IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE THE CONSERVATORSHIP OF

JOSEFA HOLGUIN AND JOSE HOLGUIN,
Incapacitated Adults,

JOSE AND JOSEFA HOLGUIN; AND THE JOSE HOLGUIN AND JOSEFA HOLGUIN REVOCABLE TRUST, DATED APRIL 19, 2001, BY AND THROUGH CONSERVATOR AND SUCCESSOR TRUSTEE, EDWARD HOLGUIN,
Petitioners/Appellees,

v.

NARCISO HOLGUIN, AN UNMARRIED MAN; AND
AQUILES, LLC, AN ARIZONA LIMITED LIABILITY COMPANY,
Respondents/Appellants.

No. 2 CA-CV 2021-0006
Filed May 3, 2022

Appeal from the Superior Court in Pima County
No. GC20180204
The Honorable Kenneth Lee, Judge

AFFIRMED

COUNSEL

Law Office of Denice R. Shepherd P.C., Tucson
By Denice R. Shepherd
Counsel for Petitioners/Appellees

Udall Law Firm LLP, Tucson
By Craig L. Cline
Counsel for Respondents/Appellants

MEMORANDUM DECISION

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

E C K E R S T R O M, Presiding Judge:

¶1 This appeal arises from a dispute between two brothers, Narciso and Edward Holguin, over the handling of their parents' assets. On appeal, Narciso, together with Aquiles, LLC—a limited liability company of which Narciso is sole member and manager—appeal from the trial court's denial of their motion to set aside entry of default after their prior counsel unintentionally miscalculated a filing deadline. Because the record reflects no abuse of discretion in the trial court's ruling, we affirm.

Factual and Procedural Background

¶2 When reviewing a trial court's denial of a motion to set aside entry of default, we view the facts "in the strongest light possible in favor of supporting the trial court's decision." *Daou v. Harris*, 139 Ariz. 353, 360 (1984). In March 2020, after two years of litigation, Edward filed a complaint and petition against Narciso and Aquiles, which he amended as a matter of right in May. Narciso—both personally and as the managing member of Aquiles—was served with a summons and the amended complaint by June 1, within ninety days of the original filing, as required by Rule 4(i), Ariz. R. Civ. P. The amended complaint was also mailed to their counsel, Doug Newborn, who received it on June 1. No answer or other responsive pleading was filed within the twenty-day deadline established by Rule 12(a)(1)(A)(i), Ariz. R. Civ. P., *i.e.*, by Monday, June 22. *See also* Ariz. R. Civ. P. 6(a)(3) (when last day Saturday or Sunday, deadline is following non-holiday weekday).

¶3 That day, Newborn—who was preparing to leave for vacation—sent an email to Edward's counsel requesting that an application for default not be filed until after he returned. The next day, June 23, Edward's counsel refused the request and filed notices of and applications for entry of default. Newborn left town for vacation on June 25, returning

July 5. On July 8, Newborn filed a motion to dismiss on behalf of Narciso and Aquiles, which Edward opposed. On August 6, after a hearing, the trial court denied the motion to dismiss. No answer was filed within ten days after the court's denial of the motion, *i.e.*, by August 20. *See* Ariz. R. Civ. P. 12(a)(2)(A).

¶4 As such, on August 21, Edward again filed notices of and applications for entry of default. No answer was filed within the ten-day grace period provided by Rule 55(a)(5), Ariz. R. Civ. P. Thus, the default became effective on September 4, ten days after the application for entry of default had been filed (excluding weekends). *See* Ariz. R. Civ. P. 6(a)(2), 55(a)(4). On September 8, Edward requested a default judgment hearing pursuant to Rule 55(b)(2). On September 10, Narciso and Aquiles filed a motion asking the court to enforce a settlement agreement. Edward opposed the motion, including on the ground that it was untimely, and the trial court denied it on October 12.

¶5 The next day, Narciso and Aquiles filed a motion to set aside entry of default, together with a verified answer to the amended complaint and petition. The motion conceded that Newborn had filed the motion to enforce the settlement agreement late, "at the earliest one day late, and at the latest six days late." But it contended this failure to plead or otherwise defend within the ten-day grace period afforded by Rule 55(a)(5) was the result of "excusable neglect." Newborn explained that he had miscalculated the filing deadline by, among other things, erroneously adding five days for mailing. The motion also argued, "the stakes are severe as Narciso stands to lose literally everything he has."

