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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.34



DIVISION ONE
FILED: 06/05/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:) 1 CA-CV 11-0633
)
VICTOR LEDO,) DEPARTMENT E
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules
) of Civil Appellate
IRMA LEDO,) Procedure)
)
Respondent/Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC2011-000009

The Honorable Sam J. Myers, Judge

AFFIRMED

Victor Ledo Mesa
In propria persona

Palomino Law Firm, P.C. Phoenix
By Debra L. Palomino
Attorneys for Respondent/Appellee

J O H N S E N, Judge

¶1 Victor Ledo appeals the superior court's order granting Irma Ledo's motion to set aside the default decree of

dissolution and vacating the court's earlier Decree of Dissolution of Marriage by Default. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶12 Victor filed a petition for dissolution of his marriage to Irma on January 6, 2011.¹ Irma was served with the petition and summons the next day. By January 18 and over the next three months, however, Victor assured Irma he had "called his attorney to stop the divorce." During that time, Victor remained in the marital home and participated in family activities, such as attending church as a family. Victor and Irma participated in counseling and cooperated in creating draft property and child custody agreements. Until at least April 3, however, Victor told Irma and their children "that [the family] [was] going to be okay. And that this thing was all over with."

¶13 Meanwhile, after the time for Irma to answer the petition had expired, Victor applied for entry of default against Irma, and the court entered default on February 16. According to Irma, Victor prevented her from receiving notice of

¹ We view the evidence in the light most favorable to sustaining the superior court's findings. *In re Marriage of Priessman*, 228 Ariz. 336, 337, ¶ 2, 266 P.3d 362, 363 (App. 2011); *O'Hair v. O'Hair*, 109 Ariz. 236, 240, 508 P.2d 66, 70 (1973) ("[T]he duty of a reviewing court begins and ends with the inquiry whether the trial court had before it evidence which might reasonably support its action viewed in the light most favorable to sustaining the findings.").

the application for entry of default by withholding her mail. The court entered a decree of dissolution of marriage by default, including a property division and a child custody determination, on April 7.

¶14 Irma filed a motion to set aside the default judgment one week later, alleging Victor had deceived her by claiming to withdraw the petition for dissolution while secretly continuing with the proceedings. After briefing and an evidentiary hearing, the court granted Irma's motion to set aside and vacated the default decree of dissolution, finding "that [Victor] misrepresented the status of the proceedings, and that [Irma] reasonably relied on the misrepresentations, to her detriment."²

¶15 Victor timely appealed. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(2) (West 2012).³ See also *Sanders v. Cobble*, 154 Ariz. 474, 475, 744 P.2d 1, 2 (1987) (order setting aside default judgment appealable as special order made after judgment).

² Although not germane to this appeal, the court later clarified that its order vacating the default decree only set aside the terms of the decree, not the fact of dissolution.

³ Absent material revision after the date of the events at issue, we cite a statute's current version.

DISCUSSION

¶16 Victor argues the superior court lacked sufficient grounds to set aside the default dissolution decree. We review the court's order setting aside a default judgment for an abuse of discretion. *Richas v. Superior Court*, 133 Ariz. 512, 514, 652 P.2d 1035, 1037 (1982); *Birt v. Birt*, 208 Ariz. 546, 549, ¶ 9, 96 P.3d 544, 547 (App. 2004). See generally Ariz. R. Fam. Law P. 1 cmt. (family law rules subject to same interpretation as other rules with substantially same language), 85 cmt. (based on Ariz. R. Civ. P. 60). "The law favors resolution on the merits and therefore resolves all doubts in favor of the moving party." *Richas*, 133 Ariz. at 514, 652 P.2d at 1037 (citing *Union Oil Co. of Cal. v. Hudson Oil Co.*, 131 Ariz. 285, 288, 640 P.2d 847, 850 (1982)).

