-arm statute by participating in extensive pretrial proceedings and forgoing numerous opportunities to move to dismiss during four year interval that followed its inclusion of defense in its answer).

Peterson v. Highland Music, Inc., C.A.9th, 1998, 140 F.3d 1313, certiorari denied 119 S.Ct. 446, 525 U.S. 983, 142 L.Ed.2d 401.

The defendant did not waive its defense to personal jurisdiction by participating in the litigation on the merits since it did so at the direction of the district judge after raising the defense in a timely fashion. IDS Life Ins. Co. v. SunAmerica Life Ins. Co., C.A.7th, 1998, 136 F.3d 537.

Continental Bank, N.A. v. Meyer, C.A.7th, 1993, 10 F.3d 1293 (personal jurisdiction).

Mitchell v. Hobbs, C.A.1st, 1991, 951 F.2d 417 (waiver of insufficient service of process by conduct).

Trustees of Cent. Laborers' Welfare Fund v. Lowery, C.A.7th, 1991, 924 F.2d 731 (defendants waived their Rule 12(b)(5) defense by participating in proceedings, even though they had not yet filed a Rule 12(b) motion or answer).

Yeldell v. Tutt, C.A.8th, 1990, 913 F.2d 533 (although Rule 12(b)(2) defense was asserted in answer, it was waived by defendants' failure to raise issue throughout litigation).

RZS Holdings, AVV v. Commerzbank, Ag, D.C.Va.2003, 279 F.Supp.2d 716 (Fourth Circuit has fleshed out Rule 12(g) and Rule 12(h) by holding that those rules contemplate implied waiver of personal jurisdiction defense by defendants who appear before court to deny allegations of complaint, but who fail to make personal jurisdiction objections at time of their appearance).

American Patriot Ins. Agency, Inc. v. Mutual Risk Management, Ltd., D.C.Ill.2003, 248 F.Supp.2d 779 (although defense can be waived through active participation in litigation before filing of answer or of responsive motion, especially if significant period of time has elapsed since filing of complaint, routine motions for extensions of time to answer and participation in settlement negotiations do not constitute active participation for waiver of venue purposes), affirmed in part, reversed in part and remanded on other grounds C.A.7th, 2004, 364 F.3d 884.

Schmude v. Sheahan, D.C.Ill.2003, 214 F.R.D. 487 (by objecting to removal of action and even appealing that decision, defendants waived defense based on insufficiency of service of process).

The defendant did not waive the defense of personal jurisdiction by opposing the plaintiff's motion for a temporary restraining order. Northeastern Land Servs., Ltd. v. Schulke, D.C.R.I.1997, 988 F.Supp. 54.

I.L.G.W.U. National Retirement Fund v. Meredith Grey, Inc., D.C.N.Y.1997, 986 F.Supp. 816 (participation in post-judgment discovery did not waive objections).

Terzano v. PFC, D.C.Puerto Rico 1997, 986 F.Supp. 706 (conduct, express submission, or failure to raise defense).

If a party requests that a court exercise its power on that party's behalf, and the request is not preceded or accompanied by an objection to personal jurisdiction, that party is deemed to have waived the defense of lack of personal jurisdiction. Lomaglio Associates, Inc. v. LBK Marketing Corp., D.C.N.Y.1995, 876 F.Supp. 41.

Clark v. City of Zebulon, D.C.Ga.1993, 156 F.R.D. 684 (defendant did not waive defense of improper service of process, which it had raised in its responsive pleading, by engaging in discovery and other activity designed to move the case toward trial).

U.S. v. International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, D.C.N.Y.1992, 816 F.Supp. 864 (failing to raise issue at hearing, and at hearing assuring court that settlement had been reached, waived objection to adequacy of service of process).

[FN33]

Party in default

The defendant's motion to dismiss for insufficiency of service must be rejected, because it was not raised in a timely manner, as it was raised nineteen months after the filing of an appearance and nine months after the entry of default, and because it was omitted in a previously filed motion to dismiss. Bentley v. Raveh, D.C.Conn.1993, 151 F.R.D. 515.

