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

URBAN ENDEAVORS, INC., an Arizona corporation, Plaintiff/Appellee, v. STEPHEN FRIEDMAN, as trustee of the Stephen L. Friedman Sole & Separate Trust dated March 13, 1996, Defendant/Appellant.	No. 1 CA-CV 09-0359 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-053990

The Honorable Jerry Porter, Commissioner

AFFIRMED

The Lynch Law Firm, L.L.C. Scottsdale
By Andrew D. Lynch
And John C. Shorb
Attorneys for Plaintiff/Appellee

Tidmore Law Offices, L.L.P. Phoenix
By Mick Levin
Attorneys for Defendant/Appellant

S W A N N, Judge

¶1 Stephen Friedman appeals from the superior court's denial of his motion to set aside a default judgment in favor of Urban Endeavors, Inc. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 On October 23, 2008, Urban Endeavors filed a complaint against Stephen Friedman and Charlie Sivak, alleging that the defendants refused to remove permanent obstructions located within an easement that allowed Urban Endeavors to access its property by automobile. The complaint alleged the following facts.

¶3 The easement was established in a 1976 deed and ran with the land. During 2007 and 2008, Urban Endeavors sent multiple letters to Friedman, who at that time owned the property on which the easement was located and also owned a neighboring property benefited by the easement. In the letters, Urban Endeavors asked that Friedman remove two light poles and a monument sign from the area covered by the easement. Friedman refused, and in early 2008 built a dumpster enclosure, located partially on the property burdened by the easement and partially on Friedman's neighboring property, that further obstructed the easement. In September 2008, Friedman sold the property burdened by the easement to Sivak. Urban Endeavors thereafter

sent a letter to Friedman and Sivak asking for the removal of all obstructions, but the defendants did not comply.

¶4 The complaint asserted that Friedman and Sivak committed breach of contract by placing the obstructions within the easement and by refusing to remove them. Urban Endeavors sought damages and attorney's fees. Urban Endeavors also sought declaratory relief establishing that the easement is enforceable and must be free of obstructions, as well as injunctive relief requiring that the defendants remove the existing obstructions and not construct additional obstructions.

¶5 The court set an order to show cause return hearing. Before the hearing date, Urban Endeavors effected personal service on Sivak and filed a motion for alternative or substituted service of Friedman because attempts to personally serve him had been unsuccessful. At the November 18, 2008 return hearing, Friedman and Sivak both appeared, representing themselves. The transcript of the hearing is not included in the record on appeal, but the court's minute entry reflects that both defendants "verified that they have received service of Plaintiff's complaint." Accordingly, the court denied as moot Urban Endeavors' motion for alternative or substituted service of Friedman. The parties then stipulated to the location of the easement at issue and discussed the obstructions. Friedman agreed to remove the dumpster enclosure from the easement, and

the court set a February 6, 2009 evidentiary hearing regarding Urban Endeavors' request for preliminary injunctive relief. Both defendants provided the court with their mailing addresses. Friedman's address was in Palm Beach, Florida.

¶6 On December 17, 2008, Urban Endeavors filed applications for entry of default against both defendants because neither Friedman nor Sivak had timely answered or otherwise responded to the complaint. Copies of the applications and related affidavits were mailed to Friedman and Sivak at the addresses they had provided to the court.

¶7 The court set a default hearing for January 20, 2009. Urban Endeavors mailed notice of the hearing to Friedman and Sivak, again using the addresses that they had provided to the court. At the hearing, the court entered default judgment against the defendants, awarding Urban Endeavors the injunctive relief it had requested together with its attorney's fees and costs.

¶8 On February 3, 2009, Friedman, through counsel, filed a motion to set aside the default judgment. He argued that his default was attributable to excusable neglect as well as misconduct by Urban Endeavors' counsel, and contended that he had substantial and meritorious defenses to the action.[1] Urban

[1] Sivak did not file a similar motion, and Friedman's attorney did not represent Sivak. Counsel nevertheless asked

Endeavors opposed the motion. On April 8, 2009, the court entered a signed judgment denying the motion and awarding attorney's fees to Urban Endeavors.

