

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 09-CV-00309 MSK-KMT

SUZANNE SHELL
Plaintiff

v.

AMERICAN FAMILY RIGHTS ASSOCIATION, et. al.

Defendants

MOTION TO ASSERT PERSONAL JURISDICTION

Comes now, Suzanne Shell, Plaintiff, *pro se* to request this court to assert personal jurisdiction over the defendants Dorothy Baez, National Association of Family Advocates (NAFA), Georgia Family Rights, Inc.(GAFRA), William Wiseman and Wiseman Studios (named defendants). I contend that the named defendants have entered their general appearances, thereby waiving any objection to personal jurisdiction or improper service of process, and have consented to this court asserting personal jurisdiction over them.

Duty to Confer

I certify that I made a good faith attempt to confer pursuant to D.C.COLO.LCivR. 7.1 with all of the named defendants above via email at their published email addresses before submitting this motion¹. I received certified return email receipts indicating the emails were

¹ Email notification is appropriate in this instance because the named defendants conduct most of their business online, and routinely use email as a reliable means of communication. Additionally, Ms. Baez has indicated in her certificate of service on her second letter to this court (#9) that email is an acceptable means of communication between the defendants. Furthermore, I have communicated via email with them in the recent past.

successfully delivered immediately after I sent them. Ms Baez read the email approximately 50 minutes after receiving it. None of the five named defendants have responded to my attempts to confer. I believe they would oppose this motion.

FACTS

Ms. Baez appeared *pro se* in her letter to the judge (#7 filed March 6, 2009). She also represented and inferred that she is appearing on behalf of her two organizations.² Ms. Baez appeared a second time (Letter by defendant Dorothy Kernaghan-Baez, #9 filed March 19, 2009) to state that she was not going to waive personal service because she wants me to incur the expense of personal service so that I will avoid “oppressing” or “abusing” her.

Mr. Wiseman appeared *pro se* in his Objection to Jurisdiction. (#8 filed March 10, 2009). Wiseman Studios is a sole proprietorship owned and operated by Mr. Wiseman and is a named defendant in this case.

Personal Jurisdiction

Ms. Baez and, through her express admission, her two organizations, GAFRA and NAFA, and William Wiseman dba Wiseman Studios have entered their general appearances in this case. Personal jurisdiction may be waived expressly or by implication. *People in Interest of Clinton*, 762 P.2d 1381 (Colo. 1988). Among other things, a tribunal acquires personal jurisdiction if “[t]he individual submits to the jurisdiction of this state by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction.” Section 14-5-201(a)(2), C.R.S. 2003.

When a defendant makes a special appearance, no other issues may be raised without that

² She states, “I, along with two organizations with which I am involved, are among those named as defendants. . .” Her two named organizations described in the complaint are Georgia Family Rights, Inc. (GAFRA) and National Association of Family Advocates (NAFA).

appearance becoming a general appearance. The named defendants did not assert they were making a special appearance, and they have sought affirmative relief from this court that acknowledges the personal jurisdiction of the court by raising issues outside those permitted by or stated under a special appearance. See *In re Marriage of Jeffers*, 992 P.2d 686, 689 (Colo. App. 1999).

A party enters a general appearance and consents to the personal jurisdiction of a court by seeking relief in a form that acknowledges the personal jurisdiction of the court. The named defendants have met the two requirements of waiving personal jurisdiction: 1) the party must have knowledge of the pending proceeding; and 2) the party must intend to appear. *In re Marriage of Lockwood*, 857 P.2d 557 (Colo. App. 1993). The named defendants cited the case number in their letters, identified themselves as defendants, and initiated communication with this honorable court for the purpose of stating facts in support of seeking some form of relief which this court has the jurisdiction to grant.

As such, their requests were brought for the purpose of asking the court for affirmative relief. Therefore, through their letters and by failing to properly assert a special appearance, the named defendants subjected themselves to the personal jurisdiction of the trial court.

Furthermore, the named defendants did not properly assert lack of personal jurisdiction over themselves. It is well settled that lack of personal jurisdiction is a privileged defense that can be waived “by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct,” *Neirbo Co. v. Bethlehem Corp.*, 308 U.S. 165, 168, (1939).

A defendant may not halfway appear in a case. See *Federal Deposit Ins. Corp. v. Oaklawn Apartments*, 959 F.2d 170, 176 (10th Cir. 1992) (noting that “`defendant may [not] halfway appear in a case, giving . . . the impression that he has been served, and [later] pull failure of service out of the hat like a rabbit” (quoting *Broadcast Music, Inc. v. MTS Enters.*,

Inc., 811 F.2d 278, 281 (5th Cir. 1987)); *Ziegler v. Akin*, 261 F.2d 88, 92 (10th Cir. 1958) (holding that voluntary appearance cures any defect in service).