I. Oliver Engebretson, Inc. v. Aruba Palm Beach Hotel & Casino, D.C.N.Y.1984, 575 F.Supp. 1262, 1264, **citing Wright & Miller.**

U.S. ex rel. Masucci v. Follette, D.C.N.Y.1967, 272 F.Supp. 563.

Zwerling v. New York & Cuba Mail S.S. Co., D.C.N.Y.1940, 33 F.Supp. 721.

See also

Clover Leaf Freight Lines, Inc. v. Pacific Coast Wholesalers Ass'n, C.A.7th, 1948, 166 F.2d 626, certiorari denied 69 S.Ct. 46, 335 U.S. 823, 93 L.Ed. 377.

The court entered a default judgment in favor of the plaintiffs. Later, the two parties participated in discovery and began negotiations to form a settlement. The parties reached an impasse and the defendants moved to vacate, claiming that service of process had been invalid. The court held that post-judgment discovery did not waive jurisdictional objections because the defendants had minimal contact with the court. I.L.G.W.U. National Retirement Fund v. Meredith Grey, Inc., D.C.N.Y.1997, 986 F.Supp. 816.

O'Brien v. Sage Group, Inc., D.C.Ill.1992, 141 F.R.D. 81.

Bavouset v. Shaw's of San Francisco, D.C.Tex.1967, 43 F.R.D. 296.

But see

Davis v. Carter, C.A.7th, 2003, 61 Fed.Appx. 277 (not selected for publication in Federal Reporter; not to be cited per Seventh Circuit Rule 52)(defendants responded to complaint with letters to judge and court concluded that they were in default since they did not file answer and further refused to let them move to vacate judgment, under Rule 55(c), on basis of lack of personal jurisdiction; appellate court reversed on grounds that irregular response to complaint either could waive jurisdictional defense or merits but never both—if letters were answers, then default was inappropriate but jurisdictional grounds were waived under Rule 12(h)(1) but if letters were not answers, then default was correct but jurisdictional defense still could be raised under Rule 55(c) motion to vacate).

Although no pre-answer motion raising improper venue was filed, and although the answer was not filed until almost three months after the service of the complaint and summons, the Environmental Protection Agency and its administrator had not waived their right to object on the ground of improper venue; the venue defense had been properly preserved in the answer and the plaintiff never instructed the clerk to enter a default, and in fact, later consented to an amendment of the answer. Township of Long Beach v. City of New York, D.C.N.J.1978, 445 F.Supp. 1203, 1207 n. 1.

Compare

Torres v. Torres, D.C.N.Y.1985, 603 F.Supp. 440, 442, **citing Wright & Miller** (personal jurisdiction defense not waived when pleading served only few days late).

That the defendant was technically in default for four days before filing its motion to quash and set aside the service of the summons did not preclude it from raising the question of lack of personal jurisdiction when no judgment by default had been entered. Koncewicz v. East Liverpool City Hosp., D.C.Pa.1940, 31 F.Supp. 122.

[FN34]

Waiver after 20 days

Granger v. Kemm, Inc., D.C.Pa.1966, 250 F.Supp. 644 (venue and service of process).

Nelson v. Victory Elec. Works, Inc., D.C.Md.1962, 210 F.Supp. 954 (venue).

Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp., D.C.Pa.1940, 31 F.Supp. 403 (venue).

See also

Farmers Elevator Mut. Ins. Co. v. Carl J. Austad & Sons, Inc., C.A.8th, 1965, 343 F.2d 7, 12 (dictum).

Bavouset v. Shaw's of San Francisco, D.C.Tex.1967, 43 F.R.D. 296.

U.S. v. Cave Constr., Inc., D.C.Mont.1966, 250 F.Supp. 873 (dictum).

Tuckman v. Aerosonic Corp., Del.Ch.1978, 394 A.2d 226, 233, **citing Wright & Miller.**

Compare

In Totalplan Corp. of America v. Lure Camera Ltd., D.C.N.Y.1985, 613 F.Supp. 451, the court deemed the defendants' venue and personal jurisdiction defenses to have been waived by the defendants' failure to file a responsive pleading within twenty days of being served with process, but nonetheless considered the defendants' motions to dismiss on these grounds in view of the plaintiff's failure to seek entry of default, the court's permissive standard in vacating defaults, the defendants' lack of willfulness in defaulting, and the absence of any prejudice to the plaintiff from the defendants' late response.

