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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 01/03/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: GH

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

GOODMAN, PA, an Arizona ) No. 1 CA-CV 11-0134  
professional corporation, )  
) DEPARTMENT A  
Plaintiff/Counterdefendant/ )  
Appellant, ) **MEMORANDUM DECISION**  
) (Not for Publication -  
v. ) Rule 28, Arizona Rules  
) of Civil Appellate  
RICHARD L. BROOKS, ) Procedure)  
)  
Defendant/Counterclaimant/ )  
Appellee. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-000328

The Honorable Bethany G. Hicks, Judge  
The Honorable Gary E. Donahoe, Judge

**AFFIRMED**

Goodman, PA Phoenix  
By Grant H. Goodman  
Attorneys for Plaintiff/Counterdefendant/Appellant

Osborn Maledon, PA Phoenix  
By Geoffrey M. T. Sturr  
Attorneys for Defendant/Counterclaimant/Appellee

**I R V I N E**, Judge

¶1 Goodman, PA ("Goodman") appeals from default judgment entered in favor of Richard L. Brooks on Brooks' counterclaims

for breach of fiduciary duty and breach of contract. For the following reasons, we affirm.

#### **FACTS AND PROCEDURAL HISTORY**

¶12 Goodman filed a complaint in interpleader. The complaint alleged that Goodman had represented Brooks in negotiations with an insurance company for personal injuries. It alleged that Goodman received and deposited into its IOLTA account a check in the amount of \$100,000 from the insurer as a settlement for those claims, that Goodman and Brooks had agreed that Goodman's fee for services would be \$15,000, that Brooks issued a check for that amount to Goodman but the check was returned for insufficient funds, and that Goodman transferred \$15,000 from its IOLTA account to cover the fee. The complaint further alleged that Goodman held the remaining \$85,000 pending resolution of outstanding claims for medical services, but that Osborn Maledon, PA ("Osborn Maledon") claiming to represent Brooks, demanded \$100,000 be transferred to its IOLTA account. Goodman interpleaded the \$85,000, claiming concern that it would be liable if it transferred the funds to Osborn Maledon "given the numerous Defendants who have adverse claims with respect to that money."

¶13 On January 22, 2010, Brooks answered stating that Goodman filed the action before Brooks could demonstrate that no valid liens on the settlement funds existed. The answer sought

an order requiring Goodman to deposit the full \$100,000 with the court and releasing all funds to Osborn Maledon, or an order releasing the \$85,000 that had been deposited with the court.

¶4 Brooks also filed a counterclaim against Goodman. On February 23, Brooks filed an amended counterclaim for breach of fiduciary duty and, alternatively, breach of contract. Brooks alleged that he had orally agreed to pay Goodman based on an hourly fee, but that Goodman produced no evidence of hours worked to justify a fee of any amount. The amended counterclaim alleged that the transfer of the \$15,000 from Goodman's IOLTA account was (1) a breach of the fiduciary duties that it owed Brooks and (2) a breach of contract and a violation of Professional Code of Ethics Rule ("ER") 1.15. Brooks further alleged that the interpleader of the \$85,000 was improper because Goodman knew that no one other than Brooks claimed entitlement to the funds. Brooks sought an order declaring that Goodman was not entitled to fees or to only reasonable fees and judgment for \$15,000 or the amount Goodman retained in excess of reasonable fees.

¶5 On the same day as the amended counterclaim, Brooks filed a motion for summary judgment on Goodman's interpleader claim, arguing Goodman could not meet the requirements for a proper interpleader action. Brooks claimed that only he had an interest in the \$85,000 deposited with the court.

¶16 Goodman replied to the counterclaim and filed its own cross-claim alleging that Brooks had failed to pay fees earned by Goodman. On March 29, Judge Bethany Hicks granted Brooks' motion for summary judgment on Goodman's interpleader complaint; the order was entered the next day ("March 30 judgment").

¶17 On March 30, Goodman filed a notice of change of judge. Goodman argued that it had until March 30 to file a response under the original deadline, and the parties had stipulated to extend the deadline until April 5, 2010, to file the response and the answer to Brooks' amended counterclaim. Accordingly, Goodman argued that the March 30 judgment was void as premature and asked that "all proceedings be stayed until the Presiding Judge reassigns this matter to a new judge." On April 5, Goodman filed a motion noting it had not yet received notification of the appointment of a new judge and asking to stay all proceedings pending that appointment.

¶18 Brooks responded on April 6. Brooks took no position on the motion for change of judge other than to request that the court act quickly. Brooks objected to the motion to stay, asserting that it was unsupported by legal authority, was unwarranted, and would impose a hardship on Brooks if granted. Brooks requested that the court withdraw the March 30 judgment and summarily grant Brooks' motion for summary judgment under Rule 7.1(b) because Goodman had failed to file a response to it

by April 5. On that same day, Brooks applied for entry of default on his counterclaim because Goodman had failed to reply to the counterclaim.