“General appearance or responsive pleading by a defendant that fails to dispute personal jurisdiction will waive any defect in service or personal jurisdiction”, *Cf. Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986) amended on other grounds, 807 F.2d 1514 (9th Cir.), cert. denied, 484 U.S. 870 (1987). Ms. Baez did mention that, to her knowledge, none of the defendants have waived service or have not been formally served. However, neither she nor Mr. Wiseman actually raised any objection to improper service of process as to the named defendants.

The defendants did not raise any formal objections to personal jurisdiction. Objections to personal jurisdiction and service of process must be asserted in the answer or in a pre-answer motion. Fed. R. Civ. P. 12(b). If a party files a pre-answer motion and fails to assert the defenses of lack of personal jurisdiction or insufficiency of service, he waives these defenses. *Id.* 12(h)(1). Federal Rule of Civil Procedure 12 provides that objections to personal jurisdiction or service of process must be raised in a party’s first responsive pleading or by motion before the responsive pleading. See *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 738 (1st Cir. 1983) (holding that defenses set forth in Rule 12(h), which include lack of personal jurisdiction and ineffective service of process, must be raised in a party’s “first defensive move”). “If a party files a pre-answer motion and fails to assert the defenses of lack of personal jurisdiction or insufficiency of service, he waives these defenses.” *FDIC v. Oaklawn Apartments*, 959 F.2d 170, 175 (10th Cir. 1992).

The issues raised by the defendants in the letters do not constitute “a defense or objection” contemplated within the meaning of Fed. R. Civ. P. 12. The named defendants’s letters to this court was a defensive move that triggered the provisions of Rule 12(h). See *Martinez v. Picker Int’l, Inc.*, 635 F. Supp. 658, 659 (D.P.R. 1986). The named defendants’s failure to properly object to personal jurisdiction in a timely fashion waived the defense. See

O'Brien v. R.J. O'Brien & Assocs., Inc., 998 F.2d 1394, 1398-99 (7th Cir. 1993) (holding that party waived objection to court's exercise of personal jurisdiction when it failed to include objection in its initial motion to vacate the entry of default); *cf. Accounts Nos. 3034504504 & 144-07143*, 971 F.2d at 983-84 (applying waiver provisions of Rule 12(h) to claimant in civil forfeiture action); 953 E. Sahara, 807 F. Supp. at 582 (same).

Relief Requested

I respectfully request this court to find that Ms. Baez, GAFRA and NAFA, and Mr. Wiseman dba Wiseman Studios have waived any defense to personal jurisdiction and improper service of process, and have voluntarily and knowingly entered their general appearance in this case, and have thereby consented to this court's exercise of personal jurisdiction over defendants Dorothy Kernaghan-Baez, Georgia Family Rights, Inc., National Association of Family Advocates, William Wiseman and Wiseman Studios.

I respectfully request this court to order the afore named defendants to file their answers by a date certain.

Any other relief this court deems just and proper.

Respectfully Submitted March 20, 2009

/s/ Suzanne Shell

Suzanne Shell *pro se*
14053 Eastonville Rd.
Elbert, CO 80106
dsshell@gmail.com
719-749-2971

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the attached document PLAINTIFF'S MOTION TO ASSERT PERSONAL JURISDICTION were placed in the United States Mail, first class mail, postage prepaid on March 21, 2009

Georgia Family Rights, Inc.
c/o Dorothy Kernaghan-Baez
811 Aumond Place East
Augusta, GA 30909

National Association of Family Advocates
c/o Dorothy Kernaghan-Baez
811 Aumond Place East
Augusta, GA 30909

Dorothy Kernaghan-Baez
811 Aumond Place East
Augusta, GA 30909

William Wiseman
PO Box 693
1625 Siskiyou St
Klamath Falls OR 97601-2046

Wiseman Studios
PO Box 693
1625 Siskiyou St
Klamath Falls OR 97601-2046

Service of process perfected to defendants below on March 19, 2009:

AFRA
c/o William O. Tower
7334 Chivalry Way
Citrus Heights CA 95621-4333

William O. Tower
7334 Chivalry Way
Citrus Heights CA 95621-4333

Ann Tower
7334 Chivalry Way
Citrus Heights CA 95621-4333

Ringo Kamens alias for Alex D. Bryan
address unknown
sent to email addresses
ringo@coimc.org
2600denver@gmail.com

/s/ Suzanne Shell March 20, 2009

Suzanne Shell