DIVISION ONE
FILED: 09/28/2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

OUTSOURCE MANAGEMENT GROUP, LLC, a foreign corporation, Plaintiff/Appellee, v. FIRST FAMILY MEDICAL GROUP, P.C., an Arizona professional corporation, Defendant/Appellant.	1 CA-CV 09-0651 DEPARTMENT A **MEMORANDUM DECISION** Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)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. CV2008-027290

The Honorable Barbara A. Hamner, Judge *Pro Tempore*

AFFIRMED

Hammerman & Hultgren, P.C. Phoenix
By Vincent M. Creta
Attorney for Plaintiff/Appellee

Law Office of John A. Conley, P.C. Phoenix
By John A. Conley
Attorney for Defendant/Appellant

B A R K E R, Judge

¶1 First Family Medical Group, P.C. ("First Family") appeals the trial court's denial of its motion to vacate the

default judgment entered against it. Finding no abuse of discretion, we affirm.

Facts and Procedural History

¶2 On October 31, 2008, Outsource Management Group, LLC ("OMG") filed a complaint against First Family alleging breach of contract and seeking damages in the amount of $43,330.75. First Family was served with the complaint at its Phoenix office on November 3, 2008. The summons stated:

> **YOU ARE HEREBY SUMMONED** and required to appear and defend, within the times applicable in this action in this Court. If served within Arizona, you shall appear and defend within 20 days after the service of the Summons and Complaint upon you, exclusive of the day of service. . . .
>
> YOU ARE HEREBY NOTIFIED that in case of your failure to appear and defend within the time applicable, judgment by default may be rendered against you for the relief demanded in the Complaint.
>
> . . . .
>
> YOU ARE CAUTIONED that in order to appear and defend, you must file an Answer or proper response in writing with the Clerk of this Court, accompanied by the necessary filing fee, within the time required, AND YOU ARE REQUIRED TO SERVE A COPY OF ANY ANSWER OR RESPONSE UPON THE PLAINTIFF'S ATTORNEY. A.R.C.P. 10(d); A.R.S. §12-311; A.R.C.P. 5.

¶3 First Family did not file an answer within the twenty-day period. On December 1, 2008, twenty-eight days after First Family was served, OMG filed an application for entry of default

judgment because First Family had failed to plead or otherwise defend the lawsuit. To comply with Arizona Rule of Civil Procedure ("Rule" or "Rules") 55(a)(1)(i), OMG provided notice of the application for entry of default to First Family and cautioned that if First Family "fails to file a responsive pleading or otherwise defend in this action within ten (10) days of the filing of this Application" this would result in entry of a default against it.[1]

¶4 Dr. Kenneth Fisher, the owner and principal of First Family, authored a letter on December 2, 2008, acknowledging receipt of the complaint but contesting liability. According to Dr. Fisher, he "sent [the] letter" to the trial court on December 2. However, the record does not reflect that the trial court received this letter, and First Family did not pay the appearance fee. OMG's attorney received a faxed copy of the letter on December 5, 2008.[2]

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[1] OMG's application for entry of default actually specifies that failure to plead will result in a "default *judgment* [that] will be entered against that party." All that Rule 55(a)(3) permits at that point, however, is entry of *default*, not entry of the default judgment. Ariz. R. Civ. P. 55(a)(3) (specifying that "[a] *default* shall not become effective if the party claimed to be in default pleads or otherwise defends as provided by these Rules prior to the expiration of ten (10) days from the filing of the application for entry of default") (emphasis added).

[2] The trial court's August 14 minute entry from the hearing on First Family's motion to vacate the default judgment states "[i]n oral argument, Plaintiff's counsel acknowledged

¶5 Twelve days later, on December 17, OMG filed a motion for entry of default judgment. The motion was mailed to First Family but First Family did not respond. The trial court entered its default judgment against First Family on January 29, 2009. Subsequently, First Family filed a motion and application to vacate the default judgment on February 27, 2009, which was ultimately rejected by the trial court but properly refiled on March 6, 2009.[3] Following oral argument, the trial court denied First Family's motion to vacate. First Family timely filed this notice of appeal.

¶6 We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A) (2003) and 12-2101(C) (2003).

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receiving Dr. Fisher's letter via facsimile." Although the parties did not submit the transcript of the August 14 hearing with the record on appeal, and there is no other mention of the faxed letter in the record, neither party on appeal disputes that OMG's attorney received the letter via fax within the ten-day period to respond to the application for entry of default.

