IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

ZACHARY BLAIN, CHARLES BLAIN, AND
GLOW ZONE MINI GOLF LLC,
Plaintiffs/Appellees,

v.

STONE & KELSO LLC, AN ARIZONA LIMITED LIABILITY COMPANY;
AND MICHELE SCHMIDT,
Defendants/Appellants.

No. 2 CA-CV 2019-0032
Filed April 30, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20183769
The Honorable Charles V. Harrington, Judge
The Honorable Lee Ann Roads, Judge Pro Tempore

AFFIRMED

COUNSEL

Law Office of Thomas Jacobs, Tucson
By Thomas Jacobs
Counsel for Plaintiffs/Appellees

Burris & MacOmber P.L.L.C., Tucson
By D. Rob Burris and Jennifer J. Maldonado
Counsel for Defendants/Appellants

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

B R E A R C L I F F E, Judge:

¶1 Appellant Stone & Kelso LLC appeals from the trial court's denial of its Motion to Set Aside Entry of Default and Default Judgment. Stone & Kelso contends the court erred in failing to vacate the default judgment because it is void, the plaintiffs' misrepresentations and misconduct caused it to default, on the grounds of mistake, or on the grounds of "any other reason justifying relief." It further contends that the court erred in refusing to set aside entry of default "for good cause." We affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to upholding the trial court's ruling on a motion to set aside a default judgment." *Ezell v. Quon*, 224 Ariz. 532, ¶ 2 (App. 2010). Stone & Kelso owns a commercial building in Tucson and rents out individual units within the building. In January 2018, Stone & Kelso leased a commercial unit to Zachary Blain, Charles Blain, and Glow Zone Mini Golf LLC (collectively "Glow Zone").

¶3 In July 2018, Glow Zone filed a complaint against Daniel Eftimoff, an individual, and Stone & Kelso for breach of contract, unjust enrichment, and fraud, seeking compensatory and punitive damages, attorney fees and costs. Glow Zone served Stone & Kelso's statutory agent with the summons and complaint on August 2, 2018. Amy Burns, a member of Stone & Kelso, ultimately received the summons and complaint but Stone & Kelso did not thereafter answer or file any response to the complaint and summons.

¶4 On August 28, Glow Zone filed an Application for Default and Notice [of] Default. A copy of the Application and Notice was mailed to Stone & Kelso's statutory agent in Tucson (at the address at which the summons and complaint were served), and to Stone & Kelso directly at a different address in Tucson. The Application and Notice stated that "This default will be effective against defaulted parties named above 10 days after

the filing of this application unless said parties plead or otherwise defend prior to the expiration of said 10 days." Stone & Kelso failed to file an answer or otherwise defend against the complaint within the next ten days, and, on September 14, Glow Zone filed a Motion for Entry of Default Judgment against Stone & Kelso.

¶5 On September 26, Glow Zone filed a Petition for Temporary Restraining Order claiming Stone & Kelso's agents were harassing them. A hearing was scheduled for the same day. A copy of the petition, notice of hearing, and other related documents were served on Stone & Kelso's statutory agent before the hearing. At the hearing, the trial court noted that Stone & Kelso received service but did not appear. The court issued the temporary restraining order and scheduled a hearing for a preliminary injunction on October 10.

¶6 Burns and Eftimoff[1] attended the October hearing. The trial court advised them that, because Stone & Kelso is a limited-liability company, it must be represented in court by counsel licensed in Arizona. The court also informed them of the consequences of default and that the company was already in default. Burns asked the court if they should be seeking a continuance of the hearing, and the court informed her that such a request on behalf of the company would also need to be through an attorney. After taking evidence from Glow Zone, the court granted the preliminary injunction.

¶7 Thereafter, a hearing on the motion for entry of judgment by default was set for November 27, 2018. Stone & Kelso was not present at that hearing, nor had Stone & Kelso in the intervening weeks either filed an answer to the complaint or otherwise defended against the action, or even entered a formal appearance through counsel. At the default judgment hearing, the trial court asked Glow Zone if it had given Stone & Kelso three days' notice of the hearing, because Stone & Kelso attended the October hearing. Glow Zone told the court that Stone & Kelso had been defaulted, had not entered any appearance through counsel, and therefore was not entitled to notice. As discussed more fully below, Glow Zone representatives Charles and Zachary Blain testified. The court entered judgment by default, finding that Stone & Kelso was in breach of contract and had been unjustly enriched, awarding Glow Zone $11,172.56 in

[1] The parties stipulated to dismiss Eftimoff and Schmidt as defendants. Eftimoff is therefore not a party to this appeal.

compensatory damages, $50,000 in punitive damages, and $10,328.42 in attorney fees and costs.

