DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOE'S ROCK, L.L.C., an Arizona limited liability company, Plaintiff/Appellant, v. LESTER O. SMITH, JR. and JANE DOE SMITH, husband and wife; LOS ENTERPRISES, L.L.C., an Arizona limited liability company; EZ RANCH, L.L.C., an Arizona limited liability company, Defendants/Appellees.	No. 1 CA-CV09-0186 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Yavapai County

Cause No. P-1300-CV-0020050166

The Honorable David L. Mackey, Judge

AFFIRMED

The Vakula Law Firm, P.L.C. Prescott
By Alex B. Vakula
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D O W N I E, Judge

¶1 Joe's Rock, L.L.C. ("appellant") appeals from an order setting aside a default judgment against Lester O. Smith, Jr. ("Smith"); Los Enterprises, L.L.C. ("Los Enterprises"); and EZ Ranch, L.L.C. ("EZ Ranch") (collectively, "defendants" or "appellees"). For the following reasons, we affirm.

BACKGROUND

¶2 Smith worked as the manager of Los Enterprises, which in turn managed EZ Ranch. On June 18, 2004, appellant and EZ Ranch entered into a License and Removal Agreement ("Agreement"), whereby EZ Ranch granted appellant an exclusive license to extract rock, aggregate and other material from real property ("Property") owned by EZ Ranch.

¶3 In the fall of 2004, Smith was diagnosed with squamous cell carcinoma that required "aggressive treatment." In November, he underwent a radical neck resection to remove a category 4 malignant tumor, followed by chemotherapy and radiation in January 2005. The treatments left Smith "lethargic, uncomfortable, feeling sickly and unable to think clearly." The treatments also adversely affected Smith's pre-

existing medical conditions and required several hospitalizations in 2005.

¶4 On February 22, 2005, appellant filed a complaint against defendants alleging that Smith barred access to the Property, contrary to the terms of the Agreement. The complaint alleged claims for conversion, breach of the implied covenant of good faith and fair dealing, breach of contract, and quantum meruit; it also requested attorneys' fees. On March 12, appellant served the summons and complaint on defendants via personal service on Smith at his Mayer, Arizona residence. The affidavit of service stated that Smith was "authorized to accept service" for EZ Ranch and Los Enterprises.

¶5 Defendants did not answer the complaint or otherwise defend. Appellant filed a notice of application, application, affidavit, and entry of default for each defendant and mailed copies to Smith's Mayer address. On July 19, 2005, appellant obtained a default judgment for $113,590.98 plus interest, $587.10 in costs, and $3000 in attorneys' fees.

¶6 Seven months later, on February 9, 2006, appellant sought a writ of general execution to satisfy the default judgment; a copy of the application was mailed to defendants at Smith's home address. The writ itself, however, listed unique

addresses for each defendant and identified the statutory agents for Los Enterprises and EZ Ranch.

¶7 On March 21, 2006, defendants moved for relief from the default judgment pursuant to Arizona Rule of Civil Procedure ("Rule") 60(c)(6) ("Rule 60 motion"). Defendants asserted that Smith's debilitating medical condition and treatments justified relief; noted that Smith was served personally, but the statutory agents for Los Enterprises and EZ Ranch had not been served; and asserted defenses to the complaint.

¶8 On April 20, 2006, the sheriff conducted a sale of the Property. Two parcels were sold to a third party for $123,300, and appellant bought the remaining parcel--appraised at $3,800,000 in 2002--for $5000. Smith died on June 21, 2006.

¶9 On June 30, 2006, after briefing and oral argument, the superior court granted the Rule 60 motion in an unsigned minute entry. It denied appellant's motion for reconsideration. On July 12, 2006, appellees filed an answer to the complaint, and litigation proceeded. Appellant did not seek a signed, appealable order until January 2009. On February 19, 2009, the court entered a signed order consistent with its June 30, 2006 ruling.

¶10 Appellant appealed from the February 19, 2009 order. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(C) (2003).

