DIVISION ONE
FILED: 06-17-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

L. P. STINGLEY, JR.,	)	1 CA-CV 09-0381
	)	
Plaintiff-Appellant,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	
CITY OF PHOENIX, DANE R. TRAINES, CPCU, AU,	)	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
	)	
Defendants-Appellees.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-018519

The Honorable Edward O. Burke, Judge

AFFIRMED

Law Office of Sylvia L. Thomas, LLC — Phoenix
By Sylvia L. Thomas
Attorneys for Plaintiff-Appellant

Gary Verburg, City Attorney — Phoenix
Phoenix City Prosecutor's Office
By Christina E. Koehn, Assistant City Prosecutor
Attorneys for Defendants-Appellees

G E M M I L L, Judge

¶1 Plaintiff-Appellant L.P. Stingley, Jr. appeals from the superior court's order denying his motion to set aside the judgment in favor of Defendants-Appellees City of Phoenix and

Dane R. Traines. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

¶2 On October 5, 2007, Stingley filed a complaint arising out of the City's clean-up and removal of vehicles, bees, and bee-keeping equipment from his property. He alleged the City had not apprised him in advance of the abatement, and he demanded $32,350,000 in damages.

¶3 The City moved to dismiss the complaint on the grounds that its action was taken pursuant to an abatement order that directed the City to "take all necessary and proper measure[s] to abate the conditions on the property . . . [including but not limited to] removal of, board up of and destruction of any items that contribute to [violations of the City of Phoenix

[1] Defendants move to strike an affidavit by Joe Carabajal, Ph.D., attached to Stingley's opening brief, and several of its attachments because these documents were not contained in the record on appeal. Stingley urges us to take judicial notice of each of the documents (except Dr. Carabajal's affidavit and resume), consisting of transcripts, docket sheets, and minute entries from earlier criminal proceedings against Stingley, and an article regarding the Brief Psychiatric Rating Scale. Generally, our review is limited to the record before the trial court. *GM Dev. Corp. v. Cmty. Am. Mort. Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990). However, as Stingley points out, we may take judicial notice of a matter of which the trial court may have taken notice, even if the court was never asked to do so. *State v. McGuire*, 124 Ariz. 64, 65, 601 P.2d 1348, 1349 (App. 1978) ("An appellate court can take judicial notice of any matter of which the trial court may take judicial notice, even if the trial court was never asked to do so."). In the exercise of our discretion, however, and because these items were not presented to the trial court, we decline to take judicial notice of the documents attached to Dr. Carabajal's affidavit, and we therefore grant defendants' motion to strike.

Neighborhood Preservation Ordinance] including any bees and bee housing or storage." Stingley responded that the City removed and damaged items at 3322 E. Wood Street, an address different than the property address identified in the abatement order, 3332 E. Wood Street. The court denied the motion to dismiss.

¶4 Defendants answered the complaint, denying all of Stingley's allegations and raising the affirmative defense of Stingley's failure to comply with Arizona's notice of claim statute, Arizona Revised Statutes ("A.R.S.") section 12-821.01(A) (2003).[2] They then moved for summary judgment on the grounds that Stingley had not filed his notice of claim with the City within 180 days of the abatement, and had failed to serve Traines with a notice of claim. Stingley did not timely respond.[3] The trial court issued an unsigned minute entry order

[2] Stingley claims defendants admitted paragraphs 6 through 14 of his complaint. As the complaint does not contain paragraphs numbered 6 through 14, it appears Stingley is referring to the paragraphs contained in Exhibit A to the complaint, which he incorporated by reference in paragraph 2 of the complaint. Defendants denied paragraph 2 of the complaint, and by so doing effectively denied the allegations contained in Exhibit A.

[3] The record on appeal contains a document entitled "Motion to Remove Dane R. Traines," filed July 17, 2008, that might arguably be considered a timely response to the motion for summary judgment. However, Stingley conceded in the trial court and on appeal that he did not respond to the motion for summary judgment within the time allowed by Rule 56(c)(1), Arizona Rules of Civil Procedure, or before the court issued its ruling. Accordingly, we do not treat the July 17, 2008 motion as a response to defendants' motion for summary judgment.

stating that Stingley had not responded to the motion and the court had reviewed the entire file, found good cause for granting defendants' motion for summary judgment, and did so.

