

**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

PLAINTIFF'S RESPONSE TO DEFENDANT WISEMAN'S NOTICE PRO SE
DOCUMENT #8 filed on 03/10/2009

Comes now, Suzanne Shell, Plaintiff, *pro se*, in response to the notice submitted to this honorable court by defendant William Wiseman, entitled "Objection to Jurisdiction" (#8). I contend that the defendants's objections must be overruled or, in the alternative, the notice must be stricken for failure to conform to the Federal Rules of Civil Procedure and the Local Rules.

1. Mr. Wiseman is the owner of another named defendant, Wiseman Studios.¹
2. Burden of Proof. The moveant has the burden of proof to support his request for relief.
3. Mr. Wiseman did not send me a copy of his objection. I did receive electronic notice of Ms. Wiseman's pleading and herein exercise my right to respond to the issues he raises in his objection and to present all material that is pertinent to Mr. Wiseman's and Wiseman Studio's letter. See Fed. R. Civ. P. 12(d).
4. On the face of this letter, Mr. Wiseman refers to this document as "Objection to Jurisdiction"

¹ Wiseman Studios is a sole proprietorship, owned and operated by William Wiseman.

5. Item 1 raised by the defendant states facts to support the existence of a concurrent claim which would bar this court from considering this complaint now before it. It is the defendant's burden to establish claim preclusion, *Nwosun v. General Mills Restaurants, Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997).
6. Mr. Wiseman contends, without supporting evidence, that he (and Wiseman Studios) who are named as defendants in this action are currently named in an identical suit in California.
7. I did name Mr. Wiseman and Wiseman Studios in a counterclaim in an ongoing case in California, however, I had them both withdrawn without prejudice as third party defendants on December 31, 2008², before I made any attempt at perfecting service.³ Since neither Mr. Wiseman nor Wiseman Studios are named defendants in any other case where I am the plaintiff, there is no bar to this case proceeding with them as defendants.
8. Item 2 raised by the defendants appears to be a challenge to subject matter jurisdiction based on 28 U.S.C 1332 (4)(A)(ii) requirements which are applicable only to class actions.
9. As this is not a class action case, this objection is irrelevant and must be overruled.

Personal Jurisdiction

10. Mr. Wiseman and Wiseman Studios 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

² See *Exhibit 1*, Request for Dismissal Entered in *Tower v. Shell*, Superior Court of California, County of Sacramento, case number 06AS03504

³ These facts were easily ascertainable because California places the pleadings on this case on the Internet for free public access. See *Exhibit 1*

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.

11. When a defendant makes a special appearance, no other issues may be raised without that 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).
12. 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 defendant cited the case number in her letter, identified himself as defendant, 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.
13. 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.
14. 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).
15. 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).
 16. “General appearance or responsive pleading by a defendant ***that fails to dispute personal jurisdiction*** (*emphasis added*) 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.
 17. 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).

18. 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

19. Mr. Wiseman’s dba Wiseman Studios’s objections to jurisdiction based on the issues he has raised must be overruled because the facts he submitted in support of his request are knowingly false or provably false or irrelevant or frivolous, and he has submitting no evidence tending to support his facts or tending to refute my evidence showing that there is no identical action with identical parties open in California.
20. Alternatively, I respectfully request the court to strike Mr. Wiseman’s Objection to Jurisdiction (#8) as improper under Fed.R.Civ.P. 7 and D.C.COLO.LCivR. 7.1 A and for his failure to properly serve me with a copy of this communication to the court.
21. I further request that this court find that, by virtue of his submission to this court (#8), Mr. Wiseman has entered his general appearance on behalf of the defendants William

Wiseman and Wiseman Studios and have thereby waived any objection to personal service or improper service of process, and have consented to this court asserting personal jurisdiction over them, and order them to file their answers by a date certain.

Any other such relief this honorable court deems just and necessary.

