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

BOLT SECURITY MONITORING SERVICES, LLC, an Arizona limited liability company, Plaintiff/Appellee, v. TAWNYA FOX and PHIL FOX, wife and husband, Defendants/Appellants.	1 CA-CV 09-0257 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-020738

The Honorable Lindsay Best Ellis, Commissioner

AFFIRMED IN PART; REVERSED IN PART; REMANDED

Van Cott & Talamante, P.L.L.C. Phoenix
By Joyce N. Van Cott
Attorneys for Plaintiff/Appellee

Pangerl Law Firm, P.L.L.C. Phoenix
By Regina M. Pangerl
Attorneys for Defendants/Appellants

D O W N I E, Judge

¶1 Tawnya and Phil Fox appeal from the denial of their motion to set aside a default judgment and the award of

attorneys' fees to Bolt Security Monitoring Services, LLC ("Bolt"). For the following reasons, we reverse the award of punitive damages, but affirm the remainder of the superior court's judgment.

FACTS AND PROCEDURAL HISTORY

¶2 From August 2005 to June 2007, Tawnya Fox was employed as Bolt's bookkeeper. In June 2007, Bolt engaged counsel, Joyce Van Cott, to investigate Tawnya's theft of company funds.[1] In September, Van Cott sent Tawnya a letter demanding payment of $22,177.66 for the amount stolen, interest, consequential damages, and attorneys' fees. The letter advised that if payment were not received by October 15, 2007, Bolt would commence litigation. The letter also warned that, if a complaint were filed, Bolt would seek additional consequential and punitive damages. Tawnya did not respond to the letter.

¶3 On November 7, 2007, Bolt sued the Foxes, alleging fraud, breach of the employment contract, breach of the duty of good faith and fair dealing, and unjust enrichment. The complaint alleged that, as bookkeeper, Tawnya had access to two credit card accounts and that, on a number of occasions, she falsely represented to the credit card companies that she was authorized to request credits against the accounts and receive

[1] Because both Mr. and Mrs. Fox are parties, we use their first names when it is necessary to distinguish between them.

funds into her personal account, resulting in the transfer of $8,633.94 from the credit card accounts to Tawnya, and leaving Bolt liable for that amount. The complaint sought compensatory damages for the funds stolen, the costs of investigating and uncovering the fraud, and for other expenses, plus interest and punitive damages.

¶4 In late November, Tawnya sent an e-mail to Brian Zellers of Bolt, asking if Bolt would accept $10,000 as repayment. Tawnya was served with the summons and complaint on December 10. On December 12, Van Cott sent Tawnya a letter by e-mail, rejecting her $10,000 settlement offer and making a counteroffer to dismiss the action with prejudice upon payment of $25,000. The letter said Bolt had incurred additional expenses because Tawnya ignored the demand letter, which necessitated filing the lawsuit and incurring service of process fees (which were increased because Tawnya allegedly tried to avoid service). The letter also expressly advised Tawnya that she had twenty days from service of the complaint to file an answer and that, if she failed to do so, Bolt would "apply to obtain a default judgment against [her] and [would] seek to collect the judgment amount." That same day, Tawnya called Van Cott, indicating she had not yet read the e-mailed letter and stating she wanted to settle. In an e-mail to Tawnya that day, Van Cott documented the telephone conversation and advised

Tawnya to "keep the 20-day deadline to respond to the complaint in mind."

¶5 On December 18, Tawnya e-mailed Van Cott, offering to settle the case for $12,011.94. She explained that the sum offered was the amount she had stolen, interest, and $2,500 for attorneys' fees. Phil Fox was served with the summons and complaint that same date.

¶6 On January 9, 2008, Van Cott notified Tawnya that Bolt had rejected her settlement offer of $12,011.94. On January 11, Tawnya responded by e-mail to Van Cott, stating she had been unable to get more than $12,000, but would explore other sources and make a counteroffer the following week.

¶7 On January 15, 2008, Van Cott filed an application for entry of default against Appellants and mailed copies of the application to both Tawnya and Phil. On the same day, Van Cott responded to Tawnya's January 11 e-mail. She advised that Bolt was willing to continue settlement discussions, but had instructed her to proceed with the litigation. She added:

> Today, I filed a Request for Entry of Default against you and your husband. A copy is attached. A copy has also been sent to each of you at your home address by first class mail.
>
> Please be advised that the default will become effective on February 4, 2008, and that if you fail to file a responsive pleading on or before that date, you will be

> foreclosed from defending against the lawsuit.
>
> If you wish to discuss settlement, I will continue to make myself available to you. However, absent a settlement prior to February 4, the case will proceed.

