NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DANIEL TOWNSEND, a single man; DAN BARNES and ANNE BARNES, husband and wife; MYLAN MARBLE and CHRISTINE MARBLE, husband and wife; JOHN MARBLE, a widower, Plaintiffs/Appellees, v. DOUGLAS WOODIN and BARBARA WOODIN, husband and wife, Defendants/Appellants.	2 CA-CV 2010-0096 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20077054

Honorable Stephen C. Villarreal, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 Barbara and Douglas Woodin appeal from the trial court's denial of their motion to set aside a default judgment entered against them and in favor of appellees Daniel Townsend, Anne and Dan Barnes, Christine and Mylan Marble, and John Marble. The Woodins argue the court erred in concluding they had not presented a "meritorious defense" and the error resulted in a denial of their right to due process. For the following reasons, 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, 233 P.3d 645, 647 (App. 2010). Appellees sued the Woodins[1] for several torts arising out of mortgage contracts for which Douglas Woodin served as broker. After filing their complaint, the appellees attempted to serve the Woodins personally, but their efforts were unsuccessful. Appellees then served the Woodins by publication. The trial court entered a default judgment on December 12, 2008. After the Woodins became aware of the judgment, they moved to set it and the default aside.[2] After a hearing, the court denied the motion. This appeal followed.

Meritorious Defense

¶3 The Woodins first argue the trial court erred in denying their motion to set aside the default and default judgment, asserting they had presented a meritorious

[1]The complaint also included Allied Home Mortgage Capital Corporation, but it was later dismissed as a defendant and is not a party to this appeal.

[2]The parties do not discuss the time limits in Rule 60(c), Ariz. R. Civ. P., or Rule 59(j), Ariz. R. Civ. P.

defense. We review for an abuse of discretion a court's denial of a motion to set aside a default judgment. *See Ezell*, 224 Ariz. 532, ¶ 15, 233 P.3d at 649.

¶4 Rule 55(c), Ariz. R. Civ. P., provides that, for good cause shown, a court may set aside a default and default judgment in accordance with Rule 60(c), Ariz. R. Civ. P. In order to establish good cause, the moving party must show: (1) its failure to file a timely answer was excused by one of the reasons listed in Rule 60(c); (2) it acted promptly in seeking relief from the default judgment; and (3) it had "a substantial and meritorious defense to the action." *Daou v. Harris*, 139 Ariz. 353, 358-59, 678 P.2d 934, 939-40 (1984). "A showing of a meritorious defense requires a showing by affidavit, deposition or testimony of some facts which, if proved at the trial, would constitute a defense." *United Imports & Exps., Inc. v. Superior Court*, 134 Ariz. 43, 46, 653 P.2d 691, 694 (1982).

¶5 As the trial court found, the Woodins never properly presented any such facts; they merely asserted in their affidavits that they had meritorious defenses to the claims. The conclusion of a party, sworn or unsworn, "that 'a defense exists' is evidence of nothing; it is a conclusion which carries no weight and is insufficient to establish the element of meritorious defense." *Id.*

¶6 The Woodins claim that denying the allegations is sufficient because that is all that would have been required in an answer to the complaint. But this assertion is contrary to binding precedent. *See id.* Additionally, they fail to recognize that their case was in a different procedural posture than that of an answering defendant. A final judgment had been entered. Similarly, the Woodins' recitation of cases involving the

burden of proof in contract cases is irrelevant in this procedural posture. *See Postal Benefit Ins. Co. v. Johnson*, 64 Ariz. 25, 33, 165 P.2d 173, 178 (1946) (when default judgment entered, well-pleaded facts deemed admitted and plaintiff not required to establish cause of action by further proof). And although the Woodins mention that their attorney attempted to address their defense at the hearing on the motion, such statements are not adequate to demonstrate a meritorious defense. *See United Imports & Exps.*, 134 Ariz. at 46, 653 P.2d at 694 ("The conclusion of [a] lawyer . . . that 'a defense exists' . . . carries no weight and is insufficient to establish the element of meritorious defense.").

¶7 The Woodins also assert that the damages awarded to appellees in the default judgment were not based on a "sum certain" as required by Rule 55(b), Ariz. R. Civ. P. But because the Woodins are appealing the denial of their motion to set aside the default judgment, not the judgment itself, they can only challenge the propriety of the trial court's denial of their motion. *See* Ariz. R. Civ. App. P. 8(c); *Lee v. Lee*, 133 Ariz. 118, 124, 649 P.2d 997, 1003 (App. 1982) (appellate court acquires no jurisdiction to review judgments not listed in notice of appeal). Moreover, appellees testified at a hearing about the amount of damages and, therefore, satisfied the requirements of Rule 55(b). *See* Ariz. R. Civ. P. 55(b). And while the Woodins assert that the calculation later was determined to be incorrect, a "sum certain" that later is determined to be incorrect does not violate the requirements of the rule. *See Sloan v. Florida-Vanderbilt Dev. Corp.*, 22 Ariz. App. 572, 575, 529 P.2d 726, 729 (1974) ("[I]n a default hearing pursuant to Rule 55(b), there is no duty on the part of a party either to present all of its evidence in support of [its] claim for damages or to offer evidence in [its] possession which is

contradictory to . . . damages."). Consequently, because the court could have concluded that the Woodins did not present a meritorious defense, it did not abuse its discretion in refusing to set aside the default judgment.[3]

Due Process

¶8 The Woodins also argue that the trial court's allegedly erroneous determination that they had not presented a meritorious defense violated their right to due process. But we have concluded that the court did not err because the Woodins had not presented a meritorious defense. The fact that the Woodins' motion was not successful is not a denial of their due process rights.

¶9 The Woodins further contend the entry of default and the default judgment also violated their due process rights because they did not receive proper notice of appellees' complaint. But the Woodins are appealing the denial of their motion to set aside the default judgment, not the judgment itself. Furthermore, although the Woodins are correct that "[t]he law favors resolution on the merits," there is also "a principle of finality in proceedings which is to be recognized and given effect," which the trial court is in a better position to determine than this court. *Daou*, 139 Ariz. at 359, 678 P.2d at 940. And a party nevertheless must make the required showing in order for a court to be able to set aside a default judgment. *See id.* at 358-59, 678 P.2d at 939-40. Therefore, the Woodins' due process arguments are without merit.

[3]The Woodins do not claim on appeal, as they did below, that the judgment was void for lack of service.

Conclusion

¶10 In light of the foregoing, we affirm the trial court's ruling.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge