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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

STANTEC CONSULTING, INC., an Arizona corporation, Plaintiff/Appellee, v. SAGUARO RESERVE, L.L.C., a Delaware limited liability company, Defendant/Appellant.	2 CA-CV 2009-0017 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20083282

Honorable Paul E. Tang, Judge

AFFIRMED IN PART;
VACATED IN PART AND REMANDED

McEvoy, Daniels & Darcy, P.C.
By Sally M. Darcy
Tucson
Attorneys for Plaintiff/Appellee

Lorber, Greenfield & Polito, LLP
By Holly Davies and Amy Wilkens
Phoenix
Attorneys for Defendant/Appellant

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

¶1 Appellant, Saguaro Reserve, L.L.C., appeals from a default judgment entered in favor of appellee Stantec Consulting, Inc. We affirm the entry of default, vacate the default judgment, and remand the case for the reasons set forth below.

BACKGROUND

¶2 We view the facts in the light most favorable to upholding the default judgment. *See Goglia v. Bodnar*, 156 Ariz. 12, 20, 749 P.2d 921, 929 (App. 1987). On May 15, 2008, Stantec filed a complaint against Saguaro, asserting several claims of breach of contract. Stantec served Saguaro with a summons and complaint on May 20. When Saguaro failed to file an answer or defend against the action, Stantec filed an application for default on June 13. The clerk of the court entered Saguaro's default that same day.

¶3 On June 23, counsel for Saguaro filed a notice of appearance together with a "Motion to Stay Proceedings Due to California Bankruptcy." In the motion, counsel explained that Saguaro's managing member had filed a bankruptcy petition in California, that other entities were seeking authority to manage Saguaro, and that the bankruptcy court had yet to rule on the matter. Stantec opposed staying the proceedings, and the trial court denied Saguaro's motion on July 22.

¶4 On August 7, Saguaro filed a counterclaim and an untimely answer. The trial court struck the answer and entered default judgment on September 23.[1] A week later, Saguaro moved to set aside the judgment. In the motion, Saguaro challenged the entry of

[1]We provide additional facts relevant to the entry of default judgment in the discussion related to that topic.

default on the grounds that the motion to stay was a responsive pleading "initiating [Saguaro's] defense" or, in the alternative, that Saguaro's delay in filing its answer was the result of excusable neglect and its defense was meritorious. Saguaro further challenged the default judgment on the ground the damages it awarded were not supported properly.

¶5 After a hearing, the trial court denied the motion to set aside the default judgment on November 17.[2] Saguaro voluntarily dismissed its counterclaim and, on December 16, appealed the order denying its motion to set aside the judgment. We have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 12-2101(A) and (C). *See Sullivan & Brugnatelli Adver. Co. v. Century Capital Corp.*, 153 Ariz. 78, 80, 734 P.2d 1034, 1036 (App. 1986) (order denying motion to set aside default judgment appealable as "special order made after [final] judgment"); *see also Bateman v. McDonald*, 94 Ariz. 327, 329, 385 P.2d 208, 210 (1963) (order setting aside default judgment similarly appealable).

MOTION TO STAY

¶6 Saguaro first argues the entry of default was not effective because Saguaro appeared and defended for purposes of Rule 55, Ariz. R. Civ. P., by filing its motion to stay. We review a trial court's refusal to set aside a default judgment for a clear abuse of discretion. *Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 185, 188, 836 P.2d 398, 401 (App. 1992). Finding no legal error or abuse of discretion, we affirm the court's ruling on this ground.

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[2]Although the trial court originally ruled in an unsigned minute entry order, the court later signed the order, which was then refiled on April 13, 2009.

¶7 Rule 55(a) requires the clerk of the court to enter the default of a party against whom relief is sought when that party "has failed to plead or otherwise defend as provided by the[] Rules [of Civil Procedure]." "A default entered by the clerk shall be effective ten (10) days after the filing of the application for entry of default." Ariz. R. Civ. P. 55(a)(2); *see also* Ariz. R. Civ. P. 6(a) (when rules provide time period less than eleven days, "intermediate Saturdays, Sundays, and legal holidays" excluded from computation); *Corbet v. Superior Court*, 165 Ariz. 245, 247, 798 P.2d 383, 385 (App. 1990) (Rule 6(a), Ariz. R. Civ. P., applies to entry of default). If the party claimed to be in default "pleads or otherwise defends" within that period of time, the default is not effective. Ariz. R. Civ. P. 55(a)(3). "'Defend' means to contest and endeavor to defeat a claim or demand made against one in a court of justice." *Davis v. Superior Court*, 25 Ariz. App. 402, 403, 544 P.2d 226, 227 (1976).

