

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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CHRISTINA HARPER, ATTORNEY,  
IN HER CAPACITY AS SUCCESSOR TRUSTEE,  
*Plaintiff,*

*v.*

PIMA COUNTY TREASURER, STATE OF ARIZONA,  
*Defendant/Appellee.*

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TRUEQUITY, LLC,  
*Applicant/Appellant,*

*v.*

MICHAEL JUSTINIANI,  
*Respondent/Appellee.*

No. 2 CA-CV 2022-0161  
Filed August 3, 2023

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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NOT FOR PUBLICATION  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).*

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Appeal from the Superior Court in Pima County  
No. C20204950  
The Honorable Casey F. McGinley, Judge

**VACATED AND REMANDED**

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COUNSEL

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*Counsel for Defendant/Appellee*

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By Michael A. Fleishman  
*Counsel for Respondent/Appellee*

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**MEMORANDUM DECISION**

Presiding Judge Eppich authored the decision of the Court, in which Chief Judge Vásquez and Judge Gard concurred.

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E P P I C H, Presiding Judge:

¶1 TruEquity LLC appeals from the trial court’s order granting Michael Justiniani relief from a final judgment releasing to TruEquity excess proceeds from a trustee’s sale of real property. TruEquity contends the court improperly concluded that “extraordinary circumstances” entitled Justiniani to relief because the court misinterpreted statutory requirements for notice and the record does not support the court’s findings. For the following reasons, we vacate the court’s order granting relief from the judgment and remand for further proceedings.

**Factual and Procedural Background**

¶2 We view the facts in the light most favorable to upholding the trial court’s order. *See MacLean v. Newgioco Grp., Inc.*, 251 Ariz. 31, ¶ 8 (App. 2021). In 1997, Justiniani executed a deed of trust on his property. Subsequently, due to a lot-line dispute, Justiniani executed a quit claim deed conveying 3,941 square feet of his property to his neighbors, Helen

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Tucker<sup>1</sup> and Phyllis Thompson, in exchange for 3,941 square feet of their property. The quit claim deeds were recorded in 2001.

¶3 Justiniani subsequently defaulted on his loan, and the property sold at a trustee's sale in 2020. Christina Harper, in her capacity as successor trustee, filed a complaint to deposit the excess proceeds from the sale, \$35,781.11, with the Pima County Treasurer. The complaint asserted that "[t]he property was vested to Michael Justiniani on the date of the sale and he would be entitled to the funds." Harper sent the complaint to Justiniani at three addresses, but he never received a copy.

¶4 In January 2021, TruEquity filed an application for release of the excess proceeds. It asserted that although the complaint had named Justiniani as the title holder of the property, "based on the quit-claim deed recorded on October 10, 2001, the Subject Property was actually vested in Helen Julian a/k/a Helen Tucker and Phyliss Thompson," and it was their homestead. TruEquity included a copy of the quit claim deed demonstrating the transfer of 3,941 square feet of land to Tucker and Thompson, and it asserted that Tucker and Thompson had assigned their interest in the excess proceeds to TruEquity to assist in recovering the funds. TruEquity mailed the application to Justiniani at the same addresses as Harper had mailed the complaint.

¶5 The Pima County Treasurer responded to TruEquity's application.<sup>2</sup> It asserted that it was "unclear if [TruEquity was] entitled to the excess proceeds" because Justiniani was the owner of the property at the time of the trustee sale and the quit claim deed relied on by TruEquity concerned a "lot line adjustment."

¶6 Two months later, TruEquity moved for entry of an order releasing the excess proceeds. TruEquity contended it had mailed the application and waited the statutorily required period, but no one had contested the application. All of the mailings sent to Justiniani had been returned to the sender with no forwarding address provided.

¶7 Based on the treasurer's response to TruEquity's application, the trial court held a status conference regarding "questions about [TruEquity's] eligibility to receive any excess proceeds, the possibility that

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<sup>1</sup>Tucker was formerly known as Helen Julian.

<sup>2</sup>The Pima County Treasurer has taken no position on appeal.

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there are interests superior to those of [TruEquity], and a 180 day waiting requirement.”<sup>3</sup> Following the hearing, in May 2021, the court entered a final judgment releasing the excess proceeds to TruEquity, finding that “[a]s assignee to the assignors’ interest,” TruEquity had the “most superior claim.”

