IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

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SMITA PATEL,
*Plaintiff/Appellee*,

*v.*

LEE SMITH, JOCELYN SMITH, AND NATIONAL NOTE PARTNERS OF ARIZONA, LLC,
*Defendants/Appellants*.

No. 2 CA-CV 2015-0001
Filed November 12, 2015

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Appeal from the Superior Court in Cochise County
No. CV201300221
The Honorable John F. Kelliher Jr., Judge

**AFFIRMED**

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COUNSEL

Stachel & Associates, P.C., Sierra Vista
By Robert D. Stachel Jr. and Michelle DeWaelsche
*Counsel for Plaintiff/Appellee*

Rosov Law, PLLC, Phoenix
By Elijah W. Rosov
*Counsel for Defendants/Appellants*

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**MEMORANDUM DECISION**

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

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M I L L E R, Presiding Judge:

**¶1** Appellants Lee and Jocelyn Smith and National Note Partners of Arizona, LLC (NNP) appeal from the partial default judgment entered against them,[1] contending the trial court erred by striking their answer under Rule 11, Ariz. R. Civ. P., and denying their motion to amend. Further, the Smiths and NNP contend the trial court erred by denying their motion to set aside default and motion for reconsideration.[2] For the following reasons, we affirm.

**Procedural Background**

**¶2** The following facts are undisputed. In September 2013, plaintiff Smita Patel filed an amended complaint against the Smiths and NNP that alleged consumer fraud, breach of contract, securities fraud, and conspiracy. The factual allegations concerned Patel's real estate investments with the Smiths and NNP.[3] NNP accepted service of the complaint. After several attempts by a process server to serve the Smiths, the court allowed alternative service, and they

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[1] The original judgment lodged by the parties included language from Rule 54(b), Ariz. R. Civ. P. The trial court replaced the Rule 54(b) citation with citation to Rule 54(c). We requested supplemental briefing regarding jurisdiction, and ultimately a new judgment was entered that contained only Rule 54(b) language.

[2]NNP was not included in the Smiths' answer and therefore is not appealing the first two issues. NNP joined the Smiths' motion to set aside default.

[3]There were other claims involving other defendants who are not parties to this appeal.

were served on November 18 by posting and mail. On December 10, Patel filed an application for entry of default against the Smiths and NNP. Two days before expiration of the ten-day default period pursuant to Rule 55(a)(3), Ariz. R. Civ. P., the Smiths filed an answer that stated for each allegation, including their status as husband and wife and residence in Maricopa County, "Defendants are without sufficient information and DENY the same." NNP did not file an answer.

**¶3** In January 2014, Patel moved to strike the answer and for default judgment. The hearing on that motion was continued at the request of the Smiths' first attorney. By the time of the July 7 hearing on the motion to strike, the Smiths had a new attorney, responded to Patel's motion, and requested leave to amend their answer. The trial court granted Patel's motion to strike the answer, found the default effective, denied the motion to amend, and suggested the Smiths assert their substantive arguments in a motion to set aside the default judgment. The Smiths later filed a motion to set aside that the court denied and they moved for reconsideration, which was also denied. This timely appeal followed.

**Striking of Answer**

**¶4** The Smiths first contend the trial court erred by striking their answer as a sanction under Rule 11. We review orders imposing Rule 11 sanctions for an abuse of discretion. *James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Prot.*, 177 Ariz. 316, 319, 868 P.2d 329, 332 (App. 1993). We also review a court's ruling on a motion to strike for an abuse of discretion. *Dowling v. Stapley*, 221 Ariz. 251, ¶ 45, 211 P.3d 1235, 1250 (App. 2009). The facts are viewed in the light most favorable to upholding the trial court's ruling. *See id.*

**¶5** The substantive portion of Rule 11(a) that provides authority for a court to impose sanctions states in relevant part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or

> other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact . . . and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading . . . is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction.

