ing" concentration of its resources in support of its Truk directing attorney. Had only a small portion of those resources been directed to resolution of the initial problem, both Court and counsel might have been spared the difficulty which inevitably ensued.

The application for Mandamus is granted. Pursuant thereto, it is ORDERED that respondent, the Hon. E. F. Gianotti, be, and he hereby is, commanded to disqualify himself from presiding in or determining any of the actions in which petitioner or any of the class whom she represents is a party, including those cases now pending in the States of Truk and Ponape in which parties are represented by the Micronesian Legal Services Corporation.

ITSCO; TIMOTHY, et al.; SWEET, et al.; and LATTON
v.
TRUST TERRITORY OF THE PACIFIC ISLANDS
Civil Appeal No. 315
Appellate Division of the High Court
Marshall Islands District
August 17, 1979

Government appealed from denial of motions to set aside default judgments against it. The Appellate Division of the High Court, Gianotti, Associate Justice, held that government was properly defaulted where process was served upon it and it did not answer because it thought service defective.

1. **Civil Procedure—Process—Duty To Answer When Service Is Defective**
   Defendant receiving actual notice of commencement of various actions could not fail to respond on the theory that in its opinion the process was defective and no responsive pleading was required; even if the service was defective, defendant had a duty to raise the matter by a special appearance contesting service and/or service of process, and upon defendant's failure to do so the court properly gave plaintiffs default judgments.

2. **Civil Procedure—Process—Duty To Answer When Service Is Defective**
   Any question of service of process must be properly raised; the party served cannot sit mute.

3. Judgments—Default—Setting Aside

Defendant moving for default judgments to be set aside on ground it had a meritorious defense was not entitled to have its motion granted where it did not state with particularity what the defense was.

Counsel for Appellant: JAMES G. WINN, *Assistant Attorney General*

Counsel for Appellees: GEORGE M. ALLEN, ESQ.

Before HEFNER, *Associate Justice*, GIANOTTI, *Associate Justice*

GIANOTTI, *Associate Justice*

This appeal involves approximately four civil actions filed in the Marshall Islands during the months of March and April 1978. The defendant in each of the four civil actions is the Trust Territory Government. The cases have been joined for appeal purposes. Service of the complaint and summons was made upon the defendant in each case by either making personal service upon the Marshall Islands District Administrator or submitting the complaint and summons by certified mail to the Attorney General of the Trust Territories located in Saipan. After the service was undertaken, the Attorney General's Office, through their District Attorney located in the Marshall Islands, failed to respond to the complaints within the time allowed by law, motions for default were duly filed, and default judgments were granted in each case. Subsequent thereto, motions to set aside the defaults were made, denied, and from the Court's rulings denying the motions to set aside default, defendant has appealed.

The Court finds that there are two major issues. First is the issue of service. In each of the cases, default was ordered and the Court made the following specific finding of fact.

Effective service within the meaning of Rule 4 was, in fact, had upon the Trust Territory Government and that it did have, through service upon a ranking official, actual and satisfactory notice of the commencement of an action against it.

[1, 2] In effect, the defendant, upon receiving actual notice of the commencement of each of these actions, took it upon themselves not to respond in any manner to the filing of these complaints. The attitude of the defendant was, that since in "their opinion" process was defective no responsive pleading was required. Be that as it may, if the service upon the defendant was in fact defective, there was a duty upon the defendant to raise this matter by a special appearance contesting service and/or service of process. This matter has been discussed in the case of *State v. Curry*, 257 P.2d 799/801:

> The court said in the body of the opinion: (*Stocker v. Dobyns-Lantz Hardware Co.*, 101 Okl. 134, 224 P. 303)
>
> "An individual who has been served with a summons in which he is designated by the wrong name is entitled to plead a misnomer, but the service of summons designating the defendant by the wrong name, where it is personally served upon the right defendant, is sufficient to give the court jurisdiction of the defendant, and such defect becomes immaterial, unless the defendant appears and pleads the misnomer."
>
> See also 42 Am. Jur. Process Section 18, which reads in part:
>
> "One summoned by a wrong name, being thus informed that he is sued, although not correctly described by his true name, who does not avail himself of his opportunity to object, whereby the true name would be inserted in the proceedings, is precluded from afterward doing so."

In addition to the Am. Jur. section discussion, the matter has been further discussed in 72 C.J.S. Process Section 109.

Defendant cannot with impunity ignore an actual service of process because of an alleged defect in form therein but must submit objections to the court from which the process issued. If the

service of summons is merely defective and as such is subject to attack, it is valid until attacked and confers jurisdiction on the person served.

The text writers all seem to be of the opinion, and this is substantiated by the case law cited in these texts, that:

Formal defects and irregularities in process or the service thereof must be taken advantage of at the first opportunity and before any further step in the cause is taken, otherwise they will be held to have been waived.

See 62 Am. Jur. Process Section 162.

In the instant case, the defendant chose to ignore service of process. There was an affirmative duty on its part to contest the same and upon its failure to do so the Court proceeded properly to award the default judgment to plaintiffs. We hold with the general rule that any question of service of process must be properly raised. The party cannot sit mute.

[3] As a second issue the defendant asserts that the trial court incorrectly failed to set aside the default judgments and that the motion to set aside said judgments provided that the defendants had a "meritorious defense" to the action. However, defendants failed to state with particularity just what the meritorious defense in fact was. The cases are in general agreement that a mere statement a meritorious defense is available is not sufficient and the movant must state what that defense is. See *Osborne v. Osborne*, 372 P.2d 538, Wash. 2d 163, which holds:

One seeking the vacation of a default judgment must allege and prove facts that constitute a prima facie defense to the action.

See also *Fisher v. Bunker Hill Company*, 528 P.2d 903, 96 Ida. 341, and *Bonfilio v. Ganger*, 140 P.2d 861, 60 Cal. App. 2d 405. The Federal Court Rules have provided for relief from a judgment or order where there is mistake, inadvertence, excusable neglect, newly discovered evidence, fraud,

etc., and is to be found under Rule 60(b) of the Federal Rules of Civil Procedure. However, the Federal Courts again have adopted the rule that there must be a showing of a valid defense and will not set aside the judgment until they determine that the moving party in fact does have a meritorious defense.

Motion to set aside judgment will not be considered until court has determined that movant has meritorious defense. *United States v. Williams* (1952, D.C. Ark.), 109 F. Supp. 456.

The matter has been summed up in 5 C.J.S. Appeal and Error Section 1467, which holds:

The review on appeal from an order setting aside or refusing to set aside a default judgment is limited to a determination of the correctness of or incorrectness of the decision (and) it may invoke only the question of whether a meritorious defense was prima facie shown in support of the motion to vacate.

Defendant failed to allege in its motion just what its meritorious defense was and the motion therefore is not sufficient to meet the prerequisites as above stated.

Therefore the default judgments are AFFIRMED and these matters are remanded to the Trial Division for a determination of damages.