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IN THE JUSTICE COURTS OF THE STATE OF ARIZONA
IN AND FOR THE PRECINCT OF MANISTEE, COUNTY OF MARICAPA

7 Kent C. Harding)
8)
9 Plaintiff,)
10 vs.)
11 John W. Stone)
12 Shirley D. Stone)
13 Defendants)
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Case No. CC2007176431

**DEFENDANTS’ RESPONSE IN
OPPOSITION TO PLAINTIFF’S MOTION
FOR RECONSIDERATION, ORAL
ARGUMENT AND HEARING AND
REQUEST FOR COURT TO
TAKE JUDICIAL NOTICE
OF ADJUDICATED FACTS,
THE RECORD, CASE LAWS AND
RULES OF PROCEDURE**

Comes now before this Court the defendants with “Defendants’ Response in Opposition to Plaintiff’s Motion for Reconsideration, Oral Argument and Hearing; and Request Court to take Judicial Notice of its record, adjudicated facts, case laws, Arizona and Federal Statutes, and Arizona Rules of Civil Procedure.

A Court may take judicial notice of its own records. . . . U.S. v. Wilson, 631 F.2d 118 (9th Cir. 1980)

The defendants bring this motion in response to the plaintiff’s motion for reconsideration and the emergency hearing set for July 14, 2008, pursuant to **ARCP, Rule 7.1(e)** that provides in part that, “....No motion for reconsideration shall be granted, however, without the court providing an opportunity for response; a motion authorized by this Rule may not be employed as a substitute for a motion

1 pursuant to Rule 50(b), 52(b), 59 or 60 of these Rules, and shall not operate to extend the time within
2 which a notice of appeal must be filed.”

3 The plaintiff is asking this court to reconsider its order denying their post-judgment motion to
4 strike a motion that does not exist and vacate the post-judgment order vacating a void judgment that was
5 adjudicated pursuant to ARCP, Rule 60(c)(4).

6 For the court to entertain a hearing for that purpose is improper, since “the rules of civil
7 procedure do not authorize a movant to file a motion to reconsider the trial judge’s ruling on his own
8 post-judgment motion.” *Package Express Ctr. V. Motley*, 717 So.2d 378, 379 (Ala.Civ. App. 1998).

9 “Trial court lacked jurisdiction to act on a party’s motion to set aside that court’s previous ruling
10 denying the party’s post-judgment motion and that “all actions taken after the denial of the [post-
11 judgment] motion were void.” 717 So.2d at 379. In so holding, “the only review of a denial of a post-
12 judgment motion is by an appeal” taken directly from that denial.” *Re, Dowling*, 477 So.2d at 404.

13 Simply put, a judge has no jurisdiction to “reconsider” his ruling a post-judgment motion
14 vacating the judgment where the judgment was void for lack of jurisdiction and denying the post-
15 judgment motion to strike.

16 Nevertheless, contrary to the plaintiff’s allegations that the pro tem judge lacked jurisdiction, as a
17 matter of law, Judge Haworth did have the jurisdiction to vacate the judgment just as he did.

18 It is well established and practiced law that once the void order was vacated for lack of
19 jurisdiction, it is, as a matter of law, absolutely destroyed as if it never existed, and if anyone tries to
20 execute on that order it is a felony and liability attaches.

21 As pleaded herein and thoroughly evidenced throughout the record in this case, the defendants’
22 June 6, 2008 Motion to Vacate the August 10, 2005 Judgment of Restitution for lack of jurisdiction was
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1 a NEW motion that was **never** previously presented or adjudicated before this Court or the Appellate
2 Court.

3 With all due respect, the defendants respond and oppose the plaintiff's motion to reconsider and
4 vacate this court's June 20, 2008 order vacating the August 10, 2005 Judgment of Restitution for the
5 reasons stated above in addition to the following reasons:

6 (1) This court lacks jurisdiction to reconsider its own denial of a post-judgment motion.

7 (2) This court has neither discretion nor jurisdiction to make a void order valid.

8 Courts have ruled that, ""Where there is no jurisdiction, there can be no discretion, for discretion
9 is incident to jurisdiction." Piper v. Pearson, 2 Gray 120, cited in Bradley v. Fisher, 13 Wall. 335, 20
10 L.Ed. 646 (1872).