¶8 The following week, counsel for Stone & Kelso filed a notice of appearance, and thereafter a Motion to Set Aside Entry of Default and Default Judgment. Stone & Kelso requested relief from the entry of default under Rule 55(c), Ariz. R. Civ. P., and from the default judgment under Rule 60(b)(1) and (6), Ariz. R. Civ. P., asserting its failure to timely answer the complaint resulted from "mistake, inadvertence, surprise, or excusable neglect," or was otherwise justified by Glow Zone's conduct. It supported the motion with an affidavit of Burns, who stated she is "not a lawyer and [is] not trained in the law," and that she "did not understand that Stone & Kelso had been served," "did not know that Stone & Kelso had a statutory agent that could accept service on [its] behalf," or that the complaint "was something that needed to be responded to officially." Stone & Kelso further claimed it could assert a meritorious defense if permitted to do so. After Stone & Kelso obtained the transcript from the default judgment hearing, it supplemented its Motion to Set Aside arguing that the evidence presented at the hearing did not support either the compensatory or punitive damages awards. The trial court denied the motion and this appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(2).

Analysis

¶9 In a civil action, a defendant must file an answer within twenty days after service of the summons and complaint. Ariz. R. Civ. P. 12(a)(1)(A). If a defendant fails to do so, the plaintiff may file an application for entry of default. Ariz. R. Civ. P. 55(a)(1). The default becomes effective ten days thereafter, unless, in the meantime, the defendant answers the complaint. Ariz. R. Civ. P. 55(a)(4)-(5). Once effective, and default is entered, the entry of default may be set aside by the court for good cause. Ariz. R. Civ. P. 55(c).

¶10 After entry of default, a plaintiff may file a motion for default judgment. Ariz. R. Civ. P. 55(b). If the damages sought in the complaint are for a sum certain or for a sum that can be computed with certainty, the court may enter judgment on plaintiff's motion without a hearing. Ariz. R. Civ. P. 55(b)(1)(A). Otherwise, the plaintiff must apply to the court for a default judgment after hearing, and, if the defendant has appeared in the action, the plaintiff must serve the defendant with written notice of the application for judgment and hearing date at least three days before the hearing. Ariz. R. Civ. P. 55(b)(2)(C). At any such hearing, the defaulted defendant may contest the plaintiff's claim for damages, but not liability.

Tarr v. Superior, 142 Ariz. 349, 351 (1984). Once a default judgment has been entered, whether with or without a hearing, a party may seek to have the judgment set aside under Rule 60(b), Ariz. R. Civ. P.[2] Ariz. R. Civ. P. Rule 55(c).

¶11 "A party seeking to set aside a default judgment must show that it sought relief from the judgment promptly, that the failure to timely answer the complaint was excusable under [Rule 60(b)], and that it had a meritorious defense to the action." *BYS Inc. v. Smoudi*, 228 Ariz. 573, ¶ 14 (App. 2012). "The trial court has broad discretion in deciding whether to vacate a default judgment, and this court will not disturb the trial court's ruling absent a clear abuse of discretion." *Id.* "An abuse of discretion exists when the court commits an error of law in reaching a discretionary conclusion." *Webb v. Omni Block, Inc.*, 216 Ariz. 349, ¶ 6 (App. 2007).

Rule 60(b)(1), Ariz. R. Civ. P.

¶12 Stone & Kelso argues the trial court abused its discretion in failing to vacate the default judgment under Rule 60(b)(1), Ariz. R. Civ. P., which allows a court to "relieve a party or its legal representative from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect." Stone & Kelso asserts that Burns made "two significant but innocent mistakes." The first, not understanding the importance of the complaint and summons, and the second, believing that an answer was not required because later contact with Glow Zone's counsel "involved a good faith effort on the part of [Glow Zone] to resolve the outstanding issues between them . . . so as to keep the matter out of court." Although Stone & Kelso argues that its conduct amounts to "mistake," it is rather asserting "excusable neglect."

