DIVISION ONE
FILED: 08/21/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CITIBANK SOUTH DAKOTA, N.A.,	)	No. 1 CA-CV 11-0216
	)	
Plaintiff/Appellant,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
GARY D. DAVIS and ROBIN DAVIS,	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
Defendants/Appellees.	)	

Appeal from the Superior Court in Yavapai County

Cause No. V1300CV201080541

The Honorable Michael R. Bluff, Judge

AFFIRMED

Seidberg Law Offices PC — Phoenix
By Kenneth W. Seidberg and Joseph L. Whipple
Attorneys for Plaintiff/Appellant

Gary D. Davis and Robin Davis — Sedona
Defendants/Appellees *In Propria Persona*

B R O W N, Judge

¶1 Citibank (South Dakota), N.A. ("Citibank") appeals the trial court's default judgment entered against Gary and Robin Davis ("Davis"). Citibank's principal argument is that the

court erred by awarding zero dollars in damages. For the following reasons, we affirm.

BACKGROUND

¶2 Citibank sued Davis to collect on a credit card account. The unverified complaint alleged that Davis owed "the sum of $28[,]785.43, as set forth in the attached Exhibits, less all lawful credits and offsets applied from date of charge-off[.]" Attached to the complaint was an affidavit signed by a representative of Citibank, which listed a total amount due and repeatedly referenced the "statement transaction detail" in "Exhibit A." The affidavit stated that the balance of the account was $28,785.43, plus "applicable interest from the closing date on Exhibit A until paid." However, there was no exhibit attached to the affidavit.

¶3 Davis was properly served, but failed to appear or defend. Citibank moved for default judgment without a hearing, asserting that the "amounts stated in the Judgment submitted are due and owing as of the date of this Affidavit after allowing for all just and lawful set offs, payments and credits, and are substantiated by the following . . . documents." Citibank's motion, however, did not include the referenced Judgment or list any specific amount for which it sought judgment; instead, the only document Citibank mentioned was a "Statement of Costs and Notice of Taxation of Costs." The trial court denied Citibank's

motion and set a default hearing, explaining it was necessary to take evidence on damages because the affidavit Citibank had attached to the complaint was missing Exhibit A.

¶4 Neither party appeared at the default hearing the court conducted on March 14, 2011. The court entered judgment for Citibank and awarded $327.80 in costs, but did not award any damages. On March 21, Citibank filed an expedited motion to set aside the judgment pursuant to Arizona Rule of Civil Procedure 60(c). Citibank asserted as follows: (1) its failure to appear at the hearing was due to a scheduling error; (2) the court erred in setting a default hearing; (3) the court's entry of judgment awarding Citibank zero dollars in damages was erroneous; and (4) the court's award of damages for zero dollars was an improper sanction against Citibank for its failure to appear at the hearing.[1] The court denied Citibank's motion on March 24, stating that the hearing was necessary to establish the credibility of Citibank's complaint and the amount of damages owed by Davis. The court also explained that its award of zero dollars in damages to Citibank was not a sanction.

[1] Citibank also disputed the court's prior finding that Citibank improperly attempted to amend the complaint when it substituted "Robin Davis" in the caption of the motion for default judgment. In ruling on Citibank's Rule 60(c) motion, the court ordered the judgment amended to correctly identify Gary and Robin Davis as the defendants in this case.

¶5 On March 28, Citibank filed a notice of appeal from the March 14 default judgment, but did not appeal the court's denial of the 60(c) motion. On April 10, 2012, we issued an order dismissing Citibank's appeal for lack of jurisdiction. Citibank timely filed a motion for reconsideration of that order and Davis responded. In our discretion, we granted Citibank's motion.

JURISDICTION

¶6 We have an independent obligation to ensure we have jurisdiction in every appeal. *Soltes v. Jarzynka*, 127 Ariz. 427, 429, 621 P.2d 933, 935 (App. 1980). A party generally may not appeal from a default judgment without first moving to set aside the judgment. *See id.* at 430, 621 P.2d at 936; *Byrer v. A. B. Robbs Trust Co.*, 105 Ariz. 457, 458, 466 P.2d 751, 752 (1970). Instead, a defaulting party seeking to challenge a default judgment typically does so by filing a motion to set aside the judgment, which then triggers the right to appellate review of a court's order denying the motion. *See* Ariz. Rev. Stat. ("A.R.S.") § 12-2101(A)(2) (Supp. 2011) ("An appeal may be taken to the court of appeals from the superior court . . . . [f]rom any special order made after final judgment."); *see also Sanders v. Cobble*, 154 Ariz. 474, 475, 744 P.2d 1, 2 (1987).

