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John F. Tamburo, Owner

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APRIL 26, 2006

The Honorable Herman Haase
River Valley Justice Center, Courtroom #2
3208 W. McDonough St.
Joliet, IL 60431

IN RE: 06 L 51
Tamburo, et. al., v. Andrews, et. al.

Dear Judge Haase,

I respectfully attach a courtesy copy of my surreply opposing the defendant's motion to dismiss this action. This motion is scheduled before the court on May 2, at 9:00 AM.

Your honor, I wish you the very best.

Sincerely,

John F. Tamburo

CC: Mr. Charles Mudd, Esq., Attorney for Defendant

JFT:ww

IN THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS, LAW DIVISION

JOHN F. TAMBURO, D/B/A MAN'S BEST FRIEND SOFTWARE, *Plaintiff*	)	CASE NUMBER: ***06 L 51***
v.	)	
JAMES ANDREWS, D/B/A K9PED *Defendants*	)	

NOTICE OF FILING

To: Mr. Charles Lee Mudd, Jr., Esq.
Attorney for Defendant
3344 N. Albany
Chicago, IL 60618

PLEASE TAKE NOTICE that I have submitted the attached Surreply and exhibits to the honorable Clerk of the Court for filing this day.

John F. Tamburo
Plaintiff Pro Se

PROOF OF SERVICE

I, John F. Tamburo, Plaintiff Pro Se do hereby on the penalty of perjury do certify that I transmitted a copy of this notice and all of the attached pleadings and exhibits to the above named counsel of record on or before 8:00PM on April 26, 2006, by placing it, postage prepaid, into the US Mail at 655 N. LaGrange Rd., Frankfort, IL 60423.

John F. Tamburo
Plaintiff Pro Se
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815-806-2130

IN THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS, LAW DIVISION

JOHN F. TAMBURO, D/B/A MAN'S BEST FRIEND SOFTWARE, *Plaintiff*	)	CASE NUMBER: ***06 L 51***
v.	)	
JAMES ANDREWS, D/B/A K9PED *Defendants*	)	

PLAINTIFF'S SURREPLY OPPOSING THE DEFENDANT'S MOTION TO DISMISS

1. Introduction

Defendant's counsel, in his reply memorandum supporting his motion to dismiss now at bar (hereinafter the "Reply"), raises several new arguments. In this surreply, Plaintiff shows these arguments to be misplaced, complete with inapposite citations. For the reasons shown herein, Plaintiff prays that this honorable court deny the defendant's motion in its entirety.

2. Argument

2.1. The Reply misstates the law. The defendant has waived his objections to this court's jurisdiction.

2.1.1. The statute requires that the motion be divided into parts.

In the Reply, at pp. 2-3, counsel inaccurately states several things. He contends that his motion, which he failed to divide into sections "in parts" as required by *735 ILCS 5/2-301(a), (a-5)* (2000), does not violate the statute.

However, the motion speaks for itself. It is a blob of paragraphs. In one paragraph, counsel makes arguments under sections 2-615 and (improperly) 2-619, with the 2-619 arguments directed towards this court's jurisdiction over Andrews' person. Section 2-301,

statute. However, in violation of sections 2-301(a-5) and 2-619.1,[2] counsel does not mention section 2-301 anywhere in the motion or the memo. Therefore, since the motion is not "in compliance with subsection [2-301](a)", counsel "waives all objections to the court's jurisdiction over the party's person." *735 ILCS 5/2-301(a-5).* Therefore, by black letter law, defendant has completely waived all of the jurisdictional arguments in pp.1-18 of the Memo, made wrongly under section 2-619.

2.1.3. Section 2-619 does not support an objection to personal jurisdiction.

735 ILCS 5/2-619(a) sets forth several grounds for involuntary dismissal. Apparently, counsel has confused section 2-619(a)(1) with section 2-301. Section 2-619(a)(1) refers to *subject matter jurisdiction*, not jurisdiction over the person. See *Williams v. Illinois State Scholarship Com.*, 139 Ill. 2d 24, 40 (1990) (Holding that 2-619(a)(1) facilitates the transfer or dismissal of a case filed in the wrong venue). Section (a)(1) was intended to permit a court to refuse to act where a statute prescribes a different forum. For example, when a collective bargaining agreement commands arbitration. See *Kostecki v. Dominick's Finer Foods, Inc.*, 361 Ill. App. 3d 362 (1st Dist. 2005).

