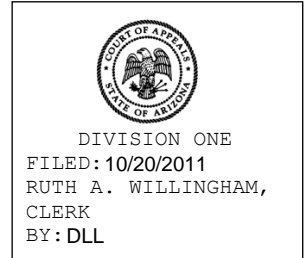


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



COMMUNITY BANK OF NEVADA, a Nevada) 1 CA-CV 10-0753
State Bank; FEDERAL DEPOSIT INSURANCE)
COMPANY, as Receiver for Community Bank) DEPARTMENT E
of Nevada,)
Plaintiffs/Appellees,) **MEMORANDUM DECISION**
v.) (Not for Publication
ABCDW, LLC, an Arizona limited) - Rule 28, Arizona
liability company; VANDERBILT FARMS,) Rules of Civil
LLC, an Arizona limited liability) Appellate Procedure)
company; BRANDON D. WOLFSWINKEL, an)
unmarried man; and ASHTON A.)
WOLFSWINKEL, an unmarried man,)
Defendants/Appellants.)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2009-022171

The Honorable Emmet J. Ronan, Judge

AFFIRMED

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By Morgan L. Hector
and Brian M. Mueller
Attorneys for Plaintiffs/Appellees

Los Angeles, CA
Scottsdale

Wright & Associates
By Lawrence C. Wright
and

Mesa

N O R R I S, Judge

¶1 ABCDW, LLC and its co-Defendants/Appellants¹ (collectively referred to as "ABCDW") timely appeal from the superior court's order reinstating Community Bank of Nevada's case on the active calendar. ABCDW argues the court abused its discretion in reinstating the case because Community Bank's counsel failed to exercise diligence to stay informed of the status of its case and, through neglect, allowed it to be dismissed. For the following reasons, we hold the superior court did not abuse its discretion in reinstating the case.

FACTS AND PROCEDURAL BACKGROUND

¶2 On July 9, 2009, Community Bank sued ABCDW, seeking a deficiency judgment against it after a real property trustee's sale. On August 14, 2009, Nevada regulators closed Community Bank and appointed Federal Deposit Insurance Company ("FDIC") as the receiver. After Community Bank's counsel withdrew from the case, FDIC noticed its appearance on October 19, 2009. In its answer, filed on November 23, 2009, ABCDW admitted it had defaulted but contested its liability to Community Bank.

¹Other co-Defendants/Appellants include Vanderbilt Farms, LLC, Brandon D. Wolfswinkel, and Ashton A. Wolfswinkel.

¶13 Pursuant to Arizona Rule of Civil Procedure ("Rule") 38.1, on April 22, 2010, court administration issued an order placing the case on the inactive calendar for dismissal on June 21, 2010, unless one of the actions designated under Rule 38.1 occurred ("38.1 Order"). The 38.1 Order only listed ABCDW's counsel and not FDIC's counsel. FDIC failed to take any of the designated steps by June 21, and, on July 15, court administration dismissed the case without prejudice for lack of prosecution. On July 22, FDIC moved to reinstate the case under Rule 60(c).

¶14 ABCDW did not respond to the reinstatement motion. Instead, on August 9, one day before its response to FDIC's motion to reinstate was due, ABCDW moved to enlarge time to respond to the motion, arguing it needed "additional time to seek an expert opinion" on whether FDIC's failure to file a motion to set was the result of excusable neglect.

¶15 After considering the reinstatement motion, ABCDW's motion to enlarge time, and FDIC's response to ABCDW's motion, the superior court found it "clear" from the record that FDIC had not received the 38.1 Order and ruled "the lack of notice constitute[d] excusable neglect." The court thus reinstated the case on the active calendar and vacated the judgment of dismissal. It also denied ABCDW's motion to enlarge time.

¶6 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1)(2010) and 12-2101(C)(2010).²

DISCUSSION

I. Rule 60(c) Relief from Judgment

A. Excusable Neglect

¶7 ABCDW argues the superior court abused its discretion in reinstating the case because, even assuming FDIC did not receive the 38.1 Order, FDIC failed to exercise diligence to stay informed of the case status. As explained below, see *infra* ¶¶ 8-9, an attorney's obligation to keep advised of the status of his or her case is not the dispositive factor for excusable neglect; it is only one factor. Based on the record presented, the court did not abuse its discretion in reinstating the case given the totality of the circumstances. See *Johnson*, 192 Ariz. at 488, ¶ 9, 967 P.2d at 1024 (appellate court reviews a superior court's "decision to grant a Rule 60(c) motion for an abuse of discretion."); *Toy v. Katz*, 192 Ariz. 73, 83, 961 P.2d

²"[A]n order vacating an order of dismissal is appealable" *Edgar v. Garrett*, 10 Ariz. App. 98, 98-99, 456 P.2d 944, 944-45 (1969); see *Johnson v. Elson*, 192 Ariz. 486, 488, ¶ 6, 967 P.2d 1022, 1024 (App. 1998) ("The dismissal order was a final order. Therefore, the judgment setting aside that dismissal was 'a special order made after final judgment.'" (quoting A.R.S. § 12-2101(C))).

