

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 07-22-2010
PHILIP G. URRY, CLERK
BY: GH

AMERICAN ASPHALT & GRADING) 1 CA-CV 09-0634
COMPANY, an Arizona corporation,)
) DEPARTMENT B
Plaintiff/Appellant,)
) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 28, Arizona Rules of
CMX, L.L.C., an Arizona limited) Civil Appellate Procedure)
liability company; CMX GROUP,)
INC., an Arizona corporation,)
)
Defendants/Appellees.)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-009602

The Honorable John A. Buttrick, Judge

AFFIRMED

Lang Baker & Klain PLC
By Kent A. Lang
William G. Klain
Michael Walter Thal
Attorneys for Plaintiff/Appellant

Scottsdale

Folk & Associates PC
By P. Douglas Folk
Benjamin L. Hodgson
Attorneys for Defendants/Appellees CMX, LLC and CMX Group, Inc.

Phoenix

P O R T L E Y, Judge

¶1 Plaintiff/appellant American Asphalt and Grading Company ("American Asphalt") appeals the denial of its request for relief pursuant to Arizona Rule of Civil Procedure 60(c) and Arizona Revised Statutes ("A.R.S.") section 12-504 (2003) after its action against CMX, L.L.C. ("CMX") was dismissed for lack of prosecution. Finding no abuse of discretion, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 American Asphalt was a contractor on a residential subdivision development project for Element H-CMSMR, L.L.C. Homes ("Element Homes"). CMX was the civil engineer and land surveyor for Element Homes. American Asphalt sued CMX and Element Homes in April 2008 and amended the complaint on July 22, 2008. The amended complaint asserted claims for professional negligence and breach of common-law implied warranty of accuracy and suitability because the mass-grading plans for the project that CMX had prepared were materially inaccurate and caused American Asphalt to significantly underestimate its bid to excavate the material.

¶3 After it was served, CMX filed a motion to dismiss and motion to compel arbitration. The court denied the motion on November 21, 2008, and in the interim, court administration issued a 150-day order on October 1, 2008. The order stated the following:

A motion to Set and Certificate of Readiness or an Appeal from Arbitration shall be filed on or before 1/20/2009. . . . If Rule 38.1 is not complied with, the case will be placed on Inactive Calendar on the date shown above and it will be dismissed pursuant to Rule 38.1, without further notice, on or after 3/23/2009.

¶4 CMX filed its answer on December 31, 2008. The parties stipulated that American Asphalt could substitute counsel in February 2009. The case was dismissed on April 29, 2009, when court administration entered a judgment of dismissal for lack of prosecution and failure to comply with Rule 38.1.

¶5 American Asphalt immediately filed a motion to reinstate the action pursuant to Rule 60(c)(1) or (6), Arizona Rules of Civil Procedure, or alternatively to refile the complaint pursuant to A.R.S. § 12-504. American Asphalt asserted that its failure to file a motion to set and certificate of readiness was an "inadvertent mistake." American Asphalt explained that the deadline to file the certificate of readiness passed while former and current counsel were transferring the case and while its current counsel was analyzing the complicated factual and technical aspects of the case in order to prosecute the issues. American Asphalt also attached a draft captioned "Plaintiff's Rule 26.1 Initial Disclosure Statement."

¶16 In denying American Asphalt's motion, the court stated the following:

The pivotal issue to be decided here is whether Plaintiff's failure to heed the Court's order warning of dismissal constituted "excusable neglect."

On the record before the Court, Plaintiff has not met its burden to show excusable neglect. Instead, it appears that one or both of the law firms who represented it were simply careless. Carelessness does not equate to excusable neglect. *Ulibarri v. Gerstenberger*, 178 Ariz. 151 (App. 1993). **Rule 60(c) relief is denied.**

Similarly, Plaintiff's request for relief under the savings statute, Ariz. Rev. Stat. § 12-504, is denied. Again, excusable neglect has not been shown. *Jepson v. New*, 164 Ariz. 265 (1990) (adopting the excusable neglect standard for Ariz. Rev. Stat. § 12-504 relief articulated on *Flynn v. Cornoyer-Hedrick Architects & Planners, Inc.*, 160 Ariz. 187 (App. 1988)).

Plaintiff's Motion to Reinstate is, therefore, denied.

(Emphasis in original.)

¶17 American Asphalt filed a notice of appeal, and we have jurisdiction pursuant to A.R.S. § 12-2101(C) (2003).

DISCUSSION

¶18 American Asphalt sought relief pursuant to Arizona Rules of Civil Procedure 60(c)(1) and Rule 60(c)(6). "The purpose of [Rule 60(c)] is to provide relief for those mistakes and errors which inevitably occur despite diligent efforts to

comply with the rules." *Panzino v. City of Phoenix*, 196 Ariz. 442, 445, ¶ 5, 999 P.2d 198, 201 (2000) (quoting *City of Phoenix v. Geyler*, 144 Ariz. 323, 332, 697 P.2d 1073, 1082 (1985)). We review the trial court's decision on a Rule 60(c) motion for an abuse of discretion. *Copeland v. Ariz. Veterans Mem'l Coliseum & Exposition Ctr.*, 176 Ariz. 86, 89, 859 P.2d 196, 199 (App. 1993).