Defendant's counsel has it completely wrong when he states that "Illinois courts have consistently addressed motions to dismiss for lack of personal jurisdiction pursuant to Section 2-619." Counsel cites *In re Marriage of Hoover*, 314 Ill.App.3d. 707, 710 (4th Dist. 2000), to support this argument, however, *Hoover does not mention section 2-619 anywhere within the decision.* In fact, *Hoover*, by its own language, is a case based on the pre-amendment version of the 2-301 statute. *Hoover*, 314 Ill. App. 3d at 710. See Exhibit SR-1, case, attached hereto.

[2] To comply, "Each part shall be limited to and shall specify that it is made under" the relevant statute. "

In fact, in the Memo, at pp.3,11, defendants cited (for a different reason) to *LaRochelle v. Allamian*, 361 Ill. App. 3d 217 (2nd Dist. 2005). *LaRochelle* did, however, address the notion that Section 2-619 supports a motion to dismiss for want of personal jurisdiction. In *LaRochelle*, 361 Ill. App. 3d at 220, the court notes that the defendants objected under 2-619, and then immediately cites to the correct 2-301 statute.

But it does not matter. Even if section 2-619(a)(1) permits motions to dismiss for want of personal jurisdiction, it does *not* allow for objections to the sufficiency of service of process, which invokes section 2-301, and it does not discharge or mitigate the defendant's statutory obligation to divide his motion into parts as required by section 2-619.1. Defendant's counsel dropped the ball, and now he must suffer the consequences. All jurisdictional objections are waived.

2.1.4. Even if a section 2-619 motion to dismiss for want of personal jurisdiction were permitted, it must fail because the court cannot consider affidavits designed to refute John's well-pled factual allegations of jurisdiction.

Please assume *arguendo* that section 2-619 permits objections to personal jurisdiction. The only reasonable ground to uphold a personal jurisdiction dismissal under the language of the statute is an "other affirmative matter avoiding the legal effect of or defeating the claim." *735 ILCS 5/2-619(a)(9).* Trying to shove a personal jurisdiction objection into the statute is quite difficult, since a claim is not "defeated" by a lack of personal jurisdiction. But please assume *arguendo* that this is the case, regardless of the provision of section 2-619 that putatively permits an objection to personal jurisdiction.

If defendant objects to personal jurisdiction under 2-619, then the motion ***admits all facts pleaded in the complaint.*** "[A] motion pursuant to either section 2--615 or section 2--619

concedes the truth of all well-pled allegations in the complaint." *Provenzale v. Forister*, 318 Ill. App. 3d 869, 879 (2nd Dist. 2001). Also, the court *must reject* the entirety of defendant Andrews' affidavit: "[E]videntiary material in support of a section 2--619 motion may not be submitted for the purpose of contradicting well-pleaded facts in the complaint." *Id.*

Provenzale is far from alone in these holdings. See *Premier Electrical Construction Co. v. La Salle National Bank* (2nd Dist. 1983) ("[A] motion pursuant to either section 2--615 or section 2--619 concedes the truth of all well-pled allegations in the complaint."); *City of Chicago v. Beretta U.S.A. Corp.*, 337 Ill. App. 3d 1, 23 (1st Dist. 2002) ("Evidentiary material in support of a section 2-619 motion may not be submitted for the purpose of contradicting well-pleaded facts in the complaint.").

Therefore, if this court holds that 2-619 is a valid basis for objection to personal jurisdiction, it must take all of John's allegations, including the jurisdictional allegations, as true, and without regard to any contrary swearings by Andrews.[3] This includes sales into Illinois, 1st Am. Cplt., ¶ 40, Defendant's fully-interactive web-site, ¶ 39, and intentionally coming into Illinois to access its court websites to obtain damaging information on John, ¶ 37. These allegations are specific facts, not legal conclusions. They are therefore well-pled. This court must reject Andrews' affidavit. *Provenzale*, 318 Ill. App 3d at 879. Therefore, under section 2-619 of the Code of Civil Procedure, the defendant's jurisdictional objections must be denied in their entirety.

[3] John disputes that any matter within Andrews' affidavit sufficiently meets his burden to defeat John's allegations of facts that support personal jurisdiction.

2.1.5. Defendant's citations to cases relating to section 2-301 are inapposite.

Counsel apparently argues against the pre-2000 version of section 2-301, citing cases that discuss the six-year-old demise of the special and limited appearance. However, *John does not argue that* the defendants have waived jurisdiction by failing to file a special and limited appearance. No current statute requires any such appearance. *LaRochelle*, 361 Ill. App. 3d. at 220. John argues that the defendants have breached the black letter law of sections 2-301 and 2-619.1.

Nor is the present version 2-301 made obsolete by the elimination of the Special and Limited Appearance. On the contrary, multiple courts have held that the revised section 2-301 requires that a defendant must first object to personal jurisdiction under 2-301 prior to filing any other motion in the case. See *In re Schmitt*, 321 Ill. App. 3d 360, 366 (2nd Dist. 2001), *LaRochelle v. Allamian*, 361 Ill. App. 3d 217, 220 (2nd Dist. 2005).

The defendant's citation to the wrong statute is certainly not an objection under 2-301, was not labeled as such as required by *735 ILCS 5/2-301(a-5)*, and thus is not a motion that properly objects to personal jurisdiction. Therefore, defendant has completely and irrevocably waived his objections to personal jurisdiction under black letter law.

2.2. John properly pleads a class of customers with whom he has a business expectancy. John is not limited to pleading only the interference with existing customers.

In the Memo, counsel argued that John did not state claims for Tortious Interference with prospective business advantage because he failed to plead the actual identities of those whose expectancies were interfered with. See Memo, pp.19-20. John cited cases that show that he properly pleads a class of prospective customers, John's Opposition Memo, pp.12-13.

Thwarted by the law, counsel shifts gears and tries again, with a new argument. Now he argues, in the Reply at pp.3-4 that John must plead "existing business relationships" in order to state a claim for tortious interference with *prospective* economic advantage. Then, counsel states that John "Plaintiff has not and cannot cite to any Illinois authority" that counters the defendant's argument. Well, here is some of that authority to which Plaintiff "cannot" cite.

The opportunity to obtain customers is an expectancy protected by the tort of interference with a business expectancy. *North Broadway Motors, Inc. v. Fiat Motors of North America, Inc.,* 622 F. Supp. 466, 469 (N.D. Ill. 1984); *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.*, 190 Ill. App. 3d 524, 529 (2nd Dist. 1989). Plaintiff properly alleges an expectancy if "a class of identifiable third persons, past and future customers, has been alleged." *Id, citing O'Brien v. State Street Bank & Trust,* 82 Ill. App. 3d 83, 85 (1980).

In the instant case, contrary to counsel's assertions that John pleads "ambiguous allegations of general, hopeful expectations of future business," John pleads a specific class of his customers in 1st Am. Cplt ¶ 5, his expectancy to do business with those customers, ¶¶ 41, 101 his loss of existing and prospective customers, ¶¶ 24-26 and Andrews' knowledge and interference by improper means ¶¶ 47, 50, 106.

Counsel, in his Reply, does not dispute that John properly alleges the other elements of Tortious Interference with Prospective Economic Advantage, and therefore John relies on his opposition memorandum, showing that he has alleged facts that constitute the offense.

2.3. Counsel continues to attempt to argue affirmative fact defenses that dispute John's sworn allegations, and to attempt to introduce evidence that putatively backs such arguments. By settled law, this is improper under Sections 2-615 or 2-619.

