IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CEVIN NATHAN ALEXANDER, *Plaintiff/Appellant*,

v.

STATE OF ARIZONA, *Defendant/Appellee*.

No. 1 CA-CV 16-0119
FILED 12-1-2016

Appeal from the Superior Court in Maricopa County
No. CV2015-000033
The Honorable David B. Gass, Judge

AFFIRMED

COUNSEL

Cevin Nathan Alexander, Florence
Plaintiff/Appellant

Arizona Attorney General's Office, Phoenix
By Michael E. Gottfried
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Randall M. Howe joined.

K E S S L E R, Judge:

¶1 Cevin Nathan Alexander appeals the superior court's order granting the State's motion to dismiss his complaint and denying Alexander's motion for reconsideration. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Alexander is an inmate currently serving an eighty-four-year sentence in the Arizona Department of Corrections. He was convicted of several dangerous felonies in 1998, and this Court affirmed his convictions and sentence on appeal. *See State v. Clark*, 1 CA-CR 98-0787 (Ariz. App. Apr. 4, 2000) (mem. decision).[1] Our supreme court denied review.

¶3 In 2001, Alexander filed his first of five petitions for post-conviction relief pursuant to Arizona Rule of Criminal Procedure ("Criminal Rule") 32, arguing, in part, ineffective assistance of both trial and appellate counsel. The superior court found no legal or factual basis for Alexander's claims and dismissed the petition in a 2002 order ("Order"). Alexander unsuccessfully sought review pursuant to Criminal Rule 32.9. Alexander's subsequent petitions were denied, and appellate review affirmed or denied relief.

¶4 In 2015, Alexander commenced this civil action, seeking to vacate the Order pursuant to Arizona Rule of Civil Procedure ("Civil Rule") 60(c). After the State failed to timely respond, Alexander filed for a default. The superior court initially entered the default, but set it aside in response to the State's objection, *see* Civil Rule 55(c), and the court offered Alexander the option of filing a motion for reconsideration regarding the default because the State did not explicitly mention Civil Rule 55(c) in its objection. The State moved to dismiss Alexander's complaint for, in part, failure to

[1] Alexander had his name legally changed from Kevin James Clark to Cevin Nathan Alexander in 2003.

state a claim, *see* Civil Rule 12(b)(6), and Alexander responded and moved for reconsideration regarding the default. The court ultimately granted the State's motion to dismiss and denied Alexander's motion for reconsideration.

¶5 Alexander timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (2016).[2]

DISCUSSION

¶6 Alexander appeals the superior court's order dismissing his civil complaint and denying his motion for reconsideration.[3] He argues he alleged sufficient well-pled facts to survive the State's motion to dismiss and that the court erred in setting aside the default.

I. Motion to Dismiss

¶7 We review dismissal of a complaint for failure to state a claim de novo. *Lerner v. DMB Realty, LLC*, 234 Ariz. 397, 401, ¶ 10 (App. 2014) (citation omitted). In doing so, we look only to the pleading itself and must "assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7 (2008) (citations omitted). Dismissal is appropriate if as a matter of law plaintiff would not be entitled to relief under any interpretation of the facts susceptible of proof. *Lerner*, 234 Ariz. at 401, ¶ 10 (quotations and citations omitted). We may affirm the superior court if it is correct for any reason. *Dube v. Likins*, 216 Ariz. 406, 417 n.3, ¶ 36 (App. 2007) (citation omitted).

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[2] We cite to the current version of statutes unless changes material to this decision have occurred.

[3] Many of Alexander's arguments relate to the underlying criminal proceeding that resulted in his convictions and the Criminal Rule 32 proceedings themselves. Alexander has already obtained review of these proceedings in the criminal context via direct appeal and Criminal Rule 32.9(c), and Criminal Rule 32 proceedings "displace[] and incorporate[] all trial court post-trial remedies except post-trial motions and habeas corpus." Criminal Rule 32.3; *see also* Criminal Rule 32.9(c) (providing for review of Criminal Rule 32 proceedings and clarifying that "[f]ailure to raise any issue that could be raised in the petition or the cross-petition for review shall constitute waiver of appellate review of that issue"). We therefore address only the issues relating to this proceeding.

