DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

AEL FINANCIAL, LLC, an Illinois limited liability company; and M2 LEASE FUNDS LLC, a Wisconsin limited liability company,	)	1 CA-CV 11-0183
	)	DEPARTMENT B
	)	**MEMORANDUM DECISION**
Plaintiffs/Judgment Creditors/Appellees,	)	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
v.	)	
INTEGRATED MACHINERY, INC.,	)	
Garnishee/Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-002349

The Honorable Jay L. Davis, Judge Pro Tempore

VACATED AND REMANDED

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K E S S L E R, Judge

¶1 Integrated Machinery, Inc. ("Integrated") appeals from the superior court's refusal to vacate a default judgment on a writ of garnishment brought by AEL Financial, L.L.C. ("AEL"). For the reasons stated below, we vacate the default judgment and remand this matter to the superior court for further proceedings consistent with this decision.

FACTUAL AND PROCEDURAL HISTORY

¶2 AEL obtained a judgment against VMC Enterprises ("VMC"). Based on that judgment, AEL sought to garnish property possessed by Integrated, but owned by VMC. A writ of garnishment was served on Integrated on May 22, 2010. On June 4, 2010, Integrated sent its answer to AEL, denying it possessed any property owned by VMC. Integrated did not file the answer with the superior court. On June 15, 2010, AEL filed an objection to the answer, questioning its veracity, and requested a hearing.

¶3 On August 24, 2010, the superior court held a hearing on AEL's objection to the answer. After the hearing, the court ordered Integrated to amend its original answer and file it within ten days, by September 3, 2010. Up to that point, AEL had not complained that Integrated failed to file its original answer, nor had it filed an application of default. Integrated did not file the amended answer by September 3, 2010 as ordered.

On September 22, 2010, AEL filed a petition for entry of default judgment against Integrated. Two days later, on September 24, 2010, Integrated filed the amended answer and a response to the petition for entry of default judgment. The court held oral argument and entered default judgment against Integrated for failure to file an amended answer by September 3, 2010.

¶4 Integrated filed a motion to set aside the default judgment. The court denied this motion based on the fact that Integrated failed to timely submit the amended answer. Integrated timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(2) (Supp. 2011).

DISCUSSION

¶5 We review the denial of a motion to set aside a default judgment for a clear abuse of discretion. *Daou v. Harris*, 139 Ariz. 353, 359, 678 P.2d 934, 940 (1984). A court abuses its discretion when its decision is not supported by the facts or it commits an error of law in reaching its conclusions. *Hurd v. Hurd*, 223 Ariz. 48, 52, ¶ 19, 219 P.3d 258, 262 (App. 2009).

¶6 Integrated argues that the superior court abused its discretion because Integrated answered the writ of garnishment, and that any failure to file the amended answer by the deadline did not permit entry of a default judgment when the amended

answer was filed within ten days of the application for entry of default. We agree.

¶7 When a garnishee fails to timely answer a writ of garnishment, the garnishor can request the court to order the garnishee to appear in person and answer the writ or to file and serve a written answer at least five days before that appearance. A.R.S. § 12-1583 (2003). If the garnishee still does not respond, the court may then enter a judgment by default against the garnishee for the full amount. *Id.* None of these prerequisites for a default judgment were met in this case.

¶8 First, Integrated answered the writ of garnishment, serving the answer on AEL. AEL did not object that Integrated failed to file the answer and did not seek a default for failure to file. Rather, it only objected to the veracity of the answer and asked for a hearing. Second, Integrated appeared at the hearing on the objection to its answer and again explained to the court why it did not think it was liable to AEL on the writ. Thus, no default judgment was permitted under A.R.S. § 12-1583. Moreover, even an untimely filing of an answer under this statute does not authorize a default judgment. *See Gutierrez v. Romero*, 24 Ariz. 382, 386, 210 P. 470, 471 (1922) (fact that a garnishee files a meritorious answer, even untimely, "should [be] treated as 'good cause,' in fact and in law, to have refused judgment, and after its entry to set it aside").

¶9 Assuming Rule 55 of the Arizona Rules of Civil Procedure ("Rule 55") applies here, a default judgment is also improper under that rule. Pursuant to Rule 55(a), a party seeking a default judgment first must file an application for entry of default. Entry of default is effective ten days after the filing of the application, but "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." Ariz. R. Civ. P. 55(a)(3). Because Integrated filed its amended answer before expiration of the ten-day period, the default was not effective. Accordingly, we vacate the default judgment entered against Integrated.

¶10 Integrated requests an award of its attorneys' fees and costs on appeal pursuant to A.R.S. § 12-341.01 (2003) and Rule 21 of the Arizona Rules of Civil Appellate Procedure ("Rule 21"). We deny Integrated's request of attorneys' fees. First, while A.R.S. § 12-341.01(A)[1] permits an award of attorneys' fees to the successful party in any contested action "arising out of a contract," this matter does not arise out of contract. Instead, it arises out of a statutory procedure for collecting a

[1] Integrated did not specify whether it was seeking fees under subsection (A) or (C) of A.R.S. § 12-341.01. The record does not provide any basis for an award of attorneys' fees under the latter section.

judgment debt through a writ of garnishment. *See Kennedy v. Linda Brock Auto. Plaza, Inc.*, 175 Ariz. 323, 325-26, 856 P.2d 1201, 1203-04 (App. 1993) (finding fees not awardable under A.R.S. § 12-341.01(A) as the matter arose under statute and not out of contract).

¶11 Second, even if the judgment debtor's obligation arose out of contract, that contract is not an essential basis for the garnishment. Because the contract would be only peripheral to the issue in this action, A.R.S. § 12-341.01(A) does not apply. *See id.* at 325, 856 P.2d at 1203; *see also Hanley v. Pearson*, 204 Ariz. 147, 151, ¶ 17, 61 P.3d 29, 33 (App. 2003). Third, Rule 21 does not provide a substantive basis for awarding attorneys' fees. *See Ezell v. Quon*, 224 Ariz. 532, 539, ¶ 31, 233 P.3d 645, 652 (App. 2010). However, since Integrated did prevail on appeal, it is entitled to an award of costs incurred in this appeal pursuant to A.R.S. § 12-341 (2003) and upon compliance with Rule 21.

¶12 AEL also seeks an award of attorneys' fees and costs on appeal pursuant to A.R.S. § 12-1583. Section 12-1583 provides that:

> The court may award a reasonable attorney's fee to the judgment creditor for whom the writ was issued and against the garnishee if the writ was not answered within the time specified in the writ and a petition requiring the garnishee to appear or answer was filed as provided in this section.

As discussed above, in the proceedings after Integrated served its answer, AEL did not claim that Integrated failed to answer the writ of garnishment. We therefore deny AEL's request for attorneys' fees. Because it did not prevail on appeal, AEL is not entitled to an award of its costs.

CONCLUSION

¶13 For the above reasons, we vacate the default judgment entered against Integrated, and remand the matter to the superior court for further proceedings consistent with this decision.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Presiding Judge

/s/
PHILIP HALL, Judge