¶8 Saguaro claims its motion to stay constitutes a defense under Rule 55(a). However, it cites no direct authority for this proposition. Instead, it suggests this conclusion may be inferred, given the judicial policy in favor of resolving claims on their merits. *See Ramada Inns, Inc. v. Lane & Bird Adver., Inc.*, 102 Ariz. 127, 129, 426 P.2d 395, 397 (1967); *Beal v. State Farm Mut. Auto. Ins. Co.*, 151 Ariz. 514, 517, 729 P.2d 318, 321 (App. 1986); *Cota v. S. Ariz. Bank & Trust Co.*, 17 Ariz. App. 326, 327, 497 P.2d 833, 834 (1972). "Although 'it is a highly desirable legal objective that cases be decided on their merits,' we review [a] trial court's refusal to set aside a default judgment only for 'a clear abuse of discretion.'" *Hilgeman v. Am. Mortgage Secs., Inc.*, 196 Ariz. 215, ¶ 7, 994 P.2d 1030, 1033

(App. 2000), *quoting Hirsch v. Nat'l Van Lines, Inc.*, 136 Ariz. 304, 308, 666 P.2d 49, 53 (1983). Saguaro has not developed its argument further or explained why we should construe its motion to stay as a defense under Rule 55(a) as a matter of judicial policy. We therefore decline to do so. *See* Ariz. R. Civ. App. P. 13(a)(6) (opening brief must contain argument, supported by citations to record and legal authority, for each issue raised); *State Farm Mut. Auto. Ins. Co. v. Novak*, 167 Ariz. 363, 370, 807 P.2d 531, 538 (App. 1990) (failure to develop argument properly results in waiver on appeal).

¶9 We also reject any suggestion that, as a matter of law, filing a motion to stay qualifies as "otherwise defend[ing]" against a claim within the meaning of Rule 55(a). "'The words "otherwise defend" [in Rule 55(a)] refer to attacks on the service, or motions to dismiss, or for better particulars, and the like, which may prevent default without presently pleading to the merits.'" *Coulas v. Smith*, 96 Ariz. 325, 329, 395 P.2d 527, 529 (1964), *quoting Bass v. Hoagland*, 172 F.2d 205, 210 (5th Cir. 1949). In short, to avoid entry of default under the rule, a defendant must attempt to defeat a plaintiff's claims on substantive or procedural grounds. It is not enough, as our supreme court demonstrated in *Rogers v. Tapo*, 72 Ariz. 53, 230 P.2d 522 (1951), to indicate an intention to defend against the claim at a later date.

¶10 In *Rogers*, the supreme court held a defendant's motion for security for costs was insufficient to prevent the entry of default. *Id.* at 56-57, 230 P.2d at 525. In so holding, the court reasoned that "[a] motion is not a pleading" as the terms are defined in the rules of procedure and that, if the motion were incorrectly construed as a defense, it could "be used

as a subterfuge to extend the time within which to answer or otherwise defend" against the action. *Id.* at 56, 230 P.2d at 525. The court's wariness of "subterfuge" is warranted by the fact that entering default is a ministerial task performed by the clerk of the court. *Id.*; *see* Ariz. R. Civ. P. 55(a); *Painter v. Freije*, 65 Ariz. 153, 155, 176 P.2d 690, 691 (1947). Entry of default is triggered by the absence of a pleading or a specific type of motion in the record on a given date, and the trial court does not pass upon the merits of the defendant's filings, if any, before a default is entered. *Rogers* therefore illustrates that, despite our preference for adjudicating claims on their merits, simply appearing and filing a motion—especially a motion intended to enlarge the time to answer—will not qualify as defending against a claim and thereby prevent the entry of default pursuant to Rule 55(a). To hold otherwise would take the court's policy to an extreme that would disparage other important interests.

