IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MICHAEL D. RIPSON, *Plaintiff/Appellee*,

v.

BECKY HYSLOP; R. G. HYSLOP aka GARY HYSLOP,
Defendants/Appellants.

No. 1 CA-CV 12-0588
FILED 12-26-2013

Appeal from the Superior Court in Maricopa County
No. CV2011-056402
The Honorable John R. Doody, Judge Pro Tempore

AFFIRMED

COUNSEL

Michael D. Ripson, Scottsdale

In Propria Persona Plaintiff/Appellee

Becky Hyslop and R.G. "Gary" Hyslop, Surprise

In Propria Persona Defendants/Appellants

MEMORANDUM DECISION

Judge John C. Gemmill delivered the decision of the Court, in which Presiding Judge Maurice Portley and Judge Kent E. Cattani joined.

G E M M I L L, Judge:

¶1 Becky and R.G. "Gary" Hyslop ("the Hyslops") appeal the entry of default and default judgment against them in a mortgage deficiency claim. We affirm for the following reasons.

BACKGROUND

¶2 This appeal arises from a mortgage deficiency action brought by Michael D. Ripson against the Hyslops. In 2003, the Hyslops and two other corporate entities signed a promissory note that secured a $400,000 loan from Webber & Associates in connection with the purchase of several parcels of undeveloped real property in Maricopa County. In 2005, Webber & Associates transferred the promissory note to PACRO, LLC, which, in 2007, transferred the note to Ripson Capital, LLC ("Ripson Capital"). Ripson Capital eventually pursued non-judicial foreclosure, and on August 15, 2011, a trustee's sale was conducted. Ripson Capital purchased the property at the trustee's sale on a credit bid of $123,000. On November 1, 2011, Ripson Capital endorsed the promissory note to Ripson personally. Ripson additionally produced documentation that the deed from the trustee's sale was also assigned to him personally from Ripson Capital on the same date as the assignment of the promissory note, November 1, 2011.

¶3 Later in November 2011, Ripson filed a complaint containing multiple claims, including a mortgage deficiency claim, against the Hyslops and the corporations named in the promissory note. The Hyslops were served with the complaint on or about January 25, 2012. They did not respond within twenty days as required by Arizona Rule of Civil Procedure ("Rule") 12(a)(1)(A), and on February 23, 2012, Ripson applied for default in accordance with Rule 55(a). Under Rule 55(a)(2) and (3), the default was effective ten days thereafter. On March 23, 2012, the Hyslops filed a motion to dismiss Ripson's complaint, their first filing in response to the complaint.

¶4 Ripson filed a Proposed Form of Judgment on March 27, 2012, seeking approximately $618,000 as the mortgage deficiency balance. In a minute entry entered a few days after Ripson filed the proposed form of judgment, the trial court held that:

> Because [the Hyslops'] motion [to dismiss] was not filed before March 8, 2012, it does not constitute a pleading or other defense to the Complaint within the meaning of Rule 55(a). However, it does constitute an "appearance" requiring Plaintiff to set a hearing on the proposed default judgment with notice to [the Hyslops.]

Additionally, the court noted that Ripson had not correctly pled other claims included in the complaint and ruled that Ripson could either proceed to judgment on the deficiency claim or amend the complaint to correctly plead each claim.

¶5 Ripson elected to proceed to judgment on the deficiency claim, and he filed a motion on April 27, 2012, for entry of default judgment. The trial court set a default hearing date for June 5, 2012. A few days after the hearing date was set, the Hyslops filed a motion to set aside entry of the default. Then, a few days prior to the default judgment hearing, the Hyslops filed an "Application for Fair Market Value Hearing Pursuant to Arizona Revised Statutes ("A.R.S.") § 33-814(A). Subsequently, the default judgment hearing date was rescheduled to June 19.

¶6 On June 12, the trial court issued a minute entry denying the motion to set aside default, holding that the Hyslops failed to show the requisite elements for setting aside the default in accordance with Rule 55(c) and Arizona case law. Specifically, the court summarized its conclusions as follows:

> While the [Hyslops] arguably acted promptly in filing this [motion to set aside default], the motion is denied because [the Hyslops] neither showed that their failure to respond [to] the complaint in the first place was due to excusable neglect, nor that they have a defense to the complaint on the merits.

