DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WANDA LEE, Plaintiff/Appellant, v. SUSAN SPENCER, individually, and as personal representative for the Estate of Douglas Spencer, deceased, Defendant/Appellee.	No. 1 CA-CV 09-0437 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-070366

The Honorable Harriett E. Chavez, Judge
The Honorable Stephen Kupiszewski, Commissioner

AFFIRMED

Wanda Lee — Wickenburg
Plaintiff/Appellant *In Propria Persona*

Mariscal, Weeks, McIntyre & Friedlander PA — Phoenix
By Charles H. Oldham and Timothy J. Thomason
Attorneys for Defendant/Appellee

B R O W N, Judge

¶1 Richard and Wanda Lee[1] appeal the trial court's denial of their motion to vacate and set aside a default judgment entered against them in a quiet title action. For the following reasons, we affirm.

BACKGROUND

¶2 The Lees and a neighboring property owner, Susan Spencer, own adjoining parcels of land. In June 2006, the Lees filed a complaint against Spencer seeking a declaratory judgment and injunctive relief to confirm an alleged easement across Spencer's property. The Lees also sought injunctive relief to enjoin Spencer from blocking access to the easement. The trial court scheduled a show cause hearing for July 24, 2008. Prior to the hearing, counsel for Spencer negotiated an interim agreement with the Lees pending a final agreement or resolution of the litigation wherein Spencer would remove obstructions to the easement based on the Lees' agreement to vacate the hearing. Spencer's counsel confirmed the substance of this agreement in a letter to the Lees on July 18, 2008.

¶3 On August 8, 2008, Spencer filed her answer and counterclaim seeking to quiet title to her property.[2] On

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[1] The notice of appeal includes Richard, who subsequently passed away prior to filing the opening brief.

[2] Two other parties were named as counter-defendants in Spencer's counterclaim; neither is a party to this appeal.

September 2, 2008, the Lees filed a motion to strike the counterclaim as untimely. The court denied the motion by minute entry dated October 10, 2008. On November 18, 2008, Spencer submitted an application and affidavit for default against the Lees. After ten days, Spencer requested a hearing for the entry of default, which was set for January 9, 2009, before Commissioner Kupiszewski. Spencer's counsel had a notice of hearing hand-delivered to the Lees' residence on January 2, 2009.

¶4 On December 30, 2008, the Lees filed a motion to set aside the application for default, alleging they had not received any notice the application had been filed. On January 5, 2009, they filed an "Answer to the Counterclaim" and two motions to vacate the January 9 hearing, based on the filing of their answer. Commissioner Kupiszewski denied both motions.

¶5 On the day of the scheduled hearing, the Lees filed a notice of change of judge for cause and as of right. Commissioner Kupiszewski vacated the hearing pending a ruling on the Lees' motion. The presiding civil court judge denied the Lees' requests to disqualify the commissioner either for cause or as of right. The default hearing was reset before the commissioner for February 2, 2009. Copies of both minute entries were mailed to the Lees.

¶6 The Lees failed to appear at the rescheduled default hearing and default was entered against them. The Lees then filed a motion to vacate and set aside the judgment based on inadvertence, surprise, excusable neglect, and lack of subject matter jurisdiction pursuant to Arizona Rule of Civil Procedure 60(c) (the "Rule 60(c) motion"). Spencer filed a response to the Rule 60(c) motion and a motion to dismiss the Lee's complaint as moot. The Lees neither replied to Spencer's response nor responded to the motion to dismiss. By minute entry dated May 6, 2009, the court denied the Lees' Rule 60(c) motion and granted Spencer's motion to dismiss. The Lees timely appealed.[3]

DISCUSSION

¶7 The Lees argue that the trial court abused its discretion in declining to set aside the entry of default or the default judgment. We review a court's refusal to set aside an entry of default or a default judgment for a clear abuse of discretion. *Hilgeman v. Am. Mortgage Sec., Inc.*, 196 Ariz. 215, 218, ¶ 7, 994 P.2d 1030, 1033 (App. 2000). We view the facts in

[3] The Lees filed their notice of appeal on June 10, 2009. A signed final judgment denying their motion to vacate was not entered until July 14, 2009. An appeal made to this court from a superior court ruling before the entry of a signed final judgment is not, however, jurisdictionally defective; rather, it simply takes effect when the clerk of the court enters the final judgment. *See Guinn v. Schweitzer,* 190 Ariz. 116, 117, 945 P.2d 837, 838 (App. 1997) (citing *Barassi v. Matison,* 130 Ariz. 418, 421-22, 636 P.2d 1200, 1203-04 (1981)).

the light most favorable to upholding the trial court's decision. *Camacho v. Gardner*, 104 Ariz. 555, 559, 456 P.2d 925, 929 (1969).

