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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re ONE RESIDENCE LOCATED AT 3225 W. SWEETWATER DR., (PC), IRR NLY PTN OF W2 W2 NW4 NE4 3.20 AC SEC 29-13-13, RECORDED IN THE OFFICE OF THE PIMA COUNTY RECORDER IN DOCKET 12183 AT PAGE 5498, INCLUDING ALL BUILDINGS, FIXTURES, STRUCTURES, AND APPURTENANCES THERETO, and $835 in U.S. CURRENCY.	2 CA-CV 2010-0161 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20098961

Honorable Paul E. Tang, Judge

AFFIRMED

Barbara LaWall, Pima County Attorney
By Kevin S. Krejci
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Herbert Beigel & Associates
By Herbert Beigel
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E C K E R S T R O M, Judge.

¶1 In this civil in rem forfeiture matter, the appellant, Richard Palmer, contends the trial court erred in granting the state's application for an order of forfeiture and denying his motion to vacate the order. We affirm for the reasons set forth below.

Factual and Procedural Background

¶2 In November 2009, the state filed a notice of pending forfeiture against a residence that had been used for storing and selling unlawful substances, as well as several hundred dollars found there during the execution of a search warrant.[1] The owner of the subject property, Richard Palmer, filed a verified claim asserting his interest in the property and claiming its exemption from forfeiture. *See* A.R.S. § 13-4311(D). The state then served a complaint on January 19, 2010, and Palmer filed an answer on February 9, 2010. He did not sign and verify the answer as required by § 13-4311(G).

¶3 In early March, the state filed a notice and application for an order of forfeiture on the ground that Palmer's unverified document was not a "proper Answer" required by § 13-4311(G). Palmer filed a signed "affidavit of verification" several days later in which he avowed he had "reviewed the Answer and state[d] under oath that the statements in the affidavit [sic] are true and correct."

¶4 Palmer also filed a separate objection to the state's application. In the objection, he maintained that a sworn verification "inadvertently" had not been filed with his answer, and he argued this amounted to a "technical inadequac[y]" that had been corrected by his affidavit. With the answer thus filed, he concluded there was no basis

[1]Other items seized and forfeited are not relevant to this appeal.

for the state's application. The state subsequently moved to strike Palmer's affidavit on the ground it did not comply with the statute or the rules of civil procedure.

¶5 The trial court held a hearing on the state's application and motion to strike on April 5. There, Palmer claimed for the first time that he had been "incapacitated" after a vehicular accident when the answer was due, which had prevented him from properly signing and verifying it. He also repeatedly asserted he had filed an amended answer or a request to amend his answer. The court observed correctly that no such request or amendment had been made. After the court had taken the matters under advisement and adjourned the hearing, Palmer orally requested that the court either characterize his objection as a request to amend his answer or permit a formal amendment to be made. The court declined to rule on the oral request.

¶6 On April 6, the trial court issued its ruling granting the state's application for an order of forfeiture and the motion to strike the affidavit. The same day, Palmer filed a written motion for leave to amend his answer. The court declined to rule on the motion on the ground that its ruling had rendered the issue moot.

¶7 Palmer then filed a motion under Rule 60, Ariz. R. Civ. P., seeking relief from the trial court's ruling on the state's application. The court denied the motion after a hearing. In its ruling, the court found, *inter alia*, that Palmer had not exercised reasonable diligence or established a ground under either Rule 60(c) or Rule 55, Ariz. R. Civ. P., excusing his failure to timely file a proper answer. Palmer filed this appeal after a corrected judgment of forfeiture was entered.

Discussion

¶8 Much as he did below, Palmer focuses his appellate arguments on his right to amend his answer. Specifically, he claims "the trial court erred in not permitting [him] to file a verification to his previously filed answer," and he argues his failure to comply with A.R.S. § 13-4311(G) "does not absolutely require fo[r]feiture."

¶9 Even assuming Palmer had the right to cure his errors in the trial court, however, he would still be required to do so in accordance with the rules of civil procedure. *See* § 13-4311(B) ("Judicial in rem forfeiture proceedings are in the nature of an action in rem and are governed by the Arizona rules of civil procedure unless a different procedure is provided by law."). In large part, as we will discuss below, Palmer did not comply with the rules here. And, to the extent his Rule 60 motion properly sought relief from the court's order granting the state's application, he has not established that the court abused its discretion in denying the requested relief. *See In re 2001 GMC Denali*, 210 Ariz. 466, ¶ 14, 113 P.3d 112, 115 (App. 2005). Thus, we affirm the judgment because the answer was untimely, unverified, and unexcused.

Timeliness

¶10 We note, first, that Palmer's answer was not filed in a timely fashion. The state filed its complaint on January 15, 2010, and served Palmer with the complaint by certified mail to his attorney, as Palmer previously had requested. *See* § 13-4311(A), (G); *see also* A.R.S. § 13-4307(1)(b). Attached to the state's March 3 notice is a certified mail receipt showing the complaint was delivered on January 19, 2010.