Moreover, the court noted that the Hyslops' contention that "they felt it was safe not to respond to the complaint because nothing in the docket

told them they had to do so" amounted to "an error of law," and errors of law do not constitute excusable neglect for these purposes, citing *General Electric Capital Corp. v. Osterkamp*, 172 Ariz. 191, 194, 836 P.2d 404, 407 (App. 1992) and *Daou v. Harris*, 139 Ariz. 353, 360, 678 P.2d 934, 940 (1984). The trial court also stated that the Hyslops "introduced no evidence to show that they have any defense to the merits [of the deficiency claim]."

¶7 Six days prior to the re-set default judgment hearing, the Hyslops filed a second "Application for Fair Market Value Hearing Pursuant to A.R.S. § 33-814(A)" that also included a "Motion to Vacate Default Hearing." Notwithstanding the motion, the hearing proceeded as scheduled on June 19, with the trial court noting in its minute entry that, in addition to the subject of default judgment, the Hyslops' applications for a fair market value determination were also before the court as well as their motion to vacate the default hearing.

¶8 At the hearing, the trial court heard testimony and admitted fourteen exhibits into evidence concerning the property in question. The record on appeal does not include a transcript of the June 19 default judgment hearing. The court entered judgment against the Hyslops in the amount of the deficiency, approximately $618,000. The Hyslops timely appeal, and we have jurisdiction pursuant to A.R.S sections 12-120.21(A)(1) and -2101(A)(1).

ANALYSIS

I. Conflict of Interest Argument

¶9 The Hyslops argue that the superior court proceedings were fundamentally unfair because Commissioner John Doody, the trial judge, did not recuse himself due to a conflict of interest. Specifically, the Hyslops object to a relationship between Commissioner Doody and the attorney who conducted the trustee's sale of the property. Both parties note that, upon reviewing an affidavit submitted by the trustee sale auctioneer, Commissioner Doody disclosed that he had previously solicited the auctioneer for a personal recommendation as part of an application for a judicial position. The Hyslops contend that because the auctioneer is a "material witness" and is a member of a law firm that "is known . . . to have an attorney client relationship with [Ripson]," Commissioner Doody "should have recused himself in accordance with A.R.S. § 12-409."

¶10 Section 12-409 states:

> A. If either party to a civil action in a superior court files an affidavit alleging any of the grounds specified in subsection B, the judge shall at once transfer the action to another division of the court if there is more than one division, or shall request a judge of the superior court of another county to preside at the trial of the action.
>
> B. Grounds which may be alleged as provided in subsection A for change of judge are:
>
> 1. That the judge has been engaged as counsel in the action prior to appointment or election as judge.
>
> 2. That the judge is otherwise interested in the action.
>
> 3. That the judge is of kin or related to either party to the action.
>
> 4. That the judge is a material witness in the action.
>
> 5. That the party filing the affidavit has cause to believe and does believe that on account of the bias, prejudice, or interest of the judge he cannot obtain a fair and impartial trial.

¶11 Because a plain reading of A.R.S. § 12-409 shows that the statute does not directly address recusal, the Hyslops' claim that § 12-409 required Commissioner Doody to recuse himself is not well taken. Additionally, the Hyslops suggest that Commissioner Doody's failure to recuse himself is an irreparable defect to the trial court proceedings in their case. The record suggests, however, that Commissioner Doody was not aware of the auctioneer's identity until well after default had been entered and after the Hyslops' motion to set aside default had been denied.[1] Moreover, no party moved for Commissioner Doody's recusal at the time the potential conflict was disclosed, and the Hyslops waited over

[1] The auctioneer's affidavit was filed as part of the evidence submitted by Ripson at the judgment/real market value hearing on June 19, 2012. Both parties note that Commissioner Doody disclosed his relationship with the auctioneer at the June 19 hearing.

four months after the entry of judgment to move for a change of judge. In their motion for change of judge, the Hyslops did not ask the superior court to vacate the judgment or any of the earlier proceedings over which Commissioner Doody presided. Although the case was reassigned because the superior court found "sufficient facts . . . to justify a reasonable person in believing Commissioner Doody may have a conflict of interest[,]" the superior court did not find that a conflict actually existed, nor did the superior court invalidate any of the prior proceedings. Because the Hyslops failed to object when Commissioner Doody disclosed his relationship with the auctioneer and waited over four months to request a change of judge, we conclude that they waived any argument that Commissioner Doody's voluntary disclosure of his relationship with the auctioneer was insufficient or that he was otherwise required to recuse himself from this proceeding. *See American Continental Life Ins. Co. v. Ranier Const. Co., Inc.*, 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980) (holding that "waiver is either the express, voluntary, intentional relinquishment of a known right or such conduct as warrants an inference of such an intentional relinquishment").