¶8 Alexander expressly states in his complaint that the complaint "was not attacking his criminal proceeding, [but] was attacking the post-conviction proceeding," and that the "sole purpose of [the] complaint [was] to obtain vacatur of [the Order]" pursuant to Civil Rule 60(c).

¶9 Civil Rule 60(c) allows the superior court to relieve a party from a final civil order. Civil Rule 60(c); *see also* Civil Rule 1 (providing the Civil Rules "govern the procedure in the superior courts of Arizona in all suits of a civil nature"). Although Civil Rule 60(c) once applied to both criminal and civil matters, it was replaced by Criminal Rules 24.2 and 24.3 in 1972 and no longer applies to criminal cases. Criminal Rule 24.2 cmt. The post-conviction proceeding and the Order from which Alexander sought relief are criminal in nature. *See* Criminal Rule 32.3 (clarifying Criminal Rule 32 proceedings are "part of the original criminal action and not a separate action"); *see also* Criminal Rule 32.3 cmt. ("[A]ll Rule 32 proceedings, regardless of the grounds presented and their past characterizations, are to be treated as criminal actions."). Therefore, Civil Rule 60(c) did not apply to the Order, and no set of facts susceptible of proof would have entitled Alexander to relief. *See* Civil Rule 12(b)(6). The superior court accordingly did not err in dismissing Alexander's complaint.

¶10 Alexander relies on several cases including *Gonzalez v. Crosby*, 545 U.S. 524 (2005), to argue Civil Rule 60(c) may be used to attack the integrity of a previous collateral proceeding on the basis of a procedural defect. *See also Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009); *Ruiz v. Quarterman*, 504 F.3d 523 (5th Cir. 2007). However, these cases do not support the application of Civil Rule 60(c) here because they address Federal Rule of Civil Procedure 60(b) in the context of federal habeas corpus proceedings. *See Gonzalez*, 545 U.S. at 529-30; *Phelps*, 569 F.3d at 1131; *Ruiz*, 504 F.3d at 526. Federal habeas corpus proceedings are civil in nature and incorporate the Federal Rules of Civil Procedure, unlike Criminal Rule 32 proceedings. *Gonzalez*, 545 U.S. at 529-30.

¶11 Finally, Alexander argues that even if Civil Rule 60(c) no longer applies to criminal cases, the superior court still maintains the inherent power to vacate the Order. Although "the superior court has inherent authority to modify or vacate orders which it enters by mistake," *State v. Brooks*, 161 Ariz. 177, 179 (App. 1989), Alexander has not presented a mistake justifying an exercise of this authority, *see Porter v. Spader*, 225 Ariz. 424, 429, ¶ 16 (App. 2010) (citations omitted) ("The purpose of [Civil] Rule 60(c) is to allow a trial court discretion to relieve a party's failure to comply with court-established or mandated rules; e.g., the failure to file a timely answer, resulting in the entry of default and a default judgment, or

the failure to meet court-imposed deadlines for the prosecution of an otherwise timely action, resulting in dismissal of the action."). Additionally, the cases Alexander cites as bases for this argument took place before 1972 and the creation of Criminal Rules 24.2 and 24.3. *See Preston v. Denkins*, 94 Ariz. 214 (1963); *State v. Lopez*, 96 Ariz. 169 (1964). They accordingly do not support Civil Rule 60(c)'s application here. Because Civil Rule 60(c) does not apply to criminal orders, and Alexander's complaint sought to vacate a criminal order, the superior court did not err in dismissing his complaint for failure to state a claim upon which relief may be granted.

II. Default

¶12 Alexander next argues the court erred in setting aside the default because the State failed to show excusable neglect. He asserts he was entitled to a default judgment as a matter of law.

