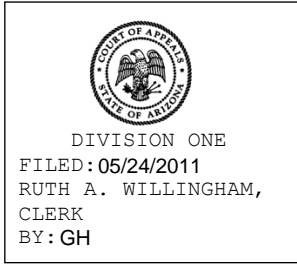


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
 EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
 See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
 Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS  
 STATE OF ARIZONA  
 DIVISION ONE

THE TROILO FAMILY LIMITED	)	1 CA-CV 10-0713
PARTNERSHIP, a Nevada limited	)	
partnership; ROBERT MACDONALD;	)	DEPARTMENT C
KEITH KINARD; OLIVER BADGIO;	)	
WALTER FIELDER; JEFFREY J.	)	<b>MEMORANDUM DECISION</b>
MASTRO; MIKE MASTRO; and DENNIS	)	(Not for Publication -
MASTRO,	)	Rule 28, Arizona Rules
	)	of Civil Appellate
Plaintiffs/Appellees,	)	Procedure)
	)	
v.	)	
	)	
4D MEDIA, INC.; THOMAS N. and	)	
CHERIE CARTER, husband and wife;	)	
RICHARD A. and KAREN JOHNSON,	)	
husband and wife,	)	
	)	
Defendants/Appellants.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV 2009-032121

The Honorable Benjamin E. Vatz, Commissioner

**AFFIRMED**

Law Office of Roger D. Smith  
 By Roger D. Smith  
 Attorney for Defendants/Appellants

Scottsdale

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**K E S S L E R**, Judge

¶1 Defendants/appellants 4D Media, Inc., Thomas N. Carter, Cherie Carter, Richard A. Johnson, and Karen Johnson ("Defendants") appeal the superior court's order denying them relief from a default judgment. For the reasons that follow we affirm the order of the superior court.

**FACTUAL AND PROCEDURAL HISTORY**

¶2 The Triolo Family Partnership, Robert Macdonald, Keith Kinard, Oliver Badgio, Walter Fielder, Jeffrey J. Mastro, Mike Mastro, and Dennis Mastro ("Plaintiffs") filed a complaint in the superior court asserting sundry causes of action arising out of 4D's failure to pay several million dollars in corporate bonds. Plaintiffs served Thomas and Cherie Carter and 4D Media on October 23, 2009. They served Richard and Karen Johnson on October 28, 2009.

¶3 By December 4, 2009 none of the Defendants had answered the complaint and Plaintiffs filed an application and affidavit for entry of default. Plaintiffs mailed copies of the application to each defendant at the address the defendant was served. On December 24, 2009 Plaintiffs filed a motion for default judgment, again mailing a copy to each of the

Defendants. By January 15, 2010, Defendants still had not filed anything in the superior court, and the court entered a default judgment.

¶4 On June 9, 2010, Defendants made their first filing in the case, a motion for relief from default judgment pursuant to Arizona Rule of Civil Procedure 60. The motion indicates that the first attempt any defendant made to answer the complaint was December 11, 2009. At that time, Defendant Carter attempted to file an answer but erroneously directed the original answer and filing fee to Plaintiff's counsel, and the copy without the filing fee was directed to the superior court. Plaintiffs' counsel returned the original answer and filing fee to Carter, and the superior court rejected the copy of the answer, stating that Defendants had failed to include the proper filing fee.

¶5 According to the Rule 60 motion, Carter attempted to file a subsequent answer, which the superior court rejected because its caption indicated the wrong court and the fee proffered was insufficient.<sup>1</sup> The Defendants spent the time between the second rejection and the filing of their Rule 60 motion attempting to raise money for their filing fee and locate an Arizona attorney.

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<sup>1</sup> The Rule 60 motion does not indicate when this attempt took place, but does indicate that the superior court rejected the second attempted filing on January 7, 2010.

¶16 The superior court held that as a matter of law the facts proffered by the Defendants, even if believed, did not justify relief from judgment. The Defendants filed a timely notice of appeal. This Court has jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 12-2101(C) (2003).

