IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Marriage of:

PEARL ANNE AGARD, *Petitioner/Appellee*,

v.

ROGER G. LUNDTVEDT, *Respondent/Appellant*.

No. 1 CA-CV 15-0102 FC
FILED 7-19-2016

Appeal from the Superior Court in Maricopa County
No. FN2014-090103
The Honorable Carolyn K. Passamonte, Judge *Pro Tempore*

VACATED AND REMANDED

COUNSEL

Donaldson Stewart PC, Chandler
By Richard S. Fregin
Counsel for Petitioner/Appellee

Riggs Ellsworth & Porter PLC, Mesa
By Paul C. Riggs, Spencer T. Hale
Counsel for Respondent/Appellant

MEMORANDUM DECISION

Judge Kenton D. Jones delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Patricia K. Norris joined.

JONES, Judge:

¶1 Roger Lundtvedt (Husband) appeals the trial court's denial of his motion to set aside a default decree. For the following reasons, we vacate the order and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶2 Pearl Agard (Wife) petitioned for legal separation from Husband in January 2014 and sought an equitable distribution of the community property. Wife later moved to convert the action to a marital dissolution, which the family court granted. Husband did not respond to the petition and Wife applied for entry of default.

¶3 Less than ten days later, Husband's counsel filed a notice of appearance and a motion to dismiss Wife's petition. The family court denied the motion to dismiss and also denied Wife's application for entry of default. Wife then filed a "motion to set default hearing, or in the alternative, status conference," and the court scheduled a default hearing.

¶4 After conducting a default hearing in which Husband appeared telephonically from a hospital, the family court granted Wife's proposed default decree and signed it in open court. The default decree listed three parcels of land owned by the parties and stated that the properties "should be sold and the net proceeds should be divided equally between the parties."

¶5 Husband moved to set aside the default decree arguing the land was his sole and separate property and that because Wife's petition did not list the parcels as items of community property to be divided, he lacked notice Wife would claim — or was claiming — an interest in that property. Accordingly, Husband argued the decree was void and should be set aside. The family court denied Husband's motion. Husband timely

appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21 and -2101(A)(2).[1]

DISCUSSION

¶6 Husband argues the family court failed to follow the prerequisite procedural requirements of Arizona Rule of Family Law Procedure 44 and that the court therefore erred in failing to set aside the decree as void.[2] We review the denial of a motion to vacate a void judgment *de novo*. *Duckstein v. Wolf*, 230 Ariz. 227, 231, ¶ 8 (App. 2012) (citing *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1217 (11th Cir. 2009)).

¶7 Pursuant to Arizona Rule of Family Law Procedure 44(A)(2)-(3), "acceptance by the clerk of the filing of the application for entry of default constitutes the entry of default," which, while having been *entered*, is not *effective* until "ten (10) days after the filing of the application for entry of default." Rule 44(A)(4) provides that a default does not become effective "if the party claimed to be in default pleads or otherwise defends . . . prior to the expiration of ten (10) days from the filing of the application for entry of default." An entry of default "has no effect" where the respondent pleads or otherwise defends within ten days of the filing of the application for entry of default. *Corbet v. Superior Court*, 165 Ariz. 245, 248 (App. 1990) (analyzing the effectiveness of an entry of default after the asserted defaulting party filed a pleading within ten days under Arizona Rule of

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[1] Absent material changes from the relevant date, we cite a statute's current version.

[2] Wife argues Husband waived any argument not raised in his motion to set aside. Husband argued in his motion to set aside and supporting reply that the default decree was void. Husband's main premise for the voidness argument both in the family court and on appeal is that the decree is different in kind from or exceeded the relief requested in Wife's petition in violation of Arizona Rule of Family Law Procedure 45(G). In his reply brief, Husband argues that a judgment is void where the procedural notice requirement rules are not satisfied. A void judgment "may be attacked either directly or collaterally at any time within a reasonable time after entry of judgment." *Sprang v. Petersen Lumber, Inc.*, 165 Ariz. 257, 264 (App. 1990) (citing *Cooper v. Commonwealth Title*, 15 Ariz. App. 560, 562-63 (App. 1971)). Because we find the judgment void for procedural errors, we do not address Husband's Rule 45(G) argument. We also do not address Husband's arguments based upon misconduct or surprise.

Civil Procedure 55(a)); *see also* Ariz. R. Fam. L.P. 44 comm. cmt. ("This rule is based on Rule 55, *Arizona Rules of Civil Procedure*.").

¶8 Here, the clerk accepted and filed Wife's application for entry of default and, therefore, default was entered. Although Husband did not file an answer to Wife's petition, he filed a motion to dismiss within ten days of the entry of default, which constituted a proper defense and precluded the entry of default from becoming effective. *See Prutch v. Town of Quartzsite*, 231 Ariz. 431, 436, ¶ 17 (App. 2013) (holding a motion to dismiss "was a proper defense that procedurally precluded entry of default" because it "satisfie[d] the 'otherwise defends' requirement for avoiding entry of default"); *see also Coulas v. Smith*, 96 Ariz. 325, 329 (1964) (citing *Bass v. Hoagland*, 172 F.2d 205, 210 (5th Cir. 1949) with approval, which lists a motion to dismiss as an action that may prevent default).

¶9 Wife concedes her application for entry of default did not become effective because Husband filed the motion to dismiss, but she argues the default became effective ten days after she filed her "motion to set default hearing, or in the alternative, status conference," because the motion "revived" the previously ineffective application. Wife cites no case law, rule, or statute for this proposition, and we reject her argument.

¶10 Rule 44(A) requires a party to submit an application to the clerk for entry of default, and entry of default is allowed "'only upon adequate notice to the defaulting party.'" *Estate of Lewis v. Lewis*, 229 Ariz. 316, 326, ¶ 28 (App. 2012) (quoting *Ruiz v. Lopez*, 225 Ariz. 217, ¶ 18 (App. 2010)). Wife's application for entry of default was denied by the court, thereby making it impossible for that entry of default to ever become effective.

¶11 To obtain an effective default after the family court denied Husband's motion to dismiss, Wife would have had to file another application for entry of default to satisfy the notice requirements of Rule 44(A)(1). She failed to do so. The resulting default judgment is therefore void. *See Ruiz*, 225 Ariz. at 223, ¶ 21 (holding the "notice requirement" of the default rule "must be satisfied in order to trigger the running of the ten-day period," and "[w]ithout such notice, the ten-day grace period does not begin to run, the entry of default is ineffective, and the default judgment is void").

¶12 The family court has no discretion to refuse to vacate a void default judgment. *See Preston v. Denkins*, 94 Ariz. 214, 219 (1963) (citing *Gordon v. Gordon*, 35 Ariz. 357, 368 (1929)); *Martin v. Martin*, 182 Ariz. 11, 14

(App. 1994). Thus, the court's denial of Husband's motion to set aside the void default judgment was error.

CONCLUSION

¶13 For the foregoing reasons, we vacate the order denying the motion to set aside and remand to the family court for further proceedings consistent with this decision. In our discretion, we decline to award attorneys' fees to either party. As the successful party, we award costs to Husband upon compliance with ARCAP 21.