DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

25TH STREET INDUSTRIAL, LLC., an Arizona limited liability company,	)	1 CA-CV 09-0363
	)	DEPARTMENT B
Plaintiff/Appellee,	)	**MEMORANDUM DECISION**
v.	)	
	)	Not for Publication –
EMC INTERNATIONAL, INC., a Texas corporation,	)	(Rule 28, Arizona Rules of Civil Appellate Procedure)
Defendant/Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-052272

The Honorable Gerald Porter, Judge Pro Tem

AFFIRMED

Clark Hill PLC — Scottsdale
By Ryan J. Lorenz
Attorneys for Plaintiff/Appellee

Neuheisel Law Offices — Tempe
By Richard G. Neuheisel
Attorney for Appellant

B A R K E R, Judge

¶1 EMC International, Inc. ("Tenant") appeals the trial court's denial of a motion to set aside a judgment pursuant to

Arizona Rule of Civil Procedure 60(c). For the following reasons, we affirm.

Facts and Procedural Background

¶2 In March 2004, Tenant entered into a six-year standard commercial lease involving industrial property with 5801 South LLC. Following an assignment of the lease to 25th Street Industrial, LLC ("Landlord"), Landlord alleged that Tenant went into default in June, July, and August of 2007 by failing to pay rent, failing to maintain required policies of insurance, and failing to maintain service contracts. On August 1, 2007, Landlord notified Tenant of its default and terminated the lease. Landlord re-entered to take possession of the premises pursuant to Arizona Revised Statutes ("A.R.S.") section 33-361(A) on August 11. On August 21, Landlord filed a forcible entry and detainer action under A.R.S. §§ 12-1171 et seq. and 33-361. The action sought past due rent and the right to sell the Landlord-liened property, among other relief.

¶3 Tenant's counsel sent a letter to Landlord's counsel on August 28 informing Landlord's counsel that he was assisting Tenant with the "landlord tenant problems." The summons and complaint were delivered to Carlos Vargas, Alejandro Bornacini, and Rodrigo Soto San Roman on August 31 at Irvington Boulevard in Houston, Texas. The first hearing was set for September 4, 2007. Tenant did not appear on September 4, but Tenant's

counsel sent a letter to Landlord's counsel acknowledging the hearing and its continuance. The court continued the hearing to September 18 in order to effectuate service. On September 10, the summons, complaint, and the order continuing the hearing were delivered to the Irvington Boulevard address and left with an employee of Tenant. The hearing was again continued to September 25. Raul Loya, the statutory agent for Tenant, was served at a different address in Dallas, Texas on September 21.

¶4 At the hearing on September 25, Tenant was again not present nor represented by counsel. A short discussion occurred between the court and Landlord's counsel regarding service, and the court then entered judgment for Landlord. Tenant and Tenant's counsel received Landlord's application for award of attorneys' fees and a statement of costs on October 10, 2007. The court awarded attorneys' fees and costs in a judgment on November 13, 2007. Over fifteen months later, on January 29, 2009, Tenant filed a motion to vacate the judgment pursuant to Arizona Rule of Civil Procedure 60(c). That motion was denied on April 9, 2009.

¶5 Tenant filed a timely notice of appeal. This court has jurisdiction under A.R.S. § 12-2101(B), (F)(1) (2003).

Discussion

¶6 Tenant appeals from the denial of relief from judgment pursuant to Rule 60(c). "A party seeking relief from a default judgment pursuant to Rule 60(c) must demonstrate 1) that its failure to file a timely answer was excusable under one of the subdivisions of Rule 60(c), 2) that it acted promptly in seeking relief and 3) that it had a substantial and meritorious defense to the action." *Almarez v. Superior Court*, 146 Ariz. 189, 190, 704 P.2d 830, 831 (App. 1985). "We will not disturb the trial court's decision on a motion to set aside a judgment absent an abuse of discretion." *Ruesga v. Kindred Nursing Ctrs. W., L.L.C.*, 215 Ariz. 589, 595, ¶ 17, 161 P.3d 1253, 1259 (App. 2007) (quoting *Tovera v. Nolan*, 178 Ariz. 485, 490-91, 875 P.2d 144, 149-50 (App. 1993)); *see McKernan v. Dupont*, 192 Ariz. 550, 554, ¶ 10, 968 P.2d 623, 627 (App. 1998) ("The trial court has broad discretion in determining whether to grant relief under Rule 60(c) and, absent an abuse of that discretion, we will not disturb its decision."). An abuse of discretion occurs when the trial court misapplies the law in ruling on a Rule 60(c) motion. *City of Phoenix v. Geyler*, 144 Ariz. 323, 329, 697 P.2d 1073, 1079 (1985).