¶6 Edward opposed the motion to set aside entry of default. At the hearing on the motion, Newborn apologized, "thr[e]w [him]self before the mercy of th[e] Court," and asked that the default judgment be set aside, the answer be accepted, and the case be allowed to proceed to trial. He explained that, due in part to staffing issues, he had "mis-calendared the deadline" and "filed [his] responsive pleading in accordance with the deadline that [he had] mis-calendared"—conduct he argued "falls under the purview of excusable neglect." He then explained in detail how he had calendared the deadline, admitting that he "made at least one error and potentially two errors in this interpretation" of the rules of civil procedure that led him to believe incorrectly that he "had five more days" to file. In particular, he calculated the deadline from the date of receipt, not of filing, and he incorrectly added five days for mailing. Newborn also argued there were "other reasons under Rule 6(c) to grant relief." In particular, he contended his mistake was "minor" compared to the harm the default judgment would cause to Narciso.

¶7 Finding that Newborn had "made an honest mistake," the trial court nonetheless denied the motion to set aside entry of default. In August 2021, after a default damages trial, the court entered final judgment against Narciso and Aquiles based on the entry of default. They have appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1), (9).

Discussion

¶8 The only issue before us on appeal is whether the trial court erred in denying the motion to set aside entry of default. As our supreme court has explained, "trial judges are in a much better position than appellate judges" to determine whether entry of default should be set aside. *Daou*, 139 Ariz. at 359. That determination therefore "lies entirely within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of that discretion." *Gen. Elec. Cap. Corp. v. Osterkamp (Osterkamp II)*, 172 Ariz. 191, 193 (App. 1992). Our review is limited to "the questions raised by the motion to set aside and does not extend to a review of whether the trial court was substantively correct in entering the judgment from which relief was sought." *Laveen Meadows Homeowners Ass'n v. Mejia*, 249 Ariz. 81, ¶ 6 (App. 2020) (quoting *Hirsch v. Nat'l Van Lines, Inc.*, 136 Ariz. 304, 311 (1983)).

¶9 Under Rule 55(c), a trial court "may set aside an entry of default for good cause." To obtain such a result, the defaulting party must show the same "good cause" as that required for obtaining relief from a judgment by default under Rule 60(b), Ariz. R. Civ. P.[1] *Gen. Elec. Cap. Corp. v. Osterkamp (Osterkamp I)*, 172 Ariz. 185, 188-89 (App. 1992). Narciso and Aquiles argue, as they did below, that they established good cause under Rule 60(b)(1) ("excusable neglect") or, alternatively, Rule 60(b)(6) ("any other reason justifying relief").

[1]In addition to good cause, the moving party must show both that it acted promptly in seeking relief from the entry of default and that it had a meritorious defense. *Richas v. Superior Court*, 133 Ariz. 512, 514 (1982). Because we conclude that Narciso and Aquiles failed to make a sufficient showing of good cause, we need not address whether they met these other requirements for setting aside entry of default. *See Osterkamp II*, 172 Ariz. at 194.

"Excusable Neglect" under Rule 60(b)(1)

¶10 The trial court expressly rejected the first argument, finding itself "obligated" to deny the motion to set aside entry of default because "a miscalculation of a date by an attorney does not constitute excusable neglect under the case law." Narciso and Aquiles contend this holding "ignores" what they call "overwhelming case law in Arizona." They insist Newborn's "reasonable miscalculation of the deadline is the kind of mistake, inadvertence or excusable neglect contemplated by Rule 60(b)(1)," and that the court "abused its discretion in ignoring relevant case law." This argument fails.

¶11 "Arizona courts have been predominantly unforgiving . . . when confronted with a lawyer's *legal error* in reading the statutes and the case law." *Ellman Land Corp. v. Maricopa County*, 180 Ariz. 331, 340 (App. 1994). A finding of excusable neglect is "ordinarily reserved for factual or clerical errors, not misconstructions of the law." *Id.*; *see also Daou*, 139 Ariz. at 360 (characterizing only "clerical and secretarial errors" as "often unavoidable and many times excusable"); *In re $11,660 U.S. Currency*, 251 Ariz. 106, ¶ 16 (App. 2021) ("The Arizona Supreme Court has held that calendaring mistakes that stem from reliance on support staff may be excusable."); *Jarostchuk v. Aricol Commc'ns, Inc.*, 189 Ariz. 346, 349 (App. 1997) (no excusable neglect when calendaring error was "neither inadvertent nor clerical" but rather "intentional action on a matter requiring some legal competence" because "[i]f that is all it takes to show excusable neglect, filing deadlines are open-ended"). The narrow exception to this "general unwillingness to construe legal error as excusable neglect" is when the law is "particularly muddled and confusing," justifying "a degree of reparable lawyer error." *Ellman Land Corp.*, 180 Ariz. at 340-41 (giving "considerable deference" to tax court's finding that law was "so uncertain" as to excuse legal error).