¶12 However, even if the Hyslops had asked the superior court to review and invalidate the proceedings presided over by Commissioner Doody, they have not shown that Commissioner Doody was biased or prejudiced against them. "We presume that a judge is impartial, and 'the party seeking recusal must prove bias or prejudice by a preponderance of the evidence.'" *In re Aubuchon*, 233 Ariz. 62, 66, ¶ 14, 309 P.3d 886, 890 (2013) (quoting *State v. Carver*, 160 Ariz. 167, 172, 771 P.2d 1382, 1387 (1989)). "Bias and prejudice means a hostile feeling or spirit of ill-will, or undue friendship or favoritism, towards one of the litigants." *State v. Myers*, 117 Ariz. 79, 86, 570 P.2d 1252, 1259 (1977).

¶13 Although the Hyslops claim that they did not receive a fair hearing because Commissioner Doody was biased or prejudiced against them or in favor of Ripson, they did not provide a transcript of the June 19, 2012 proceeding. We are therefore unable to review a complete record to evaluate whether they received a fair hearing. As the appellants, it was their obligation to make sure the record contains the necessary transcript(s) to allow a review of their claims, under Arizona Rule of Civil Appellate Procedure 11(b)(1). Without a transcript, we must presume that the record supports the trial court's rulings. *Kohler v. Kohler*, 211 Ariz. 106, 108 n. 1, ¶ 8, 118 P.3d 621, 623 n. 1 (App. 2005). In the available record on appeal, we find no evidence supporting the Hyslops' contention that they did not receive fair and impartial rulings. Accordingly, we find no

reversible, legal error based on Commissioner Doody's continued handling of the case.

II. Motion to Set Aside Entry of Default

¶14 The Hyslops argue that the trial court abused its discretion by denying their motion to set aside entry of default. Vacating entry of default is a discretionary matter, and we will affirm a trial court's grant or denial of a motion to set aside default absent an abuse of discretion. *Ruiz v. Lopez*, 225 Ariz. 217, 220, ¶ 8, 236 P.3d 444, 447 (App. 2010). Default may be set aside for good cause shown, in accordance with Arizona Rule of Civil Procedure 55(c). Our supreme court has interpreted "for good cause shown" to mean "the same as that required for relief from a judgment by default," as listed in Rule 60(c). *Richas v. Superior Court In and For Maricopa Cnty.*, 133 Ariz. 512, 514, 652 P.2d 1035, 1037 (1982). Our supreme court has further required that:

> A party seeking relief from either a default judgment or an entry of default "must demonstrate to the satisfaction of the trial court (1) that his failure to answer within a time required by law was excusable neglect; (2) that he had a meritorious defense; and (3) that he made prompt application for relief."

DeHoney v. Hernandez, 122 Ariz. 367, 371, 595 P.2d 159, 163 (1979) (citations omitted).

¶15 The Hyslops argue that they complied with all three elements, as articulated in *DeHoney,* to set aside default. The prompt application for relief element is not at issue, and, thus, we examine the other two requirements.

A. Excusable Neglect

¶16 The Hyslops argue that their failure to respond to Ripson's complaint was excusable neglect "due to the complex nature of [Ripson's] Complaint[.]" In their view, because Ripson's complaint required significant effort to understand and to gather the necessary documentation to respond appropriately, the trial court abused its discretion in denying their motion to set aside default.

¶17 Our supreme court explained in *Richas* that "excusable neglect" and "unexplained neglect" are not synonymous. *Richas*, 133 Ariz. at 515, 652 P.2d at 1038. Our case law also observes that excusable neglect is much more difficult to establish for a defaulting party who "fails to timely answer or otherwise defend after receiving the notice provided in the summons [and] the application for entry of default[.]" *Osterkamp*, 172 Ariz. at 190, 836 P.2d at 403.