¶9 Friedman timely appeals. We have jurisdiction pursuant to A.R.S. § 12-2101(C) (2003). *See M & M Auto Storage Pool v. Chem. Waste Mgmt., Inc.*, 164 Ariz. 139, 141, 791 P.2d 665, 667 (App. 1990) ("An order denying or granting a motion to set aside a judgment under Rule 60(c), Arizona Rules of Civil Procedure, is appealable as a 'special order made after final judgment.'").

DISCUSSION

I. Appellate Jurisdiction

¶10 Urban Endeavors contends that we lack jurisdiction over this appeal because of a defect in Friedman's notice of appeal. We also have an independent duty to determine whether we have jurisdiction. *Sorensen v. Farmers Ins. Co.*, 191 Ariz. 464, 465, 957 P.2d 1007, 1008 (App. 1997).

¶11 The formal written, signed judgment denying Friedman's motion to set aside the default judgment was entered and filed in April 2009, and the notice of appeal was filed in May 2009. But instead of indicating that appeal is taken from the April 2009 judgment, Friedman's notice of appeal indicates that appeal

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the court to vacate the default judgment with respect to both defendants. Sivak is not a party on appeal.

is taken from a March 2009 order denying his motion to set aside the default judgment. The March 2009 order is an unsigned minute entry and as such is not appealable. *See Eaton Fruit Co. v. California Spray-Chemical Corp.*, 102 Ariz. 129, 130, 426 P.2d 397, 398 (1967).

¶12 The notice's failure to specify the proper judgment does not render it insufficient. "[I]f a valid judgment has been entered in the case, a notice of appeal timely filed in relation to such judgment will not be found insufficient merely because the date given as that of the order or judgment appealed from is the date of an earlier rendering of the same judgment by minute entry order . . . ." *Hanen v. Willis*, 102 Ariz. 6, 10, 423 P.2d 95, 99 (1967). Friedman's notice of appeal was timely filed in relation to the April 2009 judgment. We have jurisdiction over the appeal.

II. Denial of Motion to Set Aside Default Judgment

¶13 Ariz. R. Civ. P. 55(c) provides that for good cause shown, a court may set aside a default judgment in accordance with Rule 60(c). The party moving to set aside the default judgment must show: (1) his failure to file a timely answer was excused by one of the reasons listed in Rule 60(c); (2) he acted promptly in seeking relief from the default judgment; and (3) he had a substantial and meritorious defense to the action. *E.g., Daou v. Harris*, 139 Ariz. 353, 358-59, 678 P.2d 934, 939-40

(1984). We review a trial court's refusal to set aside a default judgment for a clear abuse of discretion. *Id.* at 359, 678 P.2d at 940.

A. Rule 60(c)

¶14 Rule 60(c) provides various reasons for which a party may be relieved from a final judgment. Friedman sought relief based on excusable neglect, described in Rule 60(c)(1), and misconduct of an adverse party, described in Rule 60(c)(3).

1. Excusable Neglect

¶15 For purposes of Rule 60(c), excusable neglect is neglect "such as might be the act of a reasonably prudent person under similar circumstances." *Daou*, 139 Ariz. at 359, 678 P.2d at 940 (citation omitted). Ignorance of the rules of civil procedure is not excusable neglect. *Id.* Neither is mere carelessness. *Id.* A failure to act arising from reliance on the assurances of an opposing party or opposing counsel, however, may be excusable neglect. *Evans v. C & B Dev. Corp.*, 4 Ariz. App. 1, 2, 417 P.2d 372, 373 (1966).

¶16 According to Friedman, he acted as a reasonably prudent person in failing to file a timely answer because he "tried diligently to meet the demands of the system as best he knew how." First, he alleges that he never received a copy of the complaint. On this record, the particulars of the service of process on Friedman are unclear. The return hearing minute

entry, however, reveals that Friedman was either served by an alternative method or waived service and had actual notice of the proceedings. Friedman has not contested the accuracy of the minute entry's summary of his statements.

¶17 Friedman next contends that his failure to file a timely answer was reasonable because at the return hearing, he informed the court and opposing counsel that in several weeks he would be traveling out of the country. We have no difficulty concluding that Friedman's decision to forgo filing an answer because of an upcoming trip was not the act of a reasonably prudent person. There is nothing in the record to suggest that Urban Endeavors or its counsel assured Friedman that default proceedings would not be initiated should he fail to file a timely answer, or that the filing of an application for entry of default would be delayed until Friedman returned from his trip. Urban Endeavors properly mailed a copy of the application and the related affidavit to the domestic mailing address that Friedman had provided.[2]

¶18 We conclude that Friedman's failure to file a timely answer was not attributable to excusable neglect.