¶12 Here, as the trial court indicated, the law is clear: "The *filing* of the application for default constitutes the entry of default. A default is effective 10 days after the application for entry of default is *filed*." Ariz. R. Civ. P. 55(a)(4) (emphasis added). In order to prevent default from becoming effective, the party claimed to be in default must plead or otherwise defend "within 10 days after the application for entry of default is *filed*." Ariz. R. Civ. P. 55(a)(5) (emphasis added). And Rule 6(c), under which "5 calendar days are added" to deadlines after service by mail, by its express terms only applies "[w]hen a party may or must act within a specified time after *service*" (emphasis added), not filing. All of this was clearly articulated in *Baker International Associates, Inc. v. Shanwick*

International Corp., 174 Ariz. 580 (App. 1993).[2] There, we highlighted that Rule 55 is based on the date of *filing*, not service, and expressly found that the rule allowing five additional days when service is made by mail "clearly did not apply" to calculating the deadline for responding to an application for entry of default under Rule 55. *Id.* at 582-83 ("[W]e interpret the civil rules at issue to mean what they say—namely, that Rule 6[] does not extend the ten-day period of Rule 55[]."). Thus, even if it was an "honest mistake," Newborn's conclusion that he had until September 10 to plead or otherwise defend to prevent the default filed on August 21 from becoming effective was neither reasonable nor the product of a particularly muddled or confusing area of law. *See also Jarostchuk*, 189 Ariz. at 347, 349-50 (reversing as abuse of discretion trial court's finding that legal secretary's miscalculation of filing deadline qualified as excusable neglect when she intentionally excluded certain days based on unreasonable misreading of clear language of civil rules).

¶13 *Baker* also supports the trial court's conclusion that Newborn's miscalculation of the filing deadline did not constitute excusable neglect under the case law. There, the defendant filed its answer one day after the expiration of the ten-day grace period under Rule 55 because counsel—as here—incorrectly believed that the deadline had been extended by five days due to service by mail. *Id.* at 581. And there, as here, the trial court refused to set aside the default, finding that the failure to timely file "was not the result of excusable neglect." *Id.* at 582. We upheld that ruling, finding no abuse of discretion in the trial court's refusal to characterize an attorney's erroneous reliance on an inapplicable rule as excusable neglect. *Id.* at 584. As we explained, "Both the language of the relevant rules and the holding of the court in *Anderson* should have alerted the attorney to the fact that he did not have five additional days in which to file his client's answer to prevent the entry of default from becoming effective."[3] *Id.* We also refused to "quarrel with the trial court's conclusion

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[2]Edward cited this case when arguing to the trial court that Narciso's and Aquiles's motion to dismiss in response to the first application for entry of default had been untimely filed.

[3]Referring to *Anderson v. Fidelity Southern Insurance Corp.*, 119 Ariz. 563 (App. 1978), in which we explained that the provision of the rules of civil procedure allowing five additional days when service is made by mail, "by its express terms, is applicable only when a party is required to take some action 'within a prescribed period after the *Service* of a notice . . . upon him.'" (emphasis and alteration in *Anderson*) (quoting former Ariz. R. Civ. P. 6(e), which has since been renumbered).

that the circumstances did not establish excusable neglect" when, as here, "the attorney gave no explanation as to why he did not timely file the answer before the filing of the application for entry of default" (here, two such filings) and the entry of a default judgment posed "serious negative consequences" for his client—something Narciso and Aquiles also urge in this case. *Id.*