¶5 On August 13, 2008, Stingley moved to set aside the judgment. He stated that through a mistake or fraud his response to defendants' motion for summary judgment did not reach the court, despite his understanding that he had contracted with Frontier Process Servers to deliver his response to the court.[4] In response, defendants argued Stingley had not met the standard for setting aside a judgment for mistake or fraud pursuant to Arizona Rule of Civil Procedure 60(c). In addition, they produced an affidavit from the Assistant Manager for Frontier Process Servers, who denied Stingley had contracted with the company to file or serve a response to defendants' motion for summary judgment.

¶6 Stingley then filed his response to defendants' motion for summary judgment and a separate statement of facts.[5] He argued he was entitled to judgment as a matter of law because there was no material question of fact that the City's abatement

[4] In his motion to set aside the judgment, Stingley referred to "plaintiff[']s motion for summary judgment." He later asserted that the document was intended as a response to defendants' motion for summary judgment.

[5] Again, this document was entitled "Plaintiffs Motion for Summary Judgment," but we regard it as Stingley's response to defendants' motion for summary judgment.

of his property at 3322 E. Wood Street was illegal. He also asserted that he did not serve his notice of claim within 180 days of the abatement due to his insanity, but that he did timely file the notice within 180 days of the end of his disability on April 6, 2007.

¶7 Thereafter, on September 11, 2008, the court entered a signed judgment memorializing its minute entry granting summary judgment in favor of defendants. Stingley appealed the judgment on November 13, 2008. Defendants moved to dismiss the appeal on the grounds that the notice of appeal was untimely, and Stingley stipulated to a dismissal. This Court dismissed the appeal on March 4, 2009.

¶8 In the meantime, the superior court held oral argument on Stingley's motion to set aside the judgment, and issued an unsigned minute entry denying the motion. The court also denied Stingley's motion for a continuance to allow him to gather additional evidence to support his motion to set aside the judgment. It entered a signed order memorializing its decision on April 16, 2009. Stingley timely appeals.

¶9 We have jurisdiction pursuant to A.R.S. § 12-2101(C) (2003).

ISSUES

¶10 Stingley argues the superior court: (1) erred in granting summary judgment for defendants because the record

contained evidence that his incompetency tolled the time for filing his notice of claim; and (2) abused its discretion in failing to set aside the judgment pursuant to Arizona Rule of Civil Procedure 60(c). He also challenges (3) the court's denial of his motion for a continuance to supplement his motion to set aside the judgment with additional evidence.

ANALYSIS

A. Summary Judgment Ruling

¶11 As an initial matter, we address defendants' argument that we lack jurisdiction to consider Stingley's challenge to the court's entry of summary judgment for defendants. As defendants point out, our jurisdiction is limited to Stingley's appeal from the April 16, 2009 order denying his motion to set aside the judgment because that is the only ruling identified in his notice of appeal and because he voluntarily dismissed his earlier, untimely, appeal from the court's judgment. *Lee v. Lee*, 133 Ariz. 118, 124, 649 P.2d 997, 1003 (App. 1982) ("The court of appeals acquires no jurisdiction to review matters not contained in the notice of appeal. 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.") (citation omitted).

¶12 Moreover, we reject Stingley's argument that we may reach the merits of the summary judgment ruling because the

superior court should have treated his untimely response to the motion for summary judgment as a motion for new trial, such that his appeal from the April 16, 2009 order would be a timely appeal from the underlying judgment. Stingley's response did not reference Arizona Rule of Civil Procedure 59, which sets forth the grounds for a new trial, and did not ask the court to vacate the judgment, but instead addressed the propriety of summary judgment for Stingley on his claims.[6] In addition, Stingley expressly represented to the superior court that the pleading was a response to defendants' motion for summary judgment, and gave no indication that the court should regard it as a motion for new trial. Further, even if Stingley's response could be considered a motion for new trial that extended his time to appeal from the September 11, 2008 judgment, because his May 15, 2009 notice of appeal did not identify the September 11, 2008 judgment as a basis for the appeal, we would not have