¶8 In June 2022, Justiniani filed a motion to vacate the judgment pursuant to Rule 60, Ariz. R. Civ. P. The trial court granted the motion, finding “extraordinary circumstances” justified relief because Justiniani had not been properly notified of the action. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(2).<sup>4</sup> See *Brumett v. MGA Home Healthcare, LLC*, 240 Ariz. 420, ¶¶ 14-15 (App. 2016) (ruling on Rule 60(c) motion appealable as special order after final judgment); see also *Gonzalez v. Nguyen*, 243 Ariz. 531, n.1 (2018) (former Rule 60(c) reorganized in 2016 as Rule 60(b) and (c) without substantive change).

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<sup>3</sup>A transcript of this hearing is not included in the record on appeal. The minute entry from the hearing notes that counsel for TruEquity made “an avowal to the Court regarding the lot line adjustment enumerated in the Qui[t] Claim Deed” and that the court granted TruEquity’s application.

<sup>4</sup>Justiniani’s motion, brought over a year after the final judgment, alleged TruEquity had “committed a fraud upon the court.” The trial court considered this claim under Rule 60(b)(3), which permits relief for fraud generally but must be brought “no more than 6 months after the entry of the judgment.” Ariz. R. Civ. P. 60(c)(1); see also *State v. McCarrell*, 80 Ariz. 240, 243 (1956) (six-month limitation in Rule 60 is jurisdictional). This time limit does not, however, “limit [a] court’s power to . . . set aside a judgment for fraud *on the court*.” Ariz. R. Civ. P. 60(d)(3) (emphasis added). A court may do that at any time. *Cypress on Sunland Homeowners Ass’n v. Orlandini*, 227 Ariz. 288, ¶¶ 42-43 (App. 2011); *Rogone v. Correia*, 236 Ariz. 43, ¶ 11 (App. 2014). In any event, because the court concluded Justiniani was not entitled to relief pursuant to Rule 60(b)(3) but rather pursuant to Rule 60(b)(6), relief was not necessarily precluded due to timeliness. See Ariz. R. Civ. P. 60(c)(1) (six-month time limit for motions made under Rule 60(b)(1)-(3)); *Amanti Elec., Inc. v. Engineered Structures, Inc.*, 229 Ariz. 430, ¶ 10 (App. 2012) (“when relief might have been available under one of the first five clauses but for the fact that the time limits . . . had elapsed,” relief still available if motion raises additional exceptional circumstances convincing court it is in the interest of justice).

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**Discussion**

¶9 TruEquity first asserts the trial court erred in granting Justiniani’s Rule 60 motion because it misinterpreted A.R.S. § 33-812(G) by “append[ing] its own nebulous notice requirements.” Justiniani counters that “strict compliance with . . . § 33-812(G) alone does not mean that [he] was afforded adequate due process under the circumstances” and that the court did not err. We review the court’s grant of a Rule 60 motion for an abuse of discretion, but we review its interpretation of rules and statutes de novo. *Gonzalez*, 243 Ariz. 531, ¶ 8; *John Munic Enters., Inc. v. Laos*, 235 Ariz. 12, ¶ 5 (App. 2014). The court has “extensive discretion” in ruling on a Rule 60(b)(6) motion, *Gonzalez*, 243 Ariz. 531, ¶ 11, but it abuses that discretion if it misapplies the law, *City of Phoenix v. Geyler*, 144 Ariz. 323, 329 (1985).

¶10 More than a year after the trial court had ordered release of the excess proceeds, Justiniani moved the court to vacate that order pursuant to Rule 60(d)(3). He asserted that he had not filed an application for the excess proceeds “as he had been investigating his potential claims to overturn the Trustee’s Sale” and that he only learned his available claims were related to the excess proceeds after he had engaged counsel. He further asserted Rule 60 relief was proper because TruEquity had committed a fraud upon the court by avowing the property had vested in Tucker and Thompson, who “had no legitimate legal interest . . . as they only owned a small sliver . . . conveyed to settle a boundary dispute.” Because § 33-812(J) imparts a duty to “acknowledge the existence of any apparent . . . interest that could have priority,” Justiniani asserted TruEquity had violated its duty to the court and had concealed material facts.

¶11 TruEquity responded that Justiniani had not proven by clear and convincing evidence that it had defrauded the trial court, emphasizing that there was no proof of its intent to do so. It further asserted that it had “acknowledge[d] an alleged interest by Justiniani” in its application and that Justiniani had been provided proper notice pursuant to § 33-812(G), but he failed to act, which should preclude him from moving to vacate the order. Justiniani asserted TruEquity had intended to mislead and he should not be barred because he had never received the application.

