IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2019-CA-00981-COA

SEAN A. VILLAVASO, L. MURPHY'S TRUCKING SERVICE INC. AND SAV TRUCKING SERVICES LLC	**APPELLANTS**
v.	
S.H. ANTHONY INC.	**APPELLEE**

DATE OF JUDGMENT:	05/17/2019
TRIAL JUDGE:	HON. ROGER T. CLARK
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT, FIRST JUDICIAL DISTRICT
ATTORNEY FOR APPELLANTS:	JAMES L. FARRIOR III
ATTORNEY FOR APPELLEE:	MICHAEL JAMES THOMPSON JR.
NATURE OF THE CASE:	CIVIL - CONTRACT
DISPOSITION:	AFFIRMED - 12/15/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE WILSON, P.J., LAWRENCE AND McCARTY, JJ.

WILSON, P.J., FOR THE COURT:

¶1. L. Murphy's Trucking Service Inc. (Murphy Trucking), a Louisiana corporation, entered into a contract with S.H. Anthony Inc. (Anthony), a Mississippi corporation. The contract provided that any disputes would be arbitrated in Gulfport, Mississippi. A dispute arose and was arbitrated in Gulfport. The arbitrator ruled in favor of Anthony, and the Harrison County Circuit Court entered a judgment confirming the award. However, Murphy Trucking had been administratively dissolved by the time of the court's judgment, and Anthony was unable to collect the judgment.

¶2. Anthony then filed a complaint against Murphy Trucking, SAV Trucking Services LLC (SAV), and Sean A. Villavaso, the owner of SAV and a former part owner of Murphy Trucking. Anthony alleged that the court should pierce the corporate veil and hold Villavaso personally liable, that SAV was a continuation of Murphy Trucking, and that Murphy Trucking had fraudulently transferred assets to avoid the judgment against it. After the defendants failed to answer the complaint, Anthony obtained a default judgment against them. Five months later, the defendants filed a motion to set aside the default judgment, arguing that they were never served with process and had a colorable defense to Anthony's complaint. Another five months later, the defendants filed a second motion to set aside the default judgment, this time alleging that they were not subject to personal jurisdiction in Mississippi. After a hearing, the circuit court denied the defendants' motions to set aside the default judgment. For the reasons discussed below, we find no error and affirm.

FACTS AND PROCEDURAL HISTORY

¶3. Anthony had a contract to do construction work at the Orleans Parish Prison in New Orleans. In September 2011, Anthony subcontracted with Murphy Trucking to supply and deliver pumped river sand to the job site. Although Murphy Trucking's work would be performed in Louisiana, the subcontract included a Mississippi choice-of-law clause and provided that any disputes would be arbitrated in Gulfport. Villavaso signed the agreement on behalf of Murphy Trucking. A dispute later arose and was submitted to arbitration in Gulfport. Villavaso attended the arbitration on behalf of Murphy Trucking. In September 2015, the arbitrator entered an award in favor of Anthony and ordered Murphy Trucking to

pay Anthony $357,495.81. In October 2015, Anthony filed a motion to confirm the arbitration award in the Harrison County Circuit Court. Murphy Trucking was served (by personal service on Villavaso) but failed to respond, and in February 2016 the circuit court entered a judgment confirming the arbitration award. The judgment awarded Anthony $361,417.33 plus post-judgment interest.

¶4. Meanwhile, on November 7, 2015, the Louisiana Secretary of State administratively dissolved Murphy Trucking for failure to file its annual report. At the time of dissolution, Villavaso was Murphy Trucking's president. Two related Louisiana corporations—Murphy Heavy Equipment Company and Murphy Dredging Company—were also administratively dissolved around the same time.

¶5. In May 2016, Anthony discovered that Murphy Trucking had been dissolved. Anthony then filed a complaint against Murphy Trucking, SAV, and Villavaso (hereinafter, collectively, "the Villavaso parties"). Anthony sought "specific performance" of its contract with Murphy Trucking, i.e., payment of the judgment confirming the arbitration award. Anthony also alleged that Villavaso knowingly and intentionally dissolved Murphy Trucking in order to avoid paying the judgment,[1] that SAV was simply a continuation of Murphy Trucking, and that Murphy Trucking had fraudulently transferred assets to Villavaso or SAV to avoid paying the judgment. Based on those allegations, Anthony argued that Villavaso and SAV were also liable for the judgment.