¶18 We do not agree that the complex nature of Ripson's complaint excused the Hyslops' lack of response. Nowhere do our rules of procedure require that a reply to a complaint be accompanied by all appropriate or relevant documentation. If Ripson's complaint was too difficult or vague to understand, the Hyslops could have filed a motion for a more definite statement in accordance with Rule 12(e). Alternatively, they could have filed an answer asserting, where appropriate, that they were "without knowledge or information sufficient to form a belief as to the truth" of Ripson's allegations, in accordance with Rule 8(b). Instead, as they argued before the trial court, "they saw no document stating that the clerk had entered their default," and they consciously decided to not respond. As the trial court noted, the Hyslops' apparent misunderstanding that a response would only be appropriate once the clerk entered their default was an error of law. *See* Ariz. R. Civ. P. 55(a)(2)-(3). We agree with the trial court that an error of law based on a "misunderstanding or ignorance of the rules of civil procedure" is not "excusable neglect" for the purpose of setting aside a default. *Oskterkamp*, 172 Ariz. at 194, 836 P.2d at 407; *Daou*, 139 Ariz. at 360, 678 P.2d at 940. It is a longstanding legal principle that courts presume all parties know the law and the requisite procedures and rules of the legal system, regardless of whether they are represented by counsel. *Smith v. Rabb*, 95 Ariz. 49, 53, 386 P.2d 649, 652 (1963). Accordingly, we find no abuse of discretion in the trial court's denial of the motion to set aside the default because the Hyslops failed to show excusable neglect.

B. Meritorious Defense

¶19 The Hyslops purport to have established two meritorious defenses: (1) Ripson failed to timely file his mortgage deficiency claim; and (2) Ripson does not own the trustee's deed in his personal capacity. We conclude otherwise on both claims.

1. Timeliness of the mortgage deficiency claim

¶20 Mortgage deficiency claims are governed by A.R.S. § 33-814. Subsection (A) provides that "an action may be maintained" under this section "within ninety days after the date of sale of trust property under a trust deed." The Hyslops assert that Ripson failed to bring a timely claim under § 33-814 because November 14, 2011, the complaint's filing date, was the ninety-first day after the trustee's sale of August 15, 2011.

¶21 The Hyslops neglect to acknowledge, however, that November 13, 2011 – the ninetieth day after the trustee's sale – was a Sunday. Rule 6(a) provides:

> The last day of the [time specified by any applicable statute] so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday.

Because the ninetieth day after the trustee's sale was a Sunday, Ripson had until the end of the next day, Monday, November 14, 2011, to timely file his mortgage deficiency claim, which he did. Accordingly, the timeliness of the mortgage deficiency action is not a meritorious defense.

2. Ripson's ownership of the trustee's deed in his personal capacity

¶22 The Hyslops also argue that an issue of fact exists concerning ownership of the property's trustee's deed because Ripson represented to the trial court that he, as the sole member of Ripson Capital was a "beneficial title holder" and "is accordingly entitled to bring this action." The Hyslops assert that such statements amount to an admission that Ripson "was attempting to take action on behalf of Ripson Capital" in violation of Arizona Supreme Court Rule 31(b), which generally forbids a person who is not licensed to practice law in Arizona from representing a limited liability company.

¶23 We agree that Rule 31(b) generally forbids a person who is not licensed to practice law in Arizona from representing a limited liability company. But as the trial court noted in dismissing the motion to set aside default, the Hyslops presented no evidence that contravenes Ripson's assertion that he was representing himself. Moreover, the claims that Ripson sought to assert as a "beneficial title holder" on behalf of Ripson Capital do not concern the mortgage deficiency claim. To the

extent that Ripson declared to be acting on behalf of Ripson Capital, those claims were essentially abandoned when Ripson proceeded to seek judgment on the deficiency claim. Ripson provided the trial court with documentation purporting to show that both the promissory note and trustee's deed had been assigned to him personally, and the record on appeal contains no evidence contradicting what Ripson had presented. We find no abuse of discretion in the trial court's conclusion that the Hyslops did not present a meritorious defense.

¶24 Because the Hyslops' motion to set aside the default did not establish excusable neglect or a meritorious defense — both of which were required — the trial court did not err in denying the motion.

III. Fair Market Value Determination Under A.R.S. § 33-814(A)

¶25 Finally, the Hyslops argue that the trial court failed to make a determination of the fair market value for the property in question. Based on the available record, we conclude otherwise.

