DIVISION ONE
FILED: 02/23/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MACQUARIE MORTGAGES USA, INC., a Delaware corporation, Plaintiff/Appellee/ Cross-Appellant, v. C.P. HOME INVESTMENTS, INC., an Arizona corporation, Defendant/Appellant/ Cross-Appellee	1 CA-CV 11-0257 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)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. CV2010-007320

The Honorable Gary E. Donahoe

AFFIRMED

Dioguardi Flynn, LLP — Scottsdale
By Mark Dioguardi
Attorneys for Plaintiff/Appellee/Cross-Appellant

GUST ROSENFELD, PLC — Phoenix
By Richard A. Segal
Timothy W. Barton
Frank S. Tomkins
Attorney for Defendant/Appellant/Cross-Appellee

G O U L D, Judge

¶1 C.P. Home Investments, Inc. ("CP Home") appeals the denial of its Rule 60(c)(1) motion for relief from default judgment. For the reasons that follow, we affirm. On Macquarie Mortgages USA, Inc.'s ("Macquarie") cross-appeal, we affirm the award of attorneys' fees incurred by Macquarie in connection with its defense against CP Home's request for injunctive relief.

Factual and Procedural Background

¶2 Macquarie extended a line of credit ("LOC") to Ronald and Andrea Orban ("the Orbans"). The LOC was secured by a first deed of trust on real property located in Waddell ("the Property") and owned by the Orbans. The Orbans took out other loans secured by the Property. In November of 2005, the Orbans temporarily paid down the LOC to zero. The Orbans had Camelback Title Agency ("Camelback Title") prepare a Line of Credit Termination ("Termination") and a Release and Reconveyance of Macquarie's deed of trust ("Release"). Macquarie never received the Termination. The Orbans continued utilizing the LOC. In April of 2006, despite the fact that the Orbans owed Macquarie more than $449,000.00 on the LOC, Camelback Title recorded the Release. Camelback Title did not send Macquarie notice of its intent to file the Release as required by Arizona Revised

Statutes ("A.R.S.") section 33-707(E). As a result, Macquarie did not contest the recording of the Release. Thus, when Deutsche Bank National Trust Company ("Deutsche"), a lender subordinate to Macquarie, foreclosed on the Property, Macquarie was not paid. Deutsche purchased the Property at trustee's sale, and was issued a trustee's deed to the Property. Thereafter, Deutsche sold the Property to CP Home.

¶3 CP Home is a closely held Arizona corporation. Dora German and Jose Lopez are directors of CP Home. Both reside at the Property. After the Orbans defaulted on the LOC, Macquarie filed a complaint against the Orbans, Camelback Title, and CP Home, alleging, among other claims, judicial foreclosure of its deed of trust.

¶4 On five separate occasions over the course of four months, Macquarie served CP Home's statutory agent, Elba Nunez, with the lawsuit and default pleadings. After default judgment was entered against it, CP Home moved to set aside the default and obtained a preliminary injunction prohibiting the sale of the Property until after the trial court ruled on its motion.

¶5 In connection with CP Home's motion to set aside, Dora German stated that she was not aware of the lawsuit until early August 2010, when she received a copy of the Sheriff's Notice of Sale of Real Property. The record is silent as to whether Mr.

Lopez, the other director, received the documents, voice mails or notice of the lawsuit. Mr. Gutierrez also submitted a declaration admitting that the statutory agent advised him of the lawsuit.[1] His declaration states after being notified of the lawsuit and impending default judgment he confirmed through Guaranty Title Agency ("GTA"), the company that handled the escrow for the Property, that CP Home had purchased title insurance through LSI Title Agency Inc. ("LSI").

¶6 The statutory agent testified at her deposition that she called Ms. German repeatedly and left voice mails informing her that she had received legal documents, but Ms. German never returned any of the statutory agent's calls. The statutory agent also testified that she sent copies of all but one of the legal documents she received on behalf of CP Home from Macquarie to Ms. German and Mr. Lopez at the address she had on file for them.[2] Finally, she testified that none of these envelopes were returned to her as undeliverable.

---

[1] Mr. Gutierrez and Mr. Martinez structured the purchase of the Property and formed CP Home.

[2] The address she had on file for CP Home was different then the Property address.