¶6. Proofs of service were filed showing that a process server personally served Villavaso

[1] The complaint attached a printout from the Louisiana Secretary of State's website showing that the company was administratively dissolved on November 7, 2015.

with three summonses and copies of the complaint—one each for Villavaso, Murphy Trucking, and SAV—in Jefferson Parish, Louisiana, on July 24, 2016. In October 2016, Anthony filed an application for entry of default, and the clerk entered a default against the Villavaso parties. Anthony then filed a motion for a default judgment, and on November 29, 2016, the circuit court entered a default judgment against the Villavaso parties for $392,586.49 plus post-judgment interest.

¶7. Over five months later in April 2017, the Villavaso parties filed a motion to set aside the default judgment. They argued that Villavaso had not been served with the summonses and complaints. In an affidavit, Villavaso claimed that he was not at home when the process server allegedly served him in July 2016. In another affidavit, Villavaso's girlfriend, Kasi Lamarque, claimed that *she* had "personally received the Summons and Complaint from the process server that day." The Villavaso parties also alleged that they had a "bona fide, good faith colorable defense to the claim at issue and the amount of damages sought." However, their motion failed to disclose or provide any information about the alleged defense.

¶8. Anthony filed a response to the Villavaso parties' motion and an affidavit from the process server, Scott Meunier. Meunier again affirmed that he personally served Villavaso on July 24, 2016, with summonses and copies of the complaint for Villavaso, Murphy, and SAV. Meunier stated that he did not serve a female or anyone other than Villavaso. He stated that during prior attempts at service, he had "encountered a female occupant at [Villavaso's] address, but on . . . July 24, 2016, [he] only encountered . . . Villavaso."

¶9. In September 2017, the Villavaso parties filed additional motions to set aside the

default judgment and dismiss the complaint.[2] These motions alleged, for the first time, that the court lacked jurisdiction over the Villavaso parties because they had never done business in Mississippi and were not subject to service of process in Mississippi. In response, Anthony argued that the Villavaso parties waived their objections to personal jurisdiction by failing to raise the issue in their prior motion to set aside the default judgment. Anthony also argued that the Villavaso parties were subject to personal jurisdiction in Mississippi under the long-arm statute, Miss. Code Ann. § 13-3-57 (Rev. 2019).

¶10. Strangely, the Villavaso parties' September 2017 motions also stated that they "would . . . show that [Villavaso] was in fact served with process in this action at his address in the State of Louisiana, as shown by the Proof[s] of Service filed in this action." In other words, the Villavaso parties' new motions directly contradicted the denial of service that was the basis of their original motion. Anthony's response to the motions, which was also filed in September 2017, noted this contradiction, observing that the Villavaso parties "ha[d] now confessed that service was sufficient" but "ha[d] provided no explanation whatsoever for making the unsubstantiated allegations [denying service] in [their] first motion."

¶11. For the next eighteen months, there was little action in the case. On March 13, 2019, the Villavaso parties filed "corrected" motions to set aside the default judgment and dismiss the complaint. The "corrected" motions amended the September 2017 motions to state that the Villavaso parties would "show that **the Plaintiff alleges** that [Villavaso] was in fact served with process in this action at his address in the State of Louisiana, as shown by the

[2] Villavaso filed a motion, and Murphy/SAV filed a substantially similar motion.

Proof[s] of Service filed in this action." In other words, the corrected motions walked back the Villavaso parties' prior confession of service.[3]

¶12. At a hearing on March 14, 2019, Villavaso testified that he became a part owner of Murphy Trucking in 2014—after he signed the contract between Murphy Trucking and Anthony but before the arbitration. Villavaso testified that he was authorized to sign the contract on behalf of Murphy Trucking, and he later became a part owner of the company with his uncle, Lamont Murphy. He testified that he attended the entire arbitration in Gulfport as Murphy Trucking's only corporate representative.