[3] Although the trial court rejected First Family's February 27 motion to vacate, it accepted the second filing of the motion on March 6, 2009, after First Family's attorney paid the appearance fee required to answer a civil complaint. Ariz. Rev. Stat. ("A.R.S.") § 12-311 (2003) ("The defendant, on his appearance, shall pay to the clerk a fee pursuant to § 12-284."). On appeal, the parties dispute whether failure to pay the appearance fee affects the promptness of First Family's filing of the motion to vacate. We need not address this issue because it is immaterial to our resolution of the case.

Discussion

¶7 "Although 'it is a highly desirable legal objective that cases be decided on their merits,'" we review for an abuse of discretion a trial court's denial of a motion to vacate a default judgment. *Hilgeman v. Am. Mortgage Sec., Inc.*, 196 Ariz. 215, 218, ¶ 7, 994 P.2d 1030, 1033 (App. 2000) (quoting *Hirsch v. Nat'l Van Lines, Inc.*, 136 Ariz. 304, 308, 666 P.2d 49, 53 (1983)). A trial court abuses its discretion when there is "no evidence to support [its] conclusion or the reasons given by the court [are] 'clearly untenable, legally incorrect, or amount to a denial of justice.'" *Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, 350, ¶ 17, 141 P.3d 824, 830 (App. 2006) (quoting *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983)). First Family contends the trial court's refusal to vacate the default judgment was an abuse of discretion because (1) the default judgment was void pursuant to Rule 55(a) and (2) First Family's failure to defend was excusable neglect pursuant to Rule 60(c). We disagree.

1. Relief Pursuant to Rule 55(a)

¶8 Under Rule 55(a), "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these Rules, the clerk shall enter that party's default in accordance with the procedures set forth below." Rule 55(a)(3), however, provides that "[a]

default shall not become effective if the party claimed to be in default pleads or otherwise defends as provided by these Rules prior to the expiration of ten (10) days from the filing of the application for entry of default." OMG filed its application for entry of default on December 1, 2008. First Family contends the default judgment subsequently entered is null and void because the December 2 letter sent to the trial court and faxed to OMG's attorney was an answer and was filed within the ten-day period allotted for a responsive pleading under Rule 55(a)(3).

¶9 The trial court, however, was not persuaded by this argument and found: "[t]he letter from Dr. Fisher was not filed with the Court and there is no indication whatsoever as to what address the letter was sent. At any rate, the letter was most certainly not received by this Court." The trial court further found that "Dr. Fisher's letter in no way comports with a minimally appropriate format of a responsive pleading and appears to be a letter disputing unpaid fees allegedly mailed but to an unknown location."

¶10 Pursuant to Rule 12(a)(1)(A), "A defendant shall serve and file an answer within twenty days after the service of the summons and complaint upon the defendant." An answer "shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." Ariz. R. Civ. P. 8(b). Rule 5(h)

makes it clear that "[t]he filing of pleadings and other papers with the court as required by these Rules shall be made by *filing them with the clerk of the court*." (Emphasis added.) Our legislature also requires all defendants appearing in a lawsuit or filing an answer to submit a fee to the superior court. A.R.S. § 12-311; *see also id.* § 12-284(A) (Supp. 2009) (stating that a fee of $88.00 must be paid to file an answer or initially appear in a case).

¶11 As noted, First Family contends on appeal that Dr. Fisher mailed a letter to the trial court on December 2, 2008, which should qualify as an answer. There is no evidence, however, that the letter was ever received by the court. The affidavit does not specify the address to which the letter was sent.[4] Neither did First Family submit evidence such as a certified receipt to prove the trial court received the letter. Likewise, there is no evidence that the required filing fee for an answer was ever paid. Thus, it was within the trial court's discretion to determine that the letter was not an answer filed with the court. *See Ireland v. Carpenter*, 879 A.2d 35, 38 (Me. 2005) (holding default judgment was appropriate because letter mailed by defendants to plaintiff on last available day to

[4] Dr. Fisher's affidavit states: "On December 2, 2008, I sent a letter to the Court denying the allegations in OMG's complaint. I sent that letter to the Superior Court of Arizona and referenced the case number for the action."

respond to the complaint was not an answer); *Harrison v. Miss. Bar*, 637 So.2d 204, 215-17 (Miss. 1994); *Estes v. Ashley Hospitality, Inc.*, 679 N.W.2d 469, 473 (S.D. 2004) (holding letter authored by individual defendant and served upon plaintiff's attorney was not an answer because it was not filed with the court as required by South Dakota law).

