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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MM&A PRODUCTIONS, LLC, an Arizona limited liability company, Plaintiff/Appellant, v. YAVAPAI-APACHE NATION, a federally recognized Indian Tribe; YAVAPAI-APACHE NATION'S CLIFF CASTLE CASINO, a business enterprise of the Yavapai-Apache Nation; TRIBAL GAMING BOARD; and CLIFF CASTLE CASINO BOARD OF DIRECTORS, Defendants/Appellees.	2 CA-CV 2012-0040 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20085949

Honorable Jeffrey T. Bergin, Judge

VACATED AND REMANDED

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B R A M M E R, Judge.*

¶1 MM&A Productions, L.L.C. (MM&A) appeals the trial court's order denying its motion made pursuant to Rule 60(c), Ariz. R. Civ. P. It contends the court should have granted its motion to allow a delayed appeal because it had demonstrated the diligence and extraordinary circumstances necessary to grant relief. We vacate the court's order denying MM&A's motion and remand.

Factual and Procedural Background

¶2 MM&A brought an action against the Yavapai-Apache Nation's Cliff Castle Casino (the Tribe) alleging breach of contract, unjust enrichment, intentional interference with prospective business advantage, and fraud. On December 19, 2008, the trial court entered a signed order granting the Tribe's motion to dismiss for lack of subject matter jurisdiction. That same day the clerk erroneously file stamped an unsigned order granting the motion. On December 26, 2008, the court signed an identical order of dismissal, mistakenly believing it previously had failed to sign the order. On January 14, 2009, after learning it inadvertently had signed a second order of dismissal, the court, without mentioning specifically the December 19 order, entered an order rescinding the

December 26 order. Thereby, the time within which to appeal the December 19 order would expire on January 20, or six days hence.

¶3 MM&A's counsel's firm had received in due course the trial court's original December 19 signed order, but his office failed to docket it to establish the time within which to appeal it if desired. The office then received the December 26 signed order, again in due course, and docketed it to reflect an appeal deadline of January 26. By January 16, counsel also had received and read the January 14 order rescinding the December 26 order, but failed to examine it sufficiently to discover its effect until January 22—two days after the time for appealing the December 19 order had expired. That same day, MM&A filed a motion to reinstate the court's December 26 order pursuant to Rule 60(c). The trial court denied the motion, and this appeal followed.

Discussion

¶4 MM&A argues the trial court erred in denying relief under Rule 60(c). It asserts an abuse of discretion standard "does not apply here." We disagree. A court's order granting or denying relief under Rule 60(c) is reviewed for an abuse of discretion. *City of Phx. v. Geyler*, 144 Ariz. 323, 328, 697 P.2d 1073, 1078 (1985); *see also Maher v. Urman*, 211 Ariz. 543, ¶ 21, 124 P.3d 770, 777 (App. 2005). But the court abuses its discretion if exercised "in clear violation of the principles announced in *Park* [*v. Strick*]." *Lennar Corp. v. Auto-Owners Ins. Co.*, 214 Ariz. 255, ¶ 51, 151 P.3d 538, 551 (App. 2007).

¶5 Rule 60(c) provides that "[o]n motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment." The Rule can be used to vacate and reenter a judgment so as to permit a delayed appeal when the "aggrieved party establishes lack of knowledge that judgment has been entered, and asserts additional reasons that are so extraordinary as to justify relief." *Park v. Strick*, 137 Ariz. 100, 104, 669 P.2d 78, 82 (1983). A delayed appeal may be allowed under Rule 60(c)(1) or (6) "so long as the proper additional standards for delayed appeal are applied." *Geyler*, 144 Ariz. at 328, 697 P.2d at 1078. In deciding whether to grant relief the court must consider: "'(1) absence of Rule [58(e), Ariz. R. Civ. P.,] notice; (2) lack of prejudice to respondent; (3) prompt filing of a motion after actual notice; and (4) due diligence, or reason for lack thereof, by counsel in attempting to be informed of the date of the decision.'" *Id*., *quoting Rodgers v. Watt*, 722 F.2d 456, 460 (9th Cir. 1983). In addition to considering these four factors, relief can be granted only upon a showing of "extraordinary," "unique," or "compelling circumstances." *Id.*

¶6 The trial court acknowledged in its minute entry ruling denying MM&A's motion that it perhaps had contributed to "any uncertainty that might have resulted in" counsel's confusion, but concluded nonetheless it was "unable to grant MM&A[] relief" because, inter alia, MM&A had not demonstrated "extraordinary," "unique," or "compelling circumstances." But it is highly unusual—indeed, this instance is the first

presented to this court—for a court to follow an erroneously entered unsigned order with a signed order to the same effect, then enter an identical second signed order a week later, but then further confuse the situation by entering later an order rescinding the second signed order—ostensibly one of two regarding the Tribe's motion to dismiss the court stated it had signed inadvertently—without specifying the date of the other. Indeed, when the court entered the rescission order, counsel did not know its import given his understanding of the state of the matter.

¶7 Counsel's reliance for computing the time for appeal on the trial court's entry of a signed order on December 26, believing it to be the only extant appealable order, is the type of "compelling circumstance" that can justify relief. *Cf. J.C. Penney v. Lane*, 197 Ariz. 113, ¶ 21, 3 P.3d 1033, 1037 (App. 1999); *see also Park*, 137 Ariz. at 104-05, 669 P.2d at 82-83 (noting extraordinary circumstances justifying relief include where absence of notice due in part to act of trial court and mistake of court clerk). Therefore, we conclude as a matter of law the circumstances here are sufficiently "unique" as to warrant relief when the other *Geyler* factors[1] are satisfied and the court erred in concluding otherwise.

¶8 And although the trial court also found counsel had not exercised due diligence, we are troubled its determination may have depended on its finding that

[1]Although it mentions the *Geyler* factors, it is unclear the extent to which the trial court analyzed each factor in light of its conclusion MM&A had not demonstrated extraordinary circumstances.

"MM&A's respective counsel had actual notice of the December 19 Order five days after its entry by the clerk." This finding seems to be unsupported by the record. *See Sholes v. Fernando*, 228 Ariz. 455, ¶ 6, 268 P.3d 1112, 1115 (App. 2011) (we defer to court's factual findings unless not supported by substantial evidence). Although the December 19 order had been received at counsel's firm on December 24, counsel averred that "it was processed by the intake clerk at the office, but for some reason was not placed in the docket system. It didn't go to the docket clerk, it went to the secondary level of distribution in the office." Further, counsel "d[id] not recall seeing that minute entry," and "believed that if [he] did, [he] assumed it was just the same thing [he] had received a couple of days before." And instances of failure to follow firm procedures resulting in lack of notice to counsel are the type of errors that can be excusable. *See Lennar Corp.*, 214 Ariz. 255, ¶ 54, 151 P.3d at 552; *see also Geyler*, 144 Ariz. at 332, 697 P.2d at 1082 (clerical and secretarial errors unavoidable and often excusable).

¶9 From the record before us we cannot determine the extent to which the trial court's erroneous legal conclusion or any factual error influenced its ultimate denial of Rule 60(c) relief. We therefore remand for the court to redetermine MM&A's motion consistent with this decision. *See Geyler*, 144 Ariz. at 328-29, 697 P.2d at 1078-79 (court's discretion does not permit it to misapply legal principles or make decisions unsupported by facts).

Disposition

¶10 For the foregoing reasons, we vacate the trial court's order denying MM&A's motion made pursuant to Rule 60(c) and remand for redetermination.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge

on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.