¶13. Villavaso testified that he is also the sole owner of SAV, which he started in 2011. SAV is in the same business as Murphy Trucking, i.e., it "hauls materials." Villavaso testified that "[SAV] would work for [Murphy Trucking] as a subcontractor." In addition, SAV kept some of its trucks at Murphy Trucking's principal place of business. Nonetheless, Villavaso maintained that "SAV . . . was independent from . . . Murphy Trucking" and that there was no "relationship" between the companies.

¶14. Villavaso testified that he has lived at the same address in Metairie (Jefferson Parish), Louisiana since 2006. He denied that he was served with process in this case. Villavaso claimed that he was at work the entire day he was allegedly served (July 24, 2016). He stated

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[3] As Anthony notes, all of the motions filed by the Villavaso parties were signed by Villavaso rather than by the parties' attorney. This was improper. "*Every* pleading or motion of a party represented by an attorney *shall* be signed by at least one attorney of record in that attorney's individual name, whose address shall be stated." M.R.C.P. 11(a) (emphasis added). "The signature of an attorney constitutes a certificate that the attorney has read the pleading or motion; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." *Id.*

that his employees could verify this, but he did not obtain affidavits from any of them. As noted above, Kasi Lamarque submitted an affidavit stating that *she* "personally received the Summons and Complaint from the process server on [July 24, 2016]." However, Villavaso's testimony at the hearing contradicted Lamarque's affidavit. Villavaso testified:

> Q. [In] Exhibit B to your motion to set aside [the] default judgment, [Lamarque] signed an affidavit stating that there was no process server that brought the complaint to your residence on that day?
>
> A. Correct.

¶15. Villavaso denied that Murphy Trucking was administratively dissolved in 2015. He testified that his uncle forced the dissolution in 2016. He testified that his uncle "served [him] with papers" in March 2016 and that Louisiana's 34th Judicial District Court granted his uncle's request for dissolution in June 2016. Villavaso claimed that he was opposed to the dissolution but that "from all [he] could understand," his uncle had a "right" to dissolve the company. Villavaso testified that he did not know whether the arbitration award and judgment in favor of Anthony were ever disclosed in the dissolution proceeding. Villavaso claimed that he could not have disclosed the award or judgment because his uncle forced the dissolution and controlled the proceeding. Villavaso provided no documentation of the allegedly forced dissolution of Murphy Trucking.

¶16. Villavaso testified that he had never done any business or owned any property in Mississippi. He also stated that SAV had never done any business or owned any property in Mississippi. However, on cross-examination, he admitted that he had formed "SAV Trucking Inc.," a Mississippi corporation. He owned the company and served as its

registered agent, using a Poplarville address. The company was administratively dissolved in 2002. The Poplarville address was a family farm owned by Villavaso's grandmother. Villavaso also formed "Murphy Trucking Service of Mississippi," a Mississippi LLC. Villavaso and his uncle were members of the LLC, and Villavaso served as its registered agent at the same Poplarville address. The LLC was administratively dissolved in December 2015. Finally, Villavaso also formed, owned, and served as the registered agent for two other Mississippi LLCs: "TMN Trucking Services of Mississippi" and "Murphy Farms." Both TMN Trucking and Murphy Farms used the same Poplarville address. TMN Trucking was administratively dissolved in November 2016, although it appears to have an active United States Department of Transportation number. While Villavaso admitted that he formed, owned, and served as the registered agent for all four of these Mississippi entities, he maintained that the companies never did any business and had existed only on paper.

¶17. After the hearing, the circuit court entered an order denying the Villavaso parties' motions to set aside the default judgment and dismiss the complaint. The court found that the Villavaso parties "failed to show good cause for the default and ha[d] shown no colorable defense to liability." The court also found that the Villavaso parties failed to show that they were entitled to relief from the default judgment under Mississippi Rule of Civil Procedure 60(b) and the three-prong balancing test set out in *American States Insurance Co. v. Rogillio*, 10 So. 3d 463, 467-68 (¶10) (Miss. 2009). Finally, the court ruled that the Villavaso parties failed to show that their motions should be granted based on a lack of jurisdiction or failure to serve process. The Villavaso parties filed a notice of appeal.