[6] *J-R Constr. Co. v. Paddock Pool Constr. Co.*, 128 Ariz. 343, 346, 625 P.2d 932, 935 (App. 1981), cited by Stingley, is therefore inapplicable. In that case, we held that a party's failure to include an express reference to Rule 59 in his motion was not fatal because the motion substantially asserted the grounds specified in the rule as a basis for relief. *Id*. Additionally, *In re Estate of Kerr*, 137 Ariz. 25, 28, 667 P.2d 1351, 1354 (App. 1983), is distinguishable. In that case, we held that when "a valid appealable order in a formal proceeding under title 14 has been filed, a timely notice of appeal is not defective merely because it indicates the nonappealable interlocutory order rather than the final appealable order." The court in *Kerr* was addressing a different issue from what is presented by Stingley's argument here.

jurisdiction to consider his challenge to the judgment. ARCAP 8(c) (requiring a notice of appeal to designate the judgment appealed from); *Lee*, 133 Ariz. at 124, 649 P.2d at 1003 (stating appellate court acquires no jurisdiction to review matters not contained in the notice of appeal); *Rourk v. State*, 170 Ariz. 6, 12, 821 P.2d 273, 279 (App. 1991) (stating an appeal solely from an order denying a motion for new trial is limited to issues raised in that motion).

¶13 Accordingly, we have no jurisdiction to consider Stingley's challenge to the superior court's entry of summary judgment for defendants and do not address that issue further.

B. Motion to Set Aside Judgment

¶14 We turn, then, to Stingley's argument that the court erred in denying his motion to set aside the judgment. We review such rulings utilizing an abuse of discretion standard. *City of Phoenix v. Geyler*, 144 Ariz. 323, 328, 697 P.2d 1073, 1078 (1985).

¶15 Rule 60(c) allows a court to relieve a party from a final judgment for any of the following reasons:

> (1) mistake, inadvertence, surprise or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d);
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> (3) fraud (whether heretofore denominated

> intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party;
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> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from the operation of the judgment.

Ariz. R. Civ. P. 60(c). Stingley asserts he demonstrated entitlement to relief from the court's judgment in favor of defendants pursuant to Rule 60(c)(1) and (3).

1. Rule60(c)(1): Mistake/Inadvertence/Excusable Neglect

¶16 "To obtain relief under Rule 60(c)(1), a party must show (1) mistake, inadvertence, surprise or excusable neglect; (2) that relief was sought promptly; and (3) that a meritorious claim existed." *Maher v. Urman*, 211 Ariz. 543, 550, ¶ 21, 124 P.3d 770, 777 (App. 2005) (citation omitted). Stingley argues he demonstrated excusable neglect based upon his inadvertent failure to file and serve his response to defendants' motion for summary judgment and by virtue of his mental incompetence.[7]

[7] Defendants contend Stingley waived his arguments that his failure to respond to their motion for summary judgment was inadvertent or resulted from his psychological illness because he did not raise them in the trial court. We determine, however, that both arguments were fairly before the trial court, as Stingley raised mistake/inadvertence regarding delivery of his response in his motion to set aside the judgment, and raised

Neglect is excusable if it "might be the act of a reasonably prudent person under the same circumstances." *Geyler*, 144 Ariz. at 331, 697 P.2d at 1081. This determination is made on a "case-by-case" basis, *Ellman Land Corp. v. Maricopa County*, 180 Ariz. 331, 339, 884 P.2d 217, 225 (App. 1994), and "diligence is the final arbiter of whether mistake or neglect is excusable," *Geyler*, 144 Ariz. at 332, 697 P.2d at 1082. The superior court is vested with broad discretion in determining excusable neglect and we will not overturn its decision absent an abuse of discretion. *Daou v. Harris*, 139 Ariz. 353, 361, 678 P.2d 934, 942 (1984) (finding trial court did not abuse its discretion in refusing to find excusable neglect on the part of the defendant).

¶17 In this case, Stingley actively represented himself and participated in the litigation, yet failed to respond to defendants' motion for summary judgment. Although he alleged he contracted with Frontier Process Servers for delivery of his response and it somehow was not delivered to the court, he offered no admissible evidence to support that claim, and defendants submitted an affidavit to the contrary from a Frontier representative. Stingley also asserts his mental incompetence constituted excusable neglect for his failure to

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his psychological illness with the trial court during the Rule 60(c) argument.

timely respond to defendants' motion for summary judgment. He did not provide the trial court with any admissible evidence that he was actually mentally incompetent, but he argues the court should have discerned such incompetence from "signs of paranoia, suspicion and hostility" in his complaint and his assertion, in his (untimely) response to defendants' motion for summary judgment that his "mental status is well [d]ocumented" and he was "[driven] insane" when the City carried out its abatement order.