1. Jurisdiction

(a) Subject Matter Jurisdiction

¶7 Tenant argues the trial court did not have subject matter jurisdiction because the trial occurred outside the time limits set by A.R.S. §§ 12-1176(A) (2003) and 33-361(B) (2007). The complaint was filed on August 21, 2007, and the hearing did not take place until September 25, 2007, thirty-five days later. We review a claim for lack of jurisdiction independently as an issue of law. *R.A.J. v. L.B.V.*, 169 Ariz. 92, 94, 817 P.2d 37, 39 (App. 1991). We must "vacate such a judgment even in the case of unreasonable delay by the party seeking relief." *Id*. The requirement to act promptly in seeking Rule 60(c) relief does not apply when the judgment is attacked as void. *Master Fin., Inc. v. Woodburn*, 208 Ariz. 70, 74, ¶ 19, 90 P.3d 1236, 1240 (App. 2004).

¶8 Courts must adhere to short and strict procedural timelines in forcible detainer actions as this is "an integral part of the right itself." *Curtis v. Morris*, 184 Ariz. 393, 398, 909 P.2d 460, 465 (App. 1995). The purpose of forcible detainer actions is "to afford a summary, speedy and adequate remedy for obtaining possession of premises withheld by tenants." *Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 204-05, 167 P.2d 394, 397 (1946); *see DVM Co. v. Stag Tobacconist, Ltd.*, 137 Ariz. 466, 467, 671 P.2d 907, 908 (1983) ("The only

issue to be determined is the right to actual possession."). Thus, short deadlines are imposed as a protection for the landlord and do not benefit the tenant. *See Rushing*, 64 Ariz. at 205, 167 P.2d at 397 (holding customary and usual defenses permissible in the ordinary action at law frustrate the purpose and object of forcible detainer actions and are not permissible).

¶9 In *DVM*, the lease between the landlord and tenant included a provision for attorneys' fees. 137 Ariz. at 468, 671 P.2d at 909. The Arizona Supreme Court considered the issue of allowing attorneys' fees to be interjected into a forcible detainer action and determined that it would detract from the summary nature of the action. *Id*. At the time, there were no statutory provisions allowing the recovery of attorneys' fees, and the court held that forcible entry and detainer actions "cannot be expanded by the lease." *Id*. The goal in *DVM*, as in all forcible detainer cases, was to quickly determine the right to actual possession. The procedural and statutory restriction and timelines in place all serve that purpose.

¶10 Here, the forcible detainer action took place outside the time limits because of the difficulty of serving Tenant. The first two scheduled hearings were within the thirty-day limit in these actions. Tenant argues that requiring Landlord to re-file the action would not be a harsh remedy. However,

requiring the Landlord to do so would only incur additional costs and delay the proceedings further. In Arizona case law, the "intended beneficiary of a statute generally may waive the statute's benefit." *In re MH 2006-000749*, 214 Ariz. 318, 322, ¶ 18, 152 P.3d 1201, 1205 (App. 2007); *accord State v. Amaya-Ruiz*, 166 Ariz. 152, 175, 800 P.2d 1260, 1283 (1990) (holding defendant may waive right to be present at presentence hearing); *State v. Canady*, 124 Ariz. 599, 601, 606 P.2d 815, 817 (1980) (holding defendant had voluntarily waived his presence at probation revocation hearing by failing to appear). We conclude that this principle is also applicable here. To hold otherwise would allow tenants to evade service while requiring landlords to dismiss forcible detainer actions and re-file, slowing down the proceedings and leading to a result contrary to the statute's purpose and the legislature's intent.[1] Therefore, we determine that the trial court had subject matter jurisdiction at the time of the hearing.

(b) Personal Jurisdiction

¶11 Tenant also argues the trial court lacked jurisdiction because of failure to serve the summons and complaint. If service is not proper then the resulting judgment is void.

[1] We do not consider the situation where landlord has done nothing to meet the time restrictions and do not decide if this principle would be appropriate under those circumstances.

Hilgeman v. Am. Mortgage Sec., Inc., 196 Ariz. 215, 218, ¶ 8, 994 P.2d 1030, 1033 (App. 2000). However, "[s]ervice of process can be impeached only by clear and convincing evidence." *Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 194, 836 P.2d 404, 407 (App. 1992).

