

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of :)
)
PETITION TO AMEND RULE 55) Supreme Court Rule No. R-11-0038
OF ARIZONA RULES OF CIVIL)
PROCEDURE AND RULE 44 OF)
THE ARIZONA RULES OF)
FAMILY LAW PROCEDURE)
_____)

The Civil Bench of the Arizona Superior Court in Pima County opposes R-11-0038, the Petition to Amend Rule 55 of Arizona Rule of Civil Procedure and Rule 44 of the Arizona Rules of Family Law Procedure. The proposed rule change converts the default process from a two-step into a single-step form – by omitting Clerk of Court’s “entry” from the construct, making entry equivalent with filing. Preliminarily, the change takes Arizona in a significantly different direction from Fed. R. Civ. P. 55, *see, e.g., In re Meyer*, 373 B.R. 84, 88-89 (9th Cir. BAP 2007) (noting that the two-step process is “designed to assure that the plaintiff is entitled to the relief requested” and, if not, “the court should not enter default judgment and may even enter judgment in favor of the defaulted defendant”), which is contrary to the efforts made in recent years to harmonize the Arizona and Federal rules of procedure. More importantly, any anticipated efficiency brought by the change is outweighed by the loss of the procedural safeguard which the current form of the rule provides.

In Pima County, and in approximately ten other Arizona counties, the Clerk of the Court is responsible for the entry of default in civil cases. Our experience is that the Pima County Clerk’s Office personnel are very diligent in ensuring that an entry of default is based upon proper service and compliance with the rules, including verification that no responsive pleading or motion has been filed by the party against whom default is sought. It is not uncommon for the Pima County Clerk’s Office to reject an application for the entry of default where it is defective. Although we do not have statistics, we estimate that the Clerk’s Office rejects approximately 5 to 10 percent of the applications presented for entry based on deficiencies with service, the presence of an answer, or other problems.

We believe that the entry, and the Clerk’s Office review which precedes it, is very important. We see extremely high volume legal providers prepare and file large numbers of default applications, the bulk of which are directed to self-represented litigants who already are disadvantaged when attempting to assert their rights. This group is the least equipped to recognize an error in the process, much less pursue a remedy after a default

and subsequent default judgment is inappropriately entered. We cannot ignore our precedent which favors resolution of cases on their merits, *see Hirsch v. National Van Lines, Inc.*, 136 Ariz. 304, 666 P.2d 49 (1983), and we should not implement a procedure which so seriously undermines this central precept to our default jurisprudence.

We understand that, practically speaking, applications for default will be reviewed by the individual judges when default judgment is sought. These applications are reviewed in Pima County by individual judges when the file is presented after the Clerk of the Court already has made its review, which greatly assists the Court in focusing its attention on those deficiencies already identified. We believe, moreover, that the process should not proceed *at all* before the court has at least some assurance that the complaint at issue has been properly served, the time for answering the complaint has fully lapsed, and no answer or responsive motion in fact has been filed. The review by both the Clerk and the judge enhances the likelihood that injustice in granting a default judgment will not occur.

A default judgment is a final termination of an action. Because of this, our case law places significant legal obstacles to reversing the termination. *See United Imports and Exports, Inc. v. Superior Court*, 134 Ariz. 43, 653 P.2d 691(1982). Arizona's long-standing two-step process for default – with a Clerk's Office review on the front end – is essential to protect the most vulnerable parties against erroneous, unjust, and perhaps irreversible outcomes. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). A change in the procedure born of expediency is antithetical to our ongoing efforts to enhance equal access for all Arizona citizens.

DATED: March 28, 2012

/s/ Sarah R. Simmons
HON. SARAH R. SIMMONS
Presiding Judge
Pima County Superior Court

/s/ Richard E. Gordon
HON. RICHARD E. GORDON
Civil Presiding Judge
Pima County Superior Court