¶11 As this court has noted, "[a]ny delay in prosecuting a valid claim is 'harm' in some degree to the claimant," and enforcing the time limits specified by our rules of procedure ensures that judicial proceedings are accorded the dignity they inherently deserve. *Campbell v. Frazer Constr. Co.*, 9 Ariz. App. 262, 264, 451 P.2d 620, 622 (1969). Thus, we require a defendant who seeks relief from an entry of default or default judgment to show (1) excusable neglect in failing to comply with the rules, (2) diligent efforts to obtain relief, and (3) a meritorious defense. *Master Fin., Inc. v. Woodburn*, 208 Ariz. 70, ¶ 18, 90 P.3d 1236, 1240 (App. 2004); *see also* Ariz. R. Civ. P. 55(c) (trial court may set aside entry or judgment of default for good cause); Ariz. R. Civ. P. 60(c)(1) (grounds required to relieve defendant from final judgment include excusable neglect). Even if a defendant demonstrates

a meritorious defense, relief is unavailable unless excusable neglect in having failed to assert the defense in a timely fashion exists. *See Payne v. Payne*, 12 Ariz. App. 434, 436, 471 P.2d 319, 321 (1970) (both excusable neglect and meritorious defense required to set aside default; "[e]ither alone is insufficient").

¶12 Saguaro disagrees these standards apply here. Rather, it claims a showing of "excusable neglect and merit[or]ious defense . . . was superfluous" because it had "timely appeared and defended." In support of the latter argument, Saguaro emphasizes that neither Stantec nor the trial court "found any legal authority precluding the filing of a motion to stay as satisfying the 'defense' element of Rule 55." However, it is the movant who "generally bears the burden of demonstrating his entitlement to have a default judgment set aside." *Miller v. Nat'l Franchise Servs., Inc.*, 167 Ariz. 403, 406, 807 P.2d 1139, 1142 (App. 1991). It was therefore incumbent on Saguaro to show its motion to stay, related to a nonparty's bankruptcy proceedings, contested or attempted to defeat Stantec's substantive claims or demands. *See Davis*, 25 Ariz. App. at 403, 544 P.2d at 227. As we noted above, it has failed to do so.

¶13 In its opening brief, Saguaro asserts in passing that "filing a motion to stay was necessary[,] as . . . certain issues pertaining to . . . Saguaro's managing member . . . had to be resolved in the Bankruptcy proceeding before Saguaro could proceed further in this matter." This contention is relevant only to whether Saguaro's failure to file an answer within the allotted time was excusable—an issue Saguaro has not raised on appeal.

¶14 Moreover, as Stantec points out in its answering brief, Saguaro did not assert below, nor does it claim on appeal, that the automatic stay provision of federal bankruptcy law, 11 U.S.C. § 362, applied to this case. *See generally Miller*, 167 Ariz. at 405-07, 807 P.2d at 1141-43 (discussing effect of bankruptcy filing on state default proceedings). Furthermore, Saguaro has offered no explanation why, when it was represented by counsel authorized to file motions on its behalf, it needed more time than allowed by Rule 12, Ariz. R. Civ. P., and Rule 55(a)(3) to respond to Stantec's complaint. In fact, the bankruptcy order Saguaro submitted below that it claimed was "necessary" for it to defend in this action was dated August 28, 2008. Saguaro had filed its answer and counterclaim over twenty days earlier, on August 7. Thus, nothing in the record suggests the trial court erred or otherwise abused its discretion in refusing to set aside the entry of default, notwithstanding Saguaro's unsupported suggestion that it had filed the motion for a stay, rather than an answer, out of necessity.

¶15 Ultimately, the trial court found Saguaro's failure to file a timely answer was not the result of excusable neglect. It also found insufficient evidence of a meritorious defense to Stantec's claims. Saguaro does not challenge either of these findings on appeal. We therefore affirm the trial court's order refusing to set aside the entry of default.

ENTRY OF JUDGMENT

¶16 Saguaro next contends the default judgment is "void" because it included an award of unliquidated damages "without proper notice and hearing." As the propriety of the default proceedings is a question of law not involving any exercise of the trial court's

discretion, we review this issue de novo. *See Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 185, 188, 836 P.2d 398, 401 (App. 1992) (when "'resolution of the question is one of law or logic,'" appellate court will substitute its judgment for trial court's), *quoting City of Phoenix v. Geyler*, 144 Ariz. 323, 329, 697 P.2d 1073, 1079 (1985).

¶17 The judgment of default entered against Saguaro totaled more than $281,276, exclusive of attorney fees and costs, for engineering work Stantec performed pursuant to various contracts with Saguaro. Stantec alleged in separate counts of its verified complaint the underlying sums owed under each contract.

¶18 The record does not contain any motion or application for entry of judgment filed by Stantec. The trial court found, however, that "a judgment [was] served on or about August 7, 2008" by Stantec, and that it had "presented the Court with the pending judgment on August 7, 2008, simultaneously lodging an application for fees and costs." The record confirms that Stantec filed an affidavit on that date supporting its requested attorney fees and costs. The court subsequently entered default judgment on September 23, without having conducted a hearing or received any evidence relating to the contracts or the amount of damages resulting from Saguaro's breaches.