¶8 The Lees first argue that they were denied their right of due process because they were not properly notified of Spencer's application for default. This issue was not raised in their Rule 60(c) motion and thus they have waived this argument on appeal. *See Maher v. Urman*, 211 Ariz. 543, 548, ¶ 13, 124 P.3d 770, 775 (App. 2005) (arguments not raised in the trial court are waived on appeal).

¶9 Even if the Lees had preserved the issue for appeal, we would still conclude that they were not denied due process based on the alleged lack of notice. Pursuant to Rule 55(a),

> [a]ll requests for entry of default shall be by written application to the clerk of the court . . . [and] [w]hen the whereabouts of the party claimed to be in default are known by the party requesting the entry of default, a copy of the application for entry of default *shall be mailed to the party claimed to be in default*.

Ariz. R. Civ. P. 55(a)(1)(i) (emphasis added). The record reflects that Spencer's counsel properly submitted a written application for default to the Clerk of the Court and the application was accompanied by a proper affidavit. In accordance with Rule 55, both the application and the affidavit were mailed to the Lees as evidenced by a certificate of mailing

included with the application and affidavit. The certificate of mailing is sufficient to show proof of service. *See Trimble Cattle Co. v. Henry & Horne*, 122 Ariz. 44, 50, 592 P.2d 1311, 1316 (App. 1979) (recognizing that a "mere certification of mailing is sufficient to show proof of service to all concerned parties").

¶10 The Lees next argue that the default judgment should have been set aside based on excusable neglect and surprise. A party seeking to set aside a default judgment for failure to timely reply must establish that "(1) the failure to answer within the time required by law was due to excusable neglect; (2) relief was promptly sought; and (3) a meritorious defense to the action existed." *Master Fin., Inc. v. Woodburn*, 208 Ariz. 70, 74, ¶ 18, 90 P.3d 1236, 1240 (App. 2004) (citations omitted); *see also* Ariz. R. Civ. P. 60(c) (a party may be relieved from a final judgment for mistake, inadvertence, excusable neglect, or surprise). If the defaulted party does not adequately explain its failure to take responsive action, a motion to set aside the entry of default or a default judgment must be denied. *Baker Int'l Assocs., Inc. v. Shanwick Int'l Corp.*, 174 Ariz. 580, 583, 851 P.2d 1379, 1382 (App. 1993).

¶11 The Lees have failed to meet their burden of showing that their failure to timely respond to the counterclaim occurred due to excusable neglect. The failure to timely

respond to a properly served counterclaim is "'excusable' when the neglect or inadvertence is such as might be the act of a reasonably prudent person under similar circumstances[.]" *Beal v. State Farm Mut. Auto. Ins. Co.,* 151 Ariz. 514, 518, 729 P.2d 318, 322 (App. 1986).

¶12 The Lees' Rule 60(c) motion offers no explanation for their failure to respond to Spencer's counterclaim within the timeframe prescribed. They asserted only that the judgment should be set aside because: (1) they filed an answer; (2) they appeared at the courthouse on the day of the scheduled default hearing and were told the hearing was vacated; and (3) the court acted outside its jurisdiction because the case had been reassigned to another judge. None of these assertions explain why the Lees failed to respond to the counterclaim in a timely manner and thus they did not establish any legal basis for the trial court to conclude that the Lees acted in a reasonably prudent manner under the circumstances.

¶13 The Lees nonetheless suggest that their lack of familiarity with court rules constitutes excusable neglect for their failure to timely respond to the counterclaim. *Pro se* litigants, however, are "entitled to no more consideration than if they had been represented by counsel" and "are held to the same familiarity with required procedures and the same notice of statutes and local rules as would be attributable to a duly

qualified member of the bar." *Smith v. Rabb*, 95 Ariz 49, 53, 386 P.2d 649, 652 (1963) (citations omitted). In representing themselves, the Lees assumed the obligation of knowing and following all of the court's rules; they cannot seek solace in ignorance of the requirements. *Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 185, 190, 836 P.2d 398, 403 (App. 1992) ("Ignorance of the rules of civil procedure is not the type of excuse contemplated in Rule 60(c) as a sufficient ground for vacating entry of default or default judgment."). Thus, the Lees' lack of familiarity with procedural litigation requirements does not provide an adequate basis for relief from the judgment based on excusable neglect.[4] *Richas v. Superior Court*, 133 Ariz. 512, 515, 652 P.2d 1035, 1038 (1982) (recognizing that neglect must be excusable, and not merely unexplained).