Respectfully Submitted March 30, 2009

/s/ Suzanne Shell

Suzanne Shell
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 RESPONSE TO LETTER BY DEFENDANT WISEMAN (DOCUMENT 8) were placed in the United States Mail, first class mail, postage prepaid on March 30, 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 30, 2009
Suzanne Shell

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address):

TELEPHONE NO.:

FOR COURT USE ONLY

Suzanne Shell
14053 Eastonville Rd.
Elbert, CO 80106

719.749.2971

FILED
ENCHOSSED
DEC 31 2008
By M. CERVANTES, Jr.
Deputy Clerk

ATTORNEY FOR (Name):

Insert name of court and name of judicial district and branch court, if any:

Superior Court of California, County of Sacramento

PLAINTIFF/PETITIONER: William O. Tower

DEFENDANT/RESPONDENT: Suzanne Shell

REQUEST FOR DISMISSAL

- Personal Injury, Property Damage, or Wrongful Death
Motor Vehicle
Other
Family Law
Eminent Domain
Other (specify):

CASE NUMBER:

06AS03504

- A conformed copy will not be returned by the clerk unless a method of return is provided with the document. -

1. TO THE CLERK: Please dismiss this action as follows:

(1) Without prejudice (2) Without prejudice

(1) Complaint (2) Petition

(3) Cross-complaint filed by (name): Suzanne Shell

on (date): November 14, 2008

(4) Cross-complaint filed by (name):

on (date):

(5) Entire action of all parties and all causes of action

(6) Other (specify):* Dismiss all third party defendants

Date: December 28, 2008

Suzanne Shell

[Signature of Suzanne Shell]

(SIGNATURE)

(TYPE OR PRINT NAME OF ATTORNEY PARTY WITHOUT ATTORNEY)

*If dismissal requested is of specified parties only of specified causes of action only, or of specified cross-complaints only, so state and identify the parties, causes of action, or cross-complaints to be dismissed.

Attorney or party without attorney for:

- Plaintiff/Petitioner Defendant/Respondent
Cross - complainant

2. TO THE CLERK: Consent to the above dismissal is hereby given.**

Date: December 28, 2008

Suzanne Shell

[Signature of Suzanne Shell]

(SIGNATURE)

(TYPE OR PRINT NAME OF ATTORNEY PARTY WITHOUT ATTORNEY)

** If a cross-complaint or Response (Family Law) seeking affirmative relief is on file, the attorney for cross-complainant (respondent) must sign this consent if required by Code of Civil Procedure section 581 (i) or (j).

Attorney or party without attorney for:

- Plaintiff/Petitioner Defendant/Respondent
Cross - complainant

(To be completed by clerk)

3. Dismissal entered as requested on (date): 12/31/08

4. Dismissal entered on (date): as to only (name):

5. Dismissal not entered as requested for the following reasons (specify):

6. a. Attorney or party without attorney notified on (date):

b. Attorney or party without attorney not notified. Filing party failed to provide
a copy to conformed means to return conformed copy

M. CERVANTES

Date: 12/31/08

Clerk, by Deputy

Exhibit 1 --- PLAINTIFF'S RESPONSE TO LETTER BY DEFENDANT WISEMAN (DOC 8)



CCMS DOCUMENT VIEWING



CCMS Online Document Viewing

The Court Case Management System (CCMS) online document viewer provides the ability to view public documents on Civil and Probate cases. Please be advised that it may take up to 72 hours after document is filed for it to appear here. If the document was filed more than 72 hours ago and you still cannot find the case or documents for which you are searching, please contact the Civil Records Unit (916) 874-7186 or the Probate Unit at (916) 875-3400.

Documents accessible only to the parties of a case and any confidential or sealed documents are not available through this application.

You must have a valid case number or hearing date and department to search for case related documents. If you do not have your case number you may use the [Case Index](#) to locate it. You will need to return to this page to conduct your search.