An attorney has an affirmative duty to conduct some investigation on both facts and law before filing an answer or complaint, but need not prepare a prima facie case or gather expert opinions. *See Boone v. Superior Court*, 145 Ariz. 235, 241-42 & n.3, 700 P.2d 1335, 1341-42 & n.3 (1985). But the attorney is required to make "reasonable efforts" to determine a defense is "not illusory, frivolous, unnecessary, or insubstantial." *Id.* at 241, 700 P.2d at 1341. A general denial of the type employed here is permitted by Rule 8(b), Ariz. R. Civ. P., but such a denial is still "subject to the obligations set forth in Rule 11(a)."

**¶6** On appeal, the Smiths contend their answer should not have been stricken by the trial court because it was a timely general denial, and because their attorney made a "reasonable inquiry into the facts." The record contradicts this contention.

**¶7** According to the Smiths' response to the default judgment motion and motion to strike,[4] they did not retain counsel

[4]There are no transcripts of the hearing on the motion to strike. The Smiths have filed a narrative statement of facts pursuant to Rule 11(d), Ariz. R. Civ. App. P., asserting they delayed in responding to the complaint because they could not find an attorney they could afford. There is no indication, however, in either the statement or the record that this argument was made to the trial court before it ruled on the motion to strike. Further, we presume

until days before the ten-day window after the default application was to expire. Further, the attorney had limited information at the time he filed the original answer. Yet, the answer denied every claim in the complaint, including the names, status, and residence of the Smiths themselves. The record before the trial court at the time it struck the answer provides no explanation for these denials other than the Smiths' delay in retaining an attorney and the failure to communicate with him. There is no indication the Smiths' attorney had made a reasonable inquiry into the facts prior to filing the answer to avoid default as required by Rules 8(b) and 11(a). The trial court did not abuse its discretion by striking the answer.

**Denial of Motion for Leave to Amend**

**¶8** The Smiths next contend the trial court erred by denying their motion for leave to amend their answer. We review a court's denial of a motion to amend for an abuse of discretion. *Dube v. Likins*, 216 Ariz. 406, ¶ 24, 167 P.3d 93, 102 (App. 2007). We find no such error here.

**¶9** Once the trial court struck the answer, there was nothing to amend. Moreover, the absence of a response made the automatic default effective. *See* Ariz. R. Civ. P. 55(a)(2), (3) ("A default entered by the clerk *shall* be effective ten (10) days after the filing of the application for entry of default.") (emphasis added). As the trial court informed the Smiths at the hearing, a request for relief must be made in a motion to set aside the default rather than a motion to amend. *Cf. Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 185, 189-90, 836 P.2d 398, 402-03 (App. 1992) (Rule 55(a) gives defaulting party second chance through ten-day grace period and notice requirements; failure to defend in time requires motion to set aside). Although the Smiths argue they should have been allowed to amend because leave to amend should be freely given, they cite no case law, and we are aware of none, allowing such an amendment after entry of default was automatically entered.

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missing portions of the record support the court's decision. *See Kline v. Kline*, 221 Ariz. 564, ¶ 33, 212 P.3d 902, 910 (App. 2009).

**¶10** The Smiths also appear to argue they should have been allowed to amend their answer due to confusion regarding the July 7 minute entry.[5] Specifically, they contend it was contradictory and did not match their recollection of the hearing. There is no transcript of the hearing.[6]

**¶11** The Smiths correctly note that the minute entry states their motion to amend was granted and then it was denied. Absent a transcript, we cannot know whether the trial court initially indicated it would grant the motion and then changed its decision, or the clerk erroneously indicated the motion was granted. The subsequent statements in the minute entry, however, make clear that the court denied the motion to amend. It states, "The Court encourages [defense counsel] to file a Rule 60(c) motion with some substance to it." It also reflects counsel's avowal that he would file the motion by August 1. The Rule 60(c) discussion would have been unnecessary had the court intended to grant the Smiths' request to amend the answer.[7]

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[5]The hearing took place on July 7, and the minute entry was dated July 14. Due to an error in the court clerk's office, the Smiths' counsel did not receive the minute entry until August 15, weeks after the deadline had passed on the motion to set aside. The court took testimony from a deputy clerk and accepted the Smiths' belated motion to set aside.