¶13 "To establish that its failure to timely file an answer is excusable, a party seeking relief must demonstrate that its actions were those of a reasonably prudent person under the circumstances. '[M]ere carelessness is not a sufficient reason to set aside a default judgment.'" *Searchtoppers.com, L.L.C. v. TrustCash LLC*, 231 Ariz. 236, ¶ 22 (App. 2012) (citation omitted) (quoting *Daou v. Harris,* 139 Ariz. 353, 359 (1984)). Stone & Kelso's first claim, that Burns "did not understand that Stone & Kelso had been served" or that the complaint "was something that needed to be

[2]Former Rule 60(c), Ariz. R. Civ. P., is now Rule 60(b), Ariz. R. Civ. P.; Rule 55(c), Ariz. R. Civ. P., also erroneously refers to "Rule 60(c)" rather than current Rule 60(b).

responded to officially," betrays mere carelessness. The summons, which Burns admits to receiving, clearly stated:

> To: STONE & KELSO, LLC
>
> WARNING: THIS [IS] AN OFFICIAL DOCUMENT FROM THE COURT THAT AFFECTS YOUR RIGHTS. READ THIS SUMMONS CAREFULLY. IF YOU DO NOT UNDERSTAND IT, CONTACT AN ATTORNEY FOR LEGAL ADVICE.
>
> 1. A lawsuit has been filed against you. A copy of the lawsuit and other related court paperwork has been served on you with this Summons.
>
> 2. If you do not want a judgment taken against you without your input, you must file an Answer in writing with the Court . . . .
>
> 3. . . . [Y]our Answer must be filed within TWENTY (20) CALENDAR DAYS . . . .

Given the plain language of the summons, we cannot say Burns acted as a reasonably prudent person, irrespective of her lack of legal training. A reasonably prudent person, who did not understand the document, would, at the very least, have consulted an attorney as the summons instructed. The United States Supreme Court has stated that, as with all Rule 60(b) relief, 60(b)(1) "should only be applied in 'extraordinary circumstances.'" *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)); *Estate of Page v. Litzenburg*, 177 Ariz. 84, 93 (App. 1993) (because the federal rule is identical to the state rule, we "give great weight to federal court interpretations" of this rule). We agree. Burns' inaction was not justified, and Stone & Kelso has not shown the existence of extraordinary circumstances.

¶14 For its second assertion, Stone & Kelso claims Burns "erroneously believed that her ongoing communications with [Glow Zone] and [Glow Zone's] counsel were an appropriate attempt to resolve the matter outside of the court process which would forestal[l] any activity in court." Notwithstanding her unilateral belief in the effect of her communications with plaintiffs' counsel, under the civil rules, the only act

that would have forestalled the entry of default and default judgment would have been Stone & Kelso's timely appearance through counsel and the filing of a responsive pleading or other defense against the complaint. Again, Burns' lack of familiarity with legal procedures and Stone & Kelso's failure to act after notice is not excusable neglect. *Daou*, 139 Ariz. at 360. At best, Burns' failure to act was, again, mere carelessness. *Id.* at 359. Nor do these failures rise to the level of extraordinary circumstances. As such, we do not find the trial court erred in denying Stone & Kelso's motion to vacate the default judgment on the grounds of mistake under Rule 60(b)(1), Ariz. R. Civ. P.

Rule 60(b)(3), Ariz. R. Civ. P.

¶15 Stone & Kelso next argues the trial court abused its discretion in failing to vacate the default judgment under Rule 60(b)(3), Ariz. R. Civ. P., which allows for the vacation of a default judgment for "fraud . . . , misrepresentation, or other misconduct of an opposing party." Stone & Kelso claims Glow Zone's or its counsel's "misrepresentations or other misconduct" caused its "failure to properly defend against the action." In its Motion to Set Aside Entry of Default and Default Judgment below, however, Stone & Kelso argued:

> Ms. Burn[s'] initial mistakes were then compounded by the content of her communications with counsel for [Glow Zone]. *While perhaps not rising to the level of clear "fraud," "misrepresentation," or "misconduct" of an opposing party,* which would independently provide cause to set aside the entry of default and default judgment pursuant to Rule 60(b)(3), the content and timing of [Glow Zone counsel's] communications with Ms. Burns gives rise to significant concern that justice was not accomplished here . . . .

(Emphasis added.) Stone & Kelso did not assert that Glow Zone's conduct rose to the level of fraud, misrepresentation, or misconduct under Rule 60(b)(3)—but only that it gave "rise to significant concern." Because Stone & Kelso failed to adequately raise this claim below, it is waived. *See Hyman v. Arden-Mayfair, Inc.*, 150 Ariz. 444, 446 (App. 1986). Although this court may, in its discretion, address an otherwise waived issue, we will not do so here. *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503 (1987) (This court "undoubtedly has the power [to consider an issue not raised in the trial

court], but ordinarily will not exercise it."). The trial court should have been permitted to address such a fact-based claim as fraud in the first instance. *See Echols v. Beauty Built Homes, Inc.*, 132 Ariz. 498, 500 (1982) (showing of fraud requires establishment of nine well-known elements by sufficient evidence).

Rule 60(b)(4), Ariz. R. Civ. P.

¶16 Stone & Kelso argues the trial court abused its discretion in failing to vacate the default judgment as void under Rule 60(b)(4), Ariz. R. Civ. P., due to Glow Zone's failure to provide it notice of the default judgment hearing required under Rule 55(b)(2), Ariz. R. Civ. P. "A judgment or order is 'void' if the court entering it lacked jurisdiction: (1) over the subject matter, (2) over the person involved, or (3) to render the particular judgment or order entered." *Martin v. Martin*, 182 Ariz. 11, 15 (App. 1994). "By contrast, a judgment or order is voidable 'when the trial court has subject matter jurisdiction but errs in issuing an order.'" *In re Marriage of Dougall*, 234 Ariz. 2, ¶ 12 (App. 2013) (quoting *State v. Bryant*, 219 Ariz. 514, ¶ 14 (App. 2008)). Deficiencies in service of process or in effectuating a default judgment do not necessarily deprive a court of jurisdiction. *See e.g.*, *Cockerham v. Zikratch*, 127 Ariz. 230, 234 (1980) (default judgment entered without affidavit showing circumstances warranting out-of-state service of process not void but subject to timely challenge on appeal); *Hanson v. Md. Nat'l Ins. Co.*, 5 Ariz. App. 122, 123 (1967) (failure to give three-day notice required by rule before default judgment did not render judgment void, but merely voidable upon timely appeal); *Smith v. Smith*, 235 Ariz. 181, ¶¶ 12-14 (App. 2014) (where a party was properly served with a petition but improperly defaulted, the resulting judgment is voidable, not "void *ab initio*"). Here, the failure to provide the post default notice of default judgment hearing, at worst, rendered the judgment voidable, not void, and thus the issue must have been raised with the trial court in the first instance. And consequently, as with its claim under Rule 60(b)(3), Ariz. R. Civ. P., because Stone & Kelso failed to raise this argument below, it has waived it on appeal. *See Wyckoff v. Mogollon Health All.*, 232 Ariz. 588, ¶ 6 (App. 2013) (failure to argue that judgment was voidable waives issue on appeal); *Hyman*, 150 Ariz. at 446. And, although we may, in our discretion, address an otherwise waived issue, we similarly will not do so here. *Hawkins*, 152 Ariz. at 503.

Rule 60(b)(6), Ariz. R. Civ. P.

¶17 Finally, Stone & Kelso contends the trial court abused its discretion in failing to vacate the default judgment pursuant to Rule

60(b)(6), Ariz. R. Civ. P., on the grounds of "any other reason justifying relief." "In order to obtain relief under 60([b])(6), the movant must show 1) extraordinary circumstances of hardship or injustice justifying relief and 2) a reason for setting aside the judgment other than one of the reasons set forth in the preceding five clauses of rule 60([b])." *Hilgeman v. Am. Mortg. Sec., Inc.*, 196 Ariz. 215, ¶ 15 (App. 2000) (quoting *Davis v. Davis*, 143 Ariz. 54, 57 (1984)). Rule 60(b)(6) enables "trial courts to grant equitable relief from default whenever the circumstances are extraordinary and justice requires." *Webb v. Erickson*, 134 Ariz. 182, 187 (1982). Stone & Kelso contends the trial court should have vacated the judgment because both the compensatory and punitive damages awards were insufficiently supported by the evidence.

Punitive Damages

¶18 "To recover punitive damages, a plaintiff must prove by clear and convincing evidence that the defendant engaged in aggravated and outrageous conduct with an 'evil mind.'" *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 132 (App. 1995). "A defendant acts with the requisite evil mind when he intends to injure or defraud, or deliberately interferes with the rights of others . . . ." *Id.* "This court must affirm [an] . . . award of punitive damages if any reasonable view of the evidence would satisfy the clear and convincing standard." *Id.* Additionally, in determining whether the amount of punitive damages awarded is proper, this court examines:

> (1) the proportionality of the award to the wrongdoer's financial position to ensure that the goals of punishment and deterrence are served without financially devastating the defendant; (2) the reprehensibility of the defendant's conduct, including the duration of the misconduct, the defendant's awareness of the risk of harm, and any concealment; and (3) the profitability to the defendant of the wrongful conduct.

Id. at 134.