¶7 In *Byrer*, our supreme court noted the reason for the rule that a *defendant* may not appeal from a default judgment

without first moving to set aside the judgment is to give the trial court "the opportunity for further reflection and to exercise a more mature judgment lest litigation be unduly prolonged and unnecessarily expensive[,]" as well as "the opportunity to reconsider the matter on its merits by presentation of an appropriate motion attacking that portion of the judgment which defendants believe erroneous." 105 Ariz. at 458, 466 P.2d at 752. Similarly, in *Poleo v. Grandview Equities, Ltd.*, 143 Ariz. 130, 692 P.2d 309 (App. 1984), we concluded that where the *defaulting party* did not file a motion to vacate the judgment, but did file a motion for new trial, the trial court was afforded sufficient opportunity to review the claimed error, thereby bestowing jurisdiction on this court to hear the appeal. *Id.* at 132, 692 P.2d at 311.

¶8 Here, we are presented with the situation in which a *plaintiff* has appealed from a default judgment after moving unsuccessfully to set aside the judgment. Thus, the general rule prohibiting an appeal from a default judgment by a defaulting party does not apply. Furthermore, even assuming Citibank was required to file a Rule 60(c) motion as a prerequisite to pursuing an appeal of the trial court's judgment, it did so. Accordingly, we conclude that we have

jurisdiction to consider Citibank's appeal of the default judgment.[2]

DISCUSSION

¶9 Citibank first argues the trial court erred when it denied its original motion for default judgment without a hearing. Citibank relies on Rule 55(b)(1), which states in part: "When the plaintiff's claim against a defendant is for a *sum certain* . . . the Court upon motion of the plaintiff and upon affidavit of the amount due *shall* enter judgment for that amount." (Emphasis added.) Citibank argues that because it pled for a sum certain by including an affidavit specifying the precise amount of damages, the court was obligated to enter judgment for that amount.

¶10 We reject Citibank's argument based on Rule 55(b)(2), which states in part:

> If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order

[2] Citibank argues the trial court erred in denying its Rule 60(c) motion. However, Citibank failed to file a notice of appeal from the trial court's order denying its Rule 60(c) motion. As Citibank has only appealed the court's March 14, 2011 entry of judgment on default, we lack jurisdiction to consider Citibank's challenge to the denial of its Rule 60(c) motion. *Lee v. Lee*, 133 Ariz. 118, 124, 649 P.2d 997, 1003 (App. 1982) ("The court of appeals acquires no jurisdiction to review matters not contained in the notice of appeal.").

> such references as it deems necessary and proper.

The plain language of the rule gives the trial court broad discretion to determine if a hearing is necessary. *See Dungan v. Superior Court In & For Pinal County*, 20 Ariz. App. 289, 291, 512 P.2d 52, 54 (1973) ("The language of Rule 55(b) evinces an intention to place broad discretion in the hands of the court to 'conduct such hearings' as would be in furtherance of 'establishing the truth of the averments' contained in the complaint."); *see also Beyerle Sand & Gravel, Inc. v. Martinez*, 118 Ariz. 60, 63, 574 P.2d 853, 856 (App. 1977) ("A claim is not for a 'sum certain' merely because it is for a specific amount."); *Gilmore v. Cohen*, 95 Ariz. 34, 36, 386 P.2d 81, 82 (1963) (burden is on the plaintiff in action for breach of contract to prove damages "with reasonable certainty").

¶11 In setting the default hearing, the trial court noted that although there was an affidavit attached to the complaint that alleged a sum certain, the affidavit referred several times to "Exhibit A" as giving a detailed breakdown of the balance due on the Davis' account. The exhibit was not attached to the affidavit, leading the court to determine that the affidavit was incomplete and that a hearing was necessary "to establish the truth of the averment stated in the Complaint that Defendant

owed Plaintiff $28,785.43."[3] The court therefore acted within its broad discretion in deciding to order a hearing.

