IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

AMY B. AWERBUCH, *Plaintiff/Appellee*,

v.

CHRISTOPHER PENNINO, *Defendant/Appellant*.

No. 1 CA-CV 16-0394
FILED 6-8-2017

Appeal from the Superior Court in Maricopa County
No. CV2015-053669
The Honorable Brian S. Rees, Commissioner

REVERSED AND REMANDED; WRIT OF GARNISHMENT VACATED

COUNSEL

Goldman & Zwillinger PLLC, Scottsdale
By Mark D. Goldman
Counsel for Plaintiff/Appellee

Christopher Pennino, Scottsdale
Defendant/Appellant

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Paul J. McMurdie joined.

T H O M P S O N, Judge:

¶1 Christopher Pennino (Pennino) appeals from an order denying his motion to set aside a default judgment and his objection to garnishment. For the reasons that follow, we reverse the court's order and vacate the writ of garnishment.

FACTUAL AND PROCEDURAL HISTORY

¶2 Appellee, Amy W. Awerbuch (Awerbuch), obtained a default judgment against Pennino on February 16, 2016 relating to a claim for breach of contract and misrepresentation.[1] The amount of the judgment was $18,263.04. The court awarded Awerbuch punitive damages in the same amount, along with $5,362.50 in attorneys' fees, pursuant to the contract, and $441.91 in costs. Awerbuch ultimately obtained a writ of garnishment for the total amount of $42,330.49 with interest accruing at a rate of 4.5 percent per day.

¶3 Pennino moved to set aside the judgment on the basis that he never received a Rule 55(a) notice of entry of default. Pennino had been served a complaint/summons in the underlying breach of contract and misrepresentation action at his residence in the City of Carefree at 6932 East Stage Coach Pass, Carefree, AZ 85377. After he did not answer the complaint within the required time frame, Awerbuch filed an application for default and an affidavit in support of entry of application for entry of default judgment (the notice) against Pennino. Awerbuch mailed the notice to Pennino using the same correct street address, but the wrong city and zip code (Cave Creek, 85331).

---

[1] The complaint in the underlying lawsuit alleged that Pennino failed to disclose, pursuant to the contract, a lack of a septic tank to the casita on the property Awerbuch purchased from Pennino.

¶4 The court denied Pennino's motion to set aside the default judgment and overruled his objection to garnishment. In a subsequent ruling, the court reaffirmed its decision and concluded that Awerbuch met "her obligation under Rule 55 by mailing the notice to the defendant's last known address. The rule is one of mailing, not one of actual notice."[2] In this ruling, the court also reaffirmed its overruling of Pennino's objection to the garnishment and directed Awerbuch to file a form of judgment against Pennino for the amount of the underlying judgment, plus costs. Pennino asked for a stay of all matters, pending an appeal. The court "allow[ed] the posting of an appeal bond in order to release the money that was being held by [Pennino's] bank.

¶5 Pennino timely appealed to this court. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2016), and -2101(A) (2016).

DISCUSSION

I. The trial court erred by granting default judgment where the party requesting default did not mail the notice to the last known address of the party claimed to be in default.

¶6 The crux of Pennino's argument on appeal is that the superior court erred in granting default judgment to Awerbuch. We agree with Pennino because contrary to the superior court's conclusion, Awerbuch did not satisfy Rule 55 of the Arizona Rules of Civil Procedure's notice requirement. Our conclusion is dispositive of all substantive issues in this appeal.[3]

---

[2] It is unclear whether Awerbuch misled the trial court about the error in mailing. Awerbuch repeatedly emphasizes the fact that the notice was sent to "the last known address listed on the Affidavit of Service." However, the record indicates that the affidavit incorrectly documented "the last known address" (i.e., the address where Pennino was served with the complaint/summons). That error is most directly attributable to Awerbuch's failure or the failure of her counsel to properly verify that the mailing was being sent to a place Pennino could possibly be located. To be sure, Pennino cannot be held to account for Awerbuch's own error.

