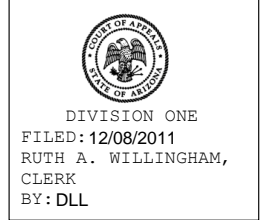


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



GINO DEMICHELE and TANYA ) 1 CA-CV 10-0885  
DEMICHELE, husband and wife, )  
 ) DEPARTMENT A  
Plaintiffs/Appellees, )  
 ) **MEMORANDUM DECISION**  
v. )  
 )  
YUIN KIM and KIMCORP USA, LLC, ) Not for Publication -  
an Arizona limited liability ) (Rule 28, Arizona Rules  
company; and CONDO USA, LLC, an ) of Civil Appellate Procedure)  
Arizona limited liability )  
company, )  
 )  
 )  
Defendants/Appellants. )

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-002956

The Honorable Eileen S. Willett, Judge

**REVERSED AND REMANDED**

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Murphy Karber PLC Phoenix  
By Richard B. Murphy  
Robert M. Karber  
Attorneys for Appellants

Keyt Law Offices Phoenix  
By Norman C. Keyt  
Attorney for Appellees

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**B A R K E R**, Judge

¶1 Yuin Kim, Kimcorp USA, and Condo USA (collectively "Defendants" or "Appellants") seek review of the trial court's entry of default judgment as a sanction for their failure to appear at a scheduled status conference. Appellants argue the court's denial of their Rule 60(c) motion and/or Rule 59(a) motion for new trial was an abuse of discretion. Because the court expressly found that a key fact was undisputed, when the record shows that it was in dispute, we reverse.

#### ***Facts and Procedural History***

¶2 In February 2009, Gino and Tanya DeMichele ("Plaintiffs" or "Appellees") sued Appellants for fraud, unjust enrichment, rescission of contract, and other claims arising out of a real estate contract between the two parties. About a year later, Appellants' counsel filed a motion to withdraw as counsel of record without consent. The motion stated that Appellants have substantially failed to fulfill their obligations to counsel, that the withdrawal will have no adverse effect on Appellants' interests, and that the "clients have been notified, in writing, and orally, of the status of this case." Appellants' counsel also filed a certificate in support of the motion certifying that "Defendants have been notified in writing of the status of this case including the dates and times of any court hearings or trial settings, pending compliance with any existing court orders, and the possibility of sanctions." On

February 16, 2010, the court granted counsel's motion to withdraw and ordered "Kimcorp USA and Condo USA as LLC's [to] obtain counsel within 45 days of the filing of this order or sanctions will issue."

¶13 On March 30, Appellees filed a motion for partial summary judgment. The motion was rejected by the court as untimely because it was past the March 22 deadline for filing dispositive motions. Appellees filed a motion for reconsideration explaining that its motion had been intentionally delayed to wait for new defense counsel to appear. Because Appellants had still failed to obtain new counsel as of March 30, Appellees then filed the motion. On reconsideration, the trial court permitted Appellees' motion for summary judgment to be filed and ordered Appellants to file a response in 30 days. A copy of the minute entry memorializing this order was sent to Appellants.

¶14 On May 11, Appellants failed to appear for a scheduled telephonic status conference. At the conference, the trial court noted that Appellants had been ordered to obtain counsel, had not complied with the order, and had failed to appear for the conference. Appellees moved for sanctions asking the court to strike Appellants' pleadings. The court did so and, finding that Appellants had failed to appear to defend the matter, permitted Appellees to proceed by default. On May 25, 2011, the

court entered judgment against Appellants in the amount of \$172,361.88 and dismissed, with prejudice, Appellants' counterclaims.

¶15 On June 11, Appellants obtained defense counsel and filed a motion for relief from judgment pursuant to Rule 60(c). The motion explained that Appellants had been putting forth diligent effort to obtain new counsel and that Appellants had not been aware of the scheduled status conference. In an unsigned minute entry, the trial court denied Appellants' motion finding that they had failed to meet their burden of proof. Appellants then filed a motion for reconsideration pursuant to Rule 59(a), which was also denied by the court in an unsigned minute entry filed on October 29. Appellants now appeal the default judgment and challenge the sanctions imposed by the trial court - striking Appellant's pleadings and entering default judgment against Appellants - as an abuse of discretion. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S") section 12-2101(A)(2) (2011) ("any special order made after final judgment").<sup>1</sup>

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<sup>1</sup> Appellees argue that we do not have jurisdiction because Appellants did not timely file their appeal. Because both denials of Appellants' motions were effectuated by unsigned minute entries, there were no signed orders for purposes of determining the time period for appeal. See *Tripati v. Forthwith*, 223 Ariz. 81, 84, ¶ 15, 219 P.3d 291, 294 (App.