DISCUSSION

¶11 Appellant contends the superior court abused its discretion in granting the Rule 60 motion because defendants' failure to file a timely answer was not excusable under Rule 60(c)(6).[1] Before addressing this argument, we discuss a

[1] Appellant's opening brief includes arguments that were not presented below. We decline to address the effect of a "Fully Executed, Fully Satisfied Final Judgment." *See Richter v. Dairy Queen of S. Ariz., Inc.,* 131 Ariz. 595, 596, 643 P.2d 508, 509 (App. 1982) ("[A]n appellate court cannot consider issues and theories not presented to the court below.") (citation omitted). Also, appellant's claim that it preserved its legal argument based on a five-week delay in seeking Rule 60 relief is debatable. Although the response to the Rule 60 motion included a section captioned, "Defendant Failed to Promptly Seek Relief from the Default Judgment," it stated no legal argument (it was also based on Rule 55(c)). It focused on appellees' failure to take action during the time preceding the default. At oral argument, appellant's counsel merely stated that the judgment "should be final . . . we're months and months past the time contemplated in Rule 60." The Rule 60 motion advised that appellees learned of the default judgment only when "Smith was served with a writ of execution." The writ was mailed to Smith February 9, 2006. The date of receipt is not in the record. The superior court found that the "collection action in February of 2006 first brought the Default Judgment to the attention of people other than Mr. Smith," and it specifically ruled that "[r]elief was promptly sought on March 21, 2006." Thus, even assuming *arguendo* that appellant adequately preserved its argument below, the trial court did not abuse its discretion in finding no disqualifying delay.

jurisdictional issue that prompted us to request supplemental briefing.

1. Supplemental Briefing

¶12 An appellate court has an independent duty to inquire into its jurisdiction. *See Soltes v. Jarzynka*, 127 Ariz. 427, 429, 621 P.2d 933, 935 (App. 1980). As such, we asked the parties to brief the legal effect, if any, of appellant's two-and-a-half year delay in seeking a signed, appealable order. We specifically asked whether appellant's participation litigating the substantive merits of the claim for that extended period of time was the equivalent of implicit consent to the unsigned order, which would make this appeal untimely. *See Douglas v. Governing Bd. of Window Rock Consol. Sch. Dist. No. 8*, 221 Ariz. 104, 108, ¶ 9, 210 P.3d 1275, 1279 (App. 2009) ("[A] party cannot appeal from a judgment to which it consents.") (citations omitted); *West v. Baker*, 18 Ariz. App. 151, 153, 500 P.2d 1139, 1141 (1972) (vacated on other grounds by 109 Ariz. 415, 510 P.2d 731 (1973) ("Where a party voluntarily acquiesces in, ratifies or recognizes the validity of a judgment against him or otherwise takes a position inconsistent with his right to appeal, he impliedly waives or is estopped to assert his right to appeal.") (citation omitted); *Alliance Mortgage Co. v. Pastine*, 104 P.3d 405, 415 (Kan. Ct. App. 2005) ("A party who

voluntarily complies with a judgment cannot thereafter adopt an inconsistent position and appeal that judgment.").

¶13 In its supplemental brief, appellant argues that its litigation activities were necessary to respond to defendants' filings and to comply with the trial court's orders--actions that cannot be labeled voluntary acquiescence to the unsigned order. *See Bank IV Wichita, Nat. Ass'n v. Plein,* 830 P.2d 29, 35 (Kan. 1992) (finding "voluntary" compliance with judgment acts as a waiver of appeal, but no waiver implied in actions taken to defend and protect interests) (citation omitted); *Pastine,* 104 P.3d at 415 ("Generally, an appellant does not waive the right to appeal by measures that are taken in defense of and to protect the appellant's rights or interest.") (citation omitted). Although we find this point fairly debatable, we choose to address the appeal on its substantive merits.

2. Rule 60 Motion

¶14 The law prefers resolution of actions on their merits rather than by default, and "any doubts should be resolved in favor of the party seeking to set aside the default judgment." *Hirsch v. Nat'l Van Lines, Inc.,* 136 Ariz. 304, 308, 666 P.2d 49, 53 (1983) (citation omitted). Whether to set aside a default judgment is a decision entrusted to the superior court's

discretion, and we will affirm absent a clear abuse of that discretion. *Gen. Elec. Capital Corp. v. Osterkamp,* 172 Ariz. 191, 193, 836 P.2d 404, 406 (App. 1992) (citation omitted). However, the exercise of discretion must be supported "by facts or sound legal policy." *City of Phoenix v. Geyler,* 144 Ariz. 323, 328-29, 697 P.2d 1073, 1078-79 (1985) (citation omitted). Discretion to grant relief from a default judgment 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).