¶9 On April 8, the case was transferred to the Honorable Gary Donahoe. On April 14, Brooks filed a proposed order granting summary judgment to Brooks on Goodman's interpleader action. Brooks noted that, although Goodman had asserted in its notice for change of judge that the March 30 judgment was premature, Goodman had not moved for reconsideration of that ruling or filed a timely response to his motion for summary judgment by the April 5 deadline.

¶10 On April 20, Goodman filed a copy of a letter sent to Osborn Maledon, stating in part:

As you know, [this] action has been stayed pending a face-to-face consult between the attorneys. In accordance with the stay, [Goodman is] not going to file a Reply to [Brook]'s Amended Counterclaim until we have resolved the procedural issues created by Judge Hick's premature ruling on Brooks' Motion for Summary Judgment.

¶11 On April 29, Brooks filed a motion for entry of default judgment on his amended counterclaim. Brooks argued that Goodman had breached its fiduciary duty to him by unilaterally transferring \$15,000 from its IOLTA account. Relying on Section 37 of the Restatement (Third) of the Law Governing Lawyers (2000), which states: "A lawyer engaging in clear and serious

violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter," Brooks asked the court to declare that Goodman has forfeited any claim for attorneys' fees by breaching its fiduciary duties to Brooks. Brooks sought a default judgment in the amount of \$15,000, asserted that the damages represented a sum certain, and asked the court to enter judgment pursuant to Arizona Rule of Civil Procedure ("Rule") 55(b)(1).

¶12 By order entered on May 18, 2010, the trial court granted Brooks' motion for summary judgment on the interpleader complaint and ordered the release of the \$85,000. The order included Rule 54(b) language making the judgment final.

¶13 The court then set an evidentiary hearing pursuant to Rule 55(b), to determine the amount of damages on Brooks' application for entry of default judgment. The court later explained that it was reluctant to find that Goodman violated ER 1.15 without a hearing in light of the potential consequences to Goodman's license to practice law.

¶14 At the evidentiary hearing, Brooks argued that Goodman forfeited compensation for its services because of two breaches—removing the \$15,000 from the IOLTA account and interpleading the \$85,000 despite knowledge that no other claims on the funds existed. The court deemed the allegations in the amended counterclaim to be true and limited inquiry to the presence or

absence of lien providers having an interest in the interpleaded funds and matters related to any agreement to pay \$15,000 in fees.

¶15 Brooks testified that his insurer paid a portion of his medical bills and he paid the rest, and that he knew of no liens. He further testified that he had given Goodman a check for \$15,000 on the condition that it would not deposit the check until it had provided proof of services warranting that payment. He also testified that Goodman immediately deposited the check despite having been told that the account did not yet have sufficient funds.

¶16 The trial court entered judgment in favor of Brooks in the amount of \$15,000 plus interest, and awarded him costs of \$730 and attorneys' fees in the amount of \$10,862 pursuant to Arizona Revised Statutes ("A.R.S.") section 12-341.01(A) (2003). The court held that Goodman breached its contractual obligations to Brooks by collecting a \$15,000 contingency fee instead of the agreed upon hourly rate by failing to provide records as to the time Goodman devoted to the matter, and by withdrawing \$15,000 from its trust account as payment. The court found damages in the amount of \$15,000. The court alternatively found that Goodman breached fiduciary duties to Brooks by claiming an entitlement to an earned fee of \$15,000 and withdrawing those funds from its trust account, and by interpleading the \$85,000

when no third party had notified Goodman of any interest in those funds. The court found that Goodman acted intentionally, its conduct injured Brooks, who was required to obtain counsel to retrieve his money, and its conduct negated the value of any services provided. The court found that the remedy for Goodman's breach of its fiduciary duties was forfeiture of its \$15,000 fee claim. Goodman timely appeals.

#### DISCUSSION

¶17 Generally, a default judgment is not appealable, and relief from such a judgment must be sought through a motion to set aside, the result of which is appealable. *Kline v. Kline*, 221 Ariz. 564, 568, ¶ 11, 212 P.3d 902, 906 (App. 2009). A default judgment can be appealed, however, to challenge personal or subject matter jurisdiction or to challenge the validity of the default judgment. *Id.*

¶18 A reply to a counterclaim must be served and filed within twenty days after service of the answer and counterclaim. Ariz.R.Civ.P.12(a)(1)(B)(2). If the counterdefendant fails to timely reply, the counterclaimant may file an application for entry of default, which becomes effective ten days after the filing of the application, unless "the party claimed to be in default pleads or otherwise defends" before the ten days expire. Ariz.R.Civ.P.55(a)(2),(3). If the counterdefendant does not file a responsive pleading before ten days expire, the



counterclaimant may apply for entry of a default judgment. Ariz.R.Civ.P.55(b). If the court deems it necessary, the court may conduct a hearing to determine the amount of damages, to establish the truth of an averment, or to investigate any other matter. Ariz.R.Civ.P. 55(b)(2). A party against whom a default has been entered loses the right to litigate the merits of the cause of action. *Tarr v. Superior Court (Jenson)*, 142 Ariz. 349, 351, 690 P.2d 68, 70 (1984). All well-pleaded facts are deemed established, although conclusions of law are not. *Moran v. Moran*, 188 Ariz. 139, 146, 933 P.2d 1207, 1214 (App. 1996). On appeal, we are bound by the trial court's factual findings unless they are demonstrated to be clearly erroneous. *Sabino Town & Country Estates Ass'n v. Carr*, 186 Ariz. 146, 149, 920 P.2d 26, 29 (App. 1996).