¶13 As an initial matter, Alexander's assertion that he was entitled to a default judgment fails. A default judgment may only be entered "against the state or an officer or agency thereof [if] the claimant establishes a claim or right to relief by evidence satisfactory to the court." Civil Rule 55(e). As discussed *supra* ¶ 9, no set of facts susceptible of proof would have entitled Alexander to his requested relief, therefore default judgment would have been inappropriate in this case.

¶14 As to the entry of default, Civil Rule 55(c) allows the superior court to set aside a default "for good cause shown," and the good cause necessary is the same as that required for relief from a judgment by default. *Richas v. Superior Court*, 133 Ariz. 512, 514 (1982). "The law favors resolution on the merits and therefore resolves all doubt in favor of the moving party." *Id*. (citation omitted). Setting aside a default is within the sound discretion of the superior court, and we will not upset the court's decision absent a clear abuse of discretion. *Daou v. Harris*, 139 Ariz. 353, 359 (1984) (citation omitted). A court abuses its discretion when no evidence supports its conclusion or its reasons are "clearly untenable, legally incorrect, or amount to a denial of justice." *Searchtoppers.com, L.L.C. v. TrustCash LLC*, 231 Ariz. 236, 241, ¶ 20 (App. 2012) (quotations and citations omitted). "A rule of general application is that on appeal, if we have any doubts as to whether the trial judge has abused a discretion vested in him, we should not interfere with the disposition made by him." *Martin v. Rossi*, 18 Ariz. App. 212, 215 (1972).

¶15 Although the superior court has broad discretion to set aside the entry of default, it may do so only when the moving party has demonstrated that its failure to file a timely answer was excusable under one of the subdivisions of Civil Rule 60(c), such as excusable neglect.[4] *Richas*, 139 Ariz. at 514 (citations omitted). Although "excusable neglect does not lend itself to an exact definition, there must be a basis in the record from which the court can determine if the conduct is that of a reasonably prudent person under the circumstances." *W. Coach Corp. v. Mark V Mobile Homes Sales, Inc.*, 23 Ariz. App. 546, 548 (1975). Administrative error generally constitutes excusable neglect. *See, e.g.*, *City of Phoenix v. Geyler*, 144 Ariz. 323, 333 (1985); *Cook v. Indus. Comm'n*, 133 Ariz. 310, 312 (1982).

¶16 In its motion to set aside the default, the State explained that an administrative error caused its failure to respond to Alexander's complaint, and it presented an affidavit from an employee of the Arizona Attorney General's Office who had investigated the neglect. The employee explained that based on his investigation, another employee at the Arizona Attorney General's Office had mistaken the complaint for a civil complaint and sent it to the Maricopa County Attorney's Office. This is precisely the type of neglect Civil Rule 60(c) was created to address, *see Porter*, 225 Ariz. at 429, ¶ 16 (stating Civil Rule 60(c)'s purpose "is to allow a trial court discretion to relieve a party's failure to comply with court-established or mandated rules; e.g., the failure to file a timely answer, resulting in the entry of default and a default judgment"), and the affidavit was "based upon personal knowledge and . . . allege[d] facts sufficient to establish what occurred and explain why it should be found excusable" as required by law, *see Richas*, 133 Ariz. at 515. We therefore cannot say the superior court abused its discretion in finding the conduct was "that of a reasonably prudent person under the circumstances." *W. Coach*, 23 Ariz. App. at 548; *see Daou*, 139 Ariz. at 359 (stating superior court judges are in a better position than appellate judges to determine whether setting aside default is warranted). Accordingly, we find the court did not abuse its discretion in setting aside the default.

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[4] The moving party must also demonstrate that it acted promptly in seeking relief from the entry of default and had a meritorious defense to the action. *Richas*, 139 Ariz. at 514 (citation omitted). However, Alexander does not raise these issues on appeal; therefore we address only excusable neglect. *Childress Buick Co. v. O'Connell*, 198 Ariz. 454, 459, ¶ 29 (App. 2000) (citation omitted) (stating issues not clearly raised in appellate briefs are deemed waived).

CONCLUSION

¶17 For the foregoing reasons, we affirm the superior court's ruling.

AMY M. WOOD • Clerk of the Court
FILED: AA