¶12 Arizona Rule of Civil Procedure 4.2(h) provides that service of a summons upon a corporation located outside Arizona is to be done pursuant to Rule 4.1(k). Ariz. R. Civ. P. 4.2(h). Under Rule 4.1(k), service is accomplished by "delivering a copy of the summons and of the pleading to a partner, an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." *Id.* 4.1(k). "[I]f the agent is one authorized by statute to receive service *and the statute so requires*," a copy must also be mailed to the party. *Id*. Tenant misreads this portion of the statute to always require mailing.

¶13 Service upon a corporation's foreign agent will support a finding of valid and proper service. *Hilgeman*, 196 Ariz. at 218-19, ¶¶ 8-12, 994 P.2d at 1033-34. In determining whether a foreign agent has been properly served, we look to the law of that jurisdiction. *Id.* at ¶ 8 (applying Florida law to determine whether a Florida corporation was properly served under Rule 4.1(k)). Tenant is a Texas corporation, and Landlord served Tenant in Texas. Under Texas law, the "president and all

vice presidents of the corporation and the registered agent of the corporation shall be agents of such corporation upon whom any process, notice, or demand required or permitted by law to be served upon the corporation may be served." Tex. Bus. Corp. Act Ann. art. 2.11(A) (Vernon Supp. 2007). If the corporation does not maintain a registered agent in the state, then service can be made upon the secretary of state and a copy thereof must be forwarded by registered mail to the registered address of the corporation. *Id.* 2.11(B). Under this situation mailing is required, but that is not the circumstance here.

¶14 On September 21, 2007, the order, summons, complaint, and arbitration certificate were personally served on Raul H. Loya. The relevant order is an order dated September 18 that continued the hearing to September 25, when the hearing was held.[2] Loya was the statutory agent for Tenant in Texas. We fail to see how this service is not valid. Thus, the record below contains evidence of a reasonable basis for rejecting Tenant's assertion of inadequate service.

2. Counsel's Actions

¶15 Tenant argues that Landlord's counsel's failure to keep Tenant's counsel apprised of the action was a breach of

[2] Tenant asserts that notice of the continued trial date was not served on Tenant. However, this contention is not supported by an affidavit from any representative of Tenant, and the record does not substantiate such a claim.

civility and professional courtesy and constituted a fraud on the court. Landlord argues that Tenant's counsel was not entitled to any notice until the formal filing of an appearance, and that without the filing of an appearance Landlord did not know whether or not Tenant's counsel was representing Tenant in court. In support of this argument, Landlord relies on Arizona Rule of Civil Procedure 5.1, which states that an attorney cannot perform any task in an action without first appearing as counsel of record. Ariz. R. Civ. P. 5.1(a)(1). The failure to give notice to Tenant's counsel or apprise the court of Tenant's representation fell far below the standards we expect from counsel.

¶16 Although Tenant's counsel had not formally appeared, Landlord's counsel had notice that Tenant was represented by counsel. On August 28, 2007, prior to trial or any service, Tenant's counsel wrote to Landlord declaring that Tenant "has asked me to assist [Tenant in] the landlord tenant problems at [the industrial property]." On September 4, 2007, the day of the first scheduled hearing, Tenant's counsel sent another letter to Landlord stating:

> I learned from [Tenant] that a 9:45 a.m. hearing was scheduled at the Southeast Regional Center. I called your office immediately and your legal assistant, Pam, informed me that the hearing was being continued as not everyone was served.

> Pam also told me that you would be calling me later today. I will look forward to discussing a settlement of this matter with you.

Landlord's counsel mailed a letter to Tenant's counsel on September 5, 2007, in which he solicited "offers or suggestions on how best to resolve this matter," and acknowledged Tenant's counsel as such in an invoice statement to Landlord. On September 25, 2007, two hours before the forcible detainer hearing, Landlord's counsel faxed a letter to Tenant's counsel rejecting a settlement proposal. The letter ends "If your client has an alternative proposal, please let me know." Neither the September 5 nor the September 25 letters mention the forcible detainer action or upcoming hearings. The following year, on August 29, 2008, Landlord's counsel excused his failure to keep Tenant's counsel apprised of the action by the following:

> By September 4, 200[7], the complaint had been filed and the lock-out accomplished. Because your client was served and you did not enter an appearance, I was not certain you would represent them. I have had the experience of receiving phone calls or letters from lawyers retained to do nothing more than urge settlement but without a commitment to appear in court and litigate on a client's behalf. I expected that a lawyer of your experience and reputation would make an appearance if that was your client's desire. However, it did not appear that your client was interested in litigating the case by having you enter an appearance and defending it.

