

FILED
TIME 1:28 P.M.

JAN - 4 2013

MARY ELLEN DUNLAP
CLERK OF SUPERIOR COURT
By _____ Deputy

1 P. RANDALL BAYS, ESQ./013479
2 BAYS LAW, PC
3 100 S. Seventh Street
4 Sierra Vista, Arizona 85635
5 (520) 459-2639
6 rbays@bayslaw.com
7 Tombstone City Attorney

8 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
9 **IN AND FOR THE COUNTY OF COCHISE**

10 **CITY OF TOMBSTONE,**)
11)
12 Plaintiff,)
13)
14 v.)
15)
16 **BEATTY'S GUEST RANCH AND**)
17 **ORCHARD, LLC, THOMAS BEATTY SR,**)
18 **EDITH M BEATTY, BEATTY LIVING**)
19 **TRUST,**)
20)
21 Defendants.)

NO. CV201200499


**MOTION TO SET ASIDE ENTRY
OF DEFAULT AND JUDGMENT
(Rule 55(c), ARCP)**

BAYS LAW PC
100 S. Seventh Street
SIERRA VISTA, AZ 85635
Tel: (520)459-2639

22 Plaintiff, CITY OF TOMBSTONE, by and through its attorney, P. RANDALL BAYS,
23 requests that this Court, pursuant to Rule 55(c), Arizona Rules of Civil Procedure, set aside the
24 entry of default because the Counterclaim is seeking the same relief that the complaint is seeking
25 and this court lacks jurisdiction because the counterclaim was previously decided by a superior
26 court in Cochise County and therefore is res judicata. Further, the Defendant cannot adversely
27 possess property belonging to a municipality when the property is being used for a public
28 purpose pursuant to A.R.S. § 12-510. This motion is supported by the attached memorandum of
points and authorities.

Respectfully submitted this 4th day of January, 2013

BAYS LAW, P.C.



P. RANDALL BAYS
Tombstone City Attorney

Copy of the foregoing
mailed this 4th
day of January, 2013, to:

COPY OF ORIGINAL

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JOHN A MACKINNON
LAW OFFICE OF JOHN A. MACKINNON, PLLC
PO BOX 1836
BISBEE AZ 85603
Attorney for Defendants

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Under Rule 55(c), of the Arizona Rules of Civil Procedures, "for good cause shown the
3 court may set aside an entry of default and, if a judgment by default has been entered, may
4 likewise set it aside in accordance with Rule 60(c)." However, "the law favors resolution of
5 litigation on the merits; therefore, when considering a motion to set aside a default, all doubts are
6 to be resolved in favor of the defaulted party." *Sax v. Superior Court, Pima County*, 147 Ariz.
7 518, 711 P.2d 657 (App. 1985).

8 In determining whether the default should be set aside, this Court has broad discretion,
9 although the discretion is a legal, and not an arbitrary or personal discretion. *Id.* "The legal
10 criteria which a court is to consider on a motion to set aside a default are: 1) did the defendant act
11 promptly in seeking relief from the entry of default; 2) was the failure to file a timely answer due
12 to mistake, inadvertence, surprise or excusable neglect; and 3) did the defendant establish a
13 meritorious defense?" *Id.* The general test of what is excusable is whether the neglect or
14 inadvertence is such as might be the act of a reasonably prudent person under the circumstances.
15 *Id.*

16 ***Prompt Request for Relief from Entry of Default***

17 Other than Rule 60(c), ARCP, there is no rule on what constitutes a "prompt request for
18 relief" other than where "the mistake or neglect ... was the type of clerical error which might be
19 made by a reasonably prudent person who attempted to handle the matter in a prompt and
20 diligent fashion." *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 163-164, 871 P.2d 698, 710-711
21 (App. 1993). Rule 60(c) states that motions asserting "mistake or excusable neglect" should be
22 filed within six (6) months.
23