As in the Memo, counsel, apparently seeking to dismiss under section 2-615, continues to argue the affirmative defense of "substantial truth" against the defamation counts, supported by an affidavit from defendant Andrews that attempts to dispute the allegations in the First Amended Sworn Complaint. This is improper under a mountain of settled law. To wit:

> "[Defendants] not only presented hybrid sections 2--615 and 2--619 motions, but they also presented evidentiary material going to the truth of the allegations contained in the complaint. This is improper because *a motion pursuant to either section 2--615 or section 2--619 concedes the truth of all well-pled allegations in the complaint*. Further, a section 2--615 motion, unlike a section 2--619 motion or a motion for summary judgment pursuant to section 2--1005, is a motion *based on the pleadings rather than the underlying facts*. Accordingly, depositions, affidavits, and other supporting materials may not be considered by the court in ruling on a section 2--615 motion. Moreover, evidentiary material in support of a section 2--619 motion may not be submitted for the purpose of contradicting well-pleaded facts in the complaint. If the [defendants] wished to contest factual allegations in the complaint, they should have filed motions for summary judgment."
> *Provenzale v. Forister*, 318 Ill. App. 3d 869, 879 (2nd Dist. 2001) [internal citations omitted, emphasis supplied].

Counsel simply cannot argue affirmative defenses in his 2-615 motion. Affirmative defenses, as John noted in his opposition memo, are inappropriate to a motion to dismiss. See Opp. Memo, p.15, *Bryson v. News Am. Publs.*, 174 Ill. 2d 77, 86 (1996). Counsel cannot expect this court to, as it must, take all of the allegations of the First Amended Complaint as true and simultaneously dismiss the case because those same allegations are false.[4] John has alleged that the First, Second, and Third disparagements, and the creditor libel are false. 1st Am. Cplt, ¶¶ 23-24, 32, 47, 55-56, 59, 73, 78-79, 95. The complaint is internally consistent. If one alleges that a

[4] Of course, the *sworn* allegations of the First Amended Complaint are true.

defamatory statement is false, as John does (*Id.*), and that the defendant knew of its falsehood or acted with reckless disregard as to the falsehood of the statement, as John does in 1st Am. Cplt., ¶¶ 23, the Plaintiff *will* survive a motion to dismiss. *Krueger v. Lewis*, 342 Ill. App. 3d 467, 472 (1st Dist. 2003).

Andrews' affidavit cannot be considered in the context of a 2-615 motion, which is limited to the pleadings. *Provenzale v. Forister*, 318 Ill. App. 3d at 879. It is error to confuse motions and consider defendant's affidavits, depositions, or exhibits on a section 2-615 motion. *Johnson v. Nationwide Business Forms, Inc.*, 41 Ill. App. 3d 128, 131, 359 N.E.2d 171, 173, 3 Ill. Dec. 761 (1st Dist., 1976). A court "may not consider supporting affidavits 'offered by the movant' ." *The Retreat v. Bell*, 296 Ill. App. 3d 450, 454 (4th Dist., 1998) *citing Baughman v. Martindale-Hubbell, Inc.*, 129 Ill. App. 3d 506, 509 (4th Dist., 1984).

The only question that section 2-615 asks is "did the Plaintiff properly allege the elements of the offense?" Since that question must be answered in the affirmative for each and every count in the First Amended Complaint, defendant's 2-615 motion must be denied in its entirety.

2.4. Counsel misstates the Opposition. John still states claims for unfair competition under the common law.

In the memo, counsel first argued that John's common law unfair competition claims must be dismissed under section 2-615 for failing to cite to the specific parts of Uniform Deceptive Trade Practices Act (UDTPA) that John alleged the defendant violated. As previously noted, the UDTPA has, not, by defendant's own citations, eliminated the common law tort of Unfair competition. Defendant still however, fails to cite to a case that holds that one must specifically cite to a clause within the UDTPA in order to state a claim.

Defendant also argues that the *Restatement (3d) of Unfair Competition § 2-3* is inapplicable because it's not specifically adopted in Illinois. Defendant finally argues, into the face of the complaint, that all of Andrews statements denigrate John and his products, and as such, are apparently immune from any action whatsoever, even though pled as deceptive and false.

Illinois courts have held that the UDTPA is a codification of the common law of unfair competition. (*Mars, Inc. v. Curtiss Candy Co.* (1972), 8 Ill. App. 3d 338, 290 N.E.2d 701; *National Football League Properties, Inc. v. Consumer Enterprises, Inc.* (1975), 26 Ill. App. 3d 814, 327 N.E.2d 242, *cert. denied*, 423 U.S. 1018, 46 L. Ed. 2d 390, 96 S. Ct. 454.) As such, it has generally been held to apply to situations where one competitor is harmed or may be harmed by the unfair trade practices of another. See *Clairol, Inc. v. Andrea Dumon, Inc.* (1973), 14 Ill. App. 3d 641, 303 N.E.2d 177, *cert. denied*, 419 U.S. 873, 42 L. Ed. 2d 112, 95 S. Ct. 134; see also *Tone and Eovaldi, New Illinois Trade Regulation Laws: The Uniform Deceptive Trade Practices Act (Part Two)*, 54 Ill. B. J. 436 (1966). So, let's humor the defendants.

