FILED BY CLERK
MAR 27 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

STANLEY RIOS, Plaintiff/Appellee, v. RICHARD C. BRUMGARD and KAY E. BRUMGARD, husband and wife, Defendants/Appellants.	2 CA-CV 2008-0124 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200601487

Honorable Stephen F. McCarville, Judge

AFFIRMED

Barassi, Curl & Abraham, PLC
By David L. Curl — Tucson
Attorneys for Plaintiff/Appellee

Richard C. Brumgard — Casa Grande
In Propria Persona

E S P I N O S A, Judge.

¶1 Appellants Richard and Kay Brumgard (the Brumgards) seek review of a default judgment awarding approximately $11,000 in damages and attorney fees to appellee Stanley Rios in his false-lien action against them. The Brumgards ask this court to vacate the default judgment, arguing the trial court erred in allowing Rios to file an amended complaint, lacked jurisdiction over the Brumgards due to improper service of process, erred in refusing to set aside the default judgment, and improperly awarded excessive attorney fees. We affirm.

Factual and Procedural History

¶2 In September 2006, Rios filed an application to confirm an arbitration award against the Brumgards' son, Todd,[1] stemming from a construction contract. Although not named as a party, Richard Brumgard filed an objection to the application and a response to Rios's motion for judgment on the pleadings. Richard contended he was "the [r]eal [p]arty in interest" and that, "[w]hile Todd . . . oversaw and handled the project, Richard C. Brumgard was the responsible party. Richard C. Brumgard is a proprietership and Todd is his eyes and ears on the project." Thereafter, Rios sought and obtained the court's permission to amend his complaint to list Richard as a defendant. Rios asserted claims

[1]Todd Brumgard is not a party to this appeal.

against the Brumgards[2] for recording a "groundless" lien against the property that was the subject of the arbitration and also requested attorney fees pursuant to A.R.S. § 33-420.

¶3 After the Brumgards failed to respond to the amended pleading, in January 2007 Rios applied for and the trial court entered their default. The Brumgards subsequently moved to set aside the entry of default, arguing the court lacked jurisdiction over them because they had not been served with the amended complaint and also asserting their pending bankruptcy proceeding barred suit against them. The court declined to set aside the default, noting the Brumgards' objection on the basis of jurisdiction was "disingenuous" because Richard had voluntarily appeared in the action by filing his objection to the confirmation of the arbitration award against Todd. But the court delayed the formal entry of judgment and award of fees until the automatic stay resulting from the Brumgards' bankruptcy was lifted or the bankruptcy dismissed, and it placed the case on the court's inactive calendar to be dismissed in October 2007.

---

[2]We note that although Rios sought and the trial court granted leave only to amend the pleadings to include Richard, the amended complaint also listed Kay Brumgard as a defendant. Kay Brumgard did not argue below nor does she contend on appeal that Richard's general appearance in this action did not constitute waiver of service as to her. We need not consider whether the trial court correctly determined that Richard's initial general appearance bound both Kay and Richard because Kay made subsequent general appearances through counsel objecting to findings of fact and otherwise acknowledging the case before the court. *See State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, ¶ 8, 66 P.3d 70, 72 (App. 2003) ("[A]ny action . . . except to object to personal jurisdiction that recognizes the case as in court will constitute a general appearance.").

¶4 In April 2007, Rios presented evidence to the trial court that the bankruptcy court had lifted its stay in December 2006, expressly allowing him to pursue his false-lien claim against the Brumgards. Also in April, the Brumgards moved for reconsideration of the court's refusal to set aside the entry of default. In June, the court ruled that Richard had made a general appearance by signing his objection to the confirmation of the arbitration award and his response to Rios's motion for judgment on the pleadings. The court further ordered the case continued on the inactive calendar in October and again in December 2007 to accommodate evidentiary hearings on damages and to resolve the issue of whether the Brumgards' bankruptcy barred Rios's action against them. In May 2008, the court determined the bankruptcy proceedings did not shield the Brumgards from suit under § 33-420 and awarded Rios statutory damages of $5,000 plus costs and attorney fees of $5,802. This appeal followed.

Discussion

Amended Complaint

¶5 The Brumgards first argue the trial court erred in granting Rios's motion to amend the complaint. "We will not disturb a trial court's ruling on a motion to amend a pleading absent an abuse of discretion." *Valley Farms, Ltd. v. Transcont'l Ins. Co.*, 206 Ariz. 349, ¶ 6, 78 P.3d 1070, 1073 (App. 2003). Motions to amend pleadings are to be liberally granted. *See* Ariz. R. Civ. P. 15(a); *Dube v. Likins*, 216 Ariz. 406, ¶ 24, 167 P.3d 93, 102 (App. 2007).

