IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF:

ENRICO BAFFERT LAOS,
Petitioner/Appellee,

and

BETH ANNE LAOS,
Respondent/Appellant.

No. 2 CA-CV 2015-0085
Filed February 4, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).

Appeal from the Superior Court in Pima County
No. D20140458
The Honorable Dean Christoffel, Judge Pro Tempore

AFFIRMED

COUNSEL

Solyn & Lieberman, PLLC, Tucson
By Melissa Solyn and Scott Lieberman
Counsel for Petitioner/Appellee

Centuori & Alcoverde, PC, Tucson
By René S. Alcoverde, Jr.
Counsel for Respondent/Appellant

MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

H O W A R D, Presiding Judge:

¶1 Beth Laos appeals the trial court's denial of her motion for a new trial and also contends the court erred in denying her motion to set aside a default order, both of which were filed in connection with the dissolution of her marriage to Enrico Laos. Beth argues that, although she failed to file a pretrial statement and was absent from a number of court proceedings, the court erred by limiting her participation at the default hearing. She argues that she is therefore entitled to have the default order set aside, and to be provided with a new trial. Because Beth has waived some claims and we lack jurisdiction of another, we affirm the decision of the court.

Factual and Procedural Background

¶2 In February 2014, Enrico petitioned for dissolution of his marriage to Beth. At the mandatory settlement conference in early December, Beth did not appear. At the final pretrial conference one week later, Beth again did not appear and the trial court noted that it had not been contacted regarding her absence at either the settlement or pretrial conferences. Further, Beth did not file a pretrial statement. The court "treat[ed Beth]'s refusal to participate in the court process as a default" and then struck her answer and response and ordered that she "not be permitted to present any evidence or exhibits" at the default hearing, which the court scheduled in place of the trial.

¶3 Beth appeared at the January default hearing where the trial court informed her that she had been defaulted. Although Beth was present at the hearing, the court conducted the proceeding as a default hearing and substantially accepted Enrico's proposed decree with little participation from Beth. The court issued the decree of

dissolution in March, and as a result of Beth's default, the court was forced to accept Enrico's contention that Beth was not entitled to any form of spousal maintenance.

¶4 Later that March, Beth filed a motion for new trial. In that motion, Beth argued that she should be provided a second trial because, as relevant here, she was "unable to participate in the [settlement or pretrial conferences] due to the exacerbation of [her] disease process." Enrico opposed the motion, arguing that Beth had failed to state a cognizable claim under Rule 83(A), Ariz. R. Fam. Law P. Nine days later, the trial court denied Beth's motion for a new trial agreeing that she failed to state a claim under Rule 83, and moreover, she did not at any time provide "proof of a total inability to communicate with the Court in her Motion" and her neglect was therefore inexcusable. After the court denied her motion, Beth filed notice she had obtained representation by an attorney and subsequently filed a Reply in Support of her motion for a new trial.

¶5 In that reply, Beth argued first that the trial court erred by denying her motion when it did, as she still had time to file her reply. She next argued that attorney illness can "support a claim for excusable neglect" and requested relief under Rule 83(A)(1) which provides relief when a party's rights are materially affected by an "irregularity in the proceedings of the court . . . or abuse of discretion, whereby the moving party was deprived of a fair trial." The court did not immediately issue any order in response to the Reply, and Beth filed a motion for reconsideration on April 28.

¶6 On May 8, before the trial court had ruled on her motion for reconsideration, Beth filed a notice of appeal which listed only her motion for new trial as the subject of that appeal. On May 21, Enrico filed an opposition to the motion for reconsideration, and on June 4 both parties stipulated to revest jurisdiction in the trial court so it could rule on the motion for reconsideration and any motion to set aside. On June 8, while this court was in the process of ruling on the stipulation to revest jurisdiction, Beth filed a motion to set aside the entry of default in the trial court, arguing that Rule 85(C)(1)(a), Ariz. R. Fam. Law P., allowed that court to set aside the entry of default on the basis of excusable neglect. On August 10, the trial court again denied the motion for new trial and denied both the

motion for reconsideration and the motion to set aside. Pursuant to Beth's August 12 request, this court reinstated her appeal.

Motion for New Trial

¶7 Beth argues she is entitled to a new trial because the trial court erred when it refused to allow her to participate at the default hearing. Beth asserts that under Rule 44(B)(2), Ariz. R. Fam. Law P., a defaulted party may participate once a motion is correctly made under that rule. However, Beth did not raise this argument at the default hearing or in her motion for a new trial. Rather, she raised it for the first time in her reply in support of that motion. This court will not consider arguments raised for the first time in a reply. *Westin Tucson Hotel Co. v. State Dep't of Revenue*, 188 Ariz. 360, 364, 936 P.2d 183, 187 (App. 1997) ("a claim raised for the first time in a reply is waived"). And this court will not consider arguments raised for the first time in a motion for reconsideration. *Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, ¶ 15, 159 P.3d 547, 550 (App. 2006). Thus, Beth's argument concerning Rule 44(B)(2) is waived on appeal.

