Michael K. Jeanes, Clerk of Court
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THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE ARIZONA TAX COURT

TX 2017-000250 02/22/2018

HONORABLE CHRISTOPHER WHITTEN

CLERK OF THE COURT
T. Cooley
Deputy

STATE OF ARIZONA DEPARTMENT OF REVENUE

SHYLA R FREESTONE

v.

GARDUNOS CHILI PACKING COMPANY AT GAINEY RANCH L L C, et al.

MICHAEL F BEETHE
BART WILHOIT

MINUTE ENTRY

The Court has Defendant Holly Reynolds' (Johnstone) "Motion to Set Aside Default Judgment" filed on November 10, 2017, and fully briefed as of January 12, 2018.

Although oral argument was requested, the pleadings of the parties make their positions sufficiently clear. Therefore, no oral argument was scheduled.

A party seeking relief from default must demonstrate that the failure to respond properly in a timely manner was excusable neglect, that he has a meritorious defense and that the application for relief was promptly filed. *DeHoney v. Hernandez*, 122 Ariz. 367, 371 (1979). The law favors resolution on the merits, and doubts are to go to the moving party. *Daou v. Harris*, 139 Ariz. 353, 359 (1984). There must nonetheless be "good cause" for the Court to disregard the principle of finality and set aside a default judgment. "[T]he discretion thus vested in the court is a legal, and not an arbitrary or personal discretion. There must be some legal justification for the exercise of the power, some substantial evidence to support it." *Richas v. Superior Court*, 133 Ariz. 512, 514 (1982). The facts here test the limits of discretion.

First, the notice given by the Department was proper. Rule 55(a)(3)(C) requires that notice must be mailed "on the date the application is filed, or as soon as practicable after its filing." *See Champlin v. Bank of America*, 231 Ariz. 265, 267-68 ¶ 14 (App. 2013) ("in order to provide notice that default will be effective ten days from the filing of the application, the notice must be provided either *before, or simultaneously with*, that filing….requiring notice *contemporaneously with* the filing does not impose an undue hardship on a plaintiff"). The notice must be mailed to the person's last known address, in accordance with Rule 5(c)(2)(C). This is not a case where notice was mailed to an address insufficient for delivery, as was the situation in *Ruiz v. Lopez*, 225 Ariz. 217 (App. 2010). Instead, it was sent to the address supplied by Ms. Reynolds (Johnstone), from which she had in the interim moved without informing the Department. If a new address is supplied after service, the rule does not require the plaintiff to start over from scratch.

The Summons gives clear instruction that "you must file a response in writing in the office of the Clerk of the Superior Court, 201 West Jefferson Street, Phoenix, Arizona 85003, accompanied by the necessary filing fee. A copy of the Response must also be mailed to the Plaintiff's attorney whose name appears above." A copy of Ms. Reynolds's "Response to Your Summons" was mailed to Ms. Freestone, the Assistant Attorney General representing the Department. But it was not filed with the Clerk of the Court. Ms. Reynolds's affidavit does not explain why she omitted to file a copy with the Clerk of the Court. (Doing so would likely have led to correction of its other problem, its utter failure to comply with Local Rule 2.15.)

Turning to divorce-related issues, the New Mexico decree is entitled to full faith and credit in Arizona. *Schitz v. Superior Court*, 144 Ariz. 65, 68 (1985). Arizona recognizes that the property laws of the state of matrimonial domicile apply. *Lorenz-Auxier Financial Group, Inc. v. Bidewell*, 160 Ariz. 218, 220-21 (App. 1989). As the decree was naturally founded on New Mexico law, it is that law which determines the rights and obligations of the parties at any given time. Ms. Reynolds cites A.R.S. § 25-214(C)(3), which terminates the power of one spouse to bind the community property upon service of a petition for dissolution, legal separation, or annulment. But New Mexico law is very different. Any debt contracted during marriage is a community debt unless it falls under one of the narrowly defined categories of separate debt listed in N.M.S. § 40-3-9(A). *Beneficial Finance Co. of New Mexico v. Alarcon*, 816 P.2d 489, 492 (N.M. 1991). Relevantly here, Section 40-3-9(A)(1) defines a separate debt as one "contracted or incurred by a spouse before marriage or after entry of a decree of dissolution of marriage"—in other words, all debts, not otherwise defined as separate, contracted between marriage and the entry of the decree are community debts. A subsequent divorce does not affect the community nature of a debt incurred during the marriage. *Malcolm v. Malcolm*, 408 P.2d 143, 144 (N.M. 1965). There is a catchall provision, subsection (A)(6), which excludes debts "declared to be unreasonable" under N.M.S. § 40-3-10.1. But this requires both that the spouses have been separated at the time the debts were incurred and that the debt did not contribute to the

benefit of both spouses. It also requires that such a finding have been made by the court at the time of its final decree of dissolution of marriage. Judge Walker made no such finding. In fact, she found that the "incredible amount of debt based on [Mr. Johnstone's] earnings" was a community debt, apportioned to him as part of the equitable distribution of marital assets.

Ms. Reynolds asserts that she cannot be held liable because the decree of dissolution assigned that debt to Mr. Johnstone. She cites no legal authority for that argument, and it appears to be without merit under either New Mexico or Arizona law. *Sunwest Bank of Albuquerque v. Roderiguez*, 770 P.2d 533, 538 (N.M. 1989); *Community Guardian Bank v. Hamlin*, 182 Ariz. 627, 631 (App. 1995). If found liable in this action, she may bring in her ex-husband either as a co-defendant in the case in chief under Rule 19, or as a cross-defendant in her own crossclaim, but that is not an issue to be resolved now.

The Court returns to the standards for relief. A mistake that a layperson unfamiliar with the jargon and customs of the legal profession might make can constitute excusable neglect. *Davis v. Superior Court*, 25 Ariz.App. 402, 403 (1976) (relief where, to comply with "appear and defend" requirement, defendant physically appeared in courthouse instead of filing answer). But the Court cannot see how Ms. Reynolds concluded from the language of the Summons – "you must file a response in writing in the office of the Clerk of the Superior Court, … accompanied by the necessary filing fee" – that filing her Response with the Clerk of the Court and paying the filing fee were not necessary steps. Sending a copy to opposing counsel is clearly an additional requirement – "A copy of the Response must also be mailed to the Plaintiff's attorney" – and not an option in lieu of filing with the Clerk. Ms. Reynolds's denial of involvement with the business may be true; for the purposes of this motion, the Court so assumes. But under the controlling New Mexico law, it is irrelevant. As long as she and Mr. Johnstone remained married, that is, until the date of the court's order dissolving their marriage, the debts of one were the debts of both.

Lacking both excusable neglect and a meritorious defense, the motion to set aside default is denied.