¶7 After the trial court denied CP Home's motion to set aside the default judgment, the Property was sold at a sheriff's sale to Macquarie.[3]

¶8 We have jurisdiction to review the order denying CP Home's motion for relief from default judgment pursuant to A.R.S. § 12-2101(A)(2) (West 2012) as a "special order made after final judgment."[4]

Discussion

¶9 We review the denial of a motion to set aside a default judgment for an abuse of discretion. *Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 185, 188, 836 P.2d 398, 401 (App. 1992). We note, however, that the law prefers resolution of actions on their merits rather than by default and any doubts should be resolved in favor of the party seeking to set aside the default judgment. *Id.* The superior court is vested with

[3] Macquarie argues that this appeal is moot because CP Home did not obtain a stay of execution of the default judgment. As a result, the Property was sold to Macquarie at a sheriff's sale on January 27, 2011. By order dated August 17, 2011, a different panel of this court addressed the same issue in the context of Macquarie's motion to dismiss the appeal and determined that this appeal is not moot because the sheriff's sale does not preclude this court from vacating or reversing the default judgment; nor does it preclude the superior court from granting relief from default.

[4] Unless otherwise specified, we cite to the current version of the applicable statutes because no revisions material to this decision have occurred.

broad discretion when deciding a motion to set aside a default judgment and its ruling will not be overturned on appeal absent a clear abuse of discretion. *Richas v. Superior Court*, 133 Ariz. 512, 514, 652 P.2d 1035, 1037 (1982). The exercise of discretion must be supported "by facts or sound legal policy." *City of Phoenix v. Geyler*, 144 Ariz. 323, 328-29, 697 P.2d 1073, 1078-79 (1985).

¶10 The entry of default may be vacated and set aside "for good cause shown," according to Arizona Rule of Civil Procedure 55(c). The good cause necessary for setting aside or vacating entry of default is the same as that required for relief from a judgment by default under Rule 60(c). *DeHoney v. Hernandez*, 122 Ariz. 367, 371, 595 P.2d 159, 163 (1979); *Richas*, 133 Ariz. at 514, 652 P.2d at 1037.

¶11 A party seeking relief from a default judgment pursuant to Rule 60(c) must establish each of the following: (1) the failure to file a timely answer was excusable under one of the subdivisions of Rule 60(c), (2) the party had a meritorious defense to the action, and (3) the party acted promptly in seeking relief from the default judgment.[5] *United*

[5] The parties agree that CP Home satisfied the third requirement by promptly moving to set aside the default judgment.

Imps. & Exps., Inc. v. Superior Court, 134 Ariz. 43, 45, 653 P.2d 691, 693 (1982); *Almarez v. Superior Court*, 146 Ariz. 189, 190, 704 P.2d 830, 831 (App. 1985).

¶12 CP Home contends that the default judgment should have been set aside because it demonstrated excusable neglect under Rule 60(c)(1). Because we disagree, we need not decide whether CP Home established that it had a meritorious defense.

I. CP Home Did Not Demonstrate Excusable Neglect

¶13 Generally, default judgments are disfavored; however, this does not mean that every default judgment will be set aside. *Richas*, 133 Ariz. at 514, 652 P.2d at 1037. As the superior court noted, Ms. German and Mr. Lopez chose to take title to the home in the name of a corporation. In Arizona, if a statutory agent is served with a lawsuit, the superior court examines the conduct of the statutory agent to determine whether there is excusable neglect. *W. Coach Corp. v. Mark V Mobile Homes Sales, Inc.*, 23 Ariz. App. 546, 549, 534 P.2d 760, 763 (1975). Failure to inform its principal of the service of a lawsuit due to mere carelessness on the part of a duly appointed statutory agent is not excusable neglect for failure to defend a lawsuit. *Postal Benefit Ins. Co. v. Johnson*, 64 Ariz. 25, 34, 165 P.2d 173, 178 (1946). *See also, Lynch v. Ariz. Enter. Mining Co.*, 20 Ariz. 250, 253, 179 P. 956, 957 (1919) (failure

to notify its principal because the statutory agent did not know its address was not excusable neglect).

