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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



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

PHYLLIS JEAN ANDERSON,) 1 CA-CV 09-0563
)
Plaintiff/Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
HARLIN LEVIOD DIAL,) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
Defendant/Appellant.)
_____)

Appeal from the Superior Court in Mohave County

Cause No. CV2008-0983

The Honorable Charles W. Gurtler, Judge

AFFIRMED

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By Elana C. Sears
Attorneys for Plaintiff/Appellee

Kingman

Law Offices of Paul Lenkowsky
By Paul Lenkowsky
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Bullhead City

O R O Z C O, Judge

¶1 Appellant, Harlin Leviold Dial (Dial), appeals the trial court's order denying his motion for relief from judgment

pursuant to Arizona Rule of Civil Procedure 60(c). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On June 11, 2008, Appellee, Phyllis Jean Anderson (Anderson), filed a complaint for partition relating to the parties' thirteen-year cohabitation.¹ On June 24, 2008, attorney William L. filed a notice of appearance indicating he would be representing Dial. On October 1, 2008, Anderson filed an application for entry of default against Dial for failure to defend. A default hearing was held on December 3, 2008, at which the trial court confirmed its earlier entry of default.²

¶3 During the pendency of the action, Dial attempted to contact his counsel, William L., on numerous occasions. Despite these efforts, William L. failed to keep Dial informed of the status of his case. As a result, Dial independently contacted the court's clerk's office and on February 2, 2009, he learned that a default judgment had been entered against him. After successfully contacting William L. regarding the default judgment, William L. told Dial that he would file a motion to set aside the default judgment. However, William L. failed to do so

¹ Anderson subsequently amended her original complaint and filed a complaint for dissolution of domestic partnership by partition.

² The clerk of the court originally entered a default against Dial on October 1, 2008.

and on May 6, 2009, William L. informed Dial that he should obtain new counsel. On May 18, 2009, Dial retained new counsel. On May 29, 2009, Dial filed a Rule 60(c) motion for relief from judgment.

¶14 Dial argued that he was entitled to relief from the default judgment "due to excusable neglect under Rule 60(c)(1) of the Arizona Rules of Civil Procedure or alternatively, under Rule 60(c)(6)." On August 20, 2009, the trial court denied Dial's Rule 60(c) Motion. The trial court found that Dial failed to establish excusable neglect because he did not act as a reasonably prudent person would under the circumstances. Additionally, the trial court found Dial failed to promptly seek Rule 60(c) relief because of an inexcusable delay in filing his Rule 60(c) Motion.³ Dial filed a timely notice of appeal and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 and -2101.B (2003).

DISCUSSION

¶15 Dial raises one issue on appeal: whether the trial court abused its discretion in denying Dial's Rule 60(c) Motion. "We review a trial court's denial of a motion for relief from judgment under Rule 60(c) for an abuse of discretion." *Aileen H. Char Life Interest v. Maricopa County*, 208 Ariz. 286, 298, ¶ 39,

³ Dial initially learned of the default judgment on February 2, 2009. His Rule 60(c) Motion was not filed until nearly four months later on May 29, 2009.

93 P.3d 486, 498 (2004). Moreover, "[a]lthough our trial courts enjoy broad discretion when deciding whether to set aside judgments under Rule 60(c), that discretion 'is circumscribed by public policy favoring finality of judgments and termination of litigation.'" *Panzino v. City of Phoenix*, 196 Ariz. 442, 448, ¶ 19, 999 P.2d 198, 204 (2000) (citation omitted).

¶16 Dial argues that the trial court abused its discretion by not considering Dial's Rule 60(c) argument relating specifically to Rule 60(c)(6). Dial contends that the trial court only analyzed Dial's Rule 60(c) Motion under the terms of Rule 60(c)(1). However, a review of the record below, particularly Dial's Rule 60(c) Motion, indicates Dial failed to develop his Rule 60(c)(6) argument below and has therefore waived it. *See Stulce v. Salt River Project Agric. Improvement and Power Dist.*, 197 Ariz. 87, 94, ¶ 27, 3 P.3d 1007, 1014 (App. 1999); Ariz. R. Civ. P. 7.1(a) ("All motions made before or after trial shall be accompanied by a memorandum indicating, as a minimum, the precise legal points, statutes and authorities relied on.")

¶17 Although Dial asserted that he was entitled to relief under Rule 60(c)(6), his Rule 60(c) Motion lacked any support for this contention. Rule 60(c) states in pertinent part:

On motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the

following reasons: (1) mistake, inadvertence, surprise or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment.

However, it is well established that "to obtain relief under Rule 60(c)(6), [the moving party] must show 'extraordinary circumstances of hardship or injustice,' other than or in addition to those circumstances set out in clauses (1) through (5)." *Gorman v. City of Phoenix*, 152 Ariz. 179, 182, 731 P.2d 74, 77 (1987) (citation omitted). In this case, Dial's Rule 60(c) Motion suggested only that the facts established "excusable neglect," as required by Rule 60(c)(1). His motion in no way indicated that "extraordinary circumstances" other than "excusable neglect" existed. Because "excusable neglect" relates exclusively to relief under Rule 60(c)(1), we find Dial's argument relating to Rule 60(c)(6) was inadequate, devoid of authority or reasoning, and thus not preserved on appeal. See *Stulce*, 197 Ariz. at 94, ¶ 28, 3 P.3d at 1014.

¶18 Nevertheless, assuming Dial adequately developed a Rule 60(c)(6) argument, the trial court appropriately found that Dial failed to timely seek relief. Rule 60(c) also requires that the motion "be filed within a reasonable time." "In other words, a defaulted defendant must show that 'it acted promptly in seeking relief from the entry of default.'" *Hilgeman v. Am. Mortgage Sec., Inc.*, 196 Ariz. 215, 220, ¶ 15, 994 P.2d 1030, 1035 (App. 2000). Further, "[t]he trial court has discretion to determine

whether the delay in filing the motion to set aside was reasonable." *Id.* In this case, we cannot say the trial court abused its discretion.

¶19 The trial court found the delay in filing the Rule 60(c) Motion to be inexcusable. The trial court stated, "[d]espite [Dial's] knowledge the attorney had not acted timely or properly in the past, [Dial] relied on the attorney's representation that a [Rule 60(c) motion] would be timely filed. [Dial] then sat on his hands for several weeks only to go through the same process with the attorney again." Moreover, it took Dial nearly four months to file his Rule 60(c) Motion after receiving notice of the entry of default. We cannot say the trial court abused its discretion in light of the nearly four-month delay and the fact that Dial relied on counsel he knew had previously abandoned his case.⁴

⁴ Dial also argues the trial court should have held an evidentiary hearing to determine whether Dial had a meritorious defense in the matter. *Alvarez v. Super. Ct.*, 146 Ariz. 189, 190, 704 P.2d 830, 831 (App. 1985) ("A party seeking relief from a default judgment . . . must demonstrate . . . that it had a substantial and meritorious defense to the action."). Because the trial court appropriately found Dial failed to promptly seek relief, we need not consider this issue. Similarly, we need not consider Dial's argument that he in fact did have a meritorious defense to the action.

CONCLUSION

¶10 For the reasons previously stated, we affirm the trial court's order denying Dial's Rule 60(c) Motion.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

PATRICK IRVINE, Presiding Judge

/S/

PHILIP HALL, Judge