¶12 Moreover, the letter did not comply with the minimum pleading requirements of Rule 8 necessary to constitute an answer. There was no short and plain statement of First Family's defense to OMG's claim against it. In addition, the letter failed to admit or deny the numbered allegations in OMG's complaint. Thus, it was within the trial court's discretion to determine the letter was not a formal pleading but a letter "appear[ing] to . . . disput[e] unpaid fees allegedly mailed but to an unknown location."

¶13 First Family takes issue with OMG's attorney's failure to inform the court that he received the December 2 letter prior to seeking entry of the default judgment on December 17. First Family contends OMG's attorney had a duty to inform the court of the letter. Even if OMG's attorney owed a duty to inform the trial court of the December 2 letter, which we are not deciding, this was resolved when the issue was presented to the trial court at the hearing on the motion to vacate the default judgment. The same trial judge who entered the default judgment

also denied the motion to vacate. Had the trial judge deemed the letter dispositive in determining whether to enter default judgment, then the trial judge would have vacated the default judgment.

¶14 Dr. Fisher also sent this letter on behalf of First Family and without the assistance of counsel. Arizona case law, however, treats *pro se* litigants the same as litigants represented by an attorney. *See Old Pueblo Plastic Surgery, P.C. v. Fields*, 146 Ariz. 178, 179, 704 P.2d 819, 820 (App. 1985) (stating an unrepresented party appearing in an Arizona court is entitled to no more consideration than a party appearing through counsel). *But see Solis v. County of Los Angeles*, 514 F.3d 946, 957 n.12 (9th Cir. 2008) (applying federal "policy of liberal construction in favor of pro se litigants" (quoting *Rand v. Rowland*, 154 F.3d 952, 957 (9th Cir. 1998)). Corporations must be represented by an attorney to appear in Arizona state court and defend a lawsuit.[5] *State v. Eazy Bail Bonds*, 224 Ariz. 227, 229, ¶ 12, 229 P.3d 239, 241 (App. 2010) ("A corporation cannot appear in superior court except through counsel."). However the letter is characterized, it is certainly not a document filed by an attorney, which is required of any answer filed on behalf of a corporation. Thus, on this

[5] We see no reason to treat professional corporations differently.

record, the trial court did not abuse its discretion when it denied First Family's motion to vacate the default judgment pursuant to Rule 55(a).

2. Relief Pursuant to Rule 60(c)

¶15 Entry of default judgment may be set aside in accordance with Rule 60(c). Ariz. R. Civ. P. 55(c). Under Rule 60(c), the trial court can relieve a party from a final judgment due to "mistake, inadvertence, surprise or excusable neglect." A trial court will grant a motion to vacate a default judgment when the moving party makes an adequate showing (1) that it acted promptly in seeking relief from the default judgment, (2) that its failure to timely answer and defend was due to excusable neglect, and (3) that it has a meritorious defense. *United Imp. & Exp., Inc. v. Superior Court*, 134 Ariz. 43, 45, 653 P.2d 691, 693 (1982).

¶16 We focus our attention upon the second element because the trial court deemed it dispositive. The trial court found "Defendant's arguments [for relief pursuant to Rule 60(c)] are devoid of any showing of any reasonable excuse for failing to defend if in fact the Court did not find Mr. Fisher's letter to be a responsive pleading." Contrary to First Family's contention that its actions were reasonable and prudent because the letter was an answer and it promptly sought counsel after

default was entered, we find no abuse of discretion in the trial court's determination.