¶14 The court did not abuse its discretion by concluding that CP Home failed to establish excusable neglect to set aside the default judgment. CP Home acknowledges that its statutory agent was served with the complaint and default papers and made numerous attempts to notify the principals via mail and phone.[6] The superior court provided a detailed explanation for its finding that there was no excusable neglect, explaining that (1) the statutory agent was served with the initial complaint, (2) the statutory agent was served with the amended complaint, (3) the statutory agent received the application for default in April 2010, but Defendant took no action to defend the case, (4) Defendant was mailed a copy of Plaintiff's motion seeking entry of the default judgment on June 24, 2010, and (5) the default hearing was held, again with Defendant doing nothing to defend the action prior to the hearing to vacate the entry of default. Thus, "Defendant was advised at least five times that

[6] Ms. German's declaration states that she was not aware of the lawsuit until receiving the Notice of Sheriff's sale. However, the record is silent as to Mr. Lopez's knowledge of the lawsuit. He lived with Ms. German and may have received the voice mails and mail. Thus, the record does not support CP Home's contention that Jose Lopez, one of the "actual owners of the home," received no notice of the action until the end of July, 2010. Nor does CP Home provide any citation to the record as support for this statement as required by ARCAP 13(a)(4).

there was a lawsuit against it that required Defendant's attention," but "did not act as a reasonably prudent person would act under the circumstances."

¶15 CP Home's effort to show excusable neglect based on the actions of Mr. Gutierrez lack merit. The record is not clear as to why CP Home's statutory agent provided notice to Mr. Guitierrez; Mr. Gutierrez was not an officer or director of the corporation, and there is no evidence before us that he was acting as the agent of CP Home or its principals. In any event, upon receipt of the default pleadings from Ms. Nunez, Mr. Gutierrez gave the documents to Marie Soja at GTA, and "[a]t that time, Ms. Soja indicated that she would turn over the documents to the appropriate people at GTA." Mr. Gutierrez provides no information regarding Ms. Soja's position with GTA. In addition, Ms. Soja provided no assurance whatsoever that GTA would take any action to defend CP Home in the lawsuit; Ms. Soja did not even promise to advise LSI of the problem.

¶16 Assuming that CP Home could rely upon the actions of Mr. Gutierrez to establish excusable neglect, CP Home has failed to do so. CP Home attempts to liken the actions taken by Gutierrez to those of the defendant in *Martin v. Rossi*, 18 Ariz. App. 212, 501 P.2d 53 (1972). In *Martin*, a City of Phoenix police officer was involved in an accident while on duty.

Martin sued the officer, who upon direction from his supervisor, immediately met with LaSota, the legal advisor to the City. LaSota told the officer that the City would probably defend the lawsuit, but if there were any problems, LaSota would contact the officer. Months later, the officer discovered that a default judgment had been entered against him. LaSota recalled placing the pleadings in interoffice mail, but never followed up with the City Attorney's office. *Id.* at 215, 501 P.2d at 56.

¶17 Finding excusable neglect, the court in *Martin* set aside the default judgment and the appellate court affirmed because even though LaSota was not the officer's attorney, he was the legal advisor to the City's police department and one of his duties was to receive and transmit copies of lawsuits involving police officers to the City law department. LaSota also told the officer that he (the officer) had done everything required of him, that LaSota would set in motion the City's procedures for defending lawsuits against its employees, and that LaSota would notify him immediately if the City would not defend him. *Id.*

¶18 Unlike *Martin,* the actions of Mr. Gutierrez are not sufficient to support a finding of excusable neglect. Mr. Gutierrez does not suggest that the individual he spoke with at GTA was responsible for or knowledgeable about the handling of

legal matters. Mr. Gutierrez did not contact LSI, the company that actually sold CP Home the title insurance; rather, he contacted the escrow company. Mr. Gutierrez did not provide the pleadings to GTA so that it would have the information needed to take action to defend CP Home. GTA did not indicate in any way that it would defend or otherwise handle the lawsuit on CP Home's behalf. The only assurance provided by the unidentified representative was that CP Home had title insurance - protection that has nothing to do with the defense of a lawsuit.

II. CP Home Is Not Entitled to Have Any Portion of the Default Judgment Set Aside as Void under Rule 54(d)

¶19 The interpretation of Rule 54(d) is a question of law and thus is subject to de novo review. *In re Reymundo F.*, 217 Ariz. 588, 590, ¶ 5, 177 P.3d 330, 332 (App. 2008) ("Issues concerning the proper interpretation of statutes and rules are questions of law which we review de novo.").

¶20 CP Home requests that paragraphs D, E, F, G, H and I of the default judgment foreclosing CP Home's interest in the Property be set aside as void under Rule 54(d) because the relief requested in those paragraphs exceeds the relief requested in the prayer for relief contained in the amended complaint. It argues that because Macquarie's prayer in Count Ten seeking Judicial Foreclosure does not mention CP Home and

the prayer in Count Eleven, which mentions CP Home, only seeks an order quieting title "upon foreclosure of its Deed of Trust,"[7] Macquarie is not entitled to foreclose CP Home's interest in the Property. We disagree.