The following day, Tawnya responded that she had received the e-mail and would "have this settled before your deadline of February 4."

¶8 On January 23, Tawnya e-mailed Van Cott and asked if Bolt would accept the $12,000 previously offered, saying she could obtain no additional funds. She stated she could deliver a check for that amount before February 4. On January 28, Van Cott replied that Bolt would not accept $12,000 and stated, "If you and your husband do not pay $25,000 (per my letter of December 12, 2007) or file a responsive document by February 4, I will prepare and file a Motion for Entry of Default Judgment with the Superior Court."

¶9 On February 5, Tawnya e-mailed Van Cott, stating she was trying to refinance her home to increase the settlement amount. She said she intended to pay $75 per week until she received a refinancing check. Van Cott responded that any payments received would be credited to the amount owed but, "notwithstanding any payments that you may make, my client has instructed me to continue with the default proceedings and to stop only if a full and documented settlement agreement is

reached. As of this moment, we have no agreement regarding settlement."

¶10 On February 20, Tawnya sent a letter directly to Brian Zellers of Bolt with a cashier's check for $13,000, asking that Bolt accept the check as settlement and apologizing for her conduct. On March 6, Bolt filed a motion for entry of default judgment, an affidavit of Brian Zellers regarding damages, and a request for a hearing. The motion sought consequential damages, including attorneys' fees, the amount stolen, and interest, for a total of $32,248.65. The motion requested that, if the court determined not all of the requested consequential damages should be awarded as consequential damages, they be awarded as punitive damages.[2]

¶11 On March 12, Tawnya e-mailed Van Cott, asking what it would take to settle the case and stating she could get an additional $3,000. Van Cott responded that Bolt would put the lawsuit on hold if, by March 21, Tawnya paid $16,000 (including

[2] The accompanying affidavit explained that some of the thefts had been discovered in June 2007, after which Bolt hired a new bookkeeper, a CPA, and Van Cott to investigate the extent of the criminal activity. Zellers asserted that Tawnya "had created a complex web of false transactions and account entries to conceal her thefts." He outlined that Bolt paid $7,018.83 in bookkeeping services and $2,100 for accounting services and estimated that another 205 hours would be necessary to complete the investigation. He also explained that Bolt had paid $2,100 to the company that held the merchant credit cards for costs of researching and providing records related to the transactions at issue.

the $13,000 already submitted), Tawnya and Phil executed an agreement obligating them to pay an additional $11,000 at a rate of $1,000 per month plus interest, and the Foxes executed a stipulation for entry of judgment to be filed in the event of a default under the settlement agreement. Once the obligations were paid, the lawsuit would be dismissed. Van Cott stated the offer would expire on March 17, 2008.

¶12 On March 14, Tawnya sent an e-mail saying that Phil was not taking her calls and if Bolt could not settle for $20,000, she would have to use the money to hire an attorney. Van Cott responded that day, saying she would forward the offer and adding:

> Once again, I hereby advise you that these negotiations will not stop the default proceedings that are ongoing. . . . Unless a settlement is reached, [Bolt] will proceed to obtain the default judgment against you and Phil, and then will proceed to execute the judgment against both of you.

Later on March 14, Van Cott advised Tawnya by e-mail that Bolt would not settle for less than $27,000 and that if Phil would not sign the settlement documents, the payment must be in cash. Tawnya was told that Bolt would accept payment on or before March 27 and that if payment was received, the default proceedings would be discontinued, but otherwise "the matter will proceed to judgment."

¶13 On March 18, Tawnya sent an e-mail to Van Cott saying she had borrowed all she could and could not get additional money by the deadline. She asked if she could send a cashier's check made out to Zellers personally to "save him 30% on taxes." On March 23, Tawnya informed Van Cott she had a family emergency out of state and had to use some of the settlement funds for a plane ticket. She asked Van Cott to ask Zellers to drop the case.

¶14 On March 31, the court held a default judgment hearing. Van Cott advised Bolt was seeking to recover not only the funds stolen plus interest, but also consequential damages. She asserted that, because of Tawnya's actions, the company's books were falsely stated, requiring Bolt to conduct a "wall-to-wall" audit for the two years Tawnya was employed. Van Cott stated Bolt was seeking attorneys' fees and bookkeeping costs either as consequential damages or punitive damages. The court agreed that those costs would be consequential damages. The court then noted, "[I]t seems to me that you also would be entitled to a separate award for punitive damages, because you set forth in your complaint every single element of fraud and clearly this is a case where the behaviors of the Defendant was such that I would definitely consider punitive damages." Van Cott suggested a punitive damage award of $25,000, and the court agreed. The court entered judgment that day as follows:

$8,633.94 for the funds stolen, $1,245.25 in interest, $22,369.46 in consequential damages, and $25,000 in punitive damages, for a total of $57,248.65.