¶17 Arizona Rule of Family Law Procedure 44(C) authorizes the superior court to set aside a default dissolution judgment based on grounds set forth in Rule 85(C). Rule 85(C)(1)(c) in turn authorizes the court to grant relief from judgment obtained through "fraud, misrepresentation, or other misconduct of an adverse party." Ariz. R. Fam. Law P. 85(C)(1)(c); see also Ariz. R. Civ. P. 60(c)(3) (authorizing relief from judgment on grounds of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party"). To justify relief, the party seeking to set aside a

default judgment generally must show "1) that its failure to file a timely answer was excusable under one of the subdivisions of [Rule 85(C)(1)], 2) that it acted promptly in seeking relief and 3) that it had a substantial and meritorious defense to the action." *Blair v. Burgener*, 226 Ariz. 213, 216, ¶ 7, 245 P.3d 898, 901 (App. 2010) (quoting *Alvarez v. Superior Court*, 146 Ariz. 189, 190-91, 704 P.2d 830, 831-32 (App. 1985)). Victor concedes Irma promptly sought relief from the default decree, but argues she failed to show misrepresentation under the rule and a meritorious defense.

¶8 Relief from judgment under Rule 85(C)(1)(c) requires a showing that the adverse party's fraud, misrepresentation or other misconduct prevented the moving party from fully presenting its case. *Estate of Page v. Litzenburg*, 177 Ariz. 84, 93, 865 P.2d 128, 137 (App. 1993). Because the rule is remedial, misconduct meriting relief can come in any form rendering it inequitable to let the judgment stand. *Id.* (citation omitted). Here, Irma admitted she was served with the petition and initially knew of the dissolution proceedings. She further testified, however, that Victor thereafter told her on several occasions that he had "called his attorney to stop the divorce." Until at least April 3, she believed they were reconciling because Victor remained with the family in the marital home, attended church with her and the children and

repeatedly told her "that we were going to be okay. And that this thing was all over with." Irma also testified Victor prevented her from receiving notice of the application for default until after the court granted judgment by default. Although Victor claimed he never suggested he would withdraw the dissolution petition, Irma's testimony constituted "a proper showing of facts" on which the superior court could exercise its discretion. See *Richas*, 133 Ariz. at 514, 652 P.2d at 1037. Similarly, although Victor argues Irma's cooperation in creating a draft custody agreement and draft property settlement agreement shows she knew the dissolution proceedings were ongoing, these actions are consistent with an attempt to reach an amicable, out-of-court agreement in the event reconciliation efforts might fail. The court did not err by finding "[Victor] misrepresented the status of the proceedings, and that [Irma] [] relied on the misrepresentations."

¶19 Victor next argues Irma failed to establish a meritorious defense warranting relief from the default decree. Although the moving party must present something more than simple speculation, "the showing of a meritorious defense need not be strong" because it "is not intended to be a substitute for a trial of the facts." *Richas*, 133 Ariz. at 517, 652 P.2d at 1040. Here, Irma presented a draft property settlement agreement, signed by Victor, under which Irma would receive

"full ownership" of the "house on 80th Street" and Victor would receive the marital residence. Under the default dissolution decree, however, Victor was awarded title to both houses.⁴ In fact, under the draft agreement, Irma was to receive \$12,000 cash, whereas she received only an \$8,000 "equalization payment" under the default decree. Because the default decree is less favorable to Irma than the draft agreement, the court did not err by concluding Victor's misrepresentations resulted in a "detriment" to Irma.

¶10 Finally, Victor argues that because Irma received actual notice of the petition and failed to answer, "her culpable conduct prevents her from obtaining relief by way of a motion to vacate." But Rule 85(C)(3), in conjunction with Rule 44(C), addresses that precise situation. Irma conceded actual notice, but the court found Irma's failure to respond was excused under the rule by Victor's misrepresentations. As described above, the court did not err in so finding.

CONCLUSION

¶11 For the foregoing reasons, we affirm the court's order. Irma requests attorney's fees on appeal under A.R.S. §

⁴ The default decree assigned to Irma the outstanding mortgage debt on the 80th Street house even though it awarded title to Victor. Victor characterized this as a "typographical error," and, because Victor conceded he had and would assume the debt, we need not consider it as an additional detriment to Irma under the default decree at this time.

25-324 (West 2012). We deny her request without prejudice. She may seek her fees incurred in this appeal pursuant to § 25-324(A) at the conclusion of the dissolution action. Because she has prevailed on appeal, we grant her costs on appeal, contingent on compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
PHILIP HALL, Judge