

**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

**RESPONSE TO DEFENDANT THOMAS DUTKIEWICZ MOTION TO DISMISS AND
QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION [#66]
filed on April 24, 2009**

COMES NOW Plaintiff Suzanne Shell, in opposition to the Defendants'

Response to Defendant Thomas Dutkiewicz Motion to Dismiss and Quash Service of Summons for Lack of Personal Jurisdiction [#66] filed on April 24, 2009. I contend that the defendant forfeited his defenses of lack of personal jurisdiction and improper service by virtue of entering his general appearance.

1. "Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived." *Insurance Corp. of Ireland, Ltd., v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982).
2. Rule 12(h)(1) of the Federal Rules of Civil Procedure provides that a defense based on lack of personal jurisdiction is waived if not made by motion or included in a responsive pleading.
3. "A defect in the district court's jurisdiction over a party is a personal defense which may be asserted or waived by a party." *Williams v. Life Sav. and Loan*, 802 F.2d 1200, 1202 (10th Cir. 1986). 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).

4. The defense of lack of personal jurisdiction may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct. *Yeldell v. Tutt*, 913 F.2d 533, 539 (8th Cir. 1990), cited in *Hunger United States Special Hydraulics Cylinders Corp. v. Hardie-Tynes Manufacturing Company*, 203 F.3d 835 (10th Cir. 02/04/2000) (unpublished decision).
5. Thomas Dutkiewicz entered a general appearance when he filed his Appearance document [#65] on April 24, 2009, which stated in its entirety, “ Enter my appearance in the above-entitled case as a Pro Se litigant.” This entry of appearance was his first filing with the court.
6. This court has personal jurisdiction over T. Dutkiewicz by virtue of his voluntary appearance. *Williams v. Life Sav. & Loan*, 802 F.2d 1200, 1202 (10th Cir. 1986) “[J]urisdiction over a party may be conferred upon a court . . . by voluntary appearance of a party.”
7. Voluntary appearance waives the defense of lack of personal jurisdiction. *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1318 (9th Cir.) (stating that “a party's failure to satisfy th[e] minimum steps” specified in Rule 12(h)(1) is not the only way to waive the defense of lack of personal jurisdiction), cert. denied, 119 S. Ct. 446 (1998); *Continental Bank, N.A. v. Meyer*, 10 F.3d 1293, 1296-97 (7th Cir. 1993) (determining that defendants’ conduct constituted waiver of personal jurisdiction defense) both cited in *Hunger United States Special Hydraulics Cylinders Corp. v. Hardie-Tynes Manufacturing Company*, 203 F.3d 835 (10th Cir. 02/04/2000) (unpublished decision).
8. Thomas Dutkiewicz’s actions amount to a legal submission to the jurisdiction of the court. *Compagnie des Bauxites de Guinee*, 456 U.S at 704-05.
9. Waiver can be based on a party’s appearance. *Federal Deposit Insurance Corp. v.*

Oaklawn Apartments, 959 F.2d 170 (10th Cir. 03/17/1992) (The district court's finding of waiver was based on attorney Newcombe's appearance, *reversed and remanded to determine if that appearance and representation was authorized by the party.*)

10. *Zelson v. Thomforde*, 412 F.2d 56, 58 (3rd Cir. 1969) held it was error for the district court to dismiss a case sua sponte for want of personal jurisdiction, where the defendant appeared without objecting to the court's jurisdiction over him, cited in *Williams v. Life Sav. and Loan*, 802 F.2d 1200, 1202 (10th Cir. 1986)

Wherefore, I respectfully request this court to strike defendant's motion to dismiss as vexatious and frivolous, or

In the alternative deny the defendant's motion to dismiss.

If this court grants neither request, then I respectfully request the court to grant me the opportunity to respond to the motions to dismiss based on personal jurisdiction on its face because to take the time to do so at this time, in view of the defendant's admitted appearance in this case, is a waste of my limited time and resources considering the sheer volume of work I must attend to meet my deadlines.

Respectfully submitted May 13, 2009

/s/Suzanne Shell

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