¶18. On appeal, the Villavaso parties argue that they rebutted the presumption of service of process because the only witness at the hearing, Villavaso, testified that he was not served. They also argue that the default judgment should have been set aside under Mississippi Rule of Civil Procedure 60(b) based on the three-prong balancing test for motions to set aside default judgments. Finally, the Villavaso parties argue that the circuit court lacked personal jurisdiction over them under the long-arm statute and that the court's exercise of jurisdiction violates due process. For the reasons discussed below, we find no error and affirm.

ANALYSIS

I. The trial judge did not abuse his discretion by finding that the Villavaso parties failed to rebut the presumption of proper service.

¶19. The Villavaso parties argue that the trial court erred by denying their motion to set aside the default judgment for lack of service of process. "In the absence of proper service of process, the court lacks jurisdiction, so any default judgment that it enters is void." *S & M Trucking LLC v. Rogers Oil Co. of Columbia*, 195 So. 3d 217, 221 (¶16) (Miss. Ct. App. 2016) (quotation marks omitted). "If a default judgment is void, the trial court has no discretion and must set the judgment aside." *McCain v. Dauzat*, 791 So. 2d 839, 842 (¶7) (Miss. 2001); *see* M.R.C.P. 60(b)(4) & advisory committee notes.

¶20. "When service of process is contested, the trial court must make findings to resolve disputed issues of fact." *Span ex rel. Span v. Nichols*, No. 2018-CA-01332-COA, 2020 WL 2394167, at *7 (¶33) (Miss. Ct. App. May 12, 2020) (citing *Thornton v. Freeman*, 242 So. 3d 188, 190 (¶4) (Miss. Ct. App. 2018)), *cert. denied* (Miss. Dec. 1, 2020). "With regard to service of process, this Court applies an abuse-of-discretion standard of review to the trial

court's findings of fact." *Long v. Vitkauskas*, 228 So. 3d 302, 304 (¶5) (Miss. 2017). "The trial court may make such findings based on affidavits with or without live testimony or depositions." *Span*, 2020 WL 2394167, at *7 (¶33); *see Collins v. Westbrook*, 184 So. 3d 922, 929 (¶18) (Miss. 2016) (holding that the trial court did not abuse its discretion by finding a lack of service based on conflicting affidavits); M.R.C.P. 43(c) ("When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.").

¶21. "If a process server has executed a return properly, there is a presumption that service of process has occurred." *Collins*, 184 So. 3d at 929 (¶18). This presumption may be rebutted by extrinsic evidence, including testimony and affidavits. *Id.*; *McCain*, 791 So. 2d at 842 (¶8). "Indeed, testimony by the contesting party, *if believed*, is sufficient to overcome the presumption and to support a finding that she was not served." *Long*, 228 So. 3d at 305 (¶9) (emphasis added) (brackets and quotation marks omitted). But the trial judge may find that the testimony disputing proper service of process lacks credibility—and, thus, find that the presumption of proper service of process has not been rebutted. *See McCain*, 791 So. 2d at 842 (¶8) (finding that the trial judge did not abuse his discretion by finding proper service because the process server executed a sworn affidavit attesting to proper service, and the trial judge "did not believe a word" of the opposing party's testimony).

¶22. The Villavaso parties allege that service was not made on Villavaso but on his girlfriend. Villavaso and his girlfriend both signed affidavits to that effect, and Villavaso

testified at the hearing that he was at work on the date the process server claimed to have served him at home. However, Villavaso's testimony at the hearing that the process server never attempted service on July 24, 2016, conflicted with Lamarque's affidavit that she personally received the summonses and complaints that day. Moreover, the process server, Meunier, executed contemporaneous, sworn proofs of service attesting that he served Villavaso personally. Finally, Meunier signed an affidavit in which he specifically averred that he served Villavaso and did not encounter Lamarque or anyone else at Villavaso's residence on the date of service.

