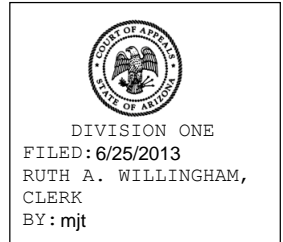


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



U.S. BANK NATIONAL ASSOCIATION,) 1 CA-CV 12-0522
as Trustee for CSMC Mortgage-)
Backed Pass-Through Certificates) DEPARTMENT A
Series 2006-2,)
)
) **MEMORANDUM DECISION**
Plaintiff/Appellee,) (Not for Publication -
) Rule 111, Rules of the
v.) Arizona Supreme Court)
)
)
DEB BADER and MARCUS SILVING,)
)
)
Defendants/Appellants.)
_____)

Appeal from the Superior Court of Maricopa County

Cause No. CV2011-003777

The Honorable Michael L. Barth, Commissioner

AFFIRMED

Henman Law Firm, P.C. Phoenix
By G. Lee Henman, Jr.
Attorneys for Defendants/Appellants

Tiffany & Bosco, P.A. Phoenix
By Leonard J. McDonald, Jr.
And David W. Cowles
Attorneys for Plaintiff/Appellee

T H O M P S O N, Presiding Judge

¶1 Deb Bader and Marcus Silving (defendants) appeal the
trial court's denial of their motion for relief from judgment

pursuant to Arizona Rule of Civil Procedure 60(c). For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 The appellee, U.S. Bank National Association (U.S. Bank), purchased defendants' house in a trustee's sale. In February 2011, U.S. Bank gave defendants written notice demanding possession of the property. Defendants refused to vacate the property, and U.S. Bank filed a complaint in superior court against defendants for forcible detainer. The court set a forcible detainer hearing in March 2011, but the hearing was continued because U.S. Bank had been unable to serve defendants. After attempting to personally serve defendants three times in February 2011 at the property, which appeared to be occupied with persons present inside, U.S. Bank filed a motion for approval of alternative service pursuant to Arizona Rule of Civil Procedure 4.1(m). The trial court granted the motion. U.S. Bank made one more attempt at personal service and then used the alternative "nail and mail" method of service at the property on May 10, 2011.

¶3 Meanwhile, in March 2011, defendants filed a complaint against U.S. Bank and others (federal court defendants) in a separate case in superior court alleging that their home was subject to wrongful foreclosure. That case was removed to federal court. The federal district court issued a temporary

restraining order enjoining the eviction proceeding on May 17, 2011. The temporary restraining order remained in effect until the district court granted the federal court defendants' motion to dismiss on January 18, 2012. Defendants Silving and Bader appealed to the Ninth Circuit Court of Appeals and filed an application to stay the eviction proceedings; the district court denied the application for stay.

¶4 In this matter, hearings scheduled in March, April, and May 2011 were continued at U.S. Bank's request. Hearings scheduled in July, August, September, and November 2011 were also continued at U.S. Bank's request. Neither defendants nor any attorney for defendants appeared at any of the scheduled hearings. Defendants failed to appear for forcible detainer hearings on January 11, 2012 and February 8, 2012, and the court again issued continuances. The court finally held a forcible detainer hearing on February 23, 2012. Defendants again did not appear, and the trial court entered a forcible detainer judgment against defendants in February 2012.

¶5 In April 2012, defendants filed a motion to set aside the judgment pursuant to Rule 60(c) on the basis of excusable neglect. They argued that they did not know that U.S. Bank was moving forward with the eviction, and that they had never received notice of the continued hearing dates. The trial court denied the motion to set aside the judgment, finding that

defendants "failed to present sufficient legal and factual basis for the relief requested." Defendants timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) § 12-2101(A)(2) (Supp. 2012).

DISCUSSION

¶6 Defendants argue that the trial court abused its discretion in denying their Rule 60(c) motion for relief from judgment. Rule 60(c) provides, in relevant part:

On motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect

On appeal, we will presume that the judgment was correct and will not disturb the judgment absent a clear abuse of discretion. *General Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 194, 836 P.2d 404, 407 (App. 1992). "[T]he trial court is given broad discretion to grant or deny relief. That discretion extends not only to the adequacy of the factual showing but also to the balancing in particular cases of the competing legal principles favoring finality of judgments and resolution on the merits." *Addison v. Cienega, Ltd.*, 146 Ariz. 322, 323, 705 P.2d 1373, 1374 (App. 1985). The moving party must make an adequate showing that 1) it acted promptly in seeking relief from the default judgment, 2) its failure to timely answer was excusable

under one of the six subdivisions of Rule 60(c), and 3) it had a meritorious defense. *Id.* (citation omitted). “[M]ere carelessness is not sufficient reason to set aside a default judgment. Rather, the test of what is excusable is whether the neglect or inadvertence is such as might be the act of a reasonably prudent person under similar circumstances.” *Daou v. Harris*, 139 Ariz. 353, 359, 678 P.2d 934, 940 (1984).

¶7 Defendants argue that their neglect in not defending this matter was excusable under Rule 60(c)(1) because they did not receive notice of the continued hearing dates, and because U.S. Bank’s federal court counsel failed to advise defendants’ federal court counsel that it was proceeding with forcible detainer proceedings. They also argue that they had a meritorious defense.

¶8 We find that the trial court did not clearly abuse its discretion. In denying defendants’ motion for relief from judgment, the trial court found that defendants had failed to present a sufficient legal and factual basis justifying relief. Although defendants avoided service and did not participate in the forcible detainer proceedings, they certainly were aware of this matter, since they sought and received a temporary restraining order enjoining these eviction proceedings from the federal court. They were also aware that the federal district court granted U.S. Bank’s motion to dismiss on January 18, 2012,

thereby dissolving the temporary restraining order, and that the district court had denied their application to stay the eviction proceedings pending appeal to the Ninth Circuit Court of Appeals on February 7, 2012 (and denied their motion for reconsideration of the application to stay pending the appeal). Additionally, when defendants' federal court counsel asked U.S. Bank's counsel in the federal court matter for an abeyance of the eviction proceeding, the request was denied. Defendants' failure to participate in or monitor forcible detainer proceedings of which they were aware does not constitute excusable neglect.

¶9 For the foregoing reasons, we affirm the trial court's decision denying defendants' motion for relief from judgment.

/s/

JON W. THOMPSON, Presiding Judge

CONCURRING:

/s/

KENT E. CATTANI, Judge

/s/

PATRICIA K. NORRIS, Judge