¶12 After a hearing, the trial court concluded that it could not find TruEquity intended to mislead the court, although it had been “unreliably informed that the entirety of the parcel was transferred” and “[t]he

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previous judge did not have an opportunity to measure out on behalf of Mr. Justiniani how much he was entitled to receive from any excess proceeds.”

¶13 The trial court observed that the “question becomes, then, should that be held against Mr. Justiniani that he did not respond.” It concluded it should not be and Rule 60(b)(6) relief was warranted because “[t]he notice that was provided to Mr. Justiniani, while it may have met the bare minimum of [§ 33-812(G)], in no way could have apprised Mr. Justiniani of what his rights were, what interest he may have had, or what ability he had to seek excess proceeds.” Finding that the notice “was sent to two (2) former addresses of Mr. Justiniani” and that “the idea behind notice is to provide a meaningful opportunity to understand what is going on and to proceed from there,” it noted,

[w]hile [§ 33-812(G)] may establish bare minimums, in a case such as this, when Truequity, LLC was put on notice by the Pima County Treasurer that there was another individual, it would have taken very small steps to verify if that individual existed, where he existed, and if he wished to participate in these proceedings.

The court concluded these were “extraordinary circumstances” justifying relief.

¶14 Rule 60(b)(6) provides “broad equitable power,” *Webb v. Erickson*, 134 Ariz. 182, 186 (1982), permitting a trial court to “vacate judgment whenever such action is appropriate to accomplish justice,” *id.* (quoting *Klapprott v. United States*, 335 U.S. 601, 615 (1949)). Under (b)(6), a court may relieve a party from a final judgment for any reason justifying relief, “provided that the movant can show ‘extraordinary circumstances of hardship or injustice justifying relief’ and ‘a reason for setting aside the judgment other than one of the reasons set forth in the preceding five clauses.’” *Skydive Ariz., Inc. v. Hogue*, 238 Ariz. 357, ¶ 25 (App. 2015) (quoting *Hilgeman v. Am. Mortg. Secs., Inc.*, 196 Ariz. 215, ¶ 15 (App. 2000)); *see also Gonzalez*, 243 Ariz. 531, ¶ 15 (clause six mutually exclusive from first five clauses). However, nothing in Rule 60 limits the court’s power to set aside a judgment for fraud on the court. Ariz. R. Civ. P. 60(d)(3); *see also Cypress on Sunland Homeowners Ass’n v. Orlandini*, 227 Ariz. 288, ¶¶ 42-43 (App. 2011).

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¶15 It appears the trial court solely relied on what it deemed to be inadequate service of Justiniani to determine relief was warranted under Rule 60(b)(6). The court noted that “[w]hile [§ 33-812(G)] may establish bare minimums . . . it would have taken very small steps to verify if [Justiniani] existed, where he existed, and if he wished to participate in these proceedings.” To that extent, we cannot affirm. Rule 60(b)(4) permits the court to relieve a party from final judgment that is void. A judgment is void under (b)(4) if a defendant is not properly served with process. *Hilgeman*, 196 Ariz. 215, ¶ 8. Therefore, lack of notice, alone, may justify relief under (b)(4), see *Ruffino v. Lokosky*, 245 Ariz. 165, ¶¶ 10, 18 (App. 2018), but it is not sufficient under (b)(6), *Webb*, 134 Ariz. at 188-89. See also *Roll v. Janca*, 22 Ariz. App. 335, 336 (1974) (court cannot rely upon “both Clause 4 and Clause 6 . . . because of their mutual exclusiveness”).

¶16 In any event, we cannot say that TruEquity’s attempts to notify Justiniani deprived him of due process such that the judgment is void. Section 33-812(G) is clear and unambiguous. See *PNC Bank v. Cabinetry By Karman, Inc.*, 230 Ariz. 363, ¶ 7 (App. 2012) (generally concluding § 33-812 is “clear and unambiguous”). Subsection G provides, in relevant part, that an applicant for excess proceeds from a trustee sale,

shall mail postage prepaid by any form of mail that requires a signed and returned receipt a copy of the application to . . . all persons at each of the addresses named on the list that is incorporated in or attached to the complaint and to any other address of the persons that is known to or ascertained by the applicant . . . . On return of the . . . undelivered or unclaimed original envelope, the applicant shall file with the court an affidavit that states that the application was mailed to the person and that the application was . . . [n]ot received, as evidenced by the returned envelope. The applicant shall attach to the affidavit a copy of the original unopened and undelivered or unclaimed returned envelope . . . . [T]he applicant shall . . . [c]ontinue service of the application . . . until the original, unopened and undelivered envelope is returned without any forwarding address.

