SUMMARY
February 10, 2022

2022COA17

No. 20CA1178, *Garcia v. Puerto Vallarta Sports Bar, LLC* — Civil Procedure — Default — Process — Relief From Judgment or Order — Clerical Mistakes

A division of the court of appeals holds that (1) a court may correct the spelling of a defendant's name after entering a default judgment, and that doing so does not change the party against which the default judgment was entered; and (2) a defendant waives a challenge to a default judgment based on insufficiency of service of process by (a) waiting until after entry of default judgment to make that challenge, knowing of the case from the outset; or (b) failing to make that challenge in its initial effort to set aside the judgment.

COLORADO COURT OF APPEALS **2022COA17**

Court of Appeals No. 20CA1178
City and County of Denver District Court No. 18CV34624
Honorable A. Bruce Jones, Judge

Eric Garcia,

Plaintiff-Appellee,

v.

Puerto Vallarta Sports Bar, LLC,

Defendant-Appellant.

ORDERS AFFIRMED

Division III
Opinion by JUDGE J. JONES
Lipinsky and Gomez, JJ., concur

Announced February 10, 2022

Law Office of David Gibans, LLC, David Gibans, Denver, Colorado, for Plaintiff-Appellee

KOB Law, LLC, Knute O. Broady, III, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Puerto Vallarta Sports Bar, LLC (PVSB), appeals the district court's orders granting the post-default-judgment motion of plaintiff, Eric Garcia, to amend the caption and judgment to correct the spelling of PVSB's name and denying PVSB's motion to set aside the default judgment based on insufficiency of service of process. We affirm. In doing so, we hold that (1) C.R.C.P. 60(a) may be employed to correct a misspelling of the name of the defendant following a default judgment, and that such a correction doesn't change the party against which the judgment was entered; and (2) PVSB waived its challenge to the sufficiency of service of process in two ways: (a) by failing to raise the issue until after the court entered default judgment while all along having actual notice of the case and (b) by failing to raise that issue when it first challenged the default judgment.

I. Background

¶ 2 This case arises from physical injuries Garcia claims to have sustained on October 7, 2017, while in the parking lot of the bar owned by PVSB. Garcia filed his complaint on December 14, 2018. It asserted four claims for relief: (1) negligence; (2) premises liability; (3) negligent hiring, supervision, training, and/or retention; and (4)

respondeat superior. The complaint, the district court civil summons, and the district court civil case cover sheet identified the defendant as "Puert*a* Vallarta Sports Bar, LLC, a Colorado Limited Liability Company doing business as Puert*o* Vallarta Sports Bar." (Emphasis added.)

¶ 3 The affidavit of service showed that service of process was made by leaving the documents with Adriana Raygoza, the "manager on duty," on January 2, 2019, while she was at the bar. The proof of service also identified the defendant as "Puert*a* Vallarta Sports Bar, LLC, d/b/a Puert*o* Vallarta Sports Bar." (Emphasis added.)

¶ 4 PVSB never responded to the complaint.

¶ 5 On February 5, 2019, Garcia filed a motion for default judgment under C.R.C.P. 55(b). The district court held the motion in abeyance and issued a notice to cure certain defects in the motion and the accompanying proposed order. Garcia promptly addressed the defects the district court had identified, and the court granted the motion for default judgment on April 19, 2019. As now relevant, the court entered judgment against "Puert*a*

Vallarta Sports Bar, LLC, . . . doing business as Puerto Vallarta Sports Bar" in the amount of $78,940.16. (Emphasis added.)[1]

¶ 6 About six months later, in an effort to collect on the judgment, Garcia filed a notice of a hearing set for January 8, 2020, pursuant to C.R.C.P. 69(e)(1). Garcia also filed an affidavit of service showing that the owner/operator of PVSB, Ramiro Montes, had been served on December 11, 2019, with a subpoena to attend and to produce documents at the hearing, and with blank Rule 69 interrogatories.

