

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2010-000478-001 DT

01/20/2011

COMMISSIONER EARTHA K. WASHINGTON

CLERK OF THE COURT
T. Melius
Deputy

HARVEY J LAWRENCE & ASSOCIATES INC KEITH R RICKER

v.

JOHN BALSIS (001)

JOHN BALSIS
PO BOX 12094
SCOTTSDALE AZ 85267

REMAND DESK-LCA-CCC
WEST MCDOWELL JUSTICE COURT

RECORD APPEAL RULING / REMAND

Lower Court Appeal No. CC2009307712

This Court has jurisdiction over this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. § 12-124(A). The Court has considered the record of the proceedings from the trial court, exhibits made of record, and the memoranda submitted.

The appellate issue in this case is whether the trial court abused its discretion when it failed to set aside the default judgment entered against the appellant, John Balsis.

The procedural history of this case is important in determining the appellee's argument on appeal that this Court does not have jurisdiction to decide the matter. The appellee filed its breach of contract complaint on May 20, 2009, listing the appellant as a defendant. The appellant filed his answer to the complaint on June 9, 2009. Mediation in the case took place before a mediator on December 3, 2009. The parties were unable to come to an agreement and the mediator set the matter for trial. The trial court record shows that both sides signed a "Mediation Outcome Notice" stating that they had been unable to come to an agreement. The notice indicated that a firm trial date would be scheduled and according to the parties, the mediator wrote on the notice that the trial date was set for February 8, 2010. On December 3, 2009, the court record shows that it delivered a notice of court date to both parties; the trial date was set for February 8, 2010, at 10:30 am.

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At the time set for trial, the appellant failed to appear and though not noted in the record, the trial court entered a default judgment against him. The appellant came to court on the date set for trial but came at 1:30 p.m. He filed a motion to have the judgment set aside the same date; in the motion he stated that he was informed in the arbitration (mediation) hearing that the trial date was set for 1:30 p.m. and that that he was not notified of the 10:30 a.m. trial date. Although it appears from the record that the parties were not notified in writing of the trial court's decision on the appellant's motion, the "Calendar Events and Hearings" that is a part of the record sent to this Court, has a notation dated February 25, 2010, that the trial court denied it. On March 4, 2010, the trial court signed a written judgment in favor of the appellee. The judgment included an amount the appellee was seeking in damages and also included attorney's fees and costs. The appellant on March 16, 2010 filed a motion to vacate the March 4, 2010, judgment. The appellant's motion was denied by the trial court on April 29, 2010, and the parties were notified in writing about the result on May 3, 2010. The appellant filed a notice of appeal on May 12, 2010.

"A denial of a motion to set aside a default judgment is an appealable order. *Bateman v. McDonald*, 94 Ariz. 327, 385 P.2d 208 (1963). . . . Rule 58(a) provides in part:

'All judgments shall be in writing and signed by a judge . . . duly authorized to do so. The filing with the clerk of the judgment constitutes entry of such judgment, and the judgment is not effective before such entry'

We use the term "judgment" in this opinion in the sense contemplated by both Rule 54(a) and 58(a), that is, an act of the court which is both substantively appealable and is in appealable form so as to vest jurisdiction in this court to consider its merits. In this sense, a distinction must be drawn between a preliminary determination by the court and a judgment which follows and embodies that determination. See *Winkelman v. General Motors Corp.*, 48 F.Supp. 490 (S.D.N.Y.1942).

. . . First, historically, the reasons why a court reaches a certain conclusion has never been considered a "judgment" of the court. As is stated in 6A Moore's Federal Practice P 58.02 at 58-55 (2d ed. 1948):

"An Opinion is not itself a judgment, even though it contains conclusions of fact or of law, and foreshadows how the judge intends to dispose of the case. An 'opinion' is the embodiment of the court's reasons for a judgment that normally is to follow." (Emphasis in original, footnotes omitted.)

. . . The spirit of Rule 58(a) is clear:

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“The primary purpose of the amended rule is to formalize by a writing all judgment, decrees and appealable orders, and to fix the crucial act of entry of every judgment, decree or appealable order by reference to the date of its filing . . .” (State Bar Committee Notes to Amended Rule 58(a).)

In order to give full effect to this purpose, such judgments should stand out loud and clear so that the practitioner can ascertain their rendition, they should not be hidden away in a preamble to a judgment upon and entirely separate point.”¹

Pursuant to Rule 58, the judgment of the trial court in favor of the appellee did not occur until April 29, 2010. The appellant had 14 days after the entry of the judgment to file his appeal.² The appellant filed his notice of appeal within the 14 day requirement thereby granting this Court jurisdiction to consider the appellate issue raised by him.

“A trial court may set aside an entry of default if there is “good cause shown.” Ariz. R. Civ. P. 55(c). “The test of good cause is the same for an entry or judgment of default.” *Webb v. Erickson*, 134 Ariz. 182, 185-86, 655 P.2d 6, 9-10 (1982). In order to show good cause, the moving party must show that (1) mistake, inadvertence, surprise or excusable neglect exists and (2) a meritorious defense to the claims exists. *Richas v. Superior Court*, 133 Ariz. 512, 514, 652 P.2d 1035, 1037 (1982); *see* Ariz. R. Civ. P. 60(c). Excusable neglect exists if the neglect or inadvertence “is such as might be the act of a reasonably prudent person in the same circumstances.” *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 163, 871 P.2d 698, 710 (App.1993). “A meritorious defense must be established by facts and cannot be established through conclusions, assumptions or affidavits based on other than personal knowledge.” *Richas*, 133 Ariz. at 517, 652 P.2d at 1040.”³ “[I]t is a highly desirable legal objective that cases be decided on their merits and that any doubts should be resolved in favor of the party seeking to set aside the default judgment. *Richas v. Superior Court*, 133 Ariz. 512, 652 P.2d 1035 (1982); *Union Oil Co. v. Hudson Oil Co.*, 131 Ariz. 285, 640 P.2d 847 (1982). These matters, however, rest entirely within the trial court's discretion and will not be overturned on appeal unless a clear abuse of discretion has been shown. (Citations omitted).”⁴

In this case the appellant claimed that he had been informed by the mediator that the trial was set at 1:30 p.m. on February 8, 2010. In his motion to vacate the judgment the appellant wrote:

¹ *Apache East, Inc. v. Means*, 124 Ariz. 11, 12-14, 601 P.2d 615, 616-618(Ariz.App. 1979).

² *See Rule 4, Superior Court Rules of Appellate Procedure-Civil.*

³ *Christy A. v. Arizona Dept. of Economic Sec.* 217 Ariz. 299, 304-305, 173 P.3d 463, 468-469 (Ariz.App. Div. 1, 2007).

⁴ *Hirsch v. National Van Lines, Inc.*, 136 Ariz. 304, 308, 666 P.2d 49, 53 (Ariz., 1983).