¶14 The Rule 60(c) motion likewise provides no basis upon which to find unfair surprise. The Lees claim they were unfairly surprised by the entry of default because Spencer removed the obstructions to the alleged easement immediately after the Lees filed their complaint, thus conceding the Lees' complaint was valid. They also suggest that because they had filed their answer to Spencer's counterclaim prior to the

[4] Because we find no excusable neglect, we need not address whether relief was sought promptly or whether a meritorious defense existed.

default hearing, the default judgment was unexpected and thus invalid. These arguments are not persuasive.

¶15 The record reflects that Spencer removed the obstacles to the alleged easement solely as an accommodation to the Lees during the pendency of these proceedings. This is evidenced by a letter from Spencer's counsel to the Lees dated July 18, 2008, which states:

> Ms. Spencer has decided to remove the erected barriers to the easement running along the western side of her property during the pendency of the litigation. Please do not construe this decision as an admission of the validity of any easement you claim or a waiver of Ms. Spencer's defenses to each claim asserted in the Complaint.

Accordingly, there was no concession on the part of Spencer that the Lees claim of an easement was valid or that the removal of the obstruction formed a basis for resolving the dispute such that an answer to the counterclaim became unnecessary. Further, the fact that the Lees filed an answer prior to the default hearing does not help their position in trying to vacate the default judgment. The answer was required to be filed within the prescribed time period of Rule 12(a) or within the ten-day period following the entry of default. *See Gen. Elec. Cap. Corp.*, 172 Ariz. at 189, 836 P.2d at 402 (commenting that Rule 55(a) gives the defaulting party an automatic "second chance" and "essentially extends the time to answer under Rule 12(a)").

The mere act of filing an untimely response to a complaint or counterclaim does not constitute excusable neglect justifying Rule 60 relief from the default judgment.

¶16 Finally, the Lees argue that the trial court lacked subject matter jurisdiction to enter judgment against them because the case was transferred to Judge Chavez on January 9, 2009, following their motion for change of judge, leaving Commissioner Kupiszewski with no authority to make any rulings. They further assert that the commissioner lacked jurisdiction to enter default because an answer had already been filed. We disagree.

¶17 As an initial matter, even if the Lees' answer was timely filed, it would not be determinative of the scope of the commissioner's jurisdiction to hear the case. Second, although the case was temporarily assigned to Judge Chavez pending a determination on the Lees' motion for change of judge, it was transferred back to Commissioner Kupiszewski on January 12, 2009, after the Lees' request to disqualify the commissioner was denied. A copy of this minute entry was mailed to the Lees. The court also mailed the Lees a copy of the commissioner's January 20, 2009, minute entry informing them that a new default hearing had been scheduled before him on February 2, 2009. The Lees admit that they went to the courthouse for this hearing; they therefore had notice of the denial of their request for

change of judge and of the newly scheduled hearing. Nonetheless, they argue that because the case was again reassigned to Judge Chavez on February 6, 2009,[5] any and all rulings made by the commissioner were consequently terminated. Again, we disagree.

¶18 By way of minute entry dated January 12, 2009, the Lees were clearly notified that their request for a change of judge was denied and that the commissioner would preside over the case. The ruling made on February 6, 2009, transferring the matter to Judge Chavez, could not have retroactive effect to divest the commissioner of his jurisdiction to conduct the February 2, 2009, default hearing or to enter the resulting default judgment.

[5] The case was reassigned to Judge Chavez because one of the plaintiffs, who is not party to this appeal, was granted a change of judge as a matter of right pursuant to Rule 42(f)(1). Ariz. R. Civ. P. 42(f)(1).

CONCLUSION

¶19 Based on the foregoing, we affirm the trial court's denial of the Lees' request to set aside the default judgment.

/s/
_____
MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/
_____
JON W. THOMPSON, Judge

/s/
_____
SHELDON H. WEISBERG, Judge