¶23. The trial judge did not find Villavaso's denial of service to be credible. Given Meunier's affidavit and contemporaneous proofs of service, we cannot say that the trial judge abused his discretion by finding that the Villavaso parties failed to rebut the presumption of proper service.

II. The trial judge did not abuse his discretion by denying the motion to set aside the default judgment.

¶24. The Villavaso parties argue that the trial court erred by denying their motion to set aside the default judgment because they have a colorable defense to the complaint. They also argue that the trial judge failed to make sufficiently specific findings on this issue.

¶25. We review a trial judge's decision to grant or deny a motion to set aside a default judgment only for an abuse of discretion. *Rogillio*, 10 So. 3d at 467 (¶8). "Although default judgments are not favored in the law, it does not follow that a party seeking relief from a default judgment is entitled to that relief as a matter of right." *Id.* (quotation marks omitted). We will not reverse a denial of such a motion unless we are "convinced" that the trial judge

abused his discretion. *Id.* (quoting *H&W Transfer & Cartage Serv. Inc v. Griffin*, 511 So. 2d 895, 899 (Miss. 1987)).

¶26. "[R]equests for relief from a default judgment [are] analyzed under Rules 55(c) and 60(b) [of the Mississippi Rules of Civil Procedure]." *BB Buggies Inc. v. Leon*, 150 So. 3d 90, 101 (¶22) (Miss. 2014). "The [Mississippi Supreme] Court has articulated a three-pronged balancing test to apply in deciding whether to set aside a judgment pursuant to Rule 60(b): the trial court must consider '(1) the nature and legitimacy of the defendant's reasons for his default, i.e. whether the defendant has good cause for default, (2) whether the defendant in fact has a colorable defense to the merits of the claim, and (3) the nature and extent of prejudice which may be suffered by the plaintiff if the default judgment is set aside.'" *Id.* at (¶23) (quoting *Rogillio*, 10 So. 3d at 468 (¶10)).

¶27. The Villavaso parties argue that the trial judge failed to apply the three-factor balancing test because he failed to make detailed findings regarding each factor. They argue that the five months that passed between the default judgment and their motion to set it aside was "not an unreasonable about of time or delay." They also argue that Villavaso's testimony was sufficient to show a colorable defense. Finally, they argue that there is no evidence that Anthony would be prejudiced by the setting aside of the default judgment.

¶28. As to the first prong, the trial judge found that the Villavaso parties "failed to show good cause" for their default. As detailed above, there is sufficient evidence to support the trial judge's finding that Villavaso was served with process in July 2016 and simply failed to answer the complaint. An unexcused failure to answer a complaint is not good cause for

a default. *Id.* at 101-02 (¶24). Accordingly, the trial judge did not abuse his discretion by finding that the Villavaso parties failed to show good cause and that this factor weighed against them. *Id.*

¶29. As to the second prong, the trial judge found that the Villavaso parties failed to show that they had any "colorable defense on liability." On appeal, the Villavaso parties argue that the trial judge erred because Villavaso testified at the hearing that there was no "relationship" between him or SAV and Murphy Trucking. However, Villavaso's claim was contradicted to some extent by his admissions that SAV was in the same line of business as Murphy Trucking, that SAV was "a subcontractor" for Murphy Trucking, and that SAV shared at least one place of business with Murphy Trucking. Moreover, despite documentation showing that the Louisiana Secretary of State administratively dissolved Murphy Trucking in 2015, the Villavaso parties offered no evidence to corroborate Villavaso's claim that his uncle forced the dissolution of the company in 2016. Evidence of such a legal proceeding and the results of the dissolution would have been easy for Villavaso to produce, yet he failed to do so. After a review of the record, we cannot say that the trial judge abused his discretion by finding that the Villavaso parties failed to show a "colorable defense" and that this factor weighed against them.