There is no reported case in Illinois history where a defendant was dismissed under Section 2-615 (or 2-619 for that matter) for failure to allege the specific provision of the UDTPA that the defendant is alleged to have violated. However, there are these cases: Falsely a company's customers that the company was in bankruptcy sufficed. *M&R Printing Equip., Inc. v. Anatol Equip. Mfg. Co.*, 321 F. Supp. 2d 949 (N.D. Ill. 2004) John alleges this of the First and Fourth disparagements, The First, as Andrews knowingly and continually, after John was not in Bankruptcy, broadcasting to the Internet that John was, and that he was "actively market[ing]" a product he had no intention to finish. 1st Am. Cplt., ¶¶ 32, 33, 45. Similarly, in

the fourth disparagement, Andrews, persisted, after he knew it to be false, in telling those who telephoned him that John was about to be liquidated in bankruptcy. ¶¶ 27, 95-96.

John has pled that Andrews "disparages the goods, services, or business of another by false or misleading representation of fact." John needs plead no more. John does not need to plead a specific statute in order to make a claim at the common law.

As to the *Restatement*, John pleads that Andrews offered the free updates promise and the free updates repudiation, and made deceptive statements of his own products in order to gain customers from John, when he had no intention, from the outset, to honor his free updates promises. See 1st Am. Cplt., Count Six.

Therefore, John states proper claims for unfair competition at the common law, and also prays leave to file his Second Amended Complaint, where he pleads specific violations of the UDTPA. He also prays that the defendant's motion to dismiss be denied in its entirety.

2.5. John has not misstated or mischaracterized anything in his opposition memorandum.

The reply, at pp. 6-7, concludes with the astounding argument that John "misstates facts and mischaracterizes defendant's arguments." Nothing could be further from the truth; these arguments from the Defendant represent the pinnacle of psychological projection.

Misrepresented, not Misinterpreted: For example, on p.6 of the memo, counsel "mischaracterizes" p.14 of John's opposition memo by misquoting him. To wit: "Plaintiff claims his statement made to the United States Bankruptcy Court in which he explicitly stated he "lacked the funds required to complete the programs [CompuPed millennium] [sic]" has been 'misinterpreted.' " John was clear: "Defendant *misrepresented* John's statement in the PDF Document." [emphasis supplied]. As alleged in the 1st Am. Cplt. , ¶¶ 32-33, Defendant used the

documents he located to concoct a fantasy, to knowingly and falsely allege that John was "actively market[ing]" a program that he had no intention to complete. It is the defendant and his attorney who are trying to deceive this court by myopically focusing on the details, and not on the false import of the entire statement. Again, the impact of the statement was not that John had filed bankruptcy; counsel's repeating that falsehood *ad nauseam* shall not make it so. Its impact was what Andrews intended it to be, and intended to be false (1st Am. Cplt., ¶ 13, 16, 33, 45, 73, 78, 95-96): Andrews *lied* and said that John was 'actively market[ing]" a program he had no intention to complete. Andrews kept up that absolute falsehood for months after CompuPed Millennium was actually launched, when he had knowledge of its falsehood. 1st Am. Cplt., ¶ 33.

The law is clear that the libel is determined not by details, but by the impact of the statement as a whole. *Myers v. Levy*, 348 Ill. App. 3d 906, 920 (2nd Dist. 2004). Defendant has done nothing, and under section 2-615, cannot do anything, to show that a reasonable jury could never find that Andrews accused John of "actively market[ing]" a program that he had no intention to complete. Therefore, defendant cannot prevail under either section 2-615 or 2-619 to gain dismissal.