24 On December 6, 2012, the Application and Affidavit for Default was filed. According to
25 Rule 55(a)(2), a default entered by the clerk shall be effective ten (10) days after the filing of the
26 application for entry of default. Hence, the default in this case became effective on December
27 16, 2012. A Motion to Set Aside the Default was filed on January 4, 2013, 19 days after entry of
28 the default. During that time, there were two major holidays and weekends wherein the court and

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1 the undersigned's office was closed for eight (8) days. The reply to the counterclaim was one
2 that required the signature of the Mayor of the City of Tombstone. Based on previous
3 commitments over the holidays, he was unavailable to sign a verification page. Hence, the
4 request for relief is being made promptly.

5 ***Excusable neglect***

6 In the context of an attorney's action or inaction, the Arizona cases have found excusable
7 neglect where the attorney had established and was utilizing office procedures designed to ensure
8 a timely response, but was "deflected from this purpose by one of the many interruptions that
9 beset practitioners in modern law practice," *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 163, 871
10 P.2d 698, 710 (App. 1993). Also, Arizona case law has long recognized that the error of a
11 secretary can excuse an untimely filing. *Cook v. Industrial Com'n of Arizona*, 133 Ariz. 310,
12 312, 651 P.2d 365, 367 (1982). For example, the inadvertent failure of a secretary to notify an
13 attorney of a deadline can warrant setting aside a default on the grounds of excusable neglect. *Id.*
14 citing *Wilshire Mortgage Corp. v. Elmer Shelton Concrete Contractor, Inc.*, 97 Ariz. 65, 397
15 P.2d 50 (1964), where the secretary neglected to enter a summons because she was called away
16 from work by an illness and subsequent death in the family; and *Coconino Pulp & Paper Co. v.*
17 *O. F. Marvin*, 83 Ariz. 117, 317 P.2d 550 (1957), where the secretary who was responsible for
18 preparing calendar sheets for all the attorneys in the office failed to deliver a calendar to one
19 attorney, who missed a deadline. Similar facts to those in the case at bar are found in *Kohlbeck*
20 *v. Handley*, 3 Ariz.App. 469, 415 P.2d 483 (1966), where a new secretary failed to advise the
21 attorney of a deadline. In each of these cases, it was held on appeal that the secretaries' errors
22 constituted excusable neglect within the meaning of Rule 60(c) and warranted setting aside the
23 defaults. *Cook*, supra.

24
25 In this case, the undersigned hired a new receptionist in October 2012 and has yet to hire
26 a new legal assistant to replace Patricia Bays, who passed away on November 8, 2012 and was
27 buried on November 20, 2012. Not only was Patricia Bays, the undersigned's mother, but she
28 worked for the undersigned for 18 years as a legal assistant in the areas of probate, personal

1 injury and issues primarily dealing with the City of Tombstone. The receptionist is responsible
2 for calendaring court appearances and deadlines. The pleadings, minute entries and orders then
3 go to the legal assistant that reviews the document and ensures the deadline or court date is
4 calendared. In this case, the new receptionist did not calendar the deadlines for filing a reply to
5 the counterclaim or the application for default and Patricia Bays was not available to recheck the
6 calendar.

7 Additionally, the undersigned's father suffers from dementia. Once Patricia Bays died,
8 the undersigned became responsible for the management of the estate of Patricia and the personal
9 affairs (paying bills, closing accounts, etc) for his father. Also, the undersigned has had to
10 coordinate doctor's appointments and attend the doctors appointments with his father to describe
11 the issues.

12 Additionally, on November 23, 2012, the undersigned's parent's home flooded and the
13 undersigned became responsible for coordinating the repairs and claim with the insurance
14 company. See, exhibit (1). As a result of that flood, the undersigned's father has been residing
15 with him while the flooring is replaced.

16 On December 31, 2012, the water pipes in the ceiling of his parents' house froze and
17 flooded the house again. However, this time, many of the walls were damaged and need to be
18 replaced. Fortunately, the new flooring had not been installed.