¶8 In her reply brief, Beth argues her claim is not waived. She first contends that she raised her argument in her motion for a new trial when she "identified the grounds [for a new trial] in her layperson words" specifically "that she was sick and complained that she was not able to participate in the pretrial or trial." But Beth first waived any claim based on Rule 44(B)(2) by failing to raise this issue, or make a motion based on it, at the default hearing. She next waived it by failing to include it in her motion for new trial. This court will not construe Beth's statements that she was unable to participate in the pretrial proceedings due to her illness as a motion or an argument that the trial court did not comply with Rule 44,[1]

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[1]Rule 44(A)(5) provides: "The provisions of this rule requiring notice prior to the entry of default shall apply only to a default sought and entered pursuant to this rule." Rule 76(D), Ariz. R. Fam. Law P., which provides for pre-trial management conferences and pre-trial statements, allows the court to sanction a disobedient party by striking pleadings and refusing to allow that party to defend claims.

thus justifying a new trial under Rule 83(A)(1). Pro se litigants are held to the same standard as attorneys. *Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, ¶ 16, 17 P.3d 790, 793 (App. 2000).

¶9 Moreover, Beth never has overcome the problem the trial court identified while denying her motion for new trial: "Beth Anne provided no proof of a total inability to communicate with the Court in her Motion and in the absence of such proof[,] the Court cannot find that the complete failure to communicate with the Court before the Final Pretrial Conference is excusable." Even her subsequent motion to set aside entry of default fails to provide adequate medical evidence. In the absence of any evidence that she was unable to communicate with the court or file a pretrial statement, she has failed to show the court abused its discretion by precluding her from participating at the hearing or by denying her post-hearing motion. *See* Ariz. R. Fam. Law P. 83(A)(1) (new trial may be granted based on abuse of discretion).

¶10 Beth also argues that this court may "consider the entire record on appeal, which includes all of [her] pleadings now before this Court as part of the revestment process." Beth asserts that our review in this case is de novo, and for that reason, this court should consider arguments raised for the first time in either the reply brief or the motion for reconsideration. But the standard of review and the law governing waiver are separate rules motivated by different purposes. We review issues of law de novo. *Dressler v. Morrison*, 212 Ariz. 279, ¶ 11, 130 P.3d 978, 980 (2006). The purpose of the waiver rule is to afford the trial court and the opposing party "the opportunity to correct any asserted defects," whether legal or factual. *Trantor v. Fredrickson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994). This court is not required to review waived arguments even when the standard of review is de novo. S*ee, e.g.*, *Sholes v. Fernando*, 228 Ariz. 455, ¶¶ 6, 16, 268 P.3d 1112, 1115, 1118 (App. 2011) (finding issue waived when review of legal conclusions was de novo); *Griffith Energy, L.L.C. v. Ariz. Dep't of Revenue*, 210 Ariz. 132, ¶¶ 15, 22, 108 P.3d 282, 285, 287 (App. 2005) (issue waived in de novo review of grant of summary judgment); *Acuna v. Kroack*, 212 Ariz. 104, ¶¶ 23, 27, 128 P.3d 221, 227-28 (App. 2006) (in de novo review of judgment

as a matter of law, issues not raised below waived for appellate review).

¶11 Finally, Beth contends that her arguments are properly before this court because Enrico opened the door for these arguments in his Opposition to Motion for New Trial. But Beth does not cite any authority or develop this argument further, and thus waives it. Ariz. R. Civ. App. P. 13(a)(7); *Polanco v. Industrial Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007). Even if this argument was properly before this court, we note that Enrico did not raise the issue of whether the trial court properly applied Rule 44 in his memorandum. Thus, Beth could not include this argument in her reply in support. Ariz. R. Civ. P. 7.1(a) (reply must be "directed only to matters raised in the answering memorandum"). In conjunction with this argument, Beth reasserts that she brought her argument of excusable neglect prior to the reply brief. But as explained above, we will not construe her statements regarding illness as the same argument currently raised on appeal.

Motion to Set Aside

¶12 Beth also argues the trial court erred by denying her motion to set aside the default order pursuant to Rule 85(c)(1)(a). Rule 8(c)(3), Ariz. R. Civ. App. P., provides that a notice of appeal must "[d]esignate the judgment or portion of the judgment from which the party is appealing." This court only has jurisdiction to review matters contained in the notice of appeal. *Lee v. Lee*, 133 Ariz. 118, 124, 649 P.2d 997, 1003 (App. 1982). "In the absence of a timely notice of appeal following entry of the order sought to be appealed, we are without jurisdiction to determine the propriety of the order sought to be appealed." *Id.*

¶13 Here, Beth's notice of appeal solely designates "In chambers order: Respondent's motion for new trial filed with the Court on April 23, 2015." The notice of appeal was filed on May 8, 2015. Beth's motion to set aside was filed on June 8, and denied on August 10, 2015. Beth did not file another notice of appeal. Thus, the motion to set aside was not designated in a notice of appeal, no notice of appeal was filed after the ruling, and this court does not have jurisdiction to review it. *Lee*, 133 Ariz. at 124, 649 P.2d at 1003.

Disposition

¶14 We affirm the judgment of the trial court. We grant Enrico's request for reasonable attorney fees, or some portion thereof, pursuant to A.R.S. § 25-324, based on the reasonableness of the positions of the parties, upon compliance with Rule 21, Ariz. R. Civ. App. P.