



# Don't Watch Your Personal Jurisdiction Defense Sail Away

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The rules of civil procedure are thrust, like harpoons, upon young lawyers during their first year of law school, and for good reason.

Failing to abide by any number of a jurisdiction's various rules sections, subsections, and clauses can result in instant death to your client's cause of action or defense. For example, we know that under Rule 12(b) of the Federal Rules of Civil Procedure, motions asserting the defense of personal jurisdiction must be made before filing a responsive pleading, and can be deemed waived if not raised in such a motion or the responsive pleading itself.

**Though there are various exceptions to the time-to-plead rules, the importance of getting a personal jurisdiction challenge front and center before the court early on in the litigation process applies to most jurisdictions, and a failure to do so can undermine the defense altogether.** A defendant learned this lesson the hard way in a recent case before the Rhode Island State Supreme Court.

In *Pullar v. Cappelli*, No. 2015-303 (R.I. 2016), the plaintiff (and former Rhode Island resident) met the defendant (a New York resident) in New York to negotiate a contract for employment, in which the plaintiff was to serve as captain of the defendant's sailboat for a term of three years, with an annual salary and promise of bonus amounting to one year's salary at the conclusion of the contract. One month before the contract was set to expire, the defendant terminated the plaintiff's employment without cause, denying the skipper his bonus. The plaintiff subsequently filed suit for breach of contract to recover the money owed him.

In his initial answer, the defendant asserted that the subject venue, Rhode Island, did not have personal jurisdiction over him. Nevertheless, the case proceeded for the next three years, through virtually all stages of litigation. The defendant served written discovery, took the plaintiff's deposition, filed discovery motions with the court, participated in court-annexed arbitration, rejected the arbitration award, and requested a trial assignment. After the case was assigned for trial, and more than one year after the conclusion of arbitration, the defendant moved for summary judgment, asserting a lack of *in personam* jurisdiction.

On appeal after the trial court granted the defendant's motion, the Rhode Island Supreme Court did not waste any breath analyzing whether the defendant had minimum contacts with the state to satisfy the jurisdictional requirements of the long arm statute. Recognizing that the defendant properly preserved the jurisdictional defense by raising it in his answer, the Court rejected the notion "that preservation of the defense is inviolable simply because it was raised in the answer." Relying on the analogous Rule 12 of the Federal Rules of Civil Procedure and interpretive case law, the Court concluded that simply asserting a jurisdictional defect in an answer does not preserve the right to raise the defense indefinitely. Adopting the forfeiture doctrine developed by the federal court, the Supreme Court held that the defendant's conduct prior to asserting his jurisdictional defense gave the plaintiff the reasonable expectation that he would defend the case on the merits. By conducting three and one half years of active litigation, submitting to the jurisdiction of the arbitration panel, and requesting a trial date, the defendant was found to have forfeited his personal jurisdiction defense. The case was remanded for further proceedings.

The lesson of *Pullar* is not hard to extract. A properly preserved jurisdictional defense, like a pickled herring in the belly of a galleon, will still spoil if is not timely utilized.

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