"Arbitration Clause" Inapplicable and Moot: As to defendant's bizarre arbitration clause argument, which is of course, as shown *supra*, waived under section 2-301(a-5), counsel obfuscates the key issue. ***These statements have nothing to do with John's web site.*** John does not plead any relation to his web site. Defendant does not even adduce any evidence that Andrews visited www.mbfs.com at any time. Please remember that counsel's *sole* argument that this arbitration clause is supposed to control is that both John and Andrews operate web sites! Memo, p.15, first ¶ under heading B. Defendants adduce ***nothing*** other than this notion to stand for the notion that Andrews has agreed to these terms. Using this logic, John

must arbitrate with any and every person who has any Internet web site anywhere. John swears, see Exhibit SR-3 attached hereto, that Andrews has not, to his knowledge, assented to the web site terms of use agreement for www.mbfs.com.

Moreover, the arbitration agreement has been removed from the web site. See Exhibit SR-2 attached hereto. Defendant attempts to invoke the www.mbfs.com web site Terms of Use agreement, and seeks to have this court enforce it. See Memo, p.15. Should this court decide that defendant has somehow shown that both parties have subscribed to this agreement, a necessary prerequisite to its enforcement, this motion must fail. The agreement expressly provides: "These terms and conditions are subject to change without prior notice at any time." John therefore elects to change the agreement, as is his right according to its express terms. "Where a written agreement is clear and explicit, a court must enforce the agreement as written." *Meister v. Henson*, 151 Ill. App. 3d 1059, 1061 (3rd Dist. 1987). Defendant cannot decide whether to invoke or dispute the web site agreement (see Memo, p.15), but to the extent he invokes it, Andrews is by its express terms subject to John's revised terms, which "irrevocably" select this court as the forum for all disputes.

Moreover, the agreement that defendant has invoked also selected this forum prior to the recent changes: "Any claim relating to, and the use of, this Site and the materials contained herein is governed by the laws of the state of Illinois without regard to conflict of law rules. You consent to jurisdiction of the federal and state courts located in Will County, Illinois to hear any such claims." Defendant's Exhibit B, attached to the Memo. Therefore, John has made the alleged arbitration clause, which John again respectfully reminds the court that Andrews disputes (See Memo, p.15: "Importantly, in this action, the Defendant disputes 'the enforceability of [plaintiff's] arbitration agreement.' " [bracketed phrase retained]), completely superfluous.

WHEREFORE, your Plaintiff respectfully prays that this court DENY the defendant's motion nd compel him to answer the complaint as amended on the date of the order, within ten (10) lays thereafter.

John F. Tamburo

John F. Tamburo
Plaintiff
655 N. LaGrange Rd, Suite 209
Frankfort, Will County, Illinois 60423
815-806-2130

LEXSEE 314 ILL.APP.3D. 707

PLAINTIFF'S
SR-1
EXHIBIT

In re: the Marriage of DIANA LYNN HOOVER, Petitioner-Appellee, and DON HERBERT HOOVER, Respondent-Appellant. James E. Souk,

NO. 4-99-0608

APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

314 Ill. App. 3d 707; 732 N.E.2d 145; 2000 Ill. App. LEXIS 534; 247 Ill. Dec. 429

June 28, 2000, Decided

SUBSEQUENT HISTORY: [***1] Released for Publication July 27, 2000.

PRIOR HISTORY: Appeal from Circuit Court of McLean County. No. 94D137. Honorable Judge Presiding.

DISPOSITION: Reversed.

JUDGES: PRESIDING JUSTICE COOK delivered the opinion of the court. GARMAN, J., concurs. McCULLOUGH, J., specially concurs in part and dissents in part.

OPINIONBY: COOK

OPINION: [*708] [145]**

PRESIDING JUSTICE COOK delivered the opinion of the court:

Diana Hoover (Diana) and Don Hoover (Don) married in Iowa in 1975. They lived together until approximately November 4, 1993, at which time Diana moved to Illinois. On March 9, 1994, Diana filed a petition for dissolution of marriage in the circuit court of McLean County. Summons was issued to Don, a Georgia resident, and he was personally served. The petition for dissolution requested that the court award Diana a judgment of dissolution, her nonmarital property, her equitable share of the marital property, and other relief as the court deemed equitable. **[**146]** Don did not appear or file any responsive pleadings after being served.