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¶17 Justiniani does not dispute that TruEquity strictly complied with § 33-812(G). Rather, he asserts that such compliance was not sufficient for due process under the circumstances here.

¶18 “Due process requires notice ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” *Blair v. Burgener*, 226 Ariz. 213, ¶ 19 (App. 2010) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)). If service is prescribed by a statute, “the statute must be strictly followed.” *Mervyn’s, Inc. v. Superior Court*, 144 Ariz. 297, 299 (1985); cf. *Malnar v. Joice*, 236 Ariz. 170, ¶ 7 (2014) (in serving statutory agent, due process provided if “the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the [party] will receive actual notice” (quoting *Wuchter v. Pizzutti*, 276 U.S. 13, 24 (1928))).

¶19 Here, § 33-812(G) was strictly followed and indicates that when complied with there was a reasonable probability Justiniani would have been apprised of the action. See *Mervyn’s, Inc.*, 144 Ariz. at 299; *Malnar*, 236 Ariz. 170, ¶ 7; *Blair*, 226 Ariz. 213, ¶ 19. Thus, we cannot say that TruEquity’s actions failed to satisfy due process.

¶20 Justiniani asserts that the “gravamen” of the trial court’s ruling was that TruEquity had misled the court. We disagree. Although the court found it had been misled and expressed concern about representations made by TruEquity, it also found that any misrepresentation was not intentional on the part of TruEquity and concluded that Justiniani’s failure to respond should not be held against him because service was insufficient.<sup>5</sup> And in any event, even if the court had found Justiniani had the superior right to receive the proceeds, it was required to enter an order in favor of TruEquity because Justiniani did not respond. See § 33-812(J) (“If a response is not filed within the one hundred eighty day period by the person found by the court to have a superior right

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<sup>5</sup> As mentioned before, Rule 60(b)(3) relief was unavailable to Justiniani given the timing of his motion. Fraud on the court under Rule 60(d)(3) requires an intent to mislead the court. See *Cypress on Sunland Homeowners Ass’n*, 227 Ariz. 288, ¶ 42 (“concealing material facts and suppressing the truth with the intent to mislead the court . . . constitutes a fraud upon the court”).



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to receive the proceeds, the court shall enter an order in favor of any applicant or respondent entitled to the proceeds.”).

¶21 Accordingly, we vacate the trial court’s Rule 60(b)(6) order, but we nevertheless remand for further proceedings. As the court contemplated, Rule 60(b)(6) requires consideration of the totality of the circumstances. *Skydive Ariz., Inc.*, 238 Ariz. 357, ¶ 25. TruEquity has made representations for the first time on appeal that Tucker and Thompson had conveyed their interest to another individual before asserting an entitlement to the excess proceeds, the effect of which we are not well positioned to assess on appeal.

¶22 As explained above, under Rule 60(b)(6) the trial court may consider any reason justifying relief that is not contemplated by Rule 60(b)(1)-(5). *Skydive Ariz., Inc.*, 238 Ariz. 357, ¶ 25. Here, this includes, but is not limited to, the manner in which Tucker and Thompson came into possession of the land, the scope of their possession, the potential windfall created by an award of the proceeds to them, and, of course, the new representations that they had no interest in the proceeds in the first instance. In addition, (b)(6) asks a trial court to exercise its equitable power, *Webb*, 134 Ariz. at 186, and nothing in Rule 60 limits a court from setting aside a judgment for fraud on the court, *see* Ariz. R. Civ. P. 60(d)(3). Because we cannot say with certainty that even disregarding the question of diligence in service of process the court would have nevertheless found sufficient facts demonstrating “extraordinary circumstances of hardship or injustice justifying relief,” we remand.<sup>6</sup>

**Disposition**

¶23 We vacate the trial court’s Rule 60(b)(6) order. However, we remand for the court to consider Justiniani’s motion absent evaluation of service of the application to him.

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<sup>6</sup>At oral argument, both parties agreed remand was appropriate under the circumstances.