¶15 On May 5, 2008, the Foxes, through counsel, filed a motion to set aside the default judgment under Rule 55 and Rule 60(c), Arizona Rules of Civil Procedure. The Foxes argued their failure to respond was excusable neglect, contending they believed they were negotiating in good faith to settle the matter and had no reason to believe Bolt intended to go forward with the default. They asserted that Bolt accepted the $13,000 check under the false pretense of negotiating a settlement. They also argued that Van Cott never told Tawnya of the default hearing, so the Foxes were unable to defend against the amount of the judgment. The Foxes argued they had meritorious defenses to some of the claims and to the amounts awarded.

¶16 In response, Bolt argued that the record showed its counsel made no promises to extend any deadlines and instead advised Tawnya throughout negotiations that the litigation would proceed absent a final settlement agreement. Bolt also contended the Foxes were not entitled to notice of the hearing, although they were sent courtesy copies of the motion. Bolt asserted that, although Tawnya took less than $9,000, she destroyed the company's records, which had to be reconstructed so it could deal with clients, taxing authorities, and payroll.

¶17 In an unsigned minute entry filed July 28, 2008, the trial court denied the motion to set aside, stating:

> The record reflects that Tawnya Fox failed to act despite receiving all notices required by law and despite the repeated admonitions by Counsel that default judgment would be sought irrespective of on-going settlement negotiations. She was personally served and all default pleadings were mailed to her. E-mail communications further establish her knowledge of the proceedings. A counter offer was made to settle the case for $25,000.00 but no acceptance occurred by the due date of February 4, 2008.
>
> The record documents numerous communications between the parties and no facts exist that would substantiate the allegations that the Plaintiff or its counsel acted in bad faith. To the contrary, it appears that the Plaintiff and its Counsel used extra time and placed extra emphasis on communications with Tawnya Fox in an open, accurate and good-faith manner.
>
> As for the damages awarded at the default hearing, the Court finds that the evidence presented at the hearing, and as set forth with specificity in the Affidavit of Brian Zeller, fully supported the relief requested.

¶18 On October 1, 2008, the Foxes' new counsel filed a notice of appearance and a motion asking the court to enter a final order. On December 15, Bolt moved for an award of attorneys' fees, seeking fees incurred in obtaining entry of the default judgment, fees under Arizona Revised Statutes ("A.R.S.") section 12-349 for the Foxes' filing of a frivolous Rule 60(c) motion, and post-judgment fees and costs.

¶19 The court entered a final order on December 23, 2008. However, for unknown reasons, neither party was informed of the entry of judgment until February 9, 2009, during a hearing on Bolt's application for additional attorneys' fees. The Foxes moved to extend the time for appeal pursuant to Rule 9, Arizona Rules of Civil Appellate Procedure, which the court granted.

¶20 The court granted Bolt's request for post-judgment fees and costs, but denied as untimely its request for fees related to entry of the default judgment and its request for fees as sanctions. The Foxes appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(C) (2003).

DISCUSSION

¶21 The Foxes argue the trial court abused its discretion by refusing to set aside the default judgment and by awarding post-judgment attorneys' fees. Whether to set aside a default judgment is within the sound discretion of the trial court, and we will not disturb that decision absent a showing of a clear abuse of that discretion. *Hilgeman v. Am. Mortgage Sec., Inc.*, 196 Ariz. 215, 218, ¶ 7, 994 P.2d 1030, 1033 (App. 2000); *French v. Angelic*, 137 Ariz. 244, 245, 669 P.2d 1021, 1022 (App. 1983). A default judgment may be set aside "only when[] the moving party has made an adequate showing . . . that it acted promptly in seeking relief from the default judgment, . . . that its failure to file a timely answer was excusable under . . . Rule

60(c) . . . [and] that it had a meritorious defense." *United Imps. & Exps., Inc. v. Superior Court (Peterson)*, 134 Ariz. 43, 45, 653 P.2d 691, 693 (1982). The scope of review on appeal from the denial of a motion to set aside a default judgment is limited to the matters raised by the motion to set aside; we do not consider whether the trial court was substantively correct in entering the default judgment. *Hirsch v. Nat'l Van Lines, Inc.*, 136 Ariz. 304, 311, 666 P.2d 49, 56 (1983) (citation omitted). We view the facts in the light most favorable to upholding the trial court's decision. *Camacho v. Gardner*, 104 Ariz. 555, 559, 456 P.2d 925, 929 (1969).