¶21 The cases cited by CP Home are distinguishable. None involves a case where the prayer is technically deficient, but the relief granted is clearly requested in the allegations made in the complaint. Rather, in each case both the complaint and the prayer fail to ask for the relief granted in the default judgment. In contrast, here, CP Home concedes that the amended complaint, read as a whole, seeks to foreclose CP Home's interest in the Property.

¶22 In *Darnell v. Denton*, 137 Ariz. 204, 669 P.2d 981 (App. 1983), it appears that neither the allegations contained in the complaint nor the prayer for relief sought to recover a deficiency judgment from the debtors after the foreclosure of the real property. The attorney the Dentons consulted prior to allowing default judgment to be entered against them advised them that "no deficiency judgment could be obtained under the

[7] CP Home maintains that this phrase "implies that there will be a future foreclosure of the deed of trust against the defendants other than the Orbans." We do not agree. Nonetheless, for the purpose of argument we will assume that this phrase cannot be read as a demand for the immediate foreclosure of CP Home's interest in the Property.

complaint as worded." *Id.* at 205-206, 669 P.2d at 982-983. In *Villalba v. Villalba*, 131 Ariz. 556, 642 P.2d 901 (App. 1982), the wife petitioned for separation but at the default hearing the wife's attorney moved to amend the petition to one for dissolution. The court granted the dissolution, and the appellate court reversed. Clearly, the petition and the prayer requested separation, not dissolution. *Id.* at 558, 642 P.2d at 903. *See also United States v. Persaud*, 235 F.R.D. 696, 698 (M.D. Fla. 2005) (setting aside default judgment foreclosing property rights of wife where prayer sought the foreclosure of nominee's property rights but the amended complaint failed to allege that the wife was the husband's nominee); *S. Ariz. Sch. For Boys, Inc. v. Chery*, 119 Ariz. 277, 282-83, 580 P.2d 738, 743-44 (App. 1978) (reiterating the well-settled rule that "the relief granted on default will not exceed or substantially differ from that described in the complaint").

¶23 In the cases relied upon by CP Home, the court looks not only at the prayer for relief, but the allegations contained in the complaint. The key determination is whether the complaint and prayer for relief put the defendant on notice of the penalty he faces should he allow default to be entered against him. 10 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure*, § 2663 (West 2011);

see also Kline v. Kline, 221 Ariz. 564, 572, 212 P.3d 902, 910 (App. 2009) (holding that default judgment does not violate Rule 54(d) where the third-party complaint was well-pleaded pursuant to Ariz. R. Civ. P. 8(a) and 9(b) and contained adequate notice of the relief requested).

¶24 A case relied upon by CP Home, *School for Boys*, 119 Ariz. at 283, 580 P.2d at 744, makes it clear that the wording of the prayer is not the determinative factor. *See Columbia Val. Credit Exch., Inc. v. Lampson*, 12 Wash. App. 952, 533 P.2d 152 (1975). In *Lampson*, the appellate court voided the portion of a default judgment awarding $3,328.20 in damages, even though this is the exact amount pled in the prayer. The court limited the default judgment to $1,596.25, the amount alleged in the complaint because those allegations did not support the larger judgment set forth in the prayer. *Id.* at 955, 533 P.2d at 154.

¶25 The only case cited by CP Home that appears to assert as rigid a position as that advanced by CP Home's is *Silge v. Merz*, 510 F.3d 157 (2d Cir. 2007). Although, we are, of course, not bound by cases decided by the Second Circuit, *Silge* may be reconciled with the foregoing cases. The *Silge* court framed the issue before it, as follows: "this case calls upon us to decide whether the appellant, after securing a default judgment, should have been permitted to recover on a claim for prejudgment

interest that was not pleaded in the complaint or reflected in its demand clause." *Id.* at 158. From the opinion and the court's ruling, we can surmise that the plaintiff did not include any allegation in its complaint seeking pre-judgment interest.

¶26 Alternatively, other reasoning contained in *Silge* warrants a finding that the default judgment is not void under Rule 54(d). In *Silge*, the court explained that the purpose of a "boiler plate" generic request for "such other and further relief which this Court deems just and proper" is meant as a safeguard to remedy any defects in the prayer, such that it covers all bases as to the claims asserted in the complaint. *Id.* at 160. Thus, Macquarie's inclusion of similar boiler plate language remedied any technical defects in its prayers for relief because the amended complaint clearly sought to foreclose CP Home's interest in the Property.