¶15 Pursuant to Rule 60(c)(6), a court may grant relief from a judgment when "extraordinary circumstances of hardship *or* injustice" are present. *M & M Auto Storage Pool, Inc. v. Chem. Waste Mgmt., Inc.,* 164 Ariz. 139, 142, 791 P.2d 665, 668 (App. 1990) (emphasis added). "The determination whether a specific case presents 'extraordinary,' 'unique,' or 'compelling' circumstances is left to the sound discretion of the trial court on a case-by-case basis." *Id.* "Whether or not an illness . . . merits the setting aside of a default judgment must be evaluated in an ad hoc manner, and is a question directed to the sound

discretion of the trial court." *Daou v. Harris,* 139 Ariz. 353, 360, 678 P.2d 934, 941 (1984) (citation omitted).

¶16 Appellant claims that Smith's illness was insufficient to establish the "extraordinary circumstances" necessary to set aside the default judgment. However, the decision to set aside the judgment was founded on "'extraordinary circumstances of hardship' and 'injustice'" caused by a combination of factors not limited to Smith's illness. In considering the question of "injustice," the trial court found it had "overlooked a number of issues that impact upon the justness of the Default Judgment," including: (1) the fact that the Agreement was between appellant and EZ Ranch, but the complaint named Smith and Los Enterprises as defendants without alleging any legal basis for their liability; (2) the damage award was based on a deposition transcript without corroborating information;[2] and (3)

[2] The court expounded on this factor, stating:

> [T]he hearing in this case was conducted by presentation of the deposition testimony of Jose E. Salazar. That is not the normal practice and it made the Court somewhat uncomfortable at the time to not have a witness testify at the default hearing. In addition, while the out of pocket start-up costs were somewhat supported by the deposition exhibits, the majority of the damages awarded were based upon Mr. Salazar's opinion with no supporting information or exhibits. There is certainly

the Agreement's early termination terms, which might have provided a substantive and/or damages defense, were not brought to the court's attention. The court identified and discussed several "meritorious defenses" that appellees could assert. It concluded that the default judgment "resulted from overreaching by the Plaintiff in a non-adversarial proceeding in which the Court did not recognize legitimate legal issues." Only then did the court consider the effect of Smith's illness, stating:

> [A]t the time these proceedings were commenced and throughout this process, Lester O. Smith, Jr. was being treated for cancer. The Court cannot fathom the emotional and physical toll involved in cancer treatment. . . . There is no dispute that Mr. Smith, the only person served with process, suffered through that treatment under the cloud of a cancer diagnosis and that he recently succumbed to that disease. When those facts are considered in light of Plaintiff's overreaching and the meritorious defenses set forth above, this Court finds that the Defendants have established "extraordinary circumstances of hardship" and "injustice."

¶17 The Rule 60 motion asserted that the treatments Smith received to combat his "[p]rogressively [w]orsening [t]erminal [c]ancer" made him "infirm – unable to effectively address the issues of the litigation."[3] Appellant implied in its response

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much room in the record to debate the validity of the damage claim.

[3] As appellant contends, the medical records attached to the Rule 60 motion did not expressly state that Smith was "unable to

that Smith's illness was not sufficient under Rule 60(c)(6) because "SMITH was lucid enough to make several business judgments over his alleged period of infirmity." However, appellant failed to present legal argument on this topic. In contrast, the opening brief includes a five-page discussion, including citations to legal authority, describing why "illness, standing alone," is insufficient under Rule 60(c)(6). Because these arguments were not presented below, we decline to consider them now. *See Richter,* 131 Ariz. at 596, 643 P.2d at 509. We also find no error in denying appellant's belated attempt to conduct discovery regarding Smith's "legal infirmity."[4]

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think clearly." They did, however, establish the course of Smith's diagnosis and treatment, including the November 2004 surgery, completion of chemoradiation in March 2005, and recurrence of the disease in December 2005. Affidavits from Smith and his "long-time significant other" attested to the effect of the treatments, expressly stating that they left Smith "unable to think clearly." Physicians advised Smith about hospice care in December 2005. At a June 15, 2006 medical examination, Smith's throat tumor was large enough to present "significant airway obstruction" that limited his ability to lie down.

[4] Appellant waited until the June 29 oral argument--held three months after the Rule 60 motion, affidavits, and medical records were filed--to request additional discovery regarding Smith's "legal infirmity." At oral argument, appellant's counsel orally requested additional discovery based on "secondhand" information that "Mr. Smith was actively conducting business . . . through '05."

¶18 The trial court applied the correct legal standards, and we cannot say that it abused its considerable discretion in setting aside the default judgment.

CONCLUSION

¶19 We affirm the judgment of the superior court. We deny appellant's request for attorneys' fees and costs pursuant to A.R.S. § 12-341.01 (2003), but grant appellees' request for attorneys' fees and costs incurred on appeal upon compliance with ARCAP 21.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Judge