¶30. With respect to the third prong, the trial judge noted that "[p]assage of time is a key element in determining prejudice by the setting aside of the default judgment." The trial judge noted that the Villavaso parties filed their initial motion to set aside the default judgment in April 2017, which was five months after the default judgment was entered and

nine months after they were served with process. In addition, the purpose of Anthony's suit was to collect on an arbitration award that had gone unpaid since October 2015. The trial judge did not err or abuse his discretion by finding that the delay caused by the Villavaso parties' default constituted prejudice to Anthony and weighed against setting aside the default judgment. *See, e.g.*, *Rogillio*, 10 So. 3d at 472 (¶23).

¶31. In summary, the trial judge applied the proper legal standard, and having found that all three factors weighed against the Villavaso parties, the judge did not abuse his discretion by denying their motion to set aside the default judgment.

III. The Villavaso parties waived their objections to personal jurisdiction under the long-arm statute and due process.

¶32. Finally, the Villavaso parties argue that the circuit court lacked personal jurisdiction over them under the long-arm statute, Miss. Code Ann. § 13-3-57, and that the court's exercise of jurisdiction violates due process. Anthony responds that the Villavaso parties waived their objection to personal jurisdiction by omitting it from their original motion to set aside the default judgment. Anthony also argues that the Villavaso parties are all amenable to service and subject to personal jurisdiction in Mississippi. The Villavaso parties fail to address the issue of waiver in their brief on appeal.[4]

¶33. As discussed above, the Villavaso parties filed their initial motion to set aside the default judgment in April 2017. In that motion, they argued that the default judgment should be set aside because they were not served with process and because they had a "colorable defense" to the complaint.

[4] They also failed to address the issue in the circuit court.

¶34. Five months later, in September 2017, the Villavaso parties filed additional motions to set aside the default judgment and dismiss the complaint.[5] In these motions, they asserted for the first time that the court lacked "jurisdiction" because they were not residents of the State and did not do business in the State. In response, Anthony argued that the Villavaso parties had waived their objection to personal jurisdiction by omitting it from their original motion to set aside the default judgment. Anthony also argued that the Villavaso parties were subject to personal jurisdiction under the long-arm statute and that the circuit court's exercise of jurisdiction was consistent with due process.

¶35. The circuit court ultimately ruled that the Villavaso parties "failed to establish that [their] motions to dismiss for lack of jurisdiction . . . should be granted." The court's order did not specifically state the basis of its ruling.

¶36. After review, we conclude that the Villavaso parties waived their objections to personal jurisdiction by failing to raise the issue in their initial motion to set aside the default judgment. Under Mississippi Rule of Civil Procedure 12(b), "[e]very defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that [seven enumerated] defenses may at the option of the pleader be made by motion[.]" M.R.C.P. 12(b). The defenses enumerated in Rule 12(b) include "[l]ack of jurisdiction over the person" and "[i]nsufficiency of service of process." M.R.C.P. 12(b)(1), (5). These Rule 12(b) defenses may be combined in a single motion or pleading. M.R.C.P. 12(b), (g). However, "[a] defense of lack of jurisdiction over the person, . . . or

[5] As noted above, the Villavaso parties filed "corrected" motions another eighteen months later. *See supra* ¶11.

insufficiency of service of process is waived . . . if [it is] omitted from a motion" that raises other defenses or objections under Rule 12. M.R.C.P. 12(h)(1). As our Supreme Court has stated, a defendant who wishes to assert a defense of lack of personal jurisdiction or insufficiency of service of process must do so in its "first defensive move." *Burleson v. Lathem*, 968 So. 2d 930, 935 (¶13) (Miss. 2007) (quoting *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 738 (1st Cir. 1983)).

¶37. Applying these rules, the Villavaso parties waived the defense of lack of personal jurisdiction. The Villavaso parties filed a motion to set aside the default judgment based on the defense of insufficiency of service of process.[6] In that initial motion, the Villavaso parties did *not* dispute that they were subject to personal jurisdiction in Mississippi under the long-arm statute or otherwise. *See* 1 Jeffrey Jackson et al., *Mississippi Civil Procedure* § 8:9, at 540 (2020 ed.) (explaining that an objection that a defendant is not "amenable to the jurisdiction of the court" differs from the defense of insufficiency of service of process). Rather, the Villavaso parties raised that issue for the first time five months later in a successive motion to set aside the default judgment and dismiss the complaint. Under the general rules governing the waiver of the defense of lack of jurisdiction over the person, the Villavaso parties waived the defense by failing to include it in their initial motion.