¶ 7 At the hearing on January 8, 2020, Montes appeared and identified himself as the owner of the bar. But he didn't produce any of the documents sought by the subpoena; rather, he asked for more time "so we can complete this." The court asked Montes if he understood where the case stood legally. He said,

> Yes. Yeah I understand, and I apologize for not being in compliance with everything. I told [Garcia's attorney] in the last four months, not four months, maybe the last three years, I

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[1] The court held PVSB and a second named defendant, Cobra Security, jointly and severally liable in the principal amount of $68,698.14, plus interest of $9,686.02 and costs of $556.00, for a total judgment of $78,940.16. The principal amount included past medical expenses of $15,698.14, past wage loss of $3,000, permanent physical impairment of $25,000, and pain and suffering of $25,000.

> have personal problems; my wife was very sick and she finally died about two months ago. And I kind of ignored everything, you know. I wish I — it's not right, but I did.

The court then said, "But where you are right now is that the lawsuit was initiated some time ago." Montes responded, "Yeah. I know." The court noted that PVSB had been served with the complaint, which Montes didn't contest. Montes then repeated his request for more time to respond to the Rule 69 documents, asking for an additional month. The court granted that request and scheduled a second Rule 69 hearing for February 19, 2020. Before the conclusion of the hearing, Garcia's attorney asked Montes, "[Y]ou have acknowledged that you received the papers a year ago, correct?" He said, "Yes." Montes didn't challenge service of process at any time during the hearing.

¶ 8 Montes hired a lawyer, who entered his appearance on February 10, 2020, purportedly "on a limited basis" to (1) file motions for postjudgment relief under Rule 60; (2) file motions to stay enforcement of the judgment; and (3) attend the Rule 69 hearing.

¶ 9 At the February hearing, PVSB's attorney told the court that the entity named on the complaint, the subpoena, and the interrogatories — Puert*a* Vallarta Sports Bar, LLC — doesn't exist; Montes is a managing member of Puert*o* Vallarta Sports Bar, LLC. According to PVSB's attorney, because the documentation had been served on an entity that "does not exist" (i.e., Puerta Vallarta Sports Bar, LLC), PVSB had nothing to produce. In response, Garcia's attorney asked for leave to amend the pleadings, saying that because the original complaint said "Puerta Vallarta, doing business as Puerto Vallarta Sports Bar . . . [the mistake was] a typo" subject to amendment at any time because it was clerical. The court directed Garcia's attorney to file the appropriate motion and reset the Rule 69 hearing for May 6, 2020. PVSB's counsel didn't raise any argument regarding service of process at the February hearing.

¶ 10 On February 26, 2020, Garcia's attorney filed a motion under C.R.C.P. 15 and 60(a) to amend the caption of the case for all purposes, including the judgment, by changing the name of the defendant from, in relevant part, "Puerta" to "Puerto." PVSB responded, arguing that Garcia wasn't trying to change the

defendant's name, but rather to add a new defendant to the case. PVSB's opposition didn't challenge the validity of service of process.

¶ 11 The court granted Garcia's motion, concluding that "amendment is appropriate under Rule 60(a)" and that PVSB "had notice and has not shown prejudice."

¶ 12 On April 20, 2020, PVSB filed a motion to set aside the default judgment under Rule 60(b)(3). For the first time, PVSB argued that it hadn't been properly served with process under C.R.C.P. 4(e) because Garcia's process server had delivered the summons and complaint to Raygoza, who isn't PVSB's registered agent and is neither a manager nor a member of PVSB. As well, PVSB argued that it wasn't a "formal party" to the action until after the caption had been amended; thus, it hadn't waived personal jurisdiction because the jurisdictional challenge hadn't become "ripe" until the court approved the amendment.

¶ 13 The district court denied PVSB's motion to set aside the default judgment, reasoning that because the caption had contained a mere clerical error — "Puerta" instead of "Puerto" — the court could properly correct that error under Rule 60(a). Regarding service of process, the court ruled that PVSB had waived its right to

challenge service of process by not raising the issue when it first challenged enforceability of the judgment.

II. Discussion

¶ 14 PVSB contends that the district court erred by (1) amending the pleadings and default judgment under Rule 60(a) and (2) failing to set aside the default judgment after concluding that PVSB waived any challenge to personal jurisdiction based on invalid service of process. These contentions fail.