¶22 A default is entered when a defendant fails to "plead or otherwise defend as provided by the[] Rules" of civil procedure. Ariz. R. Civ. P. 55(a). The rules require a defendant to file an answer or a motion to dismiss. Ariz. R. Civ. P. 8, 12(a),(b). Communicating with opposing counsel, without filing an answer, does not constitute pleading or defending and is insufficient to forestall a default.

¶23 The Foxes argue Van Cott acted in bad faith by refusing to accept reasonable settlement offers. They cite no authority for the contention that the refusal to settle an action on the defendants' terms constitutes bad faith or excuses the failure to file a timely answer, and we are aware of none.

¶24 The Foxes also suggest they relied on misrepresentations by Van Cott, but the record does not support such a claim. A default resulting from reliance on assurances from the opposing party or counsel may constitute excusable neglect. *Walter v. N. Ariz. Title Co.*, 6 Ariz. App. 506, 511, 433 P.2d 998, 1003 (1967). However, the Foxes identify no statements by Van Cott to the effect that the litigation would be postponed while settlement negotiations were ongoing. On the contrary, the record shows that Van Cott, on several occasions, clearly advised Tawnya that the continuing negotiations would not affect the ongoing litigation. The only indication that Bolt would postpone the litigation appeared in an e-mail from Van Cott dated March 14, well after the deadline to respond to the entry of default, stating that the default proceedings would be discontinued if Tawnya paid $27,000 in cash before March 27 but, failing that, the matter would proceed to judgment. The record shows Van Cott specifically advised Tawnya of the twenty-day deadline to answer and the ten-day deadline to respond to the application for entry of default, as well as the consequences of failing to respond.

¶25 The Foxes note that Bolt retained a $13,000 check offered in settlement and argue the company held the check under the false pretense that it would work to settle the matter. The record shows Bolt *did* work with Tawnya to settle the case, and

the check was taken into account in subsequent negotiations. That the settlement negotiations were unsuccessful does not establish bad faith by Bolt. The record does not support the Foxes' claim that their failure to defend resulted from any misrepresentation, assurance, or bad faith by Bolt, particularly in light of Van Cott's repeated statements and warnings.

¶26 The test for whether the failure to file an answer was excusable is whether the conduct was that of a reasonably prudent person under similar circumstances. *See Daou v. Harris*, 139 Ariz. 353, 359, 678 P.2d 934, 940 (1984). The summons clearly explained that failure to appear and defend could result in a judgment of default and that "appear and defend" required filing an answer or other proper response to the complaint. Bolt's counsel warned Tawnya that failure to respond to the complaint and the application for entry of default judgment would result in a default judgment.

¶27 The Foxes contend Van Cott acted in bad faith because she did not advise them when the default hearing was scheduled. However, because the Foxes never appeared in the action, they were not entitled to notice. Ariz. R. Civ. P. 55(b)(2). Nevertheless, the Foxes acknowledge Bolt sent notice of its request for a hearing on its motion for entry of default judgment. Despite this notice, the Foxes do not claim they ever inquired about or attempted to learn the date of the hearing.

Their conduct was not that of a reasonably prudent person against whom a civil complaint has been filed.

¶28 The Foxes also contend the judgment should be set aside pursuant to Rule 60(c)(6)--for "any other reasons justifying relief from the operation of the judgment." To be entitled to relief under Rule 60(c)(6), a party must show "1) extraordinary circumstances of hardship or injustice justifying relief and 2) a reason for setting aside the judgment other than one of the reasons set forth in the preceding five clauses of rule 60(c)." *Davis v. Davis*, 143 Ariz. 54, 57, 691 P.2d 1082, 1085 (1984) (citation omitted). The Foxes failed to raise this argument in the trial court and have thus waived it. *See CDT, Inc. v. Addison, Roberts & Ludwig, CPA, P.C.*, 198 Ariz. 173, 178, ¶ 19, 7 P.3d 979, 984 (App. 2000) (this court considers only those arguments, theories, and facts presented in the trial court). *See also Hirsch*, 136 Ariz. at 311, 666 P.2d at 56 (scope of review is limited to questions raised in motion to set aside). Moreover, the Foxes have failed to identify any extraordinary circumstances of hardship or injustice or a basis for setting aside the judgment other than one falling under other provisions of Rule 60(c).