¶27 We find that despite the minor deficiencies with the prayers for relief pointed out by CP Home in Count Ten and Count Eleven, there is no doubt that the sole reason Macquarie included CP Home as a defendant in this lawsuit was to foreclose any interest CP Home had in the Property as the current owner of record. The amended complaint provided adequate notice that CP Home risked judicial foreclosure of all of its right, title and

interest in the Property if it chose not to defend the lawsuit. No portion of the default judgment is void under Rule 54(d).

III. The Superior Court Did Not Err in Awarding Only Partial Fees to Macquarie

¶28 In its cross-appeal, Macquarie contends that the superior court erred in limiting its award of attorneys' fees to those fees incurred in connection with vacating the preliminary injunction. Macquarie argues that it is entitled to recover all its attorneys' fees under A.R.S. § 12-341.01(A). This is an issue of statutory interpretation that we review de novo. *Keystone Floor & More, LLC v. Ariz. Registrar of Contractors*, 223 Ariz. 27, 29, 219 P.3d 237, 239 (App. 2009).

¶29 Macquarie's claims against CP Home were for judicial foreclosure and quiet title. In order to recover attorneys' fees on the quiet title claim, Macquarie was required to tender a quitclaim deed and $5.00 to CP Home because A.R.S. § 12-1103(B) is the exclusive statute for recovery of attorneys' fees in a quiet title action. Thus, Macquarie cannot rely upon A.R.S. § 12-341.01(A), a general attorneys' fees statute for contract actions, as an independent basis for an award of such fees. *Lange v. Lotzer*, 151 Ariz. 260, 261, 727 P.2d 38, 39 (App. 1986).

¶30 Nor does A.R.S. § 12-341.01 have any application to Macquarie's claim to judicially foreclose CP Home's interest in the Property. *Pinetop Lakes Ass'n v. Hatch*, 135 Ariz. 196, 198, 659 P.2d 1341, 1343 (App. 1983), is distinguishable from this case because resolving the issue in *Pinetop* required the court to construe the contract. That is not the case here. The key issues to be resolved in Macquarie's claim for judicial foreclosure were purely statutory; specifically, judicial foreclosure was dependent on a determination of lien priority under Arizona law, and particularly whether the release and reconveyance of the Macquarie deed of trust was valid. If the Release was enforceable under Arizona statute as to CP Home, then Macquarie would have been precluded from judicially foreclosing on CP Home's interest in the Property. If it was not, then Macquarie would be entitled to judicially foreclose. The court in *Keystone* held that A.R.S. § 12-341.01 does not apply to purely statutory causes of action. *Keystone*, 223 Ariz. at 30, ¶ 11, 219 P.3d at 240.

¶31 To convince us that A.R.S. § 12-341.01 applies, Macquarie urges that CP Home contests the validity of Macquarie's deed of trust when it argued below and on appeal that: "CP Home[] was entitled to rely on the release as terminating Macquarie's interest in the Property." But this

does nothing more than highlight that the key dispute between the parties was whether the Release was valid, not whether the underlying deed of trust was valid. As such, Macquarie's claims against CP Home turned on statutory interpretation, not contract interpretation. The Macquarie deed of trust may be "a factual predicate" to its claims against CP Home, but it is "not the essential basis" of it. *See Keystone*, 223 Ariz. at 30, ¶ 11, 219 P.3d at 240. Section 12-341.01 is not applicable. We affirm the attorneys' fee award entered below.

IV. Attorneys' Fees on Appeal.

¶32 Macquarie prevailed on the appeal; CP Home prevailed on the cross-appeal. Both parties seek an award of fees under A.R.S. § 12-341.01. As set forth above, that statute has no application here. We decline to award fees to either party.

Conclusion

¶33 For the foregoing reasons, we hold that the superior court did not abuse its discretion in denying CP Home's motion to set aside the default judgment, that no portion of the default judgment is void under Rule 54(d), and that the superior court's award of partial attorneys' fees to Macquarie was proper. Therefore, we affirm.

/S/
_____
ANDREW W. GOULD, Judge

CONCURRING:

/S/
_____
MAURICE PORTLEY, Presiding Judge

/S/
_____
ANN A. SCOTT TIMMER, Judge