19 While the undersigned's mother was alive, she would have coordinated all of these
20 events. However, with her passing, the undersigned's father is incapable and the undersigned has
21 taken on that responsibility.

22 Additionally, both parties have been vigorously prosecuting their respective positions as
23 demonstrated by the court file. This Court should know that it is extremely rare for the
24 undersigned to miss a deadline. The facts above demonstrate that the undersigned was "deflected
25 from this purpose by one of the many interruptions that beset practitioners in modern law
26 practice," *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 163, 871 P.2d 698, 710 (App. 1993).
27
28

1 Refusing to set aside the judgment in these circumstances is harsh, rather than fair and equitable.
2 *Ulibarri*, 178 Ariz. at 164, 871 P.2d at 711.

3 ***Meritorious Defense***

4 The City of Tombstone recently filed a Motion to Dismiss the Counterclaim based on
5 doctrine of res judicata and A.R.S. § 12-510. In that Motion, Tombstone asserted that a prior
6 final judgment issued by this Court in November 1915 against the BEATTY's predecessor barred
7 this Court from granting the same relief requested in 1915. *Lee v Johnson*, 70 Ariz. 122, 127,
8 216 P.2d 722, 726 (1950). A trial court exceeds its jurisdiction if it allows the issues to be
9 relitigated once a prior court issues a final judgment that is not appealed. *Casa Grande Trust Co.*
10 *v. Superior Court In and For Pinal County*, 8 Ariz.App. 163, 165, 444 P.2d 521, 523 (App.
11 1968).

12 To the extent that the BEATTYs were claiming ownership by adverse possession, under
13 A.R.S. § 12-510, municipalities are immune from the bar of limitations when acting in a
14 governmental capacity as agents of the State in matters of state-wide concern. *City of Bisbee v.*
15 *Cochise County*, 50 Ariz. 360, 72 P.2d 439 (1937). Where the municipality was acting in a
16 *public* capacity rather than in a private or proprietary capacity, the immunity under A.R.S. 12-510
17 applies to the municipality. *Reeves v. City of Phoenix*, 1 Ariz.App. 157, 400 P.2d 364 (App.
18 1965). Here, it is obvious that Tombstone is collecting water for a *public* purpose and therefore,
19 is immune from any statute of limitations. Therefore, it is clear that Tombstone has a
20 meritorious defense to the BEATTY's counterclaim.
21

22 There is a presumption in favor of hearing a case on the merits. *Ulibarri v.*
23 *Gerstenberger*, 178 Ariz. 151, 164, 871 P.2d 698, 711 (App. 1993). In determining whether
24 Tombstone should be relieved of a default, this Court must be guided by equitable principles.
25 *Coconino Pulp & Paper Co. v. Marvin*, 83 Ariz. 117, 120, 317 P.2d 550, 552 (1957). These
26 principles require that Tombstone be given a fair opportunity to litigate a disputed claim.
27 Although violation of the rule which requires the sanctity and security of a valid judgment, when
28

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the circumstances are such that it would be extremely unjust to enforce such a judgment, relief will be granted to the extent of allowing Tombstone a fair opportunity to present the matter on its merits. *Id.*

In this case, a judgment in favor of the BEATTYs regarding its counterclaim has not been entered at this time. The counterclaim is nothing more than a claim against Tombstone for the same relief. Based on the facts, circumstances and law addressed above, it would be extremely unfair, if not exceeding its subject matter jurisdiction, to refuse to set aside the default and grant a judgment in favor of the BEATTYs.

WHEREFORE, Tombstone requests that the default be set aside.

Respectfully submitted this 4th day of January, 2013

BAYS LAW, P.C.