¶18 We do not find, on this record, that Stingley's mental state constituted excusable neglect sufficient to warrant relief under Rule 60(c)(1). Moreover, because the record does not contain evidence that Stingley acted diligently, we find no abuse of discretion in the court's denial of his motion to set aside the judgment based upon excusable neglect pursuant to Rule 60(c)(1). *See Haroutunian v. Valueoptions, Inc*., 218 Ariz. 541, 549, ¶ 20, 189 P.3d 1114, 1122 (App. 2008) (stating that in order to obtain relief under Rule 60(c) a party must demonstrate due diligence).

2. Rule 60(c)(3): Fraud or Misconduct of Adverse Party

¶19 Rule 60(c)(3) permits relief from a judgment based upon an opposing party's misconduct, including a violation of a disclosure obligation under Arizona Rule of Civil Procedure 26.1 that substantially interfered with the ability to fully prepare

for trial. *Norwest Bank (Minnesota), N.A. v. Symington*, 197 Ariz. 181, 186, ¶¶ 17, 23, 3 P.3d 1101, 1106 (App. 2000) (stating any failure to disclose that would justify relief under Rule 60(c)(3) must have "substantially interfered with the ability to fully prepare for trial"). Stingley contends defendants engaged in misconduct that required the court to set aside the summary judgment because, he claims, defendants "had long known of . . . Stingley's mental health issues," but had failed to reveal this information to the court in their motion for summary judgment or to disclose this information to Stingley pursuant to Rule 26.1. We disagree with this contention.

¶20 Defendants raised Stingley's failure to timely file his notice of claim as a defense in their motion for summary judgment. While defendants owed a duty of candor to the court that required them to disclose any evidence that might raise a genuine issue of material fact, they were not required to anticipate and disprove Stingley's argument that his mental incapacity tolled the notice of claim statute. *See Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 117, 118, ¶¶ 17, 25, 180 P.3d 977, 982, 983 (App. 2008). Defendants advised the court that Stingley underwent a Rule 11 competency hearing in conjunction with criminal charges brought by the City and was determined to be competent. They were not required to do more. Moreover, Stingley had access to and was surely aware of mental

health records generated in prior criminal proceedings against him and could obtain additional evidence regarding his mental health at any time through a voluntary psychological evaluation. He was not prejudiced by defendants' non-disclosure of mental health records from prior criminal proceedings against Stingley.

¶21 We find no abuse of discretion in the court's denial of Stingley's motion to set aside the judgment based upon defendants' misconduct.

C. Motion to Continue

¶22 Finally, Stingley challenges the court's denial of his motion for a continuance to supplement his motion to set aside the judgment with additional evidence. A motion for continuance is directed to the discretion of the trial court and will not be reversed absent an abuse of discretion. *In re Estate of Kerr*, 137 Ariz. at 29, 667 P.2d at 1355.

¶23 Stingley had ample opportunity to prepare his motion to set aside the judgment and include the evidence he wished the court to consider, but chose not to provide any such evidence with his motion or during the three months preceding the argument on the motion. Subsequently, Stingley retained counsel who appeared at the argument and orally requested a continuance to supplement the record with relevant evidence, in particular, the affidavit of Stingley's treating psychologist, who counsel averred had been treating Stingley for thirteen years. Given

the amount of time Stingley had to prepare for the argument and his long-standing relationship with the psychologist whose affidavit he sought, we conclude that the court did not abuse its broad discretion in denying the continuance.

CONCLUSION

¶24 For the foregoing reasons, we affirm.

¶25 Defendants request an award of attorneys' fees on appeal as sanctions against Stingley for his improper supplementation of the record on appeal. In the exercise of our discretion, we decline to award defendants fees as a sanction under Arizona Rule of Civil Appellate Procedure 25. Because defendants are the prevailing party, we award them their taxable appellate costs conditioned upon their compliance with Arizona Rule of Civil Appellate Procedure 21(a).

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

____/s/_____
SHELDON H. WEISBERG, Presiding Judge

____/s/_____
PHILIP HALL, Judge