¶14 The ruling in *Baker* is not, as Narciso and Aquiles claim, "an outlier," nor is it "the only case that supports Edward's position." Rather, we have elsewhere held that it is reversible error for a trial court to set aside default on the ground that counsel's misunderstanding of the relevant rules of civil procedure qualifies as excusable neglect. *Osterkamp II*, 172 Ariz. at 194 (discussing *Osterkamp I*, 172 Ariz. at 190-91). This is because "under Arizona case law, an attorney's misunderstanding or ignorance of the rules of civil procedure is not the type of excuse contemplated in Rule 60[(b)] as a sufficient ground for vacating the entry of default or default judgment." *Id.*; *see also Daou*, 139 Ariz. at 359 ("ignorance of the rules of procedure is not the type of excuse contemplated in rule 60[(b)] as ground for vacating a default judgment"); *State ex rel. Corbin v. Marshall*, 161 Ariz. 429, 432 (App. 1989) ("confusion" stemming from "ignorance of our Rules of Civil Procedure" is "not the type of excuse that demonstrates good cause to vacate entry of default"). In particular, in *Osterkamp I*, we concluded that "counsel's misunderstanding of the effect of the 10-day grace period" provided in Rule 55(a), "which resulted in his failure to file an answer within that period," was insufficient reason for the trial court to have set aside a default and judgment due to mistake, inadvertence, surprise, or excusable neglect under Rule 60. 172 Ariz. at 186; *see also Maher v. Urman*, 211 Ariz. 543, ¶¶ 22-23 (App. 2005) (upholding trial court's ruling that failure to meet deadline was not excusable neglect when it "was not the result of a clerical error, but was based either on" unrepresented litigant's "ignorance" of applicable procedural rule or his strategic, "intentional choice").

¶15 Narciso and Aquiles cite a variety of cases they claim involved miscalculated or missed deadlines that our supreme court held to be the result of mistake or excusable neglect. None of those cases involved the sort of legal error by counsel at issue here. *See City of Phoenix v. Geyler*, 144 Ariz. 323, 326-27, 332 (1985) (reasonable "clerical error" due to unclear stamps); *Cook v. Indus. Comm'n of Ariz.*, 133 Ariz. 310, 311 (1982) (untimely filing due to incorrect notation by temporary substitute secretary); *Campbell v. Frazer Constr. Co.*, 105 Ariz. 40, 40 (1969) (businessman defendant's reasonable misreading of summons); *Coconino Pulp & Paper Co. v. Marvin*, 83 Ariz. 117, 121 (1957) (lawyer not informed of deadline due to "inadvertent clerical error"); *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 154, 163

(App. 1993) (involving non-receipt of motion); *Goodman's Markets, Inc. v. Ward*, 4 Ariz. App. 456, 457-59 (1966) (where plaintiff granted written extension of time to answer but later mailed revocation that may not have been received, related primarily to separate case, and was not addressed in ongoing negotiations); *see also Gorman v. City of Phoenix*, 152 Ariz. 179, 181 & n.5 (1987) (refusing to address claim of excusable neglect not raised before trial court).

Counsel's Past Conduct

¶16 At the hearing on the motion to set aside entry of default, the trial court also found that Newborn had been "consistently late for a number of deadlines." In particular, the court explained that Newborn had missed the filing deadline after "four different time periods"—not only in responding to Edward's second application for default due to the admitted calendaring error, but also "in filing the Answer to begin with, in responding to [Edward's] first Application for Default, and missing the deadline for filing an Answer within ten days of the Motion to Dismiss."

¶17 On appeal, Narciso and Aquiles contend the court abused its discretion in "mischaracterizing" Newborn's past conduct. In particular, as below, they insist that their motion to dismiss was timely filed within ten days of Edward's first application for default. But we need not address this issue because the remainder of the trial court's finding is clearly supported by the record and suffices to support the court's exercise of its discretion. Narciso and Aquiles indisputably: (a) failed to timely answer the complaint after being served, leading to Edward's first application for entry of default; (b) missed the deadline for filing an answer within ten days after the denial of their motion to dismiss, leading to the second such application; and (c) missed the deadline for pleading or otherwise defending within ten days, due to Newborn's admitted miscalculation of the filing deadline.

