Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-221

JANUARY TERM, 2021

Kirstin L. Parro v. Christopher R. Parro*	}	APPEALED FROM:
	}	
	}	Superior Court, Windham Unit,
	}	Family Division
	}	
	}	DOCKET NO. 147-7-18 Wmdm
		Trial Judge: Michael R. Kainen

In the above-entitled cause, the Clerk will enter:

Defendant ex-husband appeals the family division's post-divorce enforcement order requiring him to remove his belongings from plaintiff ex-wife's residence within two days of the order. We affirm.

The facts are not in dispute. The parties were divorced by final order issued on March 26, 2020, at which time plaintiff was living in Vermont and defendant was living in Florida. The final divorce order awarded the marital residence to plaintiff, and defendant was required to "make arrangements to pick up any belongings which remain at the . . . residence as soon as possible in consideration of COVID-19."

On August 10, 2020, plaintiff filed a motion asking the family division to enforce the final divorce order by requiring defendant to immediately make arrangements to remove from her residence by five o'clock in the evening of August 13 all personal property decreed to him in the divorce and still remaining at the residence. Plaintiff explained in her motion that neither defendant nor his attorney had responded to her entreaties beginning in mid-June to remove the belongings and that a closing on the property was scheduled for August 14. Plaintiff served defendant's attorney with her motion but did not personally serve defendant, as required by Vermont Rule for Family Proceedings 4.2(b)(1)(A) (providing that post-judgment motions not involving minor children "must be made on the party, and not the party's attorney" by personal service, registered or certified mail, or by request for waiver of service accompanied by notice of hearing).

The following day, August 11, the family division granted the order, reasoning that normally a spouse not awarded the marital residence would have thirty days to retrieve personal belongings and that, notwithstanding the fact that defendant lived in Florida and the pandemic might hamper his ability to retrieve his belongings, defendant had had more than enough time to arrange for their removal. The court ordered defendant to make arrangements to remove his belongings by five o'clock on August 13; otherwise, plaintiff could consider the belongings abandoned. On August 12, defendant moved for reconsideration of the order, explaining that as of yet he had been unable to make arrangements to pick up his belongings. He asked the court to

allow him to retrieve the belongings on August 25, stating that he had made arrangements to be personally available on that date. He also noted that plaintiff was transferring the property to the parties' son. Defendant did not claim insufficiency of service in his motion to reconsider. The court denied the motion the next day, August 13, stating that defendant had had plenty of time to make arrangements to remove his belongings and that the court was not going to compel either wife to extend the closing date or the parties' son to become the bailor of defendant's belongings.

On appeal, defendant argues that the family division's order is void and must be vacated for lack of jurisdiction because the court granted a motion that was not served on him personally, as required by the governing rule. He further contends that, in granting the order, the court failed to consider his personal circumstances and the difficulties of traveling to Vermont in the midst of a pandemic. Plaintiff responds that defendant cannot claim insufficiency of service for the first time on appeal because he received actual notice of her motion and then failed to raise that claim in his motion for reconsideration filed with the family division.

We conclude that defendant failed to preserve for appeal his insufficiency-of-service argument by not raising it at the first opportunity before the family division. See Pahnke v. Pahnke, 2014 VT 2, ¶ 22, 195 Vt. 394 ("The defense of insufficiency of service of process is waived if it is not raised at the first opportunity."). "[D]efective service is a procedural shortcoming of the type which may be waived." Myers v. Brown, 143 Vt. 159, 164 (1983). Although service of process implicates a court's jurisdiction, the court may exercise its jurisdiction, notwithstanding procedurally insufficient service of process, if that noncompliance has been waived by a failure to raise it as a defense. Id. at 164-66 ("[W]e have consistently held that parties by their conduct may waive objections to service which is void for lack of substantial compliance with legal prerequisites."). "This principle applies equally in cases for which there is no requirement of a responsive pleading, including family court petitions and motions." Pahnke, 2014 VT 2, ¶ 22.

Defendant does not dispute that plaintiff served her motion upon his attorney. Nor does he deny that he received actual notice of the motion, other than noting the lack of evidence showing he had "instantaneous actual notice" of the motion. The day after the family division granted plaintiff's motion, defendant filed a motion for reconsideration in which he contested the merits of wife's motion and the court's order but did not raise any claim of insufficient service of process. Hence, he failed to raise the defense at the first opportunity to give the family division a chance to consider it, thereby "caus[ing] unnecessary delay and avoidable expense." Myers, 143 Vt. at 167.

We find unavailing defendant's argument that the requirement of raising the defense at the first opportunity does not apply to his motion for reconsideration, which he characterizes as a timely filed motion to alter or amend the judgment pursuant to Vermont Rule of Civil Procedure 59(e). See Fournier v. Fournier, 169 Vt. 600, 601 (1999) (mem.) (stating that motion denominated as motion to reconsider was indistinguishable from motion to alter or amend judgment). Defendant relies on our statement in Osborn v. Osborn, 147 Vt. 432, 433 (1986), that a Rule 59(e) motion "is not a prerequisite to appeal," but that principle was cited to explain why the plaintiff in that case did not need to raise in her Rule 59(e) motion an issue that she had specifically raised in the divorce proceedings.

We also find unavailing defendant's argument that he could not have waived his insufficiency-of-service claim in this instance because the family division's quick ruling on plaintiff's motion deprived him of the time afforded by Vermont Rule of Civil Procedure 12(h)(1) to respond to plaintiff's motion. As noted, the waiver principle included in Rule 12(h)(1) "applies equally in cases for which there is no requirement of a responsive pleading, including family court petitions and motions." Pahnke, 2014 VT 2, ¶ 22; cf. Rollo v. Cameron, 2013 VT 74, ¶ 10, 194

Vt. 499 (finding waiver of insufficiency-of-service claim in relief-from-abuse proceeding under circumstances not governed by V.R.C.P. 12(h)(1)).

Here, defendant failed to raise his insufficiency-of-service claim at his first opportunity when he asked the family division to reconsider the merits of the order he now challenges on appeal. Defendant knew he had not been personally served at the time he filed his reconsideration motion yet did not raise that issue at that time. Thus, the family division had no opportunity to consider the claim in the first instance to avoid piecemeal litigation. See Pahnke, 2014 VT 2, ¶ 22 (stating that principle compelling early assertion of insufficiency-of-process claim and other procedural defenses is aimed at "avoid[ing] piecemeal litigation over preliminary issues that do not go to the substantive heart of the case"). Accordingly, defendant has failed to preserve his claim for this Court's consideration on appeal. See id. ¶ 25 ("A party is not permitted to appear to defend the claim on the merits without specifically objecting to service, and then to complain that he was improperly served."); see also Bell v. Bell, 162 Vt. 192, 200 (1994) (refusing to consider issue "not raised in wife's requested findings or motion to amend" or otherwise at trial).

As for defendant's challenge to the merits of the family division's order, that challenge is based on his reported medical condition and the danger or complications of traveling out-of-state during a pandemic. Both the challenged enforcement order and the original divorce order, however, require only that defendant make arrangements to have his belongings removed. Nothing in those orders require defendant to personally remove his belongings from plaintiff's residence or that he be in attendance when that is done.

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
Beth Robinson, Associate Justice

_____
Harold E. Eaton, Jr., Associate Justice