[*709] On September 15, 1994, Diana sent notice to Don that the case was set for a default hearing on the petition for dissolution of marriage. Don did not **[***2]** appear for the hearing, and an order of default was entered. After hearing testimony from Diana, the circuit court granted the petition for dissolution and ruled on the division of various assets and liabilities. The September 27, 1994, judgment of dissolution attributes over $65,000 in liabilities to Don, for which he will "hold [Diana] harmless." The court also entered judgment against Don for $22,500, representing property Diana had contributed to start Don's business.

On March 12, 1998, Diana filed a citation notice, seeking collection of the $22,500 judgment. On April 15, 1998, Don, through his attorney, filed a general appearance. Two months later, Don filed a motion to dismiss the citation on the grounds that the court lacked personal jurisdiction because Illinois was not the matrimonial domicile and he had not submitted to jurisdiction in Illinois. *735 ILCS 5/2-209* (West 1998). Two days later, Don filed a special and limited appearance, attacking jurisdiction on the underlying judgment. Don agreed that the judgment dissolving the marriage was proper; however, he moved to vacate the judgment as it related to property.

After hearing arguments, **[***3]** the court entered an order striking Don's special and limited appearance, finding that the general appearance of April 15, 1998, subjected Don to personal jurisdiction and retroactively applied to the prior judgment of dissolution. Don moved for reconsideration of the order, and the circuit court denied the motion.

The issue presented for our review is whether Don's postjudgment general appearance in response to the citation proceeding waived his objection to personal jurisdiction in Illinois as it relates to the judgment of dissolution. We find that

the circuit court's retroactive application of Don's general appearance was in error.

Initially, we note that the circuit court did have in rem jurisdiction in this case, meaning jurisdiction over the marital status. *In re Marriage of Brown, 154 Ill. App. 3d 179, 182, 506 N.E.2d 727, 729, 106 Ill. Dec. 927 (1987).* Section 401(a) of the Illinois Marriage and Dissolution of Marriage Act provides in part:

> "The court shall enter a judgment of dissolution of marriage if at the time the action was commenced one of the spouses was a resident of this State *** and the residence *** had been maintained for 90 days **[***4]** next preceding the commencement of the action or the making of the finding ***." *750 ILCS 5/401(a)* (West 1994).

Diana met the requirements of section 401 in March 1994 when she filed her petition for dissolution. Further, Don was personally served in Georgia with summons and the petition. Thus, the circuit court had **[*710]** jurisdiction over the marital status and properly terminated the marriage. However, before the circuit court can enter binding orders relating to property, it must have personal jurisdiction over the parties. *Brown, 154 Ill. App. 3d at 186, 506 N.E.2d at 731;* see R. Cook, Jurisdiction in Dissolution of Marriage Cases, *77 Ill. B.J. 266 (1989).*

It is essential to the validity of a judgment that the court have subject-matter jurisdiction and in personam jurisdiction over the parties. *Christiansen v. Saylor, 297 Ill. App. 3d 719, 723, 697 N.E.2d 1188, 1191, 232 Ill. Dec. 258 (1998).* A party over whom a court fails to acquire jurisdiction may, at any time, either directly or collaterally, attack and vacate a judgment that the court enters against the party. *Saylor, 297 Ill. App. 3d at 723, 697 N.E.2d at 1191.* **[***5]**

Diana argues that Don's general appearance and motion to dismiss constituted a consent to personal jurisdiction in **[**147]** Illinois. The Code of Civil Procedure makes a distinction between "general appearances" and "special appearances." *735 ILCS 5/2-301* (West 1998). Section 2-301(a) of the Code of Civil Procedure (Code) provides:

> "Prior to filing any other pleading or motion, a special appearance may be made either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person of the defendant. A special appearance may be made as to an entire proceeding or as to any cause of action involved therein. Every appearance, prior to judgment, not in compliance with the foregoing is a general appearance." (Emphasis added.) *735 ILCS 5/2-301(a)* (West 1998).