P. RANDALL BAYS
Tombstone City Attorney

Desert Springs Construction
 & Remodeling, LLC
 R.O.C. #157751
 Tri County Roofing LLC
 R.O.C. #262836

Date: 12/21/2012
 PH: (520) 366-0021

9828 E. Cana St.
 Hereford Az 85615

BID - PROPOSAL (001)

SUBMITTED TO: Georg Bays / Randy Bays
 Name: Bays
 Address: Brown Canyon
 Clam # 268705142

WORK TO BE PERFORMED AT: Brown Canyon

Construction Start Date:	To be Announced	Date of Plans:	N/A
Construction Completion Date:	To be Determined	Architect:	N/A
		Engineer:	N/A

Contractors Provision: Unless otherwise agreed in writing, the Contractor shall provide all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution and completion of the Project. The Contractor shall pay all income taxes required of Contractor by law. Contractor shall obtain lien releases from all suppliers and subcontractors, subject to and expressly conditioned upon Owner's payment to Contractor.

1. **The scope of the work for the project shall include:**

Services:	Patch drywall as needed throughout main level of home. Patch and texturs 130 holes maid by drill in drywall (\$260.00) Replace missing sheetrock 8 sq. ft. tape and texture. (\$220.00)
Include:	Replace missing moldings and casings removed do to watter damage. Provide and install 321' of wood base (\$642.00) Provide and install 462' of trim around doors. (\$924.00)
Include:	Paint all interior walls where drywall patching is present. Prime and paint 9884 sq.ft. interior walls as needed per watter damage. (\$1,976.00)
Include:	Remove and reinstall furniture as needed for reconstruction. (\$720.00)
Include:	Remove and replace carpet and pad 157 yards. (\$6,280.00)
Include:	Take all removed carpet and pad to dump. (\$220.00)
Services:	Project management and services as described above.

2. **Demolition:**

• None Noted

3. **Debris Removal:** Contractor agrees to remove all debris and leave the premises in broom clean condition.

4. **Workmanship:** All workmanship shall meet or exceed industry standards. In the event of dispute, the parties shall appeal to the Arizona State Registrar of Contractors for resolution. The Registrar's decision shall be final.
5. **Unknown or Different Conditions:** Should concealed or unknown conditions be encountered in the performance of the Work on the Project below the surface of the ground or should unknown physical conditions above the surface of the ground or otherwise of an unusual nature, differing material from those ordinarily encountered and generally recognized be encountered, the Contract Price shall be equitably adjusted by written change order.
6. **Owner's Duties:** The Owner shall provide the Contractor any and all information, documents and timely approvals reasonably necessary to complete Contractor's obligations under this agreement.

The Contract Sum: The Owner shall pay the Contractor in current funds for performance of the agreement the total sum of **\$11,242.00**

10 % Profit	\$1,124.00
10 % Overhead	\$1,124.00

Total Cost Of Construction \$13,490.00

Thirteen Thousand Four Hundred Ninty Dollars and No Cents

Progress payments for credit to the contract sum shall be made as follows:

First payment to start construction:	\$6,745.00
payment due upon completion of said project:	\$6,745.00

FINAL PAYMENT: The Owner shall make the final payment within seven (7) calendar days after Construction Completion. Final payment shall include all change orders and allowance items.

INTEREST: Payments due Contractor but unpaid by Owner shall bear interest at the rate of one and one-half percent (1-½%) per month , 18% per annum commencing on the date payment is due. Owner agrees to pay Contractor's cost of collection for any overdue invoices, including reasonable attorney's fees.

RESPECTFULLY SUBMITTED, _____ DATE _____
 Joe Eveningred
 Project Manager

ACCEPTANCE

You are hereby authorized to furnish all material, equipment and labor required to complete the work described in the above proposal, for which the undersigned agrees to pay the amount stated in said proposal and according to the terms thereof.

ACCEPTED _____ DATE _____
 Customer's Signature



Allstate

You're in good hands.