¶19 After hearing the testimony of Charles Blain and Zachary Blain at the November default judgment hearing, the trial court found punitive damages appropriate "given the actions of the parties and their inability to comply with court orders." This finding was seemingly based

on Charles Blain and Zachary Blain's testimony concerning Stone & Kelso's ongoing violations of the preliminary injunction. In addition to the violations of the injunction, Charles Blain testified Glow Zone was paying for the electricity for the entire building—not just for its leased space—a total of twenty-four units, and that Stone & Kelso was offering those units to prospective tenants with "free electricity." Charles Blain testified Stone & Kelso misled him into thinking Glow Zone was paying the electricity for only three other units, and that Stone & Kelso offered to reimburse Glow Zone $200 per month per unit for that additional expense, but that ultimately it had only paid $400. He also testified that Stone & Kelso owned several large commercial properties, and approximated their value to be "four to five million" dollars.

¶20 The testimony was sparse, and the foundation of Charles Blain's testimony about Stone & Kelso's wealth was unexplored. Had Stone & Kelso appeared and participated in the default judgment hearing, it could have challenged the Blains' testimony, and offered evidence of its own. It did neither, leaving Glow Zone's evidence as the entire and unchallenged basis for the trial court's ruling. "Clear and convincing evidence means 'that which may persuade that the truth of the contention is highly probable.'" *Thompson v. Better-Bilt Aluminum Prods. Co.*, 171 Ariz. 550, 557 (1992) (quoting *In re Neville*, 147 Ariz. 106, 111 (1985)). "[T]he plaintiff can . . . make its case with indirect and circumstantial evidence." *Id.* Although not overwhelming, sufficient evidence supports the trial court's award and therefore we do not find the court erred in denying the motion to vacate the judgment on the grounds that punitive damages were not appropriate.

Compensatory Damages

¶21 Stone & Kelso argues the $11,172.56 in compensatory damages is excessive because Burns' affidavit claims the value of the electricity owed from Stone & Kelso to Glow Zone is only $2,000. Glow Zone's Hearing Memorandum for Default Judgment stated, "The total special damage . . . will be for excess electricity/utility charges. The testimony and evidence will support a total claim of $11,172.56." That total was then avowed to by counsel at the November default judgment hearing and adopted by Charles Blain in his testimony. In its decision, the trial court awarded the full sum "[b]ased on the testimony and the avowals made by the attorney."

¶22 For its breach of contract claims, Glow Zone was required to prove its damages by a preponderance of the evidence. *Am. Pepper Supply*

Co. v. Fed. Ins. Co., 208 Ariz. 307, ¶¶ 13-20 (2004). The unopposed evidence Glow Zone presented met this burden. To the extent that Stone & Kelso now asks this court to reweigh the evidence, we will not do so. *Hilgeman,* 196 Ariz. 215, ¶ 7 ("[W]e will not second-guess or substitute our judgment for that of the trial court." (quoting *Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 185, 188 (App. 1992))). Stone & Kelso has also not shown "extraordinary circumstances" of hardship or injustice justifying relief." *Id.* ¶ 17. We do not, therefore, find the trial court erred in denying its motion to vacate the default judgment under Rule 60(b)(6), Ariz. R. Civ. P.[3]

Rule 55(c), Ariz. R. Civ. P.

¶23 Finally, Stone & Kelso also contends the trial court abused its discretion in failing to vacate the entry of default pursuant to Rule 55(c), Ariz. R. Civ. P. Under Rule 55(c), an entry of default may be set aside "for good cause." But, "[t]he test of good cause [under Rule 55(c)] is the same for an entry or judgment of default." *Webb*, 134 Ariz. at 185-86. The moving party must, among other things, show "that his failure to answer was excused by one of the grounds set forth in Rule 60[(b)]." *Id.* at 186. As described above, because we do not find that Stone & Kelso's failures were excused on any of the grounds stated in Rule 60(b), we similarly do not find good cause to justify vacation of the entry of default under Rule 55(c).

Disposition

¶24 For the foregoing reasons, we affirm the trial court's denial of Stone & Kelso's Motion to Set Aside Entry of Default and Default Judgment. We further award Glow Zone its reasonable attorney fees pursuant to A.R.S. § 12-341.01 and costs incurred on appeal upon its compliance with Rule 21, Ariz. R. Civ. App. P.

[3] Although the trial court granted judgment also for unjust enrichment, despite the existence of the legal claim for breach of contract, *Loiselle v. Cosas Mgmt. Group, LLC*, 224 Ariz. 207, ¶ 14 (App. 2010), separate damages were not awarded for each claim and therefore there was no double recovery.