¶19 To obtain relief under Rule 60(c)(1), the moving party must show "mistake, inadvertence, surprise or excusable neglect," that it promptly sought relief, and that it had a meritorious claim or defense. *Jepson v. New*, 164 Ariz. 265, 272-73, 792 P.2d 728, 735-36 (1990); *Copeland*, 176 Ariz. at 89, 859 P.2d at 199. To obtain relief under Rule 60(c)(6), the moving party must show "extraordinary circumstances of hardship or injustice," "that the cause was prosecuted vigorously and diligently, that reasonable steps were taken to inform the court of the status of the case, and that substantial prejudice will result unless relief is granted," that relief was sought promptly, and that the moving party had a meritorious claim or defense. *Jepson*, 164 Ariz. at 273, 792 P.2d at 736; *Copeland*, 176 Ariz. at 89, 859 P.2d at 199. Relief under Rule 60(c)(6) also requires a showing that the attorney's failure to act was legally excusable. *Panzino*, 196 Ariz. at 445, ¶ 7, 999 P.2d at 201.

¶10 American Asphalt argues that a single deadline was inadvertently missed when two law firms transferred the case file. It contends that the mistake, which the court termed "carelessness," constitutes inadvertence under Rule 60(c)(1). "The standard for determining whether conduct is 'excusable' is whether the neglect or inadvertence is such as might be the act of a reasonably prudent person under the same circumstances." *Geyler*, 144 Ariz. at 331, 697 P.2d at 1081. Whether the person acted diligently is the "final arbiter" of whether the conduct is excusable. *Id.* at 332, 697 P.2d at 1082.

¶11 American Asphalt characterizes its missed deadline as a clerical mistake that is excusable because the matter was placed on the inactive calendar before present counsel was substituted into the case, an answer had been received less than two months before present counsel took over, and court administration had not provided a separate notice that the case was on the inactive calendar.

¶12 A secretarial or clerical error resulting in a missed deadline may be excusable. *Cook v. Indus. Comm'n of Ariz.*, 133 Ariz. 310, 312, 651 P.2d 365, 367 (1982) (attorney's late filing excusable where attorney relied on erroneous recording of deadline by temporary secretary); see also *Coconino Pulp & Paper Co. v. Marvin*, 83 Ariz. 117, 119-21, 317 P.2d 550, 551-52 (1957) (attorney's failure to timely file answer excusable where

secretary failed to provide attorney with "calendar sheet" advising of deadline, as was firm's practice).

¶13 The missed deadline here was not a simple clerical mistake. There was no evidence that a secretary or assistant failed to docket a deadline or did so incorrectly. Rather, American Asphalt's former counsel failed to act on the 150-day order, and current counsel did not see the order. The 150-day order was the only pink sheet of paper in one of the two boxes of documents transferred to new counsel. Moreover, on appeal, American Asphalt stated that current counsel worked with prior counsel for several weeks before formally becoming counsel for American Asphalt. During the transition, none of the lawyers noted the inactive calendar dates.

¶14 American Asphalt argues that the timing of the answer contributed to the error. The argument is unpersuasive given the specificity of the 150-day order and from the need to comply or seek a continuance.

¶15 American Asphalt also argues that the court administrator failed to send a specific notice when the action was placed on the inactive calendar. The 150-day order provided the notice required in Rule 38.1(e); and explicitly stated the date on which the matter was to be placed on the inactive calendar and the date on which it was to be dismissed. The order also indicates no further notice will be provided.

Consequently, the failure to receive a specific notice that the matter was placed on the inactive calendar is not excusable neglect.

¶16 Although former counsel had tried to settle the case for two years before filing suit, they did not diligently prosecute the claim, nor did they provide an affidavit explaining why they did not request extensions. Current counsel did not inquire into any deadlines before being substituted, had a short time to act, and missed deadlines without seeking additional time to file required pleadings. The trial court did not abuse its discretion when it found that American Asphalt did not demonstrate excusable neglect that entitled it to relief under Rule 60(c)(1).

¶17 To determine whether relief is warranted under Rule 60(c)(6), we must also consider whether the claim was pursued vigorously. See *Gorman*, 152 Ariz. at 183, 731 P.2d at 78 (when statute of limitations has expired, the court must consider whether the record shows abandonment or pursuit of the claim; "diligence is the hallmark").

¶18 The record does not show diligent prosecution of the claim. Although the parties had tried to resolve the case for two years before the lawsuit was filed and exchanged information and correspondence on the work each did, including information from American Asphalt's engineer, Lemme Engineering, American

Asphalt failed to timely provide its Rule 26.1 initial disclosure statement or its expert witness affidavits pursuant to A.R.S. § 12-2602 (2003).

¶19 In fact, CMX's counsel sent an email to American Asphalt's new counsel on February 9, 2009, suggesting that they needed to agree on a disclosure schedule and advising new counsel that American Asphalt had yet to provide the expert's affidavit. CMX agreed to an extension of the disclosure deadline until February 19, 2009. American Asphalt did not meet that deadline. The disclosure and affidavits were provided in draft form in May 2009, but were not formally filed until June 30, 2009, when American Asphalt filed its reply to its motion for relief from the dismissal.

