DATE FILED: September 16, 2015 3:12 PM

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Court Address: 1437 Bannock St., Room 256
Denver, CO 80202

Plaintiffs: ARTHUR KEITH WHITELAW, III, JOHN DERUNGS, KATHERINE K. MCCRIMMON, LAURA PITMON, DENISE SIGON f/k/a DENISE L. SAGER, and ALAN and RITA SINGER.

Defendants: THE DENVER CITY COUNCIL (including the individual Council members in their official capacity, Albus Brooks, Charlie Brown, Jeanne Faatz, Christopher Herndon, Robin Kniech, Peggy Lehmann, Paul López, Judy H. Montero, Chris Nevitt, Debbie Ortega, Jeanne Robb, Susan Shepherd, Mary Beth Susman;
THE MANAGER OF COMMUNITY PLANNING AND DEVELOPMENT (Brad Buchanan, in his official capacity);
THE DENVER PLANNING BOARD (including the individual Board members in their official capacity, Andy Baldyga, Jim Bershof, Shannon Gifford, Renee Martinez-Stone, Brittney Morris Saunders, Joel Noble, Susan Pearce, Arleen Taniwaki, Julie Underdahl, Frank Schultz, and Chris Smith);
THE CITY AND COUNTY OF DENVER; and
CEDAR METROPOLITAN LLC (the Property Owner/zoning Applicant).

Attorney for Plaintiffs
Gregory J. Kerwin
Gibson, Dunn & Crutcher LLP
1801 California Street, Suite 4200
Denver, CO 80202-2642
Telephone: 303.298.5700
E-mail: GKerwin@gibsondunn.com

▲ COURT USE ONLY ▲

Case Number: 2015cv032427

Courtroom: 269

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR ENTRY OF INTERIM DEFAULT JUDGMENT AGAINST DEFENDANT CEDAR METROPOLITAN LLC

Plaintiffs submit this Reply Brief in support of their motion under Colo. R. Civ. P. 55(b) and 121, Section 1-14 to have the Court enter an interim default judgment against Defendant Cedar Metropolitan LLC ("Cedar"). Cedar filed a Response to Plaintiffs' Motion on September 10, 2015 labeling that document both a "Motion to Dismiss" and a "Response."[1]

For the reasons explained below, the Court should reject Cedar's attempt to delay this action through its disregard of the Colorado rules of civil procedure. As explained below, Cedar's argument that the personal service of the summons and complaint effected on its registered agent (Peter Kudla) on July 6, 2015 was insufficient, is incorrect as a matter of law. In addition Cedar waived any objection to insufficiency of service of process under Colo. R. Civ. P. 12(h)(1) by failing to file a timely motion to dismiss under 12(b)(4) by July 27, 2015—the deadline under Colo. R. Civ. P. 12(a)(1). Cedar's answer to Plaintiffs' Complaint is now more than one and one-half months late and the Court should enter an interim default judgment against Cedar, rather than reward it for its dilatory conduct.

I. Plaintiffs' Undisputed Personal Service on Cedar's Registered Agent on July 6, 2015 Was Proper and Effective.

Plaintiffs properly effected personal service of their summons and complaint on Cedar, through its registered agent, on July 6, 2015, and the Court should reject Cedar's argument challenging the sufficiency of such service. Cedar does not dispute the information presented in Plaintiffs' motion for default judgment that a copy of Plaintiffs' Summons and Complaint was

[1] Plaintiffs will file a separate motion to strike Cedar's untimely "motion to dismiss" because that motion was not filed within the 21 day time period for response allowed under Colo. R. Civ. P. 12(a). For the reasons explained in Plaintiffs' motion for an interim default judgment, Cedar's response to Plaintiffs' Complaint was due on July 27, 2015. Therefore this September 10, 2015 motion to dismiss was 45 days late, with no good cause shown by Cedar for ignoring the response deadline.

personally delivered to the office of Cedar's registered agent, Peter Kudla, on July 6, 2015. Instead, Cedar contends such service was not effective because of the identity of the person who personally delivered those papers to Cedar's agent, Plaintiffs' attorney.

Colo. R. Civ. P. 4(d) governs who can serve a summons for a lawsuit in Colorado. That rule states: "Process may be served . . . by any person whose age is eighteen years or older, not a party to the action." Under the plain reading of this language, an attorney for a party is not a "party to the action." A "party" is a person by or against whom suit is brought. See, e.g., Black's Law Dictionary Online at: http://thelawdictionary.org/party/

The language of Colo. R. Civ. P. 4(d) is based on the corresponding Federal Rule of Civil Procedure. Fed. R. Civ. P. 4(c)(2) addresses "Service" of a summons and states: "Any person who is at least 18 years old and not a party may serve a summons and complaint."

The federal courts recognize that: "Because a plaintiff's attorney is typically not a party, process may be served by the attorney." 1 *Moore's Federal Practice* § 4.70 (3d ed. 2015). *See, e.g., White v. Irene's Cuisine, Inc.*, 2002 WL 31308388 at *1 (E.D. La. Oct. 10, 2002) ("case law interpreting Rule 4 has uniformly held that plaintiff's counsel is not a 'party' for purposes of the rule, and is therefore permitted to effect service under the rule."); *Trustees of Local Union v. Perfect Parking, Inc.*, 126 F.R.D. 48, 51-52 (N.D. Ill. 1989) ("Based upon the plain language of Rule 4[(c)(2)], service of summons and complaint by an attorney for the plaintiff has been held to be proper service."); *Jugolina v. Blue Heaven Mills, Inc.*, 115 F.R.D. 13, 15 (S.D. Ga. 1986) (explaining that federal rules were amended in 1983 to reduce the role of federal marshals in service of process; the court "finds that a party's attorney may serve a summons and complaint in accordance with the Federal Rules.").

Because the Colorado rules of civil procedure are modeled on the Federal rules, the Colorado appellate courts follow federal cases interpreting the federal rules when construing comparable provisions of the Colorado rules of civil procedure. *See, e.g., Lavarato v. Branney*, 210 P.3d 485, 488-89 (Colo. App. 2009) (when federal rule and Colorado rule contain substantially similar language court treats federal cases interpreting the federal rule as persuasive in interpreting the corresponding Colorado rule); *Harding Glass Co. v. Jones*, 640 P.2d 1123, 1125 n. 3 (Colo.1982) (because Colorado rule is nearly identical to federal rule, "case law interpreting the federal rule is persuasive in analysis of the Colorado rule.").

Indeed, the Colorado Supreme Court's most recent amendments to the Colorado rules of civil procedure that took effect in July 2015 were adopted in order to keep in step with amendments to the federal rules. *See, e.g.,* Colorado Supreme Court "Rule Change 2015(5)" Comment "[2]" explaining changes to Colo. R. Civ. P. 1: "The changes here are based on identical wording changes proposed for the Federal Rules of Civil Procedure." (rule change available at: https://www.courts.state.co.us/Courts/Supreme_Court/Rule_Changes/2015.cfm).

Cedar relies on a court decision from more than one hundred years ago called *Nelson v. Chittenden*, 123 P. 656, 658-59 (Colo. 1912), that predates by many decades the modern rules of civil procedure that now govern court proceedings. In *Nelson*, the court was construing language from a Code provision that has not been in effect in Colorado for many decades. The Colorado rules of civil procedure replaced that "Code" and were modeled on the Federal Rules of Civil Procedure. Therefore, there is no basis for this Court to follow the archaic 1912 decision in *Nelson*.

Cedar also relies on the decision in *People in the Interest of T.G.*, 849 P.3d 843, 844 (Colo. App. 1992). That decision does not support Cedar's argument. In *T.G.* the court of appeals looked to the language of Colo. R. Civ. P. 17 to consider who is a "party" and held that it was proper for an employee of the district attorney's office to have served process. The discussion in that case about whether the district attorney could have served process is *dictum*. The focus of Colo. R. Civ. P. 17 on "party" is on who is asserting or defending claims in the lawsuit. Attorneys are not treated as parties under Rule 17. Cedar cites two Colorado treatises, but those are just purporting to summarize, without analysis, the old *Nelson* case.

Therefore, this Court should follow the plain language of Rule 4(d), and the cases interpreting the corresponding federal rule, and reject Cedar's argument that an attorney who is not a plaintiff or defendant cannot serve a summons in Colorado under Colo. R. Civ. P. 4(d).

II. By Failing to File a Timely Motion to Dismiss Under Colo. R. Civ. P. 12(b)(4), Cedar Waived Any Objection To the Sufficiency of Service in This Case.

In addition, the Court does not even need to decide Cedar's objection to service of the summons here because Cedar waived any objection to the sufficiency of service of process by failing to file a timely motion to dismiss under Colo. R. Civ. P. 12(b)(4) for "insufficiency of service of process." Although Cedar received Plaintiffs' Summons and Complaint on July 6, 2015, Cedar appears to believe by waiting to do anything until 63 days after Plaintiffs filed their complaint, it could create a trap requiring dismissal of this entire action under Colo. R. Civ. P. 4(m). *See* Cedar Response at 3. This argument is too clever and ignores Cedar's obligations under Rule 12.[2]

[2] Even if the 63 day time period in Rule 4(m) had applied here, that rule authorizes the Court, for good cause, to extend the time for service for an appropriate period. If the Court deemed

Colo. R. Civ. P. 12(b)(4) provides a specific mechanism for a defendant to move to dismiss for "insufficiency of service of process." But that objection to the sufficiency of service of process must be presented in a separate motion "filed on or before the date the answer" is due. *See* Colo. R. Civ. P. 12(b). Because Plaintiffs' Summons was served on Cedar on July 6, 2015, its answer or "separate motion" to challenge the sufficiency of service of process was due on July 27, 2015, i.e., "within 21 days after service of the summons and complaint." Colo. R. Civ. P. 12(a)(1). A defendant that fails to timely assert a defense based on alleged insufficiency of service of process is deemed to have waived that objection. *See* Colo. R. Civ. P. 12(h)(1) (a defense of insufficiency of service of process is "waived" if not "made by motion under this Rule" or included in a responsive pleading); *In re Marriage of Beatty and Turner*, 279 P.3d 1225, 1228 (Colo. App. 2012) (mother waived defense of insufficiency of service of process by failing to challenge the sufficiency of service in a responsive pleading). Thus, by waiting 63 days and doing nothing, Cedar defaulted on its response to Plaintiffs' Complaint and also waived any objection to the sufficiency of service of the Summons. *See generally* S. Hyatt and S. Hess, *Colorado Civil Rules Annotated* §12.2 at 138 (2005) ("In the absence of an extension of time, however, failure to respond to a complaint by pleading or motion within the time prescribed by this rule subjects the defendant to a default judgment under Rule 55.").

---

service on Cedar to be insufficient, the arguments in this Reply Brief show "good cause" and Plaintiffs would simply re-serve Cedar's registered agent again at his business address. *See, e.g., United Bank of Boulder, N.A. v. Buchanan*, 836 P.2d 473, 477 (Colo. App. 1992) ("although a complaint must be dismissed if the court otherwise lacks jurisdiction over a defendant, improper service alone does not require dismissal of the cause of action. Instead, the trial court should [merely] hold the service invalid and allow the action to stand so that the plaintiff can continue to seek proper service.") (quotations omitted).

In this case, Cedar's attorneys were clearly on notice that Plaintiffs served Cedar with the Summons and Complaint on July 6, 2015. Plaintiffs' Certificate of Service shows that on August 6, 2015 they mailed a copy of "Plaintiffs' Return of Service For Summons, Complaint . . . on Defendant Cedar Metropolitan LLC's Registered Agent on July 6, 2015," (filed with the Court on August 6, 2015), to Cedar's counsel, David Foster, at the Foster Graham firm. Plaintiffs' counsel sent this Return of Service to Mr. Foster after he had a person in his office named Diane call Mr. Kerwin on July 24, 2015 to inquire when the Summons and Complaint were served. *See* Pl. Motion for Interim Default, Exhibit 1 (Kerwin Affidavit) at ¶ 4.

Cedar's Response does not assert any other basis for opposing Plaintiffs' motion for entry of an interim default judgment against Cedar. Therefore, the Court should reject Cedar's attempt to delay adjudication of Plaintiffs' claims, and enter the interim default against Cedar that Plaintiffs request in their motion filed on September 8, 2015.

III. Cedar's Claim for Attorney's Fees is Baseless.

Plaintiffs' Reply demonstrates that Cedar lacks a valid argument to avoid a default judgment in this case. It waived any objection to the sufficiency of service of Plaintiffs' Summons, and such service was effective in any event. Therefore, Cedar's request for an award of attorney's fees is baseless. Cedar is in default because it failed to follow the requirements of Rule 12(a) and to file a timely response by July 27, 2015 (21 days from July 6)—such as a timely motion under Rule 12(b)(4) to challenge the sufficiency of service of process. Cedar's trap under Rule 4(m) is too clever. It has been "hoist with its own petard" here.

Therefore, for the reasons stated in Plaintiffs' motion and this Reply Brief, the Court should enter an interim default judgment against Defendant Cedar Metropolitan LLC, pending entry of a final judgment concerning Plaintiffs' claims against all the other Defendants.

Dated: September 16, 2015.

/s/ Gregory J. Kerwin

Gregory J. Kerwin, No. 14161
Gibson, Dunn & Crutcher LLP
1801 California Street, Suite 4200
Denver, CO 80202-2642
(303) 298-5700
Email: GKerwin@gibsondunn.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR ENTRY OF INTERIM DEFAULT JUDGMENT AGAINST DEFENDANT CEDAR METROPOLITAN LLC was served on the parties listed below on September 16, 2015 through the ICCES system:

Nathan Lucero
Tracy Davis
Assistant City Attorneys
Denver City Attorney's Office
Municipal Operations Section
201 W. Colfax Ave., Dept. 1207
Denver, CO 80202

(counsel for City Defendants)

Chip Schoneberger
Foster Graham Milstein & Calisher LLP
360 S. Garfield Street, 6th Floor
Denver, CO 80209

(counsel for Cedar Metropolitan LLC)

/s/ Gregory J. Kerwin
Gregory J. Kerwin

101994367.1