#### **ANALYSIS**

¶17 On appeal, Defendants contend that the superior court erroneously denied their motion for relief from the default judgment because their failure to answer resulted from excusable neglect and the judgment was obtained by fraud. We review the superior court's denial of Defendants' Rule 60(c) motion for relief from judgment for an abuse of discretion. *Fry v. Garcia*, 213 Ariz. 70, 72, ¶ 7, 138 P.3d 1197, 1199 (App. 2006). An abuse of discretion occurs when the court commits an error of law in the process of reaching a discretionary decision. *Hurd v. Hurd*, 223 Ariz. 48, 52, ¶ 19, 219 P.3d 258, 262 (App. 2009).

#### **I. The Defendants' Neglect Was Not Excusable**

¶18 Defendants contend that their failure to answer was a result of excusable neglect. We disagree. "A party seeking relief from either a default judgment or an entry of default 'must demonstrate to the satisfaction of the trial court (1) that his failure to answer *within a time required by law* was excusable neglect; (2) that he had a meritorious defense; and

(3) that he made prompt application for relief.'" *DeHoney v. Hernandez*, 122 Ariz. 367, 371, 595 P.2d 159, 163 (1979) (emphasis added) (quoting *Phillips v. Findlay*, 19 Ariz. App. 348, 353-54, 507 P.2d 687, 692-93 (1973)) (holding that same standard governs Rule 55(c) relief from default and Rule 60(c) relief from judgment). A reasonably prudent person would not exhaust the time allowed to answer and then wait until an application for entry of default to file an answer. *Baker Int'l. Assoc. v. Shanwick Int'l. Corp.*, 174 Ariz. 580, 585, 851 P.2d 1379, 1384 (App. 1993). In this case, Defendants were served out of state by a private process server and were required to answer within thirty days of service, either November 23, 2009 (for 4D and the Carter defendants) or November 30, 2009 (for the Johnson defendants). Only Carter attempted to file an answer, but even that was over two weeks after his answer was due and a full week after Plaintiffs filed their application for entry of default.<sup>2</sup> Carter gives no valid reason for failing to file an answer within the time allowed. None of the other Defendants attempted to answer or take any other action until June 2010, months after entry of default occurred. Although Defendants allege numerous excuses for the inadequacy of the filings they made, they have proffered no excuse for

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<sup>2</sup> We reject the Defendants' contention, unsupported by any citation to the record, that they attempted to answer in the time allowed.

failing to take any action to respond to the complaint before their thirty days expired. Therefore the superior court correctly ruled that they failed to allege facts which would establish excusable neglect.

## **II. The Judgment Was Not Procured by Fraud**

¶19 The Defendants contend that Plaintiffs fraudulently procured the judgment by requesting judgment based on the face value of the notes, notwithstanding an allegation that one of the bonds was purchased for less than its face value.<sup>3</sup> We disagree. In order to obtain relief from a judgment due to fraud, the movant must "(1) have a meritorious defense, (2) that he was prevented from fully presenting before judgment, (3) because of the adverse party's fraud, misrepresentation, or misconduct." *Estate of Page v. Litzenburg*, 177 Ariz. 84, 93, 865 P.2d 128, 137 (App. 1993). Defendants have failed to proffer sufficient facts to demonstrate entitlement to relief because they have not alleged that they were prevented from presenting a defense. Defendants have not alleged a single act of Plaintiffs that prevented them from filing an answer and presenting evidence of what consideration was given in exchange for the bonds.

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<sup>3</sup> We note that the papers submitted in support of the default refer to the face amount of the bonds and make no representation regarding what consideration was paid for them.

## CONCLUSION

¶10 For the forgoing reasons we affirm the judgment of the superior court. Defendants request attorneys' fees pursuant to the terms of the notes. Although Defendants fail to cite the provision of the note granting attorneys' fees, the Court has determined that Section 12 of the note in favor of the Troilo Family Limited Partnership and Section 13 of the notes in favor of the individual plaintiffs are the only relevant provisions. Those provisions provide one-way fee shifting in favor of the holder of the note, the Plaintiffs. Therefore, we decline Defendant's request for fees.

¶11 The Plaintiffs also request fees pursuant to the terms of their notes and A.R.S. § 44-2001(A) (2003). We award attorneys' fees to Plaintiffs pursuant to the fee shifting provision in the notes, subject to timely compliance with ARCAP

21. Therefore, we decline to consider the applicability of  
A.R.S. § 44-2001(A).

/s/

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DONN KESSLER, Judge

CONCURRING:

/s/

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PATRICIA A. OROZCO, Presiding Judge

/s/

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MICHAEL J. BROWN, Judge