¶19 In its motion to set aside the default judgment, Saguaro argued Stantec had failed to comply with Rule 55(b) because Stantec had not included a supporting affidavit for the alleged amount due when it lodged its form of judgment and it had sought "uncertain" damages without providing notice and requesting a hearing. The trial court denied Saguaro's

motion without addressing whether the rule allowed the court to enter judgment in the absence of those events.

¶20 Rule 55(b) prescribes different procedures for entering a judgment by default depending upon the circumstances of a case. Pursuant to Rule 55(b)(1), a plaintiff may obtain a judgment "[b]y motion" when "the defendant has been defaulted for failure to appear" and the plaintiff's claim "is for a sum certain or for a sum which can by computation be made certain." In such circumstances, judgment may be entered "upon affidavit of the amount due." Ariz. R. Civ. P. 55(b)(1). Rule 55(b)(2), in turn, provides:

> In all other cases the party entitled to a judgment shall apply to the court therefor . . . . If the party against whom judgment by default is sought has appeared in the action, that party or, if appearing by representative, that party's representative, shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when required by law.

¶21 Saguaro argues "Stantec's failure to meet the requirements of Rule 55(b) deprived Saguaro of due process for failure to provide notice and a hearing, thus render[ing] the subsequent default void." We find the trial court's departure from Rule 55(b)(2) requires the judgment to be vacated. Although Stantec apparently filed an application for judgment by hearing, the court entered judgment as if by motion. Yet judgment by motion was inappropriate given Saguaro's appearance and the nature of Stantec's claim.

¶22 A defendant "appear[s]" for purposes of Rule 55(b) if he or she submits to the court's jurisdiction "in a manner showing knowledge of the suit and an intention to appear." *Tarr v. Superior Court*, 142 Ariz. 371, 374, 690 P.2d 90, 93 (App. 1984). "An appearance does not prevent a party from being in default for failure to plead or otherwise defend," *Rogers v. Tapo*, 72 Ariz. 53, 57, 230 P.2d 522, 525 (1951), but it does require the entry of default judgment to occur by hearing as provided in Rule 55(b)(2). When deciding whether a defendant appeared in an action so as to be entitled to notice and a hearing, we resolve any doubts in favor of the defendant. *See Tarr*, 142 Ariz. at 374-75, 690 P.2d at 93-94. Historically, our courts have found defendants have appeared by filing an appearance fee and a motion for security for costs before entry of default, *see, e.g.*, *Rogers*, 72 Ariz. at 56-57, 230 P.2d at 525, and by filing an answer before the plaintiff's application for default judgment. *See, e.g.*, *Tarr*, 142 Ariz. at 374, 690 P.2d at 93. Thus, Saguaro appeared in the present case by filing a formal notice of appearance together with a motion to stay the proceedings, before the entry of default became effective.

¶23 Furthermore, Stantec's claim was not for a "sum certain" that could be entered without a hearing. Ariz. R. Civ. P. 55(b)(1). We acknowledge our appellate courts have given trial courts imperfect guidance on the issue of what makes a claim susceptible to default judgment simply upon motion and affidavit. *Compare Harper v. Canyon Land Dev., LLC*, 219 Ariz. 535, ¶¶ 2, 5, 200 P.3d 1032, 1034, 1035 (App. 2008) (noting in dicta damages for uncompensated bookkeeping services, alleged as specific amount in plaintiff's complaint, were "sum certain" within meaning of Rule 55(b)(1)), *with S. Ariz. Sch. for Boys, Inc. v.*

Chery, 119 Ariz. 277, 279, 282, 580 P.2d 738, 740, 743 (App. 1978) (implicitly assuming damages allegedly resulting from teachers' "breach of contract," though quantified in complaint, were "unliquidated" and thus required determination by hearing under Rule 55(b)(2)). Despite our inconsistent treatment of the issue, however, we find no Arizona authority for the proposition that a claim is "for a sum certain or for a sum which can by computation be made certain" under Rule 55(b)(1) simply because a plaintiff has alleged a precise dollar amount of damages in a verified complaint. To the contrary, we have held that "[a] claim is not for a 'sum certain' merely because it is for a specific amount." *Beyerle Sand & Gravel, Inc. v. Martinez*, 118 Ariz. 60, 63, 574 P.2d, 853, 856 (App. 1977). If this were not the case, "almost any unliquidated claim [could] be transformed into a claim for a sum certain merely by placing a monetary amount on the item of claimed damage even though such amount has not been fixed, settled, or agreed upon by the parties and regardless of the nature of the claim." *Id.*