¶17 To establish excusable neglect, the party seeking relief must sufficiently demonstrate that its actions were those of a reasonably prudent person under the circumstances. *Daou v. Harris*, 139 Ariz. 353, 359, 678 P.2d 934, 940 (1984). First Family's sole argument is that its "actions were both reasonable and prudent" because the December 2 letter was an answer and, when default was entered, it "sought the advice of counsel . . . and swiftly moved to set that default judgment aside." As indicated above, the December 2 letter was not an answer to the complaint and did not satisfy the plead or otherwise defend requirement of Rule 55(a)(3) to prevent entry of default judgment. *See supra* ¶ 11. First Family provides no explanation for its failure to file a proper answer with the trial court and pay the appropriate filing fee. Instead, First Family relies on federal case law setting aside a default judgment or finding it was an abuse of discretion not to do so when the defendant, in accordance with the summons, mailed written communication to plaintiff's attorney in response to the complaint but failed to file an answer with the court. *See A.F. Dormeyer Co. v. M.J. Sales & Distrib. Co.*, 461 F.2d 40, 43 (7th Cir. 1972) (finding the district court abused its discretion when it refused to set aside the default judgment because it was mistake or excusable

neglect for defendant's attorney to mail an answer to plaintiff's attorney and not file the answer with the court when the summons only required an answer be sent to plaintiff's attorney); *Kinnear Corp. v. Crawford Door Sales Co.*, 49 F.R.D. 3, 8 (D. S.C. 1970) (setting aside default judgment because it was mistake or excusable neglect for defendant to answer complaint by mailing a letter to plaintiff's attorney in accordance with the summons); *Dalminter, Inc. v. Jessie Edwards, Inc.*, 27 F.R.D. 491, 492-93 (S.D. Tex. 1961) (setting aside default judgment on grounds of mistake or excusable neglect because, although the layman defendant did not file an answer with the court, the defendant answered the complaint by mailing a letter to plaintiff's attorney as instructed in the summons).

¶18 Unlike these federal cases, however, the summons served on First Family specifically instructed First Family how to respond to the complaint. The summons explicitly notified First Family that it had twenty days from the date of service to file an answer and further stated:

> YOU ARE HEREBY NOTIFIED that in case of your failure to appear and defend within the time applicable, judgment by default may be rendered against you for the relief demanded in the Complaint.
>
> . . . .
>
> YOU ARE CAUTIONED that in order to appear and defend, *you must file an Answer or proper response in writing with the Clerk*

> *of this Court*, accompanied by the necessary filing fee, within the time required, AND YOU ARE REQUIRED TO SERVE A COPY OF ANY ANSWER OR RESPONSE UPON THE PLAINTIFF'S ATTORNEY. A.R.C.P. 10(d); A.R.S. §12-311; A.R.C.P. 5.

Thus, First Family knew that any answer submitted must be filed with the court, not just submitted to opposing counsel.

¶19 On the record before us, it was within the trial court's discretion to determine that First Family failed to prove mistake or excusable neglect because no reasonable party under the circumstances would believe that faxing the December 2 letter to opposing counsel was a proper pleading to prevent entry of default judgment. Even more compelling is the fact that First Family did not respond to the motion for entry of default judgment filed on December 17. At that point, regardless of any obligation on plaintiff's counsel's part to disclose the December 2 letter, First Family clearly was obligated to bring to the court's attention that it believed it had responded to the complaint by means of the December 2 letter. Yet, First Family took no such action.

¶20 In this regard, First Family's position differs substantially from that of the defaulted party *In re Zorrilla*, 115 B.R. 894 (Bankr. W.D. Tex. 1990), a case upon which First Family heavily relies. There, the court set aside a default judgment when plaintiff's counsel failed to advise the court of

an answer he had received on defendant's behalf, but which had been filed in the wrong court. An important part of the *Zorrilla* court's decision was that "defendant's neglecting to act more quickly in response to the motion for default judgment (either to prevent its entry or to set it aside) is excusable, in view of the fact that he was not notified that plaintiff was seeking it in the first place." *Id*. at 899. Here, as just stated, First Family was mailed a copy of the December 17 motion for entry of default judgment yet it took no action in response to it. While we do not condone the failure of plaintiff's counsel to advise the court of the December 2 letter he received, on the facts of this case, particularly since that failure to disclose was known to the trial court, we decline to grant relief in the face of First Family's own failure to advise the court that it had submitted the December 2 letter. Accordingly, we find no error in the trial court's denial of First Family's motion to vacate the default judgment. *See Daou*, 139 Ariz. at 359, 678 P.2d at 940 ("[M]ere carelessness is not [a] sufficient reason to set aside a default judgment.").

Conclusion

¶21 For the above-stated reasons, we affirm the trial court's denial of First Family's motion to vacate the default judgment.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
DONN KESSLER, Presiding Judge

/s/
_____
JON W. THOMPSON, Judge