We note that section 2-301 was extensively amended, effective January 1, 2000, to eliminate some of the technical challenges that had been made to objections to jurisdiction. Pub. Act 91-145, § 10, eff. January 1, 2000 (1999 Ill. Legis. Serv. 2032, 2034 (West)). Under amended section 2-301 of the Code, it is no longer necessary to **[***6]** file a special and limited appearance or a motion to quash service of process. An objection to jurisdiction over the person may be made by a motion to dismiss. The motion must be filed prior to the filing of a responsive pleading or certain other motions, but it "'may be made singly or included with others in a combined motion.'" K. Beyler, The Death of Special Appearances, *88 Ill. B.J. 30, 32 (2000),* quoting *735 ILCS 5/2-301(a)* (West Supp. 1999). This case, of course, is governed by the preamendment version of section 2-301.

Had Don challenged the jurisdiction of the circuit court prior to the entry of judgment, he would have been required to file a special appearance. However, since the judgment was already entered against him, he did not need to file a special and limited appearance to challenge jurisdiction. *Saylor, 297 Ill. App. 3d at 723, 697 N.E.2d at 1191;* **[*711]** 3 R. Michael, Illinois Practice § 10.6, at 126 (1989) (Civil Procedure Before Trial). The postjudgment general appearance did not subject Don to personal jurisdiction retroactively. *Saylor, 297 Ill. App. 3d at 723, 697 N.E.2d at 1191.* Further, **[***7]** it did not serve to validate the previous judgment entered. *Saylor, 297 Ill. App. 3d at 723, 697 N.E.2d at 1191.*

We reverse the circuit court's order that retroactively applied Don's general appearance as a basis for personal jurisdiction. Further, the judgment of dissolution of marriage is void, except for the provisions terminating the marriage.

Reversed.

GARMAN, J., concurs.

McCULLOUGH, J., specially concurs in part and dissents in part.

CONCURBY: McCULLOUGH (In Part)

DISSENTBY: McCULLOUGH (In Part)

DISSENT:

McCULLOUGH, J., specially concurs in part and dissents in part. JUSTICE McCULLOUGH, specially concurring in part and dissenting in part :

The general appearance concerned the citation proceedings.

Don's special and limited appearance and attached affidavit are apparently accepted as true by the majority. A review of the record shows, however, that the trial court never held a hearing on the merits of Don's special and limited appearance.

Saylor, as the majority confirms, stands for the proposition that a general appearance, postjudgment, does not submit a party to the jurisdiction of the court to make the judgment effective, where the court was without jurisdiction **[***8]** at the time judgment was entered. I agree. In Saylor, the trial court held a hearing on the question of service, and after judging the credibility of the witnesses, the court found that the defendant had not been served properly. The appellate court affirmed the trial court's action. In this case, the respondent's conclusion in his brief simply "requests that this court reverse the trial court's ruling and remand for further proceedings."

[148]** I submit, however, that the trial court never held a hearing on the merits of the special and limited appearance. The trial court ruled only on the general appearance question, finding Don waived any right to attack the jurisdiction of the trial court. A ruling by this court on the merits of the special and limited appearance of Don, when no hearing thereon has been held, is premature.

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PLAINTIFF'S
SR-2
EXHIBIT

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IN THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS, LAW DIVISION

JOHN F. TAMBURO, D/B/A MAN'S BEST FRIEND SOFTWARE, *Plaintiff*	)	CASE NUMBER: ***06 L 51***
v.	)	
JAMES ANDREWS, D/B/A K9PED *Defendants*	)	

EXHIBIT SR-3
JOHN TAMBURO'S SUPPLEMENTAL AFFIDAVIT OPPOSING DEFENDANT'S MOTION TO DISMISS

I, JOHN F. TAMBURO, on the penalty of perjury under the laws of the State of Illinois, do hereby swear to the following facts. If I were called as a witness I would testify identically, and these facts are my personal knowledge:

1. James Andrews has never used www.mbfs.com to buy anything from me. I personally verified this from the books and records of my company.
2. James Andrews has not ever notified me in any way that he has agreed to the web site terms of use for www.mbfs.com at any time.
3. James Andrews has written to me, and also to other people publicly, that web site terms of use are only enforceable if a button or other manifest method of assent is used to secure agreement to those terms of use.

FURTHER YOUR AFFIANT SAYETH NAUGHT

April 26, 2006

John F. Tamburo