¶17 Landlord's counsel communicated with Tenant's counsel on the day of the hearing. Under these circumstances, Landlord's counsel had a responsibility to give Tenant's counsel notice of the proceedings in the action out of professional courtesy and civility as an officer of the court. *See* Ariz. State Bar, *A Lawyer's Creed of Professionalism of the State Bar of Arizona*, (May 20, 2005), *available at* http://www.myazbar.org/Members/creed.cfm (Preamble: "As a lawyer I must strive to make our system of justice work fairly and efficiently"; B(4): "I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings."). A party seeking a default judgment is required to send the application to the opposing party's attorney, even if that attorney has not formally appeared. Ariz. R. Civ. P. 55(a)(1)(ii) ("When a party claimed to be in default is known by the party requesting the entry of default to be represented by an attorney, whether or not that attorney has formally appeared, a copy of the application shall also be sent to the attorney for the party claimed to be in default."). Nothing less should have occurred here. Landlord had knowledge, through letters and a phone call, that Tenant's counsel represented Tenant. Landlord also had an obligation to apprise the court that Tenant was represented by counsel as a duty of

candor with the court. *See In re Ireland*, 146 Ariz. 340, 342, 706 P.2d 352, 354 (1985) (attorney has an "obligation not to mislead the court through an intentional omission"); *Denise H. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 257, 260, ¶ 8, 972 P.2d 241, 244 (App. 1998) (duty of candor requires an attorney to disclose material facts). During the court's discussion with Landlord's counsel regarding service of process, Landlord's counsel made no mention of the contact it had received from Tenant's counsel. This was unacceptable. The court was placed in the position of making a judgment without full knowledge of the facts.

¶18 However, although Landlord's counsel's actions are blameworthy, Tenant was not entitled to Rule 60 relief because it failed to act promptly. Tenant's counsel had knowledge of proceedings in this litigation as evidenced by the September 4, 2007 letter. Although he received nothing more regarding the forcible detainer action before the hearing, follow up would have been appropriate: the court, cause number, and parties were known to Tenant and its counsel. Additionally, on October 10, 2007, Tenant and Tenant's counsel received Landlord's application for award of attorneys' fees along with its statement of costs. From this document, Tenant and Tenant's counsel should certainly have known that a judgment was entered or in the process of being entered. This document should

clearly have pushed Tenant to action. Nevertheless, Tenant did nothing until filing the Rule 60(c) motion on January 29, 2009, over fifteen months later. There is nothing in the record before the trial court by which Tenant or its counsel attempts to excuse this delay. Remarkably, on appeal, Tenant asserts that "there is and was no issue" regarding timeliness.

¶19 In order to obtain relief from a default judgment each of the three elements, including the requirement to act promptly, must be met. *Almarez*, 146 Ariz. at 190, 704 P.2d at 831. The standard for prompt action has been discussed extensively. In *Richas v. Superior Court*, 133 Ariz. 512, 514-15, 652 P.2d 1035, 1037-38 (1982), the Arizona Supreme Court held that a thirty-four day delay in filing a Rule 60(c) motion, without explanation for the delay, gave the trial court "no basis on which the court could exercise its discretion to find it reasonable." In *Hyman v. Arden-Mayfair, Inc.*, 150 Ariz. 444, 447, 724 P.2d 63, 67 (App. 1986), this court found a nine-week delay without explanation was untimely. "The burden of explanation is upon the party seeking to set aside the entry of default." *Richas*, 133 Ariz. 514-15, 652 P.2d at 1037-38. Here, Tenant did nothing for at least fifteen months and offered no explanation for the delay. Such a delay precludes relief under Rule 60(c) as it cannot be construed as "acting promptly." For

this reason, we need not discuss the other issues raised by Tenant on appeal.

Conclusion

¶20 For the foregoing reasons, we affirm. Landlord seeks an award of attorneys' fees pursuant to A.R.S. § 12-341.01, as the prevailing party in an action arising out of a contract. The applicable provision of the party's lease provides for an award of "all attorneys' fees reasonably incurred." An award of attorneys' fees pursuant to a contract between the parties is mandatory. *Bennett v. Appaloosa Horse Club*, 201 Ariz. 372, 378, 35 P.3d 426, 432 (App. 2001). Therefore, we award Landlord fees, as we determine to be reasonable under the facts of this case, upon Landlord's compliance with Arizona Rule of Civil Appellate Procedure 21(c).

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

/s/
_____
PETER B. SWANN, Judge