1021, 1031 (App. 1997) (abuse of discretion occurs when a superior court's ruling has "exceeded the bounds of reason.")

¶18 To obtain relief under Rule 60(c)(1), a plaintiff generally must (1) show mistake, inadvertence, surprise or excusable neglect; (2) seek relief promptly; and (3) demonstrate the existence of a meritorious claim. *Copeland v. Ariz. Veterans Mem'l Coliseum and Exposition Ctr.*, 176 Ariz. 86, 89, 859 P.2d 196, 199 (App. 1993). "Neglect is excusable if it 'might be the act of a reasonably prudent person under the same circumstances.'" *Jarostchuk v. Aricol Commc'ns, Inc.*, 189 Ariz. 346, 348, 942 P.2d 1178, 1180 (App. 1997) (quoting *City of Phoenix v. Geyler*, 144 Ariz. 323, 331, 697 P.2d 1073, 1081 (1985)). In reviewing Rule 60(c)(1) cases, our supreme court recognized that "diligence is the final arbiter of whether mistake or neglect is excusable." *Geyler*, 144 Ariz. at 332, 697 P.2d at 1082.

¶19 A court should consider the "'totality of the circumstances' . . . in determining whether a party diligently prosecuted the case," *Copeland*, 176 Ariz. at 90, 859 P.2d at 200 (citing *Jepson v. New*, 164 Ariz. 265, 276, 792 P.2d 728, 739 (1990)), including such non-dispositive factors as the "court's obligation to give notice of impending dismissal," *id.*; see Ariz. R. Civ. P. 38.1(e); *Am. Asphalt & Grading Co. v. CMX*,

L.L.C., 227 Ariz. 117, 118, ¶ 8, 253 P.3d 1240, 1241 (2011), and an attorney's obligation to remain "advised of the ongoing status of any action in which he has appeared." *Copeland*, 176 Ariz. at 90, 859 P.2d at 200; see Ariz. R. Civ. P. 5.1(b). "By considering each as a factor in the Rule 60(c) analysis, we can reconcile two policy concerns: we avoid dismissal of cases in active litigation due to minor procedural errors, while holding the parties involved, rather than the court system, responsible for diligent prosecution of litigation." *Copeland*, 176 Ariz. at 90, 859 P.2d at 200 (citations omitted).

¶10 Here, FDIC's counsel noticed its appearance, requested future court notices, and received one minute entry after he appeared in the case. The record reflects FDIC did not, however, receive the 38.1 Order. Although FDIC requested future filings in its notice of appearance, we recognize, as ABCDW points out, FDIC made no showing it had taken steps to independently calendar case deadlines. We also acknowledge a prudent attorney remains informed about the status of his or her cases, including calendaring deadlines, but this obligation is only one factor in the analysis. For example, FDIC was actively prosecuting the case by submitting discovery requests to ABCDW. Given the court's failure to send the 38.1 Order to FDIC and FDIC's active prosecution of the case, we cannot say the

superior court abused its discretion in concluding FDIC's neglect was excusable.

B. Meritorious Claim

¶11 ABCDW also argues the superior court abused its discretion in reinstating the case because FDIC failed to demonstrate a meritorious claim. ABCDW failed to raise this argument in the superior court, and thus this argument is not properly before us. *Harris v. Cochise Health Sys.*, 215 Ariz. 344, 349, ¶ 17, 160 P.3d 223, 228 (App. 2007) (appellate court will not consider issues not raised in the superior court). Nevertheless, based on its pleadings and discovery requests, it is apparent FDIC was challenging ABCDW's factual assertions regarding the fair market value of the property.

II. Motion to Enlarge Time

¶12 ABCDW also argues the superior court abused its discretion in refusing to extend ABCDW's time to respond to the reinstatement motion, because it did not consider whether ABCDW had established good cause to extend time or whether FDIC would be prejudiced by the extension. ABCDW also argues the court should not have denied its request for an extension of time without considering its reply in support of its request. We disagree with each argument and see no abuse of discretion.

¶13 ABCDW argued it needed additional time to respond to FDIC's motion so that it could consult with an expert to determine whether FDIC's actions constituted excusable neglect. On this record, ABCDW did not need to consult with an expert to respond to the motion to reinstate or to discuss whether FDIC's actions constituted excusable neglect. See *Webb v. Omni Block, Inc.*, 216 Ariz. 349, 354-55, ¶¶ 17-20, 166 P.3d 140, 145-46 (App. 2007) (expert may not testify to legal conclusion). Moreover, ABCDW waited until one day before the response deadline to request an extension and, besides asserting it needed an expert, only cited its attorney's scheduled vacation -- which began after the response's deadline -- to justify its need for additional time to respond. Because ABCDW failed to show good cause for an extension, the superior court did not need to consider whether FDIC would have been prejudiced by the proposed extension.

¶14 Additionally, ABCDW's reply in support of its motion to enlarge time did not differ in substance from its original motion. It merely cited a case discussing the court's discretion in reinstating a case and reiterated counsel's duty to "exercise[] reasonable diligence in keeping abreast of developments in its case." Accordingly, assuming the court failed to consider ABCDW's reply, ABCDW did not present any