Document viewing requires [Adobe Acrobat Reader®](#)

Search By: Case Number Department

Document Types:

Case # Format: CCMS Other

Event Date: valid date format: mm/dd/yyyy
(optional)

PROBATE:

You can view all documents on Trust and Estate cases initiated after February 5, 2007 as well as all Probate Notes for hearings after February 5, 2007. You will also be able to see that documents were filed, but not view the documents, for all Guardianship and Conservatorship cases filed after February 5, 2007 as well as many older Trust, Estate, Guardianship, and Conservatorship cases.

CIVIL:

You can view all documents on Civil cases (excluding Small Claims and Unlawful Detainer cases) for cases initiated after November 13, 2007 as well as Case Management Program Tentative Rulings for hearings after November 13, 2007. You will also be able to see all documents filed after November 13, 2007 for all Civil cases. For case files/documents not available through CCMS Document Viewing, please contact the Civil Records Unit at (916) 874-7186 or select the following link [Copies of a File or Status of a Case](#) for information on accessing the hard-copy case file and its contents.

SEARCH RESULTS:

To view documents, please disable Pop-up blockers for this Web site.

	Filing	Case Number	Document Title	Event	Dept.	File Siz
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Exhibit 1 --- PLAINTIFF'S RESPONSE TO LETTER BY DEFENDANT WISEMAN (DOC 8)

	<u>Date</u>			<u>Date</u>		
View	1/30/2009 4:26 PM	06AS03504	Minute Order	1/30/2009 4:18 PM	54	10 K
View	1/30/2009 9:17 AM	06AS03504	Minute Order	1/30/2009 9:00 AM	54	6 K
View	1/16/2009 10:54 AM	06AS03504	Third Party motion for dismissal rejected: no hearing date			59 K
View	1/13/2009 10:00 AM	06AS03504	Documents are not in compliance to CRC 3.111(b); Fee Waiver is incomplete and missing a form; case n			49 K
View	1/6/2009 10:27 AM	06AS03504	Remittitur to Trial Court Clerk			240 K
View	1/5/2009 1:07 PM	06AS03504	Motion - Other			412 K
View	1/5/2009 8:23 AM	06AS03504	Proof of Service			49 K
View	12/31/2008 11:27 AM	06AS03504	Request for Dismissal without Prejudice - Party			93 K
View	12/29/2008 2:59 PM	06AS03504	Request - Other			142 K
View	12/29/2008 1:15 PM	06AS03504	Third Party Motion for Dismissal and Counterclaim Rejected: per CRC 3.1110			60 K
View	12/8/2008 9:22 AM	06AS03504	Minute Order	12/8/2008 9:00 AM	54	5 K
View	11/14/2008 2:39 PM	06AS03504	First Paper - Other			2875 K
View	11/14/2008 2:39 PM	06AS03504	First Paper - Other			58 K
View	11/14/2008 2:39 PM	06AS03504	Proof of Service - MAILING			46 K
View	9/22/2008 1:42 PM	06AS03504	First Paper - Other			139 K
View	9/10/2008 11:21 AM	06AS03504	Memo of Costs (not posted - case referred to Trial and Mandatory Settlement Conference)			184 K
View	9/5/2008 1:29 PM	06AS03504	Memorandum of Costs (Summary)			174 K
View	9/4/2008 12:00 AM	06AS03504	Clerk's Certificate of Service By Mail			9 K
View	9/3/2008 3:13 PM	06AS03504	Minute Order	8/29/2008 11:00 AM	45	18 K
View	9/3/2008 2:57 PM	06AS03504	Minute Order	8/29/2008 11:00 AM	45	6 K
View	9/3/2008 2:45 PM	06AS03504	Final Ruling on Motion to Vacate judgment Under CCP Section 476 and Order with Respect to Effie Belo			211 K

Exhibit 1 --- PLAINTIFF'S RESPONSE TO LETTER BY DEFENDANT WISEMAN (DOC 8)