¶29 Appellants have not demonstrated that their failure to file an answer was excusable under Rule 60(c). The trial

court's refusal to set aside the default judgment is supported by the record and was not an abuse of discretion.[3]

¶30 The Foxes also argue the court erred in awarding post-judgment attorneys' fees and costs. When reviewing an award of attorneys' fees, we view the record in the light most favorable to sustaining the trial court's decision and do not disturb that decision if it is supported by any reasonable basis. *Rowland v. Great States Ins. Co.*, 199 Ariz. 577, 587, ¶ 31, 20 P.3d 1158, 1168 (App. 2001).

¶31 The fees and costs awarded were incurred by Bolt in its efforts to collect on the default judgment and in responding to the motion to set aside. The Foxes argue the request was a vindictive reaction to their attempt to obtain a final judgment to prosecute an appeal. They further argue the amounts requested were excessive.

¶32 Bolt's request for additional fees was filed six weeks after Appellants requested a final order. The request necessarily was made some months after judgment because it involved post-judgment fees and costs. Although Bolt could have

[3] Appellants argue they acted promptly once judgment was entered and that they had meritorious defenses against the fraud claim and the damages. Having found the Foxes' failure to answer the complaint was not excusable, we do not address these claims. *See Hirsch*, 136 Ariz. at 309, 666 P.2d at 54 (where party seeking relief fails to establish grounds for relief, court need not address other requirements).

submitted its request earlier, the timing does not establish that it acted out of vindictiveness or that the trial court erred in awarding the additional fees.

¶33 The Foxes also argue the fee request was excessive. Bolt's request was supported by Van Cott's affidavit, including an itemized accounting of tasks and time expended. The trial court was in the best position to determine the appropriateness of the fees requested. *McDowell Mountain Ranch Cmty. Ass'n, Inc. v. Simons*, 216 Ariz. 266, 272, ¶ 26, 165 P.3d 667, 673 (App. 2007); *Parker v. McNeill*, 214 Ariz. 495, 499, ¶ 24, 154 P.3d 1041, 1045 (App. 2007). Our review of the fee request and accompanying affidavit does not show an abuse of discretion in granting the award.

¶34 Finally, the Foxes contend the court erred by awarding punitive damages to Bolt. A default judgment may not "be different in kind from or exceed in amount that prayed for in the demand for judgment." Ariz. R. Civ. P. 54(d). A default judgment that awards relief more than or different from the relief requested is void. *Darnell v. Denton*, 137 Ariz. 204, 206, 669 P.2d 981, 983 (App. 1983); *S. Ariz. Sch. for Boys, Inc. v. Chery*, 119 Ariz. 277, 283, 580 P.2d 738, 744 (App. 1978). The rule ensures that a defendant has notice of the risk of defaulting. *Kline v. Kline*, 221 Ariz. 564, 571, ¶ 27, 212 P.3d 902, 909 (App. 2009).

¶35 Bolt's complaint sought punitive damages in "an amount no less than $100,000." However, in its motion for entry of default judgment, Bolt requested consequential damages totaling $22,369.46. It then stated:

> In the event that any of the foregoing items listed as consequential damages are not awarded as such, including attorneys' fees and costs, Plaintiff requests that these items be awarded as punitive damages.

At the damages hearing, the court *sua sponte* suggested and awarded punitive damages in addition to the total amount of consequential damages requested by Bolt.

¶36 Although one could argue that Bolt's complaint is controlling, and it sought both compensatory and punitive damages, such an interpretation creates distinct due process concerns. Bolt's motion for entry of default judgment could be read to supersede the complaint and could easily lead a reasonable defendant to conclude that his or her liability would not exceed the requested amount. This is especially true where, as here, the court *sua sponte* suggested that it award punitive damages in addition to the compensatory damages that Bolt had requested. Under these circumstances, we find that the court erred in awarding punitive damages.

CONCLUSION

¶37 The superior court did not err in denying the motion to set aside or in awarding post-judgment attorneys' fees.

However, for the reasons stated, the punitive damage award cannot stand. We remand to the superior court for entry of an amended judgment that omits the punitive damage award.

¶38 Bolt seeks attorneys' fees incurred on appeal, citing Rule 21(c), Arizona Rules of Civil Appellate Procedure. Rule 21 is a procedural rule that does not provide a substantive basis for a fee award. *Haynes v. Syntek Fin. Corp.*, 184 Ariz. 332, 341, 909 P.2d 399, 408 (App. 1995). Because Bolt has not cited any substantive basis for an award of attorneys' fees, we deny the request. *See Country Mut. Ins. Co. v. Fonk*, 198 Ariz. 167, 172, ¶ 25, 7 P.3d 973, 978 (App. 2000) (fees on appeal will be denied when party fails to provide substantive basis for request). However, Bolt is entitled to recover its costs on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Judge