### *Discussion*

¶16 First, Appellants challenge the trial court's denial of their Rule 60(c) motion for relief from judgment. "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, 93 P.3d 486, 498 (2004). In reviewing the trial court's ruling on a Rule 60(c) motion, we are mindful of the broad discretion the courts possess, the public policy favoring finality of judgments, and the "highly desirable legal objective that cases be decided on their merits." *Hirsch v. Nat'l Van Lines, Inc.*, 136 Ariz. 304, 308, 666 P.2d 49, 53 (1983); see also *Panzino v. City of Phoenix*, 196 Ariz. 442, 448, ¶ 19, 999 P.2d 198, 204 (2000).

¶17 Here, the court denied Appellants' motion, finding they failed to meet their burden of proof under Rule 60(c). As

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2009). Appellants' notice of appeal, filed on November 17, 2010, in response to the court's rulings, was premature because there was no signed order. A signed order is required to determine the cutoff date; however, "[b]ecause only the ministerial act of entering a signed order denying the [motions] remained to be accomplished, [Appellants'] premature notice of appeal is deemed effective after entry of the signed order." *Tripathi*, 223 Ariz. at 84-85, 219 P.3d at 294-95. We stayed this matter. The trial court then entered judgment by signed order on February 23, 2011, and this appeal was properly reinstated. Appellees also assert that the only jurisdiction we have is over the denial of the Rule 60(c) motion. Because our ruling on the Rule 60(c) motion makes the trial court's ruling on the Rule 59 motion moot, we need not address this issue.

the basis for its ruling, the court stated that "Defendants were advised of the Status Conference by their prior counsel and do not dispute this fact. Defendants nevertheless failed to appear for a properly noticed Status Conference." The ruling specifically states the fact that Defendants "do not dispute" that they were advised of the status conference as the basis for finding they failed to meet their burden of proof. However, in Appellants' Rule 60(c) motion and in Kim's Rule 80(i) verification attached thereto, Appellants expressly set forth that they were not aware - and had never received notice - of the status conference scheduled for May 11.

¶18 We will not substitute our judgment for that of the trial court on questions of disputed fact; however, where the court's ruling is based on a mistaken fact, it is necessarily an abuse of discretion. A trial court's discretion is "a legal, and not an arbitrary or personal discretion . . . . [a] proper showing of facts is 'a prerequisite to the exercise' of the discretion given the trial court." *Richas v. Superior Court (Rozar)*, 133 Ariz. 512, 514, 652 P.2d 1035, 1037 (1982). Thus, the court abused its discretion in denying Appellants' motion by basing its decision on the finding that a key fact was undisputed when in fact it was disputed.

### **Conclusion**

¶19 For the reasons stated above, we vacate the court's ruling denying Appellants' motion for relief from judgment and remand for proceedings consistent with this decision. Fundamental fairness may require an evidentiary hearing to provide Appellants an opportunity to defend the issue of whether they were actually advised of the status conference. See *Weaver v. Synthes, Ltd.*, 162 Ariz. 442, 445, 784 P.2d 268, 271 (App. 1989). We neither foreclose nor suggest the possibility that there may be other grounds pertinent to ruling on Appellants' Rule 60(c) motion.

¶10 Our decision is based upon the court's reliance on an incorrect fact which formed the foundation for its ruling. However, we note that granting default as a sanction for failure to comply with a court order is the most severe sanction; a court's discretion to enter default is more limited than its discretion to employ other sanctions. See *Seidman v. Seidman*, 222 Ariz. 408, 411, ¶ 18, 215 P.3d 382, 385 (App. 2009). In particular, we are not endorsing an approach in which the trial court simply corrects the factual error noted and then proceeds to enter judgment.

/s/

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DANIEL A. BARKER, Judge

CONCURRING:

/s/

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ANN A. SCOTT TIMMER, Presiding Judge

/s/

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PATRICK IRVINE, Judge