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[2] Notably, Friedman provided the Florida address immediately after the conclusion of the hearing at which he imparted the information about his upcoming foreign travel. Under the circumstances, Urban Endeavors had no reason to suspect that Friedman would not receive notice of mail sent to his Florida address while he was out of the country.

2. Misconduct of an Adverse Party

¶19 Friedman contends that opposing counsel's misconduct prevented him from attending the default hearing. According to Friedman's declaration, he did not receive notice of the default hearing from Urban Endeavors but learned of it by chance when he spoke to Sivak, and on the date of the hearing went with Sivak to the designated courtroom before the scheduled time.[3] He saw opposing counsel and informed counsel that he was present and ready to appear but would wait with Sivak in the hall outside of the courtroom until their case was called.[4] When counsel later exited the courtroom, he informed the defendants that he had already obtained a default judgment.

¶20 In an affidavit, Urban Endeavors' counsel presented a different version of events. According to counsel, Friedman approached him approximately ten minutes before the hearing was scheduled to begin and asked the reason for the hearing. When informed that a default hearing was about to take place, Friedman became visibly upset and left the courtroom. Friedman did not ask counsel to notify him when the case was called and did not indicate that he would be waiting in the hallway.

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[3] The record on appeal reflects that Urban Endeavors mailed a notice of the default hearing to Friedman at his Florida address on January 8, 2009.

[4] For the first time on appeal, Friedman contends that he expressly asked counsel to get him from the hallway at the appropriate time and counsel agreed.

Counsel assumed that Friedman had left the courthouse. Counsel acknowledged that when the case was called approximately forty minutes later, he did not volunteer to the court that he had seen Friedman and Sivak at the courthouse. Counsel stated that had the court inquired about the defendants' whereabouts, he would have given a truthful account of his encounter with Friedman.

¶21 We need not decide whether in these circumstances counsel's failure to provide information about the defendants' recent whereabouts amounted to misconduct pursuant to Rule 60(c)(3). Even assuming that it did, Friedman has not demonstrated a substantial and meritorious defense to the action.

B. Substantial and Meritorious Defense

¶22 "A showing of a meritorious defense requires a showing by affidavit, deposition or testimony of some facts which, if proved at the trial, would constitute a defense." *United Imps. & Exps., Inc. v. Superior Court (Mullins)*, 134 Ariz. 43, 46, 653 P.2d 691, 694 (1982).

¶23 Friedman contends that he has a meritorious defense to Urban Endeavors' complaint because the complaint was based on a lack of access, and access is now assured. He explains that by removing or reorienting parking spaces, he has created a new access way. Therefore, he contends, removal of the monument

sign from the area covered by the easement is unnecessary.[5] He further explains that he has obtained a permit for the sign from the City of Phoenix.

¶24 Urban Endeavors sought to enforce its rights in a specific easement. Friedman's proffered "defense" does not amount to an assertion that he is in compliance with the easement – it suggests merely that he has crafted an alternative to compliance. We agree with Urban Endeavors that Friedman's "defense" is akin to a settlement offer that has not been accepted. An unaccepted settlement offer does not constitute a meritorious defense. *See Prell v. Amado*, 2 Ariz. App. 35, 36, 406 P.2d 237, 238 (1965).

¶25 Because Friedman has not demonstrated a meritorious defense, the superior court did not abuse its discretion by refusing to set aside the default judgment against him.

ATTORNEY'S FEES AND COSTS ON APPEAL

¶26 Urban Endeavors requests attorney's fees and costs on appeal pursuant to A.R.S. § 12-341.01, A.R.S. § 12-342, and ARCAP 21. In our discretion, we decline to award fees and costs on appeal.

[5] Friedman does not specifically address the other obstructions located within the easement.

CONCLUSION

¶27 For the reasons set forth above, we conclude that the superior court did not abuse its discretion by denying Friedman's motion to set aside the default judgment. Accordingly, we affirm.

/S/
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PETER B. SWANN, Judge

CONCURRING:

/S/
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PATRICIA K. NORRIS, Presiding Judge

/S/
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DANIEL A. BARKER, Judge