[6]In their narrative statement, the Smiths state they and their attorney took notes at the hearing, and the notes "ultimately, did not reflect the content of the Minute Entry Order." But the statement does not explain their understanding of what occurred at the hearing or contradict the minute entry.

[7]In a motion for clarification of the contradictory minute entry, the Smiths again asked permission to amend, "if the court's intent was to allow an amended answer to be filed." The trial court entered an order reiterating that default had been entered against them.

**¶12** While a statement in the minute entry could be construed as contradictory if read out of context, it is apparent the Smiths understood their motion to amend was denied. Their counsel agreed to file a motion to set aside default, the Smiths never filed an amended answer, and their narrative statement of the proceedings does not provide a contradictory explanation of what occurred at the hearing. The trial court did not abuse its discretion by denying the motion for leave to amend.

**Denial of Motion to Set Aside Default Judgment**

**¶13** We review a trial court's denial of a motion to set aside default for an abuse of discretion, viewing the facts in the light most favorable to upholding the court's ruling. *Blair v. Burgener*, 226 Ariz. 213, ¶¶ 2, 7, 245 P.3d 898, 900, 901 (App. 2010). To set aside an entry of default, a defendant must show (1) his failure to timely file an answer was excusable for one of the reasons listed in Rule 60(c), Ariz. R. Civ. P., (2) he promptly sought relief, and (3) he had a meritorious defense. *Id.* ¶ 7; *see* Ariz. R. Civ. P. 55(c).

**¶14** The trial court denied the motion to set aside because none of the Rule 60(c) reasons for failure to file an answer had been satisfied. The court also observed that the motion should have been supported by affidavits. Finally, the court found defendants "ha[d] not engaged in good faith in the process of litigation" because they evaded service and failed to timely seek representation to avoid default. We will uphold the court's ruling if it is legally correct for any reason. *First Credit Union v. Courtney*, 233 Ariz. 105, ¶ 7, 309 P.3d 929, 931 (App. 2013).

**¶15** The Smiths and NNP first contend the trial court erred in denying the motion based only on their failure to file a supporting affidavit as required by Rule 7.1(a), Ariz. R. Civ. P. Although the court's order noted a lack of affidavit, the court then proceeded to address the merits of the motion, indicating it was not denying the motion solely on the basis of failure to follow the formal requirements. The Smiths concede there was no affidavit, so the factual finding was not in error; further, because the court proceeded to address the merits of the motion, we need not

determine whether it would have been proper to deny the motion solely on the basis of a lack of affidavit.[8]

**¶16** The Smiths and NNP next contend the trial court erred by finding they had not made a showing that their failure to timely file an answer was due to excusable neglect as required by Rule 60(c)(1). "[T]he test of what is excusable is whether the neglect or inadvertence is such as might be the act of a reasonably prudent person under similar circumstances." *Daou v. Harris*, 139 Ariz. 353, 359, 678 P.2d 934, 940 (1984).

**¶17** Several explanations for the delay appear in motions throughout the record. In the motion to amend and response to the motion to strike filed by their first attorney, the Smiths state they retained the attorney a few days before the expiration of the default window and the attorney did not have time to review the facts before answering. In their reply in support of their motion to set aside default, filed by present counsel, the Smiths and NNP state they obtained their first attorney *before* the beginning of the default window, and the initial delay in finding counsel was because the first two attorneys approached had been too expensive. The Smiths and NNP did not file an affidavit or otherwise swear to these explanations before the court ruled on the motion to set aside.[9]

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[8]Similarly, the defendants argue the trial court erred when it refused to take testimony swearing to the contents of the motion to set aside. We need not rule on this issue, as it appears the trial court considered the merits of the motion and ruled substantively, and, as detailed below, even assuming the statements made in the motion to set aside were in evidence, the motion was properly denied.