¶19 Brooks filed his amended counterclaim on February 23, 2010. Brooks filed an application for entry of default on April 6, well past the twenty-day period to reply and a day after the extended deadline to which the parties agreed. Goodman did not file a responsive pleading within ten days of entry of default, and on April 29, 2010, Brooks filed an application for entry of default judgment. Goodman has presented no coherent argument that any part of this process was not in compliance with Rule 55(a). Although Goodman replied to Brook's counterclaim, it did not reply to his amended counterclaim. Where, as here, a

complaint is amended in a material way, a party must file a response to the amended complaint. *Campbell v. Deddens*, 21 Ariz. App. 295, 297, 518 P.2d 1012, 1014 (App. 1974). Goodman indicated in its notice for change of judge that it would file an answer to Brooks' amended counterclaim. Its failure to do so permitted the entry of default.

¶20 A defaulted party is entitled to fully participate in a damages hearing. *Cook v. Steiner*, 22 Ariz. App. 505, 507, 528 P.2d 1264, 1266 (App. 1974). Goodman contends that its participation at the hearing was "unnecessarily truncated, or dispensed with." The record does not support this contention. At the hearing, Goodman was allowed to make an opening and closing argument, cross-examine Brooks and present evidence.

¶21 Goodman cites portions of the transcript of the hearing, however, as evidence that its participation was wrongly limited. The referenced portions of the transcript pertain to several instances where the court sustained objections to Goodman's questions because they involved matters already deemed admitted due to entry of default, matters beyond the issues of damages and breach of fiduciary duty, and/or matters deemed privileged. We review the trial court's decision on evidentiary matters for a clear abuse of discretion and prejudice. *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 505, 917 P.2d 222, 234

(1996). Goodman offers no specific argument as to why these rulings were erroneous. We thus find no abuse of discretion.

¶122 Goodman generally argues that no evidence exists to support the trial court's award of damages, and suggests that the court awarded punitive damages. We disagree.

¶123 The court did not award punitive damages. The court awarded compensatory damages after concluding that Goodman had breached its contractual obligations to Brooks by demanding \$15,000 as a contingent fee instead the hourly rate, failing to provide records supporting a fee, and withdrawing and keeping \$15,000 as an earned fee despite knowing that Brooks disputed the fee amount. The court also found that Goodman's conduct had negated any benefit it might have provided to Brooks in settlement with the insurer because Goodman breached its fiduciary duties by keeping \$15,000 and by interpleading the remaining \$85,000 despite no notice of any claim against those funds other than by Brooks.

¶124 Brooks testified that he was aware of no medical liens, had paid his medical bills, and had kept Goodman apprised of those payments. He further testified that he was damaged by Goodman's conduct in interpleading the \$85,000 because his injuries limited his ability to work, he had to borrow money to pay debts and to meet other obligations, and he was sometimes

not able to pay his bills. Because sufficient evidence supports the trial court's findings, we find no error.

¶125 In its opening brief, Goodman appears to challenge the March 30 judgment on Brooks' motion for summary judgment and the subsequent ruling granting summary judgment to Brooks denying Goodman's complaint in interpleader. It also appears to allege that Osborn Maledon interfered with Goodman's relationship with Brooks. These matters do not pertain to whether the default proceedings complied with Rule 55 and so are not properly before this Court. We note, however, that the March 30 judgment was not a final judgment and was of no force or effect; how it could have "infected the entire proceedings" as claimed by Goodman is unclear. We also note that the subsequent ruling granting summary judgment to Brooks was made final pursuant to Rule 54(b) and the time to appeal from the ruling has passed. As for any allegation of interference with a contractual relationship, no such claim was before the court.

¶126 Brooks requests an award of attorneys' fees on appeal pursuant to A.R.S. §§ 12-341.01(A), -341.01(C), and -349 (2003), and/or Arizona Rule of Civil Appellate Procedure 25. Section 12-341.01(A) authorizes a court to award attorneys' fees to the successful party in a contested action arising out of contract. As the prevailing party, Brooks is entitled to his reasonable attorneys' fees. We therefore grant his request pursuant to

A.R.S. § 12-341.01(A), upon his compliance with ARCAP 21. Accordingly, we need not address whether Brooks is entitled to attorneys' fees on other grounds.

**CONCLUSION**

¶27 For the foregoing reasons, we affirm.

/s/  
\_\_\_\_\_  
PATRICK IRVINE, Judge

CONCURRING:

/s/  
\_\_\_\_\_  
ANN A. SCOTT TIMMER, Presiding Judge

/s/  
\_\_\_\_\_  
DANIEL A. BARKER, Judge