Tempe Central Property
222 S. MILL AVENUE STE. 501
TEMPE AZ 85281



GEORGE N AND PATRICIA A BAYS
100 S 7TH ST
SIERRA VISTA AZ 856352504

December 27, 2012

INSURED: GEORGE BAYS
DATE OF LOSS: November 27, 2012
CLAIM NUMBER: 0268705142 BZW

PHONE NUMBER: 800-639-7304
FAX NUMBER: 866-234-0284
OFFICE HOURS: Mon - Fri 8:00 am - 4:30 pm

Dear GEORGE N AND PATRICIA A BAYS,

Enclosed is a copy of your estimate for damages sustained on November 27, 2012 . Your settlement has been based on our discussion and this estimate. If you have any questions regarding the estimate or settlement, please contact me at 800-639-7304 Ext. 9277223.

Sincerely,

ZACH WASHAM

ZACH WASHAM
800-639-7304 Ext. 9277223
Allstate Insurance Company

Enclosure(s)

Adjuster Name: Zach Washam
 Street Address 1001 W Southern Ave
 City, State, Zip Mesa Az 85210
 Phone: 480-927-7223



Date:
 Customer Name: Bays, George
 Claim Number:

Property Loss Worksheet

1	2	3	4	5	6	7	8	9	10
ITEM #	DESCRIPTION	QTY	(AGE) YRS	UNIT PRICE	REPL COST	SALES TAX	% DEPR / YR	DEPRECIATION	ACTUAL CASH VALUE
1	Desert springs bid	1	10	\$13,490.00	\$ 13,490.00	\$ -	3.5%	\$ 4,721.50	\$ 8,768.50
2				\$ -	\$ -	\$ -		\$ -	\$ -
3				\$ -	\$ -	\$ -		\$ -	\$ -
4					\$ -	\$ -		\$ -	\$ -
5					\$ -	\$ -		\$ -	\$ -
6					\$ -	\$ -		\$ -	\$ -
7					\$ -	\$ -		\$ -	\$ -
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28					\$ -	\$ -		\$ -	\$ -
29					\$ -	\$ -		\$ -	\$ -
30					\$ -	\$ -		\$ -	\$ -
TOTALS:					\$ 13,490.00	\$ -		\$ 4,721.50	\$ 8,768.50

Sales Tax: 0.0000%	\$ -	
Total Claim:	\$ 13,490.00	
Less Deductible:	\$ 500.00	\$ 500.00
Prior Pymts:		\$ -
Full Replacement Cost:	\$ 12,990.00	Actual Cash Value: \$ 8,268.50
Total withheld depreciation:		\$ 4,721.50

New Mexico - ANY PERSON WHO KNOWINGLY PRESENTS A FALSE OR FRAUDULENT CLAIM FOR PAYMENT OF A LOSS OR BENEFIT OR KNOWINGLY PRESENTS FALSE INFORMATION IN AN APPLICATION FOR INSURANCE IS GUILTY OF A CRIME AND MAY BE SUBJECT TO CIVIL FINES AND CRIMINAL PENALTIES.

Arizona - For your protection Arizona law requires the following statement to appear on this form. Any person who knowingly presents a false or fraudulent claim for payment of a loss is subject to criminal and civil penalties.

Adjuster Name: Zach Washam
Street Address 1001 W Southern Ave
City, State, Zip Mesa Az 85210
Phone: 480-927-7223



Allstate
You're in good hands.

Date:

Customer Name: **Bays, George**

Claim Number:

Property Loss Worksheet

1	2	3	4	5	6	7	8	9	10
ITEM #	DESCRIPTION	QTY	(AGE) YRS	UNIT PRICE	REPL COST	SALES TAX	% DEPR / YR	DEPRECIATION	ACTUAL CASH VALUE

Oklahoma - WARNING: Any person who knowingly, and with intent to injure, defraud or deceive any insurer, makes any claim for the proceeds of an insurance policy containing any false, incomplete or misleading information is guilty of a felony.