[9]The "verification" filed with their reply in support of the motion to set aside only verified the motion to set aside, which did not reference excusable neglect or any other provision of Rule 60(c). It was not until the motion for reconsideration that the Smiths and NNP included an affidavit "to affirm and verify the contents of" "all existing filings regarding the motion [to set aside] as well as attachments thereto."

**¶18** Even assuming these statements were in evidence, they do not provide a reasonable excuse for the failure to file an answer that complied with Rule 11(a). Ignorance of the rules of civil procedure is "not the type of excuse contemplated in [R]ule 60(c) as ground for vacating a default judgment." *Harris*, 139 Ariz. at 359, 678 P.2d at 940; *see Baker Int'l Assocs., Inc. v. Shanwick Int'l Corp.*, 174 Ariz. 580, 584, 851 P.2d 1379, 1383 (App. 1993). And this is not dependent upon who made the error; errors of an attorney are attributed to the client, and "it is only when the attorney's refusal or failure to act is legally excusable that relief may be obtained." *United Imps. & Exps., Inc. v. Superior Court*, 134 Ariz. 43, 46, 653 P.2d 691, 694 (1982).

**¶19** Further, neglect must be "'excusable,'" rather than "unexplained," *Richas v. Maricopa Cty. Superior Court*, 133 Ariz. 512, 515, 652 P.2d 1035, 1038 (1982), *quoting* Ariz. R. Civ. P. 60(c)(1), and there was no evidence that the answer was rushed to filing due to an excusable delay. NNP was served on September 23, 2013, the Smiths were served by alternative service on November 18, and Patel filed for entry of default on December 10, affording the Smiths at least five weeks to find an attorney and file a sufficient answer before the default window expired.[10] The Smiths and NNP do not provide any explanation, below or on appeal, that they somehow were delayed in learning of the case, limiting this window of time. The trial court did not err by denying the motion due to failure to show excusable neglect.

**¶20** The Smiths and NNP next argue the trial court erred by finding they failed to make a showing of fraud, pursuant to Rule 60(c)(3). In order to have a judgment set aside under this subsection, the moving party must show he was prevented from

[10] In their narrative statement, the Smiths state they travel regularly and received notice of service when NNP's agent contacted them as a courtesy. They do not state they were out of town during any of the attempts at service, or that they did not see the notice posted at their house or sent through the mail, nor do they provide a date on which they actually found out about the lawsuit.

defending his case because of the adverse party's fraud. *Estate of Page v. Litzenburg*, 177 Ariz. 84, 93, 865 P.2d 128, 137 (App. 1993). For example, in *Page*, the moving party requested relief from judgment upon the discovery that the adverse party had lied in response to interrogatories. *Id.* at 94, 865 P.2d at 138. Here, the Smiths and NNP claim Patel made false statements in the complaint itself, which they noted in their motion to set aside. They appear to claim fraud as a defense to their case, but they do not argue fraud prevented them from defending their case, as required to set aside a judgment pursuant to Rule 60(c)(3). The court did not abuse its discretion in denying the motion on this ground.

**¶21** The Smiths and NNP also contend the trial court abused its discretion by denying relief pursuant to Rule 60(c)(6), any other reason justifying relief. The court found that subsection inapplicable because other subsections of Rule 60(c) applied.[11] Although that is the general rule, relief may be available in extraordinary circumstances. *See Webb v. Erickson*, 134 Ariz. 182, 186-87, 655 P.2d 6, 10-11 (1982); *Amanti Elec., Inc. v. Engineered Structures, Inc.*, 229 Ariz. 430, ¶ 10, 276 P.3d 499, 502 (App. 2012). Whether Rule 60(c)(6) affords relief is determined from a totality of the circumstances. *Amanti*, 229 Ariz. 430, ¶ 7, 276 P.3d at 501.

**¶22** In their reply in support of their motion to set aside, the Smiths and NNP argued they deserved relief pursuant to Rule 60(c)(6) because the Smiths had difficulty finding an attorney, that attorney made an error in filing the answer, and then that attorney withdrew from the case. On appeal, they contend the terminal illness of their first counsel, the fact that the trial court determined the damages award after the filing of the motion to set aside, and their contentions that Patel could prevail on none of his claims to be extraordinary circumstances. The last two contentions, however, are raised for the first time on appeal, and we decline to consider them, *Harris v. Cochise Health Sys.*, 215 Ariz. 344, ¶ 17, 160 P.3d 223, 228 (App. 2007), but we address the first contention.

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[11]The order actually cited Rule 60(c)(3) again, but from the context it is clear that Rule 60(c)(6) was intended.

**¶23** Defendants' initial attorney, who filed the stricken answer, the motion to amend the answer, and the response to motion to strike, eventually withdrew due to a sudden serious illness. Of particular importance, the Smiths do not claim that the answer he filed was in some way delayed or insufficient due to his illness. Rather, the attorney's illness caused delays months after the answer was filed. Following counsel's withdrawal, the trial court continued the hearing on the motion to strike to allow the Smiths to obtain new counsel. The record does not reflect that the Smiths were prejudiced by the illness of their first attorney, and the trial court did not err by denying the motion to set aside pursuant to Rule 60(c)(6).

**¶24** In the alternative, the Smiths and NNP assert that they technically filed an answer, therefore they need not make any showing that their failure to timely answer was excusable, the first requirement to set aside default.[12] *See Burgener*, 226 Ariz. 213, ¶ 7, 245 P.3d at 901. They cite no authority in support of the argument, and we do not find it persuasive. *See* Ariz. R. Civ. App. P. 13(a)(7)(A); *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62, 211 P.3d 1272, 1289 (App. 2009). A deficient, stricken answer has no more effect than if a party made no filing. We do not find the first requirement to set aside default satisfied by an answer stricken from the record.[13]

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[12] Although they appear to make this argument only for Rule 60(c)(1), excusable neglect, it would arguably apply to failure to file due to any reason listed in Rule 60(c). *See Burgener*, 226 Ariz. 213, ¶ 7, 245 P.3d at 901 (to set aside default, party must demonstrate that failure to timely file excusable under any subdivision of Rule 60(c)).

[13] The defendants also contend the trial court erred by finding they did not engage in good faith during litigation. Because we uphold the court's ruling on the motion to set aside on the failure to show that the lack of an answer was excusable for one of the reasons listed in Rule 60(c), *Burgener*, 226 Ariz. 213, ¶ 7, 245 P.3d at 901, we need not consider this argument.

**Denial of Motion for Reconsideration**

**¶25** Finally, the Smiths and NNP contend the trial court erred by denying their motion to reconsider the motion to set aside. We review the denial of a motion for reconsideration for an abuse of discretion. *Tilley v. Delci*, 220 Ariz. 233, ¶ 16, 204 P.3d 1082, 1087 (App. 2009).

**¶26** The motion for reconsideration asserted the same issues addressed in the motion to set aside.[14] Because we have already determined no error occurred as to those issues, we necessarily conclude the trial court did not abuse its discretion by denying the motion for reconsideration.

**Disposition**

**¶27** For the foregoing reasons, we affirm. Both parties seek attorney fees and costs on appeal as an action arising out of contract pursuant to A.R.S. § 12-341.01. In our discretion, we decline to award fees. As the prevailing party on appeal, however, Patel is entitled to costs in an amount to be determined upon filing the statement as required by Rule 21, Ariz. R. Civ. App. P.

[14]The single new issue in the motion for reconsideration was the trial court's finding regarding bad faith on the part of the Smiths, which we need not address on appeal. *See supra* note 13.