[3] Both parties appear to believe, as evidenced by the briefing, that because the default judgment was entered, the defaulting party's remedy is

¶7 Pursuant to Rule 55(a)(1)(i) "[w]hen the whereabouts of the party claimed to be in default are known by the party requesting the entry of default, a copy of the application for entry of default shall be mailed to the party claimed to be in default."[4] "[T]he purpose of Rule 55(a)(1) is to provide a defaulting party a second chance to avoid the entry of default judgment." *Ruiz v. Lopez*, 225 Ariz. 217, 222, ¶ 15, 236 P.3d 444, 449 (App. 2010). The Rule provides a ten-day "grace period" within which the defaulting party may answer and act to prevent the entry of default from being rendered effective. *Corbet v. Superior Court (Turco/K.A.S.I.E.)*, 165 Ariz. 245, 247, 798 P.2d 383, 385 (App. 1990).

¶8 Awerbuch's mailing of the notice to the wrong address is tantamount to not providing Pennino with notice at all.[5] "Without such notice, the ten-day grace period does not begin to run, the entry of default is ineffective, and the default judgment is void." *Ruiz*, 225 Ariz. at 223, ¶

---

to request relief from the judgment by showing: "(1) that it acted promptly in seeking relief from the default judgment; (2) that its failure to file a timely answer was excusable . . .; and (3) that it had a meritorious defense." *State v. Jackson*, 210 Ariz. 466, 469, ¶ 14, 113 P.3d 112, 115 (App. 2005) (citations omitted). However, we also glean that Pennino's underlying argument for the set-aside was that notice was not sent to his last known address. Because we conclude *infra* that a lack of adequate notice renders the default judgment void *ab initio*, we need not examine whether Pennino made the noted showing.

[4] This case is governed by this version of Rule 55 applicable in 2016 during the relevant time-period. The rule has since been amended, effective January 1, 2017. The pertinent subsection is now reflected as Rule 55(a)(3)(A) and states: "If the party requesting the entry of default knows the whereabouts of the party claimed to be in default, a copy of the application for entry of default must be mailed to the party claimed to be in default, even if the party is represented by an attorney who has entered an appearance in the action."

[5] We need not address whether Pennino had a duty to provide the court with a mailing address other than the one where he was personally served the complaint. The fact that Pennino had a mailbox address different from his house address is irrelevant, and we will not speculate regarding what would have happened if Awerbuch's counsel had mailed the notice to Pennino's known address. The sole and narrow issue before us is whether Awerbuch complied with Rule 55's requirement to provide Pennino with notice by mail.

21, 236 P.3d at 450. The trial court therefore erred in not setting aside the default judgment under Rule 60(c)(4). *See id.; see also Blair v. Burgener*, 226 Ariz. 213, 216, 245 P.3d 898, 901 (quoting *Master Fin. Inc. v. Woodburn*, 208 Ariz. 70, ¶ 19, 90 P.3d 1236, 1240 (App. 2004)) ("[A] trial court must vacate . . . a [void] judgment[,] . . . [and] a party seeking relief from a void judgment need not show that their failure to file a timely answer was excusable, that they acted promptly . . ., or that they have a meritorious defense.") (internal quotation omitted).

II. Attorneys' Fees

¶9 Awerbuch requests both attorneys' fees and costs on appeal, but she does not cite a statute or identify a basis in support of her request. Pennino requests attorneys' fees pursuant to the underlying contract or A.R.S. § 12-341.01. Because in light of our decision this case is not over, we decline to award attorneys' fees. As Awerbuch is not the prevailing party in this appeal, we do not award her costs. *See* A.R.S. § 12-341 (stating that a prevailing party is entitled to costs).

CONCLUSION

¶10 Having found the notice Awerbuch sent insufficient under Rule 55 and the judgment void, we reverse the superior court's order, vacate the writ of garnishment, and vacate its award of attorneys' fees and costs. We remand to the superior court for further proceedings consistent with this decision.

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