[FN35]

Rule 12(a)

See vol. 5B, §§ 1345 to 1346.

See also

Luv N' Care, Ltd. v. Babelito, S.A., D.C.N.Y.2004, 306 F.Supp.2d 468 (considering, but ultimately rejecting, adoption of Rule 12(a) time requirements for Rule 12(b) motions).

[FN36]

Rule 12(a) not apply

Marcial Ucin, S.A. v. SS Galacia, C.A.1st, 1983, 723 F.2d 994, 997.

Bechtel v. Liberty Nat. Bank, C.A.9th, 1976, 534 F.2d 1335, 1341, **citing Wright & Miller.**

Breland v. ATC Vancom. Inc., D.C.Pa.2002, 212 F.R.D. 475, **citing Wright & Miller.**

Whether the defendant will be deemed to have waived the defense of defective service by failing to respond to the plaintiff's complaint within the time period specified under Rule 12(a) is determined not by Rule 12(h)(1), but by the doctrine of waiver by implication. U.S. to Use of Combustion Sys. Sales, Inc. v. Eastern Metal Prods. & Fabricators, Inc., D.C.N.C.1986, 112 F.R.D. 685, 687.

A defendant who asserts the defense of lack of personal jurisdiction in his first response to the complaint does not waive that defense if the response is not filed within twenty days of service of the complaint. Foss v. Klapka, D.C.Pa.1982, 95 F.R.D. 521, 523, **quoting Wright & Miller.**

Mat-Van, Inc. v. Sheldon Good & Co. Auctions, LLC, D.C.Cal.2007, 2007 WL 2206946 (slip op.), **citing Wright & Miller.**

Luv N' Care, Ltd. v. Babelito, S.A., D.C.N.Y.2004, 306 F.Supp.2d 468, citing and **quoting Wright &**

Luv N' Care, Ltd. v. Babelito, S.A., D.C.N.Y.2004, 306 F.Supp.2d 468, **citing Wright & Miller.**

[FN40]

No due process problem

NLRB v. Western Temporary Servs., C.A.7th, 1987, 821 F.2d 1258, 1264, **quoting Wright & Miller.**

Leab v. Streit, D.C.N.Y.1984, 584 F.Supp. 748, 760, **citing Wright & Miller.**

See also

Williams v. Mells, 1976, 225 S.E.2d 501, 503, 138 Ga.App. 60, **quoting Wright & Miller.**

Aiken v. Bynum, 1973, 196 S.E.2d 180, 181, 128 Ga.App. 212, **quoting Wright & Miller.**

[FN41]

Objection to personal jurisdiction

In re Tuli, C.A.9th, 1999, 172 F.3d 707 (district court has affirmative duty to look into court's personal jurisdiction over party in default).

The defense of lack of personal jurisdiction is not waived by default. Reynolds v. International Amateur Athletic Fed'n, C.A.6th, 1994, 23 F.3d 1110, certiorari denied 115 S.Ct. 423, 513 U.S. 962, 130 L.Ed.2d 338.

Unlike an objection to a defect in venue, an objection to lack of jurisdiction over the person is not waived by default. Williams v. Life Savs. & Loan, C.A.10th, 1986, 802 F.2d 1200, 1202.

McAleer v. Smith, D.C.R.I.1993, 818 F.Supp. 486 (appearance in action does not waive defense of lack of personal jurisdiction).

See also

Transaero v. La Fuerza Aerea Boliviana, C.A.2d, 1998, 162 F.3d 724, certiorari denied 119 S.Ct. 2022, 526 U.S. 1146, 143 L.Ed.2d 1033.

Stewart v. Ragland, C.A.9th, 1991, 934 F.2d 1033.

Architectural Woodcraft Co. v. Read, Me.1983, 464 A.2d 210, 212, **citing Wright & Miller.**

See generally

Ellington, Unraveling Waiver By Default, 1978, 12 Ga.L.Rev. 181.

[FN42]

Relief from judgment

See vol. 11, § 2862.

5C FPP § 1391

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