

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 21 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

INFLUENCE ENTERTAINMENT,

No. 21-16372

Plaintiff-Appellant,

D.C. No.

v.

2:07-cv-00462-JCM-LRL

3765 HOLDING, LLC, DBA Empire
Ballroom; EDWARD J. RUDIGER, Jr.,

MEMORANDUM*

Defendants-Appellees,

and

GENE T. LOPINTO; et al.,

Defendants.

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Submitted July 28, 2022**
San Francisco, California

Before: M. MURPHY,*** GRABER, and OWENS, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Michael R. Murphy, United States Circuit Judge for

In April 2009, the district court granted Influence Entertainment default judgment against 3765 Holding and Edward Rudiger (“Defendants”). In July 2021, the district court granted Defendants’ motion to set aside the default judgment on the basis that the renewal affidavit Influence Entertainment filed in December 2014 was not timely. Influence Entertainment appeals the district court’s decision to set aside the default judgment rather than simply declaring it lapsed or expired. Exercising jurisdiction under 28 U.S.C. § 1291, we **reverse** and **remand**. We also **grant** Influence Entertainment’s motions to supplement the record on appeal and to take judicial notice of various court filings.

Although Influence Entertainment did not argue below that the default judgment should be declared expired rather than set aside, this court has discretion to consider issues not presented to the district court “under three circumstances: (1) in the exceptional case in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process, (2) when a new issue arises while appeal is pending because of a change in the law, and, (3) when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed.” *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1322 (9th Cir. 2012) (internal quotations omitted). Influence Entertainment persuasively argues that the first and third

the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

exceptions apply here, and Defendants raise no reason why these exceptions would not apply. We exercise our discretion to consider this issue on appeal.

A default judgment may be set aside only if the defendant demonstrates its entitlement to relief under Fed. R. Civ. P. 60(b). *See* Fed. R. Civ. P. 55(c); *FDIC v. Aaronian*, 93 F.3d 636, 639 (9th Cir. 1996); *TCI Grp. Life Ins. Plan v. Knoebber*, 244 F.3d 691, 695–96 (9th Cir. 2001), *overruled on other grounds by Egelhoff v. Egelhoff ex. rel. Breiner*, 532 U.S. 141 (2001). Defendants argue they are entitled to relief under Fed. R. Civ. P. 60(b)(6), which permits a court to “relieve a party. . . from a final judgment” for “any other reason that justifies relief.” This court has held, however, that subsection (b)(6) “is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment.” *United States v. Alpine Land & Reservoir, Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). Defendants have utterly failed to demonstrate that this standard is satisfied in this case.

Moreover, contrary to Defendants’ arguments, the district court’s decision to set aside the judgment cannot be sustained on the basis of the unpublished decision in *Romano v. LaVecchia (In re Romano)*, 371 F. App’x 729, 730 (9th Cir. 2010) (unpublished). Defendants misinterpret *Romano*, which involved the vacatur of a renewal affidavit but did not implicate the underlying judgment itself. *See id.*; *see also Romano v. LaVecchia (In re Romano)*, BAP Nos. NV-08-1139, 08-1140, &

08-1142, 2008 Bankr. LEXIS 4729 at *13 (B.A.P. 9th Cir. Oct. 24, 2008).

Additionally, *Romano* is an unpublished disposition with no precedential value; to the extent it might be read to conflict with the Federal Rules, we would not follow it. *See Grimm v. City of Portland*, 971 F.3d 1060, 1067 (9th Cir. 2020).

Because Defendants did not demonstrate an entitlement to relief from judgment under Rule 60(b), the district court erred in setting aside the default judgment rather than simply declaring it lapsed or expired. We reverse the district court's decision on this basis and do not consider Influence Entertainment's other arguments for reversal.

Influence Entertainment's motion to take judicial notice, Docket No. 12, and motion to supplement the record, Docket No. 14, are GRANTED.

REVERSED and REMANDED.