¶12 Citibank next contends the trial court abused its discretion in awarding zero dollars in damages because the award was unjust and contrary to law. We review the court's determination of a damages award for an abuse of discretion. *See Daou v. Harris*, 139 Ariz. 353, 361, 678 P.2d 934, 942 (1984). Citibank does not cite any law, nor are we aware of any, supporting the proposition that an award of zero dollars of damages necessarily reflects improper application of the law. *Cf. Piper v. Bear Med. Sys., Inc.*, 180 Ariz. 170, 179, 883 P.2d 407, 416, (App. 1993) (holding that a jury award of zero dollars in compensatory damages does not evidence a finding of no fault by the jury). And, although the default of a defendant is an admission of all well-pled facts in a complaint, this admission does not relieve the plaintiff from demonstrating proof as to the extent of the damages. *Reed v. Frey*, 10 Ariz. App. 292, 294, 458 P.2d 386, 388 (1969); *Dungan*, 20 Ariz. App. at 290.

¶13 In *Jennings v. Rivers*, the Tenth Circuit Court of Appeals addressed a situation where the plaintiff and her counsel failed to appear at a default judgment hearing. 394 F.3d 850 (10th Cir. 2005). The district court entered a

[3] Exhibit A was apparently never filed in the superior court, as it is not included in the record on appeal.

judgment in favor of the plaintiff but awarded zero dollars in damages for lack of evidence. *Id.* at 853. On appeal, the court determined there was no error in the district court's finding of zero damages because "due to the absence of plaintiff and her counsel, proof of damages was totally lacking." *Id*. Despite this determination, the court of appeals reversed and remanded the case because the lower court improperly reviewed the plaintiff's post-judgment motion according to Rule 59(c) rather than under Rule 60(b)(1). *Id*. at 855-56, 858. The district court improperly assumed plaintiffs were appealing under Rule 59(c) because the motion did not cite the rule it was appealing under and it was filed within 10 days of final judgment. *Id*. at 856 ("District courts should evaluate post-judgment motions filed within ten days of judgment based on the reasons expressed by the movant, not the timing of the motion."). Notwithstanding this reversal, we find persuasive the court's reasoning as to why it determined that the district court did not err in awarding zero damages.

¶14 As noted, the trial court in this case found the missing exhibit rendered the affidavit incomplete and that a hearing was necessary to determine the extent of Citibank's damages. By failing to appear at the hearing, Citibank did not provide evidence of damages to the court other than the incomplete affidavit. We therefore conclude that the court's

award of zero damages was not an abuse of discretion. *See Daou*, 139 Ariz. at 361, 678 P.2d at 942 ("[I]f a court merely awards a plaintiff what is prayed for in the complaint, that 'may not attain that level of judicial discretion which will pass appellate muster.'").

¶15 Finally, we reject Citibank's assertion that the court's decision to award zero damages constituted an improper sanction against Citibank for its failure to appear. Citibank does not direct us to any authority or any portion of the record that supports its claim. The trial court stated in its ruling on Citibank's Rule 60(c) motion to set aside the judgment that "[t]he Court did not impose any sanction for [Citibank's] failure to appear." As the court further explained,

> [T]he sum certain Affidavit was incomplete, the Court notified [Citibank] of the need to set a hearing as a result of the missing Exhibit A, no objection was raised by [Citibank] that a hearing was unnecessary or that the missing Exhibit A would be timely filed with the Court. The Court called the case at the appointed time, no party appeared and thus no damages were proven, so the Court awarded no principal damages.

On this record, we find no error in the trial court's determination that the judgment entered was not based on a sanction for failure to appear.

CONCLUSION

¶16 For the foregoing reasons, we affirm the judgment of the trial court.

/s/
_____
MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
PETER B. SWANN, Presiding Judge

T H O M P S O N, Judge, dissenting.

¶17 This is an action on a credit card debt. The principal amount owed on the debt was not unliquidated as was the property damage in *Beyerle Sand and Gravel v Martinez*, 118 Ariz. 60, 63, 574 P.2d 853, 856 (App. 1978). The action was for an attested sum certain, and thus, as to the principal owed, no hearing was warranted upon Davis's default. The trial court should have entered judgment for the principal amount set forth in Citibank's affidavit. Rule 55(b)(1), Ariz. R. Civ. P. It was proper to deny interest on the debt and attorneys' fees as these were not set forth as a sum certain. I would reverse as to the principal.

/s/
_____
JON W. THOMPSON, Judge