¶11 Section 13-4311(G) provides that an answer must be filed "[w]ithin twenty days after service of the complaint." When calculating this period of time, "the day of the act . . . [or] event . . . from which the designated period of time begins to run [is] not . . . included," whereas the last day of the period is included. Ariz. R. Civ. P. 6(a). The twenty-day deadline for filing the answer, therefore, was Monday, February 8. Palmer filed his answer a day later, on February 9. Thus, although Palmer maintained both below and on appeal that his answer was "otherwise timely filed" but for its lack of verification—a point the state concedes—he is incorrect.

¶12 The untimeliness of the answer, standing alone, allowed the trial court to grant the state's application and order the property forfeited. *See* A.R.S. §§ 13-4311(G), 13-4314(A). Consequently, it provides this court with a sufficient ground for affirming the judgment. *See Forst v. Rodriguez*, 212 Ariz. 263, ¶ 9, 130 P.3d 538, 540 (App. 2006) ("We may affirm the trial court's ruling if it is correct for any reason apparent in the record."); *see also Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 193, 836 P.2d 404, 406 (App. 1992) ("[W]e are obliged to affirm the trial court's ruling if the result was legally correct for any reason.").[2]

¶13 The untimeliness of the answer renders moot Palmer's appellate argument that the trial court erred in not entertaining or granting his motion to amend. Under the rules of procedure, a party wishing to act after a deadline must move for an enlargement

[2]Although the rules of civil procedure allow an answer to be filed within the ten-day grace period specified in Rule 55(a) without a showing of good cause, *see Osterkamp*, 172 Ariz. at 192, 836 P.2d at 405, our forfeiture statutes specify different procedures in the event of a default. *See, e.g.*, § 13-4311(G).

of time and must demonstrate that the failure to act timely "was the result of excusable neglect." Ariz. R. Civ. P. 6(b)(2). Amendment pursuant to Rule 15(a), Ariz. R. Civ. P., is not the proper procedure.

¶14 Here, Palmer did not move for an extension of time to file his answer under Rule 6(b). Neither his answer nor his affidavit acknowledged the untimeliness of his filing. His objection, which stated that his answer had been timely and that his failure to file a timely verification had been "inadvertent," did not offer any details about the circumstances of his filing or any explanation why his failure should be excused. Thus, assuming an extension of time was permitted, the trial court did not abuse the discretion afforded by Rule 6(b) to the extent the court implicitly found Palmer had not established excusable neglect.

Verification

¶15 We further observe that Palmer's affidavit was legally insufficient to verify the answer, as required by § 13-4311(G).[3] As noted above, Palmer swore under oath that the "affidavit" was true rather than the answer. Although Palmer's later filings characterized his affidavit as a "Verification to the Answer," the trial court reasonably could have viewed the contents of the affidavit as deliberate averments and, consequently, refused to attribute to Palmer a proposition that he had not actually stated therein. Accordingly, even if the court should have permitted Palmer under the rules to

[3]The provision provides, in relevant part: "The answer shall be signed by the owner or interest holder under penalty of perjury, shall comply with the Arizona rules of civil procedure relating to answers and shall comply with all of the requirements for claims." § 13-4311(G).

belatedly amend his answer to include a statement of verification, he offered a legally deficient document to do so. We find no basis to disturb the court's ruling striking Palmer's affidavit. *See Guirey, Srnka & Arnold, Architects v. City of Phoenix*, 9 Ariz. App. 70, 71, 449 P.2d 306, 307 (1969) (appellant carries burden to show trial court erred).

¶16 Moreover, Palmer did not move to amend his petition properly pursuant to Rule 15(a), Ariz. R. Civ. P. The rule requires that any motion for leave to amend be made in writing and contain a copy of the proposed amended pleading attached as an exhibit. Ariz. R. Civ. P. 15(a)(2). Palmer filed his affidavit without making reference to Rule 15, and he initially moved to amend his answer orally rather than in writing. After the April hearing, he failed to attach a copy of the proposed amended pleading to his motion. In the trial court's ruling, it cited Palmer's failure to follow the requirements of Rule 15 among the grounds for denying the motion to amend and striking the affidavit. We again find no basis to disturb the court's ruling. *See Hall v. Romero*, 141 Ariz. 120, 124, 685 P.2d 757, 761 (App. 1984) (ruling on motion for leave to amend reviewed for abuse of discretion).

Rule 60 Motion

¶17 Palmer next argues the trial court erred in denying his motion under Rule 60, Ariz. R. Civ. P. He contends the court should have vacated its order granting the state's application for an order of forfeiture because "it is undisputed that [Palmer] was hospitalized and unavailable to his attorney on the date the verified answer was due." On April 13, along with his motion, Palmer filed an affidavit avowing he had been in a

motorcycle accident on February 6, hospitalized for several days, and discharged on February 10. Palmer claimed his attorney had "tried to reach [him] daily by telephone from February 6, 2010 to sign a Verified Answer," but because the answer was due, his attorney had filed an unverified answer instead.

