

IN THE COURT OF APPEALS OF IOWA

No. 0-805 / 10-0539
Filed November 24, 2010

**ROBERT LESTER JOHNSON and
MARY ANN JOHNSON,**
Plaintiffs-Appellees,

vs.

HOMEWORKS, INC.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Karen A. Romano,
Judge.

Homeworks, Inc. appeals from district court's grant of summary judgment
to Robert and Mary Johnson. **AFFIRMED.**

Kathryn S. Barnhill of Barnhill & Associates, P.L.L.C., West Des Moines,
for appellant.

Erik P. Bergeland of Finley, Alt, Smith, Scharnberg, Craig, Hilmes &
Gaffney, P.C., Des Moines, for appellees.

Considered by Eisenhauer, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

Homeworks, Inc. challenges the district court's grant of summary judgment in favor of the plaintiffs, Robert and Mary Johnson, in this replevin action. On appeal, Homeworks contends service of original notice was defective.

Robert and Mary Johnson initially filed and served a petition for injunctive relief, naming as defendants Homeworks and Moehl Millwork, Inc. The Johnsons acknowledge that the original notice—which was served on Homeworks and identified Homeworks as a defendant in the caption—stated: “To the Above-named defendant: Moehl Millwork, Inc.”¹ They further acknowledge that Mary Mason, president of Homeworks, raised the defect in the original notice in her pro se answer to that petition. The district court did not address the objection. See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (“It is a fundamental doctrine of appellate review that issues must ordinarily be raised *and decided* by the district court before we will decide them on appeal.” (emphasis added)).

However, counsel for Homeworks thereafter filed an appearance. The Johnsons amended their petition to allege a claim for replevin. Homeworks filed an answer to the amended petition and did not raise the jurisdictional issue. Both parties filed motions for summary judgment on the merits and again, no objection to jurisdiction was raised by Homeworks. The Johnsons argue the issue of personal jurisdiction was thus waived. We agree.

¹ Because we find Homeworks subsequently waived the issue of defect in original notice, we need not determine if this type of irregularity in the notice constitutes a fatal defect in service. See *Parkhurst v. White*, 254 Iowa 477, 481–82, 118 N.W.2d 47, 49–50 (1962) (noting that “mere irregularities which relate principally to the form of the notice or to technical or clerical errors, and which do not deceive or mislead the defendant, will not be found fatal to the jurisdiction of the court”).

Under our rules, “a civil action is commenced by filing a petition with the court.” Iowa R. Civ. P. 1.301(1). Notice must then be served on the defendant within ninety days of the date the petition was filed, unless an extension is granted by the court for good cause. Iowa R. Civ. P. 1.302(5). A defendant may challenge the sufficiency of service as provided by Iowa Rule of Civil Procedure 1.421(1). Under that rule, “[e]very defense to a claim for relief in any pleading must be asserted in the pleading responsive thereto.” The responsive pleading is generally the defendant’s answer to the petition or an amendment to the answer. See Iowa R. Civ. P. 1.421(1).

Antolik v. McMahon, 744 N.W.2d 82, 83 (Iowa 2007). A challenge to personal jurisdiction may be waived if not raised. See *Kling v. Bentien*, 725 N.W.2d 13, 16 (Iowa 2006) (“Unlike personal jurisdiction, a party cannot waive or vest by consent subject matter jurisdiction.”).

Counsel for Homemakers did not seek a ruling on the issue of the defect in the original notice from the district court. The issue was thus waived. See *In re Marriage of Ivins*, 308 N.W.2d 75, 77 (Iowa 1981).

AFFIRMED.