¶18 Narciso and Aquiles contend the trial court erred in considering that they did not file answers before Edward filed his applications for entry of default, claiming that filings submitted within the ten-day grace period established in Rule 55 are not "late." They argue: "Why [they] did not file [their] responsive pleading during the initial 20-day period and chose to file it during the 10-day default grace period . . . is simply not relevant." But, as we indicated in *Baker*, "the fact that the attorney gave no explanation as to why he did not timely file the answer before the filing of the application for entry of default" may be a relevant consideration for the trial court exercising its discretion to determine whether excusable neglect had been established. 174 Ariz. at 584. That rationale applies doubly here, where Narciso and Aquiles twice failed to timely file an answer before the filing of the application for entry of default,

and no explanation was provided to the trial court regarding either failure. We therefore "cannot quarrel with the trial court's conclusion that the circumstances did not establish excusable neglect." *Id.*

"Other Reasons" under Rule 60(b)(6)

¶19 Narciso and Aquiles also argue, in the alternative, that default should be set aside under Rule 60(b)(6) "because the judgment is extraordinarily unjust." In particular, they claim the trial court's refusal to set aside the entry of default led to a judgment through which "Narciso has lost his home, has been disinherited by the parents with whom [he] has lived closely for decades and for whom he lovingly and consistently cared for in the later years of their lives, and must pay over $1,600,000.00 plus interest, as well as [over $85,000 in] attorneys' fees and costs." They state Narciso has "nowhere else to live," lacks the resources to pay the judgment, and is retired. They insist "the result could not have been harsher" and that "there is no justice or fairness in this result."

¶20 As noted above, Rule 60(b)(6) empowers a trial court to set aside an entry of default for "any other reason justifying relief," so long as "the movant can show 'extraordinary circumstances of hardship or injustice justifying relief.'" *Skydive Ariz., Inc. v. Hogue*, 238 Ariz. 357, ¶ 25 (App. 2015) (quoting *Hilgeman v. Am. Mortg. Secs., Inc.*, 196 Ariz. 215, ¶ 15 (App. 2000)). As our supreme court has explained, this is a "very broadly worded ground for relief, which we construe as investing extensive discretion in trial courts." *Gonzalez v. Nguyen*, 243 Ariz. 531, ¶ 11 (2018); *see also Gorman*, 152 Ariz. at 182 (whether circumstances qualify as extraordinary, unique, or compelling under Rule 60(b)(6) is left "to the sound discretion of our trial courts to be resolved on a case-by-case basis"). Although "we will not hesitate to correct legal error," we are "extremely reluctant to disturb the trial court's factual findings." *Gorman*, 152 Ariz. at 182.

¶21 Here, although Narciso and Aquiles raised it,[4] the trial court did not expressly address the Rule 60(b)(6) argument in denying the motion to set aside entry of default. Nevertheless, "under the circumstances of this case, we cannot find the trial court's presumptive conclusion that no

[4]We are unpersuaded by Edward's argument that Narciso and Aquiles forfeited this claim by insufficiently raising it below. As indicated above, Narciso and Aquiles argued before the trial court that "other reasons" justified granting relief, including that Newborn's mistake was "minor" compared to the "severe" harm the default judgment would cause to Narciso, who "stands to lose literally everything he has." *See supra*, ¶¶ 5-6.

extraordinary circumstances of hardship or injustice existed was a clear abuse of discretion." *Beal v. State Farm Mut. Auto. Ins. Co.*, 151 Ariz. 514, 519 (App. 1986). Whether the court's conclusion involved credibility determinations, the balancing of competing interests, or both, we are not permitted to "second-guess or substitute our judgment for that of the trial court" in such situations. *Osterkamp I*, 172 Ariz. at 188; *see also Gonzalez*, 243 Ariz. 531, ¶ 14 (even "possibly excessive judgment does not automatically entitle a defendant to vacate a default judgment").

Attorney Fees and Costs

¶22 As he did successfully below, Edward requests attorney fees on appeal pursuant to, *inter alia*, A.R.S. §§ 12-341.01 (actions arising out of contract) and 46-456(B) (financial exploitation of vulnerable adult). Because Narciso and Aquiles have been held liable for both breach of contract and financial exploitation of vulnerable adults, we—like the trial court—award Edward reasonable attorney fees on appeal pursuant to those statutes, as well as his costs. *See* § 46-456(B) (both "reasonable costs and attorney fees" mandatory against person who financially exploits vulnerable adult); *see also* A.R.S. § 12-341 (successful party on appeal entitled to costs). We deny Narciso's and Aquiles's request for fees and costs.

Disposition

¶23 For the foregoing reasons, we affirm the judgment of the trial court and award Edward his attorney fees and costs on appeal, upon his compliance with Rule 21(b), Ariz. R. Civ. App. P.