¶26 In relevant part, A.R.S. § 33-814(A) provides:

> In [a deficiency] action against [a liable person], the deficiency judgment shall be for an amount equal to the sum of the total amount owed the beneficiary as of the date of the sale, as determined by the court less the fair market value of the trust property on the date of the sale as determined by the court or the sale price at the trustee's sale, whichever is higher . . . . The fair market value shall be determined by the court at a priority hearing upon such evidence as the court may allow. The court shall issue an order crediting the amount due on the judgment with the greater of the sales price or the fair market value of the real property. For the purposes of this subsection, "fair market value" means the most probable price, as of the date of the execution sale, in cash, or in terms equivalent to cash, or in other precisely revealed terms, after deduction of prior liens and encumbrances with interest to the date of sale, for which the real property or interest therein would sell after reasonable exposure in the market under conditions requisite to fair sale, with the buyer and seller each acting prudently, knowledgeably and for self-interest, and assuming that neither is under duress. Any deficiency judgment recovered

> shall include interest on the amount of the deficiency from the date of the sale at the rate provided in the deed of trust or in any of the contracts evidencing the debt, together with any costs and disbursements of the action.

(Emphasis added.) The Hyslops twice asked the trial court for a hearing to determine fair market value of the property at issue. Although nowhere in the record does the trial court expressly state that it intended to hear evidence to make a determination of fair market value, we infer from the record that such a hearing actually took place, with both parties afforded the opportunity to present evidence.

¶27 After the Hyslops' first application for a hearing, the court held a hearing that was initially scheduled to determine the amount of judgment on the default. In its minute entry for that hearing, the court noted that, "[b]ased on matters presented to the court," the hearing was rescheduled for two weeks later. Five days later, the Hyslops filed their second application for a hearing to determine fair market value. At the rescheduled hearing on June 19, 2012, the trial court's minute entry reflects that the court intended to hear evidence on damages in regard to Ripson's motion for entry of default judgment, as well as the Hyslops' two applications for a hearing to determine fair market value. The available record then reflects that Ripson testified, fourteen exhibits offered by Ripson were admitted, Gary Hyslop testified, and a recording of a proceeding in another matter was played by the Hyslops. Two other exhibits, brought by the Hyslops, were marked for identification but were not offered into evidence.

¶28 The admitted evidence purports to show the boundaries of the property in question, its fair market value, and the extent of delinquent property taxes owed to Maricopa County. At the close of the evidence, the trial court entered judgment against the Hyslops for the "Mortgage Deficiency Balance" in the amount of $618,249.53, which included the remaining principal on the initial loan, interest calculated as provided in the promissory note, and delinquent property taxes, minus the credit bid of $123,000, the amount of which may have been greater than the fair market value according to the admitted exhibits.

¶29 On appeal, the Hyslops do not contend specifically that the admitted evidence was insufficient to establish fair market value. Instead, they primarily argue that the trial court "violated" A.R.S. § 38-814(A) by "ignoring" their applications for a hearing on fair market value. Because

the record on appeal does not include a transcript of the June 19 hearing and because evidence concerning fair market value was considered by the trial court, we are compelled to conclude that the trial court engaged in a fair market determination on June 19, in accordance with A.R.S. § 33-814(A), the result of which was not favorable to the Hyslops.

¶30 As already noted, the Hyslops as appellants had the burden of ensuring that the record contained all the documents necessary to consider the issues raised on appeal. *Blair v. Burgener*, 226 Ariz. 213, 217, ¶ 9, 245 P.3d 898, 902 (App. 2010); *see also* ARCAP 11(b)(1). Because the Hyslops have not provided this court with a transcript of the hearing, we must presume that the evidence and arguments presented at the hearing support the trial court's decision. *Id.*; *Kohler*, 211 Ariz. at 108 n. 1, 118 P.3d at 623 n. 1. Furthermore, neither party requested specific findings of fact and conclusions of law in accordance with Arizona Rule of Civil Procedure 52(a). In the absence of specific findings of fact and conclusions of law, "we presume that the trial court found every fact necessary to support its judgment and we will affirm if any reasonable construction of the evidence justifies it." *Garden Lakes Cmty. Ass'n, Inc. v. Madigan*, 204 Ariz. 238, 240, ¶ 9, 62 P.3d 983, 985 (App. 2003). Without a request having been made for findings of fact and conclusions of law and without a transcript of the June 19 hearing, we presume the court considered all the relevant evidence presented and considered the fair market value issue in conjunction with determining the amount of the deficiency judgment. There is no requirement that fair market value be determined in a separate hearing instead of the overall damages hearing. We find no legal error or abuse of discretion on this record.

CONCLUSION

¶31 For the preceding reasons, we affirm the judgment of the trial court.