A. Correcting the Spelling of PVSB's Name

¶ 15 As it argued below, PVSB contends on appeal that the district court erred by amending the pleadings and default judgment under Rule 60(a) because when it did so, it added PVSB as a new defendant to the default judgment. We disagree.

1. Standard of Review and Applicable Law

¶ 16 We review a district court's decision to correct a clerical error under Rule 60(a) for an abuse of discretion. *Reisbeck, LLC v. Levis*, 2014 COA 167, ¶ 7. "A district court abuses its discretion when its decisions are manifestly arbitrary, unreasonable, or unfair, or when it misapplies the law." *Id.*

¶ 17 Rule 60(a) provides, in relevant part, that "[c]lerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." "[T]he rule applies to clerical mistakes made not only by a clerk, but also to mistakes made by the court and the parties." *Reisbeck*, ¶ 8.

2. Analysis

¶ 18 We conclude that the district court didn't abuse its discretion by allowing the correction of the spelling of PVSB's name under Rule 60(a). Contrary to PVSB's assertion, because the amendment merely corrected a misnomer,[2] it didn't add a stranger to the action and Garcia wasn't required to re-serve PVSB. *Compare Rainsberger v. Klein*, 5 P.3d 351, 353 (Colo. App. 1999) (where the original summons and complaint named a business entity and the amended pleadings added a newly designated, individual defendant, service of process on the business entity didn't constitute service of process

[2] A misnomer is "the misnaming of a person in a legal instrument" or "a use of a wrong or inappropriate name." Merriam-Webster Dictionary, https://perma.cc/WEY4-7KND.

on the individual), *with Reisbeck*, ¶ 15 (where a plaintiff was misnamed — Reisbeck, LLC instead of Reisbeck Subdivision, LLC — the court properly corrected the judgment under Rule 60(a) because "no different or additional liability would be imposed on any existing defendant, and no party previously a stranger to the action would be added"). Had this typographical error been corrected earlier, no other party would have appeared before the district court. It was always clear that it was PVSB that Garcia sought to hold liable.

¶ 19 PVSB nonetheless argues that Colorado case law only permits a court to correct the name of a *plaintiff*, not a misnamed *defendant*, and that, in any event, such a change can't be made postjudgment.

¶ 20 But Rule 60(a) doesn't have any limiting language that would support either of these arguments. Indeed, as to the second argument, it says that the court may correct an error "at any time." C.R.C.P. 60(a).

¶ 21 And although we aren't aware of any reported Colorado decision addressing the correction of a defendant's name

postjudgment under Rule 60(a),[3] numerous federal courts have held that Fed. R. Civ. P. 60(a) is an appropriate vehicle for amending a judgment (including a default judgment) to correct a defendant's name. *See, e.g.*, *Robinson v. Sanctuary Music*, 383 F. App'x 54, 57 (2d Cir. 2010) (affirming a post-default-judgment correction; "a misnomer [in a party's name] may be corrected when 'plaintiffs did not select the wrong defendant but committed the lesser sin of mislabeling the right defendant'" (quoting *Datskow v. Teledyne, Inc., Cont'l Prods. Div.*, 899 F.2d 1298, 1301 (2d Cir. 1990))); *Fluoro Elec. Corp. v. Branford Assocs.*, 489 F.2d 320, 322-23, 325-26 (2d Cir. 1973) (affirming postjudgment correction of the defendant's name from "Branford Associates, a corporation" to "Branford Associates" under Fed. R. Civ. P. 60(a); had the error been corrected earlier, "no other persons would have been served in the action[, and n]o others

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[3] In *Van Buren v. Posteraro*, 45 Colo. 588, 102 P. 1067 (1909), the court held, consistent with our holding, that the lower court properly amended a default judgment to correct the spelling of the defendant's last name (from "Postoria" to "Posteraro") and that the judgment was a judgment against the defendant notwithstanding the misspelling. That case predates the adoption of the Colorado Rules of Civil Procedure by several decades, but its rationale is consistent with that of the federal cases applying the current rule of federal civil procedure.

would have appeared before the court"); *Martinez v. Dart Trans, Inc.*, ___ F. Supp. 3d ___, 2021 WL 2813616, at *7 (D.N.M. July 6, 2021) (ordering a post-default-judgment correction; "allowing courts to correct misnomers comports with [R]ule 60(a)'s purpose and does not actually change a party's identity, but, instead, allows the [c]ourt to ensure that its 'purpose is fully implemented'" (quoting *Burton v. Johnson*, 975 F.2d 690, 694 (10th Cir. 1992))); *see also First Nationwide Bank v. Summer House Joint Venture*, 902 F.2d 1197, 1200 (5th Cir. 1990) (an amended judgment that only corrected the spelling of the defendant's name from Martha to Marsha was immaterial and didn't affect the time for filing a notice of appeal).