¶6 The Brumgards claim Rios "misled the Court into improvidently granting" the motion to amend his claim.[3] The merits of a claim, however, "are not to be decided in the consideration of a motion to amend." *Hernandez v. Maricopa County Superior Court*, 108 Ariz. 422, 422, 501 P.2d 6, 6 (1972). Rather, amendments to pleadings should be liberally granted, and the merits can then be challenged in a motion to dismiss or motion for summary judgment. *Id*. In fact, "'[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part[] of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment,'" denying a motion to amend a pleading is generally considered an abuse of discretion. *Walls v. Ariz. Dep't of Pub. Safety*, 170 Ariz. 591, 597, 826 P.2d 1217, 1223 (App. 1991), *quoting Foman v. Davis*, 371 U.S. 178, 182 (1962).

¶7 In this case, the Brumgards do not assert, nor can we discern, that the amended pleading was the result of delay or bad faith or that it caused them any prejudice. As Rios notes, Richard had already appeared in the action; during the three months between the filing of the original complaint and the amendment, the matter had not been set for trial; and no disclosure or discovery had occurred. Therefore, we see no abuse of discretion in granting Rios's motion to amend.

---

[3]The Brumgards also complain that Rios "had no right to unilaterally treat [them] as intervening parties," apparently confusing the legal concept of intervention, which is not at issue in this case, with a motion to amend a pleading.

Service of Process

¶8 The Brumgards next contend the trial court lacked jurisdiction over them because they were not properly served with a summons and the amended complaint. The record reflects Rios served the Brumgards by mailing the amended complaint to their home, which constitutes proper service after the party to be served has already made a general appearance. *See* Ariz. R. Civ. P. 5(c)(2)(C). In responding to the Brumgards' challenge to its jurisdiction, the trial court correctly found the Brumgards had made a general appearance when Richard filed both an objection to the confirmation of the arbitration award and a response to Rios's motion for judgment on the pleadings, in the latter of which Richard had gone so far as to name himself as a party in the caption and to sign the memorandum. *See State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, ¶ 8, 66 P.3d 70, 72 (App. 2003) (term "appearance" construed liberally, and any action except objecting to personal jurisdiction deemed general appearance). Therefore, service of the Brumgards by mail was sufficient. Even had it not been, the Brumgards' subsequent general appearances waived any defect in service. *See Montano v. Scottsdale Baptist Hosp., Inc.*, 119 Ariz. 448, 452, 581 P.2d 682, 686 (1978).

Motion to Set Aside Default Judgment

¶9 The Brumgards next assert the trial court erred in refusing to set aside the default judgment against them, claiming this decision was not "supported by the evidence" and was "a denial of [their] right to due process." We are uncertain, however, to what

"evidence" the Brumgards refer. Their argument for vacating the entry of default below was predicated on their contention that the court had no jurisdiction over them because they had not been properly served. As articulated above, there was no defect in the court's jurisdiction; thus, the court did not err in refusing to set aside the entry of default.

Attorney Fees

¶10 Finally, the Brumgards dispute as excessive the attorney fees awarded Rios. Awarding costs and fees to a successful party is mandatory under § 33-420, *see Janis v. Spelts*, 153 Ariz. 593, 597, 739 P.2d 814, 818 (App. 1987), and we review such awards for an abuse of discretion. *See Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, ¶ 17, 141 P.3d 824, 830 (App. 2006).

¶11 The Brumgards note Rios's attorneys appeared at only two short hearings and claim "the amount of work required was not substantial and very rote," the case was simple, and "[i]t is inconceivable that this routine case . . . warranted a heightened degree of skill and a legal bill by [Rios's] attorneys of over $5,000." The Brumgards insist the litigation was protracted only because Rios and his attorneys were inept for neither naming them as parties initially nor serving them properly. Again, however, as outlined above, the filing of an amended complaint was proper, as was the service of process.

¶12 Rios's counsel submitted an affidavit pursuant to *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (App. 1983), outlining the fees charged, describing the experience level of the attorneys involved, and explaining the

difficulty of the subject matter, including specifically the bankruptcy issues the Brumgards had inserted into the case. The court reduced the award from the $6,249 requested to $5,802. Because the Brumgards' legal arguments concerning the amended complaint and service of process were meritless and because there is a reasonable basis for the amount awarded, we cannot say the trial court abused its discretion. *See Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, ¶ 21, 99 P.3d 1030, 1036 (App. 2004).

¶13 Rios notes that this matter arises under § 33-420, which provides for mandatory attorney fees for a prevailing party, and requests such fees on appeal pursuant to Rule 21, Ariz. R. Civ. App. P. We grant Rios his reasonable attorney fees on appeal in an amount to be determined upon compliance with Rule 21(c).

Disposition

¶14 The judgment is affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

JOHN PELANDER, Chief Judge

GARYE L. VÁSQUEZ, Judge