¶38. The fact that the Villavaso parties' successive motions were filed after a default judgment was entered does not alter our conclusion. On this issue, we find persuasive an

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[6] *See Pub. Emps.' Ret. Sys. of Miss. v. Dillon*, 538 So. 2d 327, 327 n.1 (Miss. 1988) (explaining that a denial of service of process raises a defense of insufficiency of service of process under Rule 12(b)(5), whereas an alleged defect in "the content of the summons" raises a defense of insufficiency of process under Rule 12(b)(4)).

opinion by the United States Court of Appeals for the Ninth Circuit applying parallel federal rules. *See Am. Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1106-08 (9th Cir. 2000). In *Hayhurst*, the defendant (Hayhurst) filed a motion to set aside a default judgment under Federal Rules of Civil Procedure 55(c) and 60(b). *Id.* at 1106-07. His motion "asserted the defense of improper service under Rule 12(b)(5), but did not assert the defense of lack of personal jurisdiction under Rule 12(b)(2)." *Id.* at 1107. The Ninth Circuit stated that in general, "a defendant remains free to challenge personal jurisdiction after a default judgment has been entered." *Id.* But the defendant may "squander[] that opportunity by failing to raise" the defense in his initial filing. The court held that Hayhurst had waived the defense of lack of personal jurisdiction by not raising it in his initial motion. *Id.* The court reasoned that if a defendant asserts "*any* Rule 12 defenses in his first filing to the court, he [is] obligated to raise *all* of those specified in Rule 12(h)." *Id.* In addition, the court held that the fact that Hayhurst's initial motion "was not dubbed a 'Rule 12' motion [was] of no significance" because the rule "applies with equal effect no matter what is the title of the pleading." *Id.* The court noted that "[w]hen a party does not respond to a complaint and default judgment is entered, a Rule 55 motion will very frequently be the first document filed with the court." *Id.* The court reasoned that Hayhurst's "Rule 55 motion was also a 'Rule 12' motion in that he raised a Rule 12 objection in it, asserting insufficiency of service of process under Rule 12(b)(5)." *Id.*[7]

[7] The Ninth Circuit noted that the Seventh Circuit had similarly reasoned that a motion to set aside a default judgment that raises Rule 12 defenses is, "in essence, a Rule 12 motion which require[s] a consolidation of all Rule 12 grounds for dismissal." *O'Brien v. R.J. O'Brien & Assocs. Inc.*, 998 F.2d 1394, 1399 (7th Cir. 1993) (quoting *O'Brien v. Sage Grp.*

¶39. We find this reasoning persuasive and applicable here. The Villavaso parties filed a motion to set aside the default judgment that raised a defense of insufficiency of service of process under Rule 12(b)(5), but their motion omitted any objection based on a lack of personal jurisdiction under Rule 12(b)(2). Applying ordinary principles of waiver, we conclude that the Villavaso parties waived the issue of personal jurisdiction by omitting it from their initial motion.

CONCLUSION

¶40. The trial judge did not manifestly err or abuse his discretion by finding that the Villavaso parties failed to rebut the presumption of proper service of process. Nor did the trial judge abuse his discretion by declining to set aside the default judgment under the three-prong balancing test. Finally, we conclude that the Villavaso parties waived their objection to the court's jurisdiction over them by failing to raise that issue in their initial motion to set aside the default judgment.

¶41. **AFFIRMED.**

BARNES, C.J., CARLTON, P.J., GREENLEE, WESTBROOKS, McDONALD, LAWRENCE AND McCARTY, JJ., CONCUR.

Inc., 141 F.R.D. 81, 83 (N.D. Ill. 1992)).