¶24 Two tests exist for determining whether a claim for damages states a sum certain under Rule 55(b)(1). Under the narrower test, "a claim is not [for] a sum certain unless there is no doubt as to the amount to which a plaintiff is entitled as a result of the defendant's default." *KPS & Assocs., Inc. v. Designs By FMC, Inc.*, 318 F.3d 1, 19 (1st Cir. 2003). By this definition, sum-certain claims are those for which the finding of liability necessarily entails a specific finding of damages, as with claims involving monetary judgments, financial instruments, or contracts with liquidated damage clauses. *See id.* at 19-20. Extrinsic proof is not required to determine damages once liability has been

established. *See Interstate Food Processing Corp. v. Pellerito Foods, Inc.*, 622 A.2d 1189, 1193 (Me. 1993); *Reynolds Sec., Inc. v. Underwriters Bank & Trust Co.*, 378 N.E.2d 106, 109 (N.Y. 1978).

¶25 Under the broader test, a claim states a sum certain, or is liquidated, "'if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion.'" *Ariz. Title Ins. & Trust Co. v. O'Malley Lumber Co.*, 14 Ariz. App. 486, 496, 484 P.2d 639, 649 (1971), *quoting* Charles McCormick, *Damages* § 54 (1935); *see also Interstate Food Processing*, 622 A.2d at 1193 ("The term 'sum certain' has been held to have a meaning similar to 'liquidated amount.'"). Although this court has favored a broader definition of liquidated claims when allowing prejudgment interest, *see O'Malley Lumber*, 14 Ariz. App. at 496-97, 484 P.2d at 649-50, we have yet to address squarely the question of when a claim is for a sum certain within the meaning of Rule 55(b)(1). Here, however, we need not resolve the issue of which test applies in Arizona, because Stantec's claims did not seek a "sum certain" under either test.

¶26 Stantec sought payment for professional services rendered pursuant to various contracts but did not allege the contracts contained any liquidated damage clauses. The resulting damages were therefore unliquidated, so that the entry of default established only the right to recover damages, not their amount. *See Chery*, 119 Ariz. at 282, 580 P.2d at 743; *see also Neis v. Heinsohn/Phoenix, Inc.*, 129 Ariz. 96, 97, 100-01, 628 P.2d 979, 980, 983-84 (App. 1981) (rejecting argument that unpaid commissions were "liquidated" sums under contract). Moreover, Stantec had alleged the sums due under the contracts as aggregate

amounts. The contracts themselves were not included in the record, nor was any documentary evidence or affidavit produced to establish the contracts' terms. Notwithstanding the averments in Stantec's verified complaint, there was thus no evidence or data before the trial court allowing it to calculate the amount due under the contracts with any level of precision. *See O'Malley Lumber*, 14 Ariz. App. at 496, 484 P.2d at 649. Rather, the damage award was based wholly upon the plaintiff's assertion that the figures in its complaint were the amounts to which it was legally entitled. Even under a broader definition of a liquidated claim, Stantec's verified complaint thus was insufficient to allege a sum certain or to allow a sum certain to be reached by computation.

CONCLUSION

¶27 As an appearing party, Saguaro was entitled to three days' notice and a hearing on the issue of damages before the default judgment was entered. *See* Ariz. R. Civ. P. 55(b)(2). A hearing before judgment was also required because Stantec's claims were not for a "sum certain." Ariz. R. Civ. P. 55(b)(1). Although the failure to comply with Rule 55(b)(2) is not jurisdictional, *see Rogers*, 72 Ariz. at 57, 230 P.2d at 525, we must vacate a judgment entered in a manner inconsistent with the rule when, as here, relief is requested timely by an appearing defendant. *See id.* Because the trial court did not hold a hearing before entering judgment, we affirm the entry of Saguaro's default but vacate the judgment and remand the case for further proceedings. *See Mayhew v. McDougall*, 16 Ariz. App. 125, 130, 491 P.2d 848, 853 (1971) (appellate court may vacate only default judgment and remand case to trial court to determine amount of damages).

¶28 Both parties have requested attorney fees and costs on appeal pursuant to A.R.S. § 12-341.01(A), among other rules and provisions. Because each party has prevailed in part, we decline their requests. *See Samaritan Health Sys. v. Caldwell*, 191 Ariz. 479, ¶ 19, 957 P.2d 1373, 1378 (App. 1998).

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge