IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STEPHEN CHUNG, et al., *Plaintiffs/Appellees/Cross-Appellants*,

v.

JEFF CHOULET, et al., *Defendants/Appellants/Cross-Appellees*.

No. 1 CA-CV 18-0460
FILED 1-28-2020

Appeal from the Superior Court in Maricopa County
No. CV2015-054312
The Honorable Aimee L. Anderson, Judge, *Retired*
The Honorable Cynthia J. Bailey, Judge

AFFIRMED IN PART, REVERSED IN PART, REMANDED

COUNSEL

Titus Brueckner & Levine PLC, Scottsdale
By Jon A. Titus, David A. Fitzgerald, Nathan B. Anderson
Co-Counsel for Plaintiffs/Appellees/Cross-Appellants

Jones, Skelton & Hochuli PLC, Phoenix
By Kevin K. Broerman, Justin M. Ackerman
Counsel for Defendants/Appellants/Cross-Appellees

OPINION

Judge Jennifer M. Perkins delivered the opinion of the Court, in which Presiding Judge Samuel A. Thumma and Judge Paul J. McMurdie joined.

P E R K I N S, Judge:

¶1 This case requires us to address whether a superior court errs in granting a delayed appeal when there is no showing of due diligence or extraordinary circumstances.

¶2 Jeff and Leah Choulet (the "Choulets") challenge the superior court's order granting a request by Stephen Chung, Brenda Chung, and The Chung Family Limited Partnership (collectively the "Chungs") to set aside a final judgment on the Chungs' breach of contract claim to allow a delayed appeal. We conclude the court erred in granting the Chungs' request to file a delayed appeal because the Chungs made no showing of due diligence or extraordinary circumstances. We also reject the Chungs' arguments on cross-appeal.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 The Chungs sued the Choulets in October 2015, alleging various claims related to renovations the Choulets made to their property. On August 21, 2017, the superior court granted partial summary judgment for the Choulets on the Chungs' breach of contract claim. The Choulets filed a proposed form of judgment and an attorney fee application on September 8, both of which the Chungs opposed on September 20. The court entered partial final judgment on October 2, 2017, but the clerk did not notify the parties of the entry of the Arizona Rule of Civil Procedure 54(b) Judgment as required by Rule 58(c). The Chungs first learned of the entry of the judgment on December 4, 2017, when counsel for the Choulets sent them a copy.

¶4 Two days later, the Chungs moved to extend the time to appeal under Arizona Rule of Civil Appellate Procedure ("ARCAP") 9(f) or to have the judgment set aside under Rule 60(b) and re-entered to allow a delayed appeal. The Choulets did not oppose the Chungs' time extension request, but "maintain[ed] that the entry of the Judgment with Rule 54(b) language [was] appropriate." The superior court granted a time extension

under ARCAP 9(f), but this court denied the Chung's ARCAP 9(f) relief because it was untimely. The superior court then set aside the Rule 54(b) judgment, allowing the Chungs to take a delayed appeal. The Chungs, however, did not offer any evidence of due diligence or extraordinary circumstances warranting a delayed appeal.

¶5 The procedural saga leading up to the superior court granting the delayed appeal is relevant to the Chung's cross-appeal. While superior court proceedings were stayed for the Chungs to seek ARCAP 9(f) relief with this court, the Chungs filed two superior court motions; one contended the Rule 54(b) Judgment should be set aside on its merits, and the other asked the court to reconsider its denial of their earlier motion to set aside the Rule 54(b) Judgment to allow for a delayed appeal. After this court held the Chungs were not entitled to relief under ARCAP 9(f), the superior court lifted the stay, and the Choulets responded to the Chungs' motions. On June 13, 2018, the superior court granted both motions (the "June 13, 2018 Minute Entry"), explaining that "a mistake and/or inadvertence has occurred . . . ." One day later, the court withdrew the June 13, 2018 Minute Entry, stating that it had been "issued in error." The court then signed separate orders granting both motions without explanation (the "June 14, 2018 Orders").

¶6 The Choulets moved for clarification and reconsideration of the June 14, 2018 Orders, arguing the court granted "mutually exclusive remedies." The Choulets also requested Rule 60(b) relief based on the same arguments. A second superior court judge rotated onto the case after entry of the June 14, 2018 Orders and granted the Choulets' clarification request. The new judge in her August 8, 2018 Order found that the June 14, 2018 Orders set aside the October 2, 2017 Rule 54(b) judgment but did not set aside the grant of partial summary judgment. The Choulets appealed the August 8, 2018 Order, which this court stayed and re-vested jurisdiction in the superior court to rule on requests for clarification. On November 6, 2018, the superior court again ruled it did not set aside the grant of partial summary judgment or fee award but ruled that the Chungs could appeal the substantive ruling (the "November 6, 2018, Order").

¶7 The Choulets appealed, challenging the June 14, 2018 Orders, the August 8, 2018 Order, and the November 6, 2018 Order. The Chungs cross-appealed challenging the August 8, 2018 Order and the November 6, 2018 Order. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(2). *See Ruffino v. Lokosky*, 245 Ariz. 165, 168, ¶ 7 (App. 2018) (order granting a motion to set aside a default judgment is appealable as a special order made after judgment); *Brummet v. MGA Home Healthcare, LLC*, 240 Ariz. 421, 429–30, ¶¶ 14–15 (App. 2016).

DISCUSSION

I. The Choulets' Appeal

¶8 The Choulets contend the superior court erred in setting aside the Rule 54(b) Judgment to allow the Chungs to take a delayed appeal. ARCAP 9(f) allows the superior court to reopen the time for filing a notice of appeal for an additional fourteen days when a party did not receive notice of the judgment as required by Rule 58, but only within twenty-one days after the court entered judgment. The Chungs filed their motion here more than two months after entry of judgment. When ARCAP 9(f) does not apply—as is the case here—a party may request that a judgment be set aside for purposes of taking a delayed appeal under Rule 60(b). *City of Phoenix v. Geyler*, 144 Ariz. 323, 328 (1985).

¶9 In addressing such a request, the court should consider the following factors: (1) whether the clerk distributed notice of judgment under Rule 58(c); (2) whether the respondent would be prejudiced by relief; (3) whether the moving party sought relief promptly; (4) due diligence, or reason for lack thereof, by counsel in attempting to be informed of the date of the decision; and (5) extraordinary, compelling, or unique circumstances. *Id.* (citing *Rodgers v. Watt*, 722 F.2d 456, 460 (9th Cir. 1983) (en banc) (first four factors) and *Park v. Strick*, 137 Ariz. 100, 103–04 (1983) (extraordinary circumstances)). This court will affirm an order vacating and reentering judgment so that the moving party may appeal "so long as this discretion is not exercised in clear violation of" these principles. *Lennar Corp. v. Auto-Owners Ins.*, 214 Ariz. 255, 268, ¶ 51 (App. 2007) (quoting *J.C. Penney v. Lane*, 197 Ariz. 113, 117, ¶ 21 (App. 1999)).

¶10 The Choulets first contend the Chungs waived arguments under *Geyler* because they failed to cite Rule 60(b) or make any argument on the *Geyler* factors in their initial motion. We typically do not consider arguments raised for the first time in a motion for reconsideration, particularly where the court did not order a response, meaning the opposing party had no opportunity to respond. *Ramsey v. Yavapai Family Advocacy Ctr.*, 225 Ariz. 132, 137–38, ¶ 18 (App. 2010); *Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, 240, ¶ 15 (App. 2006). Here, the superior court gave the Choulets an opportunity to respond, and they did so. We thus decline to apply waiver. *Hatch Dev., LLC v. Solomon*, 240 Ariz. 171, 177, ¶ 18 (App. 2016), *abrogated on other grounds by KnightBrook Ins. v. Payless Car Rental Sys. Inc.*, 243 Ariz. 422, 425, ¶¶ 14–15 (2018).

¶11 Turning to the merits, the Choulets contend the Chungs presented no evidence showing either due diligence or good reason for a lack thereof in discovering the Rule 54(b) Judgment. We agree. Indeed, the Chungs appear to concede the point, arguing instead they could "rely upon the mail for notice and should not be required to contact the [Court or Clerk's office] every day to ascertain if judgment has been entered," citing *DNB Const. v. Superior Court*, 125 Ariz. 61, 63 (1980). *DNB* is distinguishable because it interpreted an earlier version of A.R.S. § 22-262, which at that time gave an appellant ten days from the date "judgment is given" to perfect an appeal from a justice court judgment. 125 Ariz. at 62. That statute does not apply to a superior court judgment.

¶12 *DNB* also predates *Geyler*, which requires those seeking time to file a delayed appeal under Rule 60(b) to show due diligence or explain why they did not exercise due diligence. *Geyler*, 144 Ariz. at 328. The *Geyler* court stated that due diligence is of "paramount importance . . . under the delayed appeal analysis" and that a court cannot grant relief without "more than counsel's mere failure to learn of the entry of judgment or failure of the clerk to comply with the requirement of giving Rule [58(c)] notice." *Id*. at 332–33.

¶13 Here, the Chungs offered no evidence to show they exercised due diligence in trying to stay informed on the status of the judgment. The Chungs knew or should have known the judgment was forthcoming, given the court's entry of partial summary judgment, the Choulets' timely submission of a proposed form of judgment and attorney fee application, followed closely by the Chungs' opposition. *See* Ariz. R. Civ. P. 5.3(b) ("Each attorney of record is responsible for keeping advised of the status of . . . pending actions in which that attorney has appeared"); *Roll v. Janca*, 22 Ariz. App. 335, 337 (1974) ("A party has a duty to take legal steps to protect his own interests.").

¶14 And staying informed on the status of a judgment (or of a case in general) is easier today than in the past given current technological resources. We take judicial notice of the fact that case dockets, including entries of judgment, are now readily accessible to the public via the Maricopa County Superior Court's website. *See* Maricopa County Superior Court, Civil Court Case History, http://www.superiorcourt.maricopa.gov/docket/CivilCourtCases/caseSearch.asp (publicly available case search page); *see also* Ariz. R. Evid. 201; *In re Roy L.*, 197 Ariz. 441, 447, ¶ 20 (App. 2000) (courts may take judicial notice of public facts not reasonably subject to dispute). This easily-accessible docket would have either timely reflected the entry of the partial

judgment, obviating the issues involved here, or it would not. Accordingly, evidence that the Chungs had checked that docket from time to time would have been uniquely relevant to the due diligence requirement. The Chungs, however, provided no evidence on the point. Recognizing that due diligence is of "paramount importance" in this analysis, we conclude there must be more than mere silence and passage of time to satisfy due diligence under *Geyler*.

¶15 The Chungs also failed to show any extraordinary, compelling, or unique circumstances; they simply declare on appeal that such circumstances existed. *See Park*, 137 Ariz. at 104 (1983); *J.C. Penney*, 197 Ariz. at 116, ¶ 14. Indeed, they only argued they "could be deprived of the ability to appeal the [Rule 54(b)] Judgment," which would be true in any delayed appeal case. *See J.C. Penney*, 197 Ariz. at 117, ¶ 20 ("[U]nder no circumstances would the failure to receive notice of entry of judgment from the clerk by itself be sufficient to obtain relief allowing a delayed appeal."). We thus conclude the superior court abused its discretion in setting aside the Rule 54(b) Judgment. *See Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 50, ¶ 27 (App. 2007) (quoting *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 456 (1982)) ("A court abuses its discretion if . . . 'the record fails to provide substantial evidence to support the trial court's finding.'").

II. The Chungs' Cross-Appeal

¶16 The Chungs raise four issues on cross-appeal, which are easily resolved. Contrary to the Chungs' argument, the second judge had both jurisdiction and authority to enter the August 8, 2018 Order because this court had expressly re-vested jurisdiction in the superior court to allow it to do so. *Cf. Love v. Farmers Ins. Grp.*, 121 Ariz. 71, 73 (App. 1978) ("A court does not lack the power to change a ruling simply because it ruled on the question at an earlier stage."). The Chungs have also not shown how doing so constituted an impermissible horizontal appeal. When considering rulings by two different superior court judges without an intervening appeal, the concept of horizontal appeal is prudential, not jurisdictional. *See Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 279 (App. 1993) ("Prior decisions have established . . . that courts must not afford this procedural doctrine undue emphasis."). Nor have the Chungs shown how the second judge abused her discretion by clarifying the June 14, 2018 Orders. Finally, the Chungs have not shown error in awarding attorney fees in the Rule 54(b) Judgment. *See Rudinsky v. Harris*, 231 Ariz. 95, 101–02, ¶¶ 28–30 (App. 2012) (holding that an award of attorney's fees on a breach of contract claim was not premature even though a defamation claim was still pending).

III. Attorney Fees and Costs on Appeal

¶17 Both sides request their reasonable attorney fees incurred in this appeal and cross-appeal pursuant to A.R.S. § 12-341.01(A). The Choulets are the successful parties; they may recover reasonable attorney fees and taxable costs upon compliance with ARCAP 21. We deny the Chungs' fee request.

CONCLUSION

¶18 We reverse the superior court's orders setting aside the Rule 54(b) Judgment and remand for further proceedings on the Chungs' remaining claims. Any further appeal from the Rule 54(b) Judgment would be untimely.

AMY M. WOOD • Clerk of the Court
FILED: AA