¶ 22 Because Colorado's Rule 60(a) is virtually identical to Fed. R. Civ. P. 60(a), we may consider cases interpreting the federal rule as persuasive authority in interpreting the Colorado rule. *See Warne v. Hall*, 2016 CO 50, ¶¶ 13-16; *Benton v. Adams*, 56 P.3d 81, 86 (Colo. 2002); *Carbajal v. Wells Fargo Bank, N.A.*, 2020 COA 49,

¶ 19 n.4. We find these federal authorities persuasive, and we don't see any reason not to follow them.[4]

¶ 23 We conclude, therefore, that the court didn't abuse its discretion by correcting the spelling of PVSB's name, and we hold that doing so didn't add a new party to the case.

B. Sufficiency of Service of Process

¶ 24 PVSB also contends that the default judgment against it is void for lack of valid service of process, a defect it claims that it can't and didn't waive. We disagree and instead conclude that PVSB waived any challenge to personal jurisdiction based on improper service because (1) PVSB had actual notice of the action against it, and it didn't raise the issue of invalid service of process until after the court entered default judgment; and (2) PVSB failed to raise the issue with its first challenge to the default judgment.

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[4] "Every Court of Appeals that has addressed the issue, including the United States Courts of Appeals for the Second, Fifth, Sixth, Ninth, and Federal Circuits, has concluded that misnomer correction is a proper application of [R]ule 60(a)." *Martinez v. Dart Trans, Inc.*, ___ F. Supp. 3d ___, 2021 WL 2813616, at *7 (D.N.M. July 6, 2021) (citing cases).

1. Standard of Review and Applicable Law

¶ 25 We review de novo an order denying a motion for relief under Rule 60(b). *First Nat'l Bank of Telluride v. Fleisher*, 2 P.3d 706, 714 (Colo. 2000).

¶ 26 As noted, PVSB moved for relief from the judgment under subsection (3) of Rule 60(b). That subsection provides for relief from a final judgment when "the judgment is void." C.R.C.P. 60(b)(3). A default judgment is void if the district court lacked personal jurisdiction over the defendant because of invalid service of process. *Burton v. Colo. Access*, 2018 CO 11, ¶ 35; *Goodman Assocs., LLC v. WP Mountain Props., LLC*, 222 P.3d 310, 315 (Colo. 2010). Even so, a party may waive a challenge to personal jurisdiction. *Gilford v. People*, 2 P.3d 120, 127 n.6 (Colo. 2000); *Meggitt v. Stross*, 2021 COA 50, ¶¶ 44-45; *see also* C.R.C.P. 12(h)(1). And such a waiver may be implied. *Gilford*, 2 P.3d at 127 n.6. Along these lines, Colorado courts have held on many occasions that a party waives that defense by failing to timely assert it. *E.g.*, *Meggitt*, ¶ 45; *Brown v. Silvern*, 141 P.3d 871, 873 (Colo. App. 2005). Indeed, that notion is stated expressly in Rule 12(h)(1)(B), which says that

> [a] defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process is waived . . . if it is neither made by motion under [Rule 12] nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

And that notion is supported by Rule 60(b)'s requirement that a challenge under subsection (3) thereof "shall be made within a reasonable time."

2. Analysis

¶ 27 Though we aren't aware of any Colorado appellate decision addressing a postjudgment waiver of a challenge to service of process in circumstances like those in this case, federal courts, as well as other state courts, have found such a waiver in these circumstances under two related, but distinct, theories.

¶ 28 First, a party may waive a challenge to personal jurisdiction, including one based on insufficiency of service of process, by having actual notice of the case but waiting until after judgment is entered to challenge jurisdiction. *E.g.*, *Frank Keevan & Son, Inc. v. Callier Steel Pipe & Tube, Inc.*, 107 F.R.D. 665, 673-74 (S.D. Fla. 1985) (the defendant waived any right to complain about defects in service of process when he waited until after the default judgment to raise the

issue, despite knowing of the case from the outset); *Myers v. Brown*, 465 A.2d 254, 258 (Vt. 1983) ("[I]n those cases in which a party has actual knowledge of the pending action, there are no constitutional issues at stake, and waiver is not only possible but advisable. . . . '[W]hen the party has received actual notice of the suit there is no due process problem in requiring him to object to the ineffective service within the period prescribed by Rule 12(h)(1) and the defense is one that he certainly can waive if he wishes to do so. His failure to do what the rule says he must do if he is to avoid a waiver might well be taken as being a waiver. Furthermore, a more permissive construction would sharply reduce the effectiveness of Rule 12(h)(1).'" (quoting 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1391, at 857-58 (1st ed. 1969))) (emphasis omitted).

¶ 29 It is undisputed that PVSB had actual notice of the action against it from the very beginning. And yet, it didn't take any action in the case until over one year later, after the court entered default judgment. As Montes said, he simply ignored the case. He thereby waived PVSB's challenge to service of process.

¶ 30 Second, a party may waive a challenge to personal jurisdiction, including one based on insufficiency of service of process, by failing to make such a challenge in its first effort to defend against a judgment. *See, e.g.*, *Democratic Republic of Congo v. FG Hemisphere Assocs., LLC*, 508 F.3d 1062, 1064 (D.C. Cir. 2007) (the defendant waived its objection to service of process by proceeding with post-default litigation because "defendants should raise such preliminary matters before the court's and parties' time is consumed in struggle over the substance of the suit"); *O'Brien v. R.J. O'Brien & Assocs., Inc.*, 998 F.2d 1394, 1398-99 (7th Cir. 1993) (the defendant waived any post-default-judgment challenge to personal jurisdiction based on defects in the summons by failing to raise the issue in its initial motion challenging default); *Mitchell v. Hobbs*, 951 F.2d 417, 422 (1st Cir. 1991) (when the defendant failed to raise the defense of lack of jurisdiction for insufficiency of service of process by either a motion under Fed. R. Civ. P. 12 or in a responsive pleading, the defendant had "submitted to the jurisdiction of the court" and waived the defense); *Trs. of Cent. Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 734 (7th Cir. 1991) (the conduct of the defaulting party's attorney, including

appearing before the court and presenting argument on behalf of the defendant, when taken in conjunction with the defendant's acknowledgment of the lawsuit, supported the court's conclusion that the defendant waived the right to object to service of process); *Schmude v. Sheahan*, 214 F.R.D. 487, 491 (N.D. Ill. 2003) (though the defendants could have raised the defense of insufficient service of process in their first motion to vacate the default judgment, they didn't, and therefore they failed to timely raise the issue and waived the defense); *J. Slotnik Co. v. Clemco Indus.*, 127 F.R.D. 435, 440-41 (D. Mass. 1989) (a defendant's first defensive move must be to address improper service; otherwise, that objection to personal jurisdiction is waived).

¶ 31 At the Rule 69 hearing on February 19, 2020, PVSB's first move to defend against the judgment was to argue that PVSB wasn't a party to the action because there was no entity named "Puerta Vallarta Sports Bar, LLC." PVSB's attorney didn't say anything about invalid service of process at the hearing, even after Garcia's counsel said service had been effected. Following the hearing, when Garcia moved to amend the caption to correct the spelling of PVSB's name, PVSB responded with the same argument.

And again, PVSB didn't mention anything about whether service of process was valid. It was only after the court granted Garcia's motion to amend that PVSB filed a motion challenging service of process.

¶ 32 This was a waiver. To hold otherwise would sanction sandbagging, to the detriment of the plaintiff and the court.

¶ 33 In sum, we conclude that the district court didn't err by finding that PVSB waived its defense of invalid service of process.

III. Conclusion

¶ 34 The orders are affirmed.

JUDGE LIPINSKY and JUDGE GOMEZ concur.