¶20 There was, moreover, very little activity between CMX's answer and the dismissal. The parties stipulated to substitute counsel and sent emails between counsel extending the date for filing the Rule 26.1 initial disclosure statements and the expert affidavits. American Asphalt's new counsel tried to understand the case and ultimately hired a second consultant, but did not seek additional time to comply with the 150-day order. And, at no time did American Asphalt default Element Homes even though Element Homes never filed an answer or responsive pleading.

¶21 The record does not establish that American Asphalt diligently prosecuted its claim. Consequently, the trial court did not abuse its discretion when it found that American Asphalt was not entitled to Rule 60(c)(6) relief.

¶22 American Asphalt also argues that it was entitled to relief pursuant to A.R.S. § 12-504, the savings statute. The statute provides in pertinent part:

If an action timely commenced is terminated . . . for lack of prosecution, the court in its discretion may provide a period for commencement of a new action for the same cause, although the time otherwise limited for commencement has expired. Such period shall not exceed six months from the date of termination.

A.R.S. § 12-504(A).

¶23 The plaintiff bears the burden of presenting circumstances justifying relief under A.R.S. § 12-504(A). *Jepson*, 163 Ariz. at 272, 792 P.2d at 735 (quoting *Flynn v. Cornoyer-Hedrick Architects & Planners, Inc.*, 160 Ariz. 187, 192, 772 P.2d 10, 15 (App. 1988)). The plaintiff must show that it acted reasonably and in good faith, that it prosecuted the case diligently and vigorously, that no other impediment exists to filing a second action, and that it will be substantially prejudiced. See *McKernan v. Dupont*, 192 Ariz. 550, 557, ¶ 26, 968 P.2d 623, 630 (App. 1998), *overruled on other grounds by Panzino*, 196 Ariz. at 445 n.3, ¶ 8, 999 P.2d at 201 n.3. The

trial court has broad discretion in deciding whether to grant relief under the savings statute, and we will not disturb that decision absent an abuse of discretion. *Jepson*, 164 Ariz. at 274, 792 P.2d at 737.

¶124 Where a case is dismissed for lack of prosecution, relief should be granted under A.R.S. § 12-504 only where the plaintiff shows that the dismissal occurred despite diligent pursuit of the case. *Id.* The diligence standard that applies to Rule 60(c)(6) relief also applies to the savings statute. *Id.* at 273, 792 P.2d at 736. Because we have already concluded that American Asphalt did not diligently prosecute the action, the trial court did not abuse its discretion when it denied relief pursuant to A.R.S. § 12-504.

¶125 CMX has requested an award of attorneys' fees on appeal pursuant to A.R.S. §§ 12-341.01(C) and -349(A)(1)¹ (2003). Section 12-341.01(C) requires the court to award reasonable attorney fees "in any contested action upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and is not made in good faith." All three elements – harassment, groundlessness, and the absence of good faith – must be present for fees to be awarded under this section. *Rowland v. Great States Ins. Co.*, 199 Ariz. 577, 587, ¶ 33, 20 P.3d

¹ CMX has not identified the subsection of A.R.S. § 12-349 under which it makes its request. We conclude the request is pursuant to § 12-349(A)(1) based on the argument presented.

1158, 1168 (App. 2001). Section 12-349(A)(1) provides that "in any civil action . . . the court shall assess reasonable attorney fees . . . against an attorney or party . . . if the attorney or party . . . [b]rings or defends a claim without substantial justification." "[W]ithout substantial justification" means that the claim constitutes "harassment, is groundless and is not made in good faith." A.R.S. § 12-349(F). Like A.R.S. § 12-341.01(C), all three elements must be proven. *City of Casa Grande v. Ariz. Water Co.*, 199 Ariz. 547, 555, ¶ 27, 20 P.3d 590, 598 (App. 2001). Under A.R.S. § 12-349, however, they must be proven by a preponderance of the evidence, rather than by clear and convincing evidence. *Id.*

¶126 CMX argues that American Asphalt's claims are groundless. It has presented no argument with respect to the elements of harassment or lack of good faith. Consequently, CMX has not established the elements required to be entitled to an award of fees under either A.R.S. §§ 12-341.01(C) or -349(A)(1).

¶127 CMX has also requested an award of attorneys' fees pursuant to A.R.S. § 34-222 (Supp. 2009). The statute requires a person to provide bonds before entering into a construction contract for certain projects and requires the bonds to include a provision allowing the prevailing party in a suit on a bond to recover reasonable attorneys' fees. § 34-222(A), (B). CMX has offered no argument and no factual basis to support application

of the statute in this case. We, therefore, deny CMX's request for attorneys' fees.

CONCLUSION

¶28 We find no abuse of discretion in the court's decision denying American Asphalt's request for relief pursuant to Rule 60(C)(1), (6), and A.R.S. § 12-504. The trial court's ruling is affirmed.

/s/

MAURICE PORTLEY, Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Presiding Judge

/s/

LAWRENCE F. WINTHROP, Judge