¶18 The trial court treated Palmer's motion as having been properly presented under either Rule 55(c), Ariz. R. Civ. P., or Rule 60(c) but denied the request for relief. In its ruling, the court found Palmer's "account does not square with either his or his counsel's failure to notify the Court or the State as to [Palmer]'s unavailability." The court observed that Palmer had "fail[ed] to explain why, given the time frames for responding as noted in the forfeiture statute, his counsel failed to locate him . . . anytime after discharge up to March 8, 2010, when the [affidavit] was finally signed." Thus, the court concluded, "the record fail[ed] to support [Palmer]'s contentions of the exercise of reasonable diligence."

¶19 Rule 60(c) requires the moving party to demonstrate a legally sufficient ground entitling it to relief "from a final judgment, order or proceeding." *See Cockerham v. Zikratch*, 127 Ariz. 230, 233, 619 P.2d 739, 742 (1980). And, Rule 55(c) affords relief from either an entry or judgment of default when "good cause" is shown pursuant to Rule 60(c). *See DeHoney v. Hernandez*, 122 Ariz. 367, 371, 595 P.2d 159, 163 (1979). Grounds for relief include "mistake, inadvertence, surprise or excusable neglect." Ariz. R. Civ. P. 60(c)(1). "A defendant's neglect or inadvertence is compared to that of a reasonably prudent person under the circumstances." *Master Fin., Inc. v. Woodburn*, 208 Ariz. 70, ¶ 18, 90 P.3d 1236, 1240 (App. 2004). Neither ignorance of relevant

procedures nor mere carelessness is excused under the rule. *See Daou v. Harris*, 139 Ariz. 353, 359, 678 P.2d 934, 940 (1984). Because a trial court is better situated to evaluate claims under Rule 60(c)(1), we review a ruling under this provision for a clear abuse of discretion. *Id.*; *see also Michener v. Standard Accident Ins. Co.*, 46 Ariz. 66, 70-71, 47 P.2d 438, 440 (1935).

¶20 Here, Palmer's representations and omissions to the trial court supported the court's conclusion that he was neither being candid with the court, as its ruling implied, nor diligent in discharging his duties under applicable law and rules. We therefore find no abuse of discretion in the court's ruling.

¶21 Nor did the trial court err in denying Palmer's motion under Rule 60(c)(6), which allows relief for "any other reason." This provision is "a residual clause which reserves to the court power to do justice in a particular case when relief is not available under other parts" of the rule. *East v. Hedges*, 125 Ariz. 188, 189, 608 P.2d 327, 328 (App. 1980). Because relief was potentially available under Rule 60(c)(1), it was not available under Rule 60(c)(6). *See Edsall v. Superior Court*, 143 Ariz. 240, 243, 693 P.2d 895, 898 (1984); *Birt v. Birt*, 208 Ariz. 546, ¶ 22, 96 P.3d 544, 549 (App. 2004).

Appellate Process

¶22 Last, we turn to a procedural matter the state raises in its answering brief. The state acknowledges this court has jurisdiction over the present appeal. Nonetheless, the state maintains Palmer failed to serve the Arizona attorney general as required by

Rule 15(b), Ariz. R. Civ. App. P.,[4] as well as A.R.S. § 13-2314(M),[5] and it asks this court "to direct [Palmer] to fulfill these obligations."

¶23 To the extent Palmer technically failed to comply with Rule 15(b) by serving copies of his opening brief exclusively upon the deputy county attorney representing the state in the present forfeiture action and not upon the attorney general, we decline to order Palmer to comply belatedly with the formal requirements of this rule because his appeal has since been comprehensively briefed and become ripe for disposition. *See Pompa v. Superior Court*, 187 Ariz. 531, 535, 931 P.2d 431, 435 (App. 1997) (noting appellate court's discretionary power to ensure compliance with rules). Assuming without deciding that § 13-2314(M) places further requirements upon an

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[4]The rule provides:

> Two copies of each brief shall be served on each party separately represented and proof of service shall be filed with the clerk of the appellate court. When the state, a county, or a state officer, is the appellee, appellant shall serve upon the county attorney of the county wherein the judgment was rendered and upon the attorney general, 2 copies of his brief.

Ariz. R. Civ. App. P. 15(b).

[5]The statute provides, in relevant part, that the attorney general may appear as amicus curiae in any proceeding involving title 13, chapter 39, which relates to forfeitures. It further provides:

> A party who files a notice of appeal from a civil action brought under . . . chapter 39 of [title 13] shall serve the notice and one copy of the appellant's brief on the attorney general at the time the person files the appellant's brief with the court. This requirement is jurisdictional.

§ 13-2314(M).

appellant, we find its application moot given our disposition of the issues Palmer has raised on appeal.[6]

¶24 We additionally observe that these issues have not been presented properly to this court. The state's request is essentially a motion for a procedural order, which must be made pursuant to Rule 6(b), Ariz. R. Civ. App. P. It may not be simply included in an answering brief.

Disposition

¶25 For the foregoing reasons, we affirm the trial court's judgment.

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

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

[6]This court has held § 13-2314(M) unconstitutional to the extent it conflicts with the procedural rules our supreme court created to govern "the practice and methods for processing" appeals. *Pompa*, 187 Ariz. at 534-35, 931 P.2d at 434-35.