11 (3) There had been **no** prior determination on the validity of the August 10, 2005 Judgment of
12 Restitution.

13 Pursuant to A.R.S. § 12-1178, the judgment and writ are two separate and distinct statutory
14 transactions, whereby the writ is based upon jurisdiction and a valid judgment of restitution.

15 (4) For reconsidering its final judgment, the plaintiff failed to provide the court that an
16 intervening change in the controlling law has occurred that would give the justice court jurisdiction
17 while (a) the bankruptcy stay was in effect, (b) when the judgment was rendered after the bankruptcy
18 filing and (c) when proper service and notification of proceeding were not perfected violating
19 substantive due process rights.

20 (5) The plaintiff failed to offer the court any previously unavailable evidence that has since
21 become available to support their contention that the pro tem judge lacked jurisdiction to vacate the
22 August 10, 2005 Judgment of Restitution, because the appellate court already ruled on the defendants'
23 first motion to vacate the September 7, 2005 Writ of Restitution.
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1 The law is clear, "Since a void order has no legal force or effect, there can be no time limit
2 within which to challenge the order or judgment. **Further, since the order has no legal force, or effect,**
3 **it can be repeatedly challenged, since no judge has the lawful authority to make a void order valid.**
4 Bates v. Board of Education, Allendale Community Consolidated School District No. 17, 136 Ill.2d 260,
5 267 (1990) (**a court "cannot confer jurisdiction where none existed and cannot make a void**
6 **proceeding valid.**"); People ex rel. Gowdy v. Baltimore & Ohio R.R. Co., 385 Ill. 86, 92, 52 N.E.2d
7 255.

8 (6) The record evinces that the defendants did not file a second motion to vacate the September
9 7, 2005 Writ of Restitution as the plaintiff claims, making the plaintiff's motion to strike a motion that
10 does not exist, frivolous.

11 The law is well-settled, that "a void order or judgment is void even before reversal". Valley v.
12 Northern Fire & Marine Ins. Co., 254 U.S. 348, 41 S.Ct. 116. When rule providing for relief from void
13 judgments is applicable, relief is not discretionary matter, but is mandatory. Orner v. Shalala, 30 F.3d
14 1307 (Colo. 1994). "Inherent power of a court is not dependent on whether a court has jurisdiction,
15 otherwise it could never have the lawful authority to determine if it had jurisdiction in any matter before
16 it. This inherent power to determine jurisdiction applies not only to determine its own jurisdiction, but
17 the jurisdiction of any other court. People v. Childs, 278 Ill.App.3d 65, 663 N.E.2d 161 (4th Dist. 1996)
18 ("The duty to vacate a void judgment is based on the inherent power of a court to expunge from its
19 records void acts of which it has knowledge."); Evans v. Corporate Services, 207 Ill.App.3d 297, 565
20 N.E.2d 724 (2nd Dist. 1990) ("A court has inherent authority to expunge void acts from its records.").

21 (7) The following was available for the court for its determination to render its decision. The list
22 includes adjudicated facts, documents in the record, as well as case law, rules and statutes that directly
23 supports the judge's decision that the judgment and orders of the court that were rendered without
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1 jurisdiction of the court because of the bankruptcy automatic stay were void and as such should be and
2 was vacated.

3 The defendants request the court to take judicial notice of the following that relates directly to
4 the fair adjudication of this case.

5 **A. THE RECORD OF THIS CASE THAT EVINCES THE FOLLOWING:**

6 1. On August 2, 2005, the defendants filed a Chapter 11 Bankruptcy.

7 2. On August 4, 2005, without jurisdiction while under bankruptcy stay, a forcible detainer
8 hearing was held against the bankrupt/defendants' before Peoria Justice of the Peace Lex Anderson.

9 3. On August 10, 2005, while the bankruptcy stay was still in full effect, Judge Anderson
10 executed a Judgment of Restitution and an Order of Writ of Restitution.

11 4. On August 11, 2005, Judge Anderson vacated the August 10, 2005 Order of Writ of
12 Restitution, but did not vacate the August 10, 2005, Judgment of Restitution.

13 5. On September 6, 2005, bankruptcy court lifted the automatic stay.

14 6. On September 7, 2005, plaintiffs obtained a new writ of restitution based on the August 10,
15 2005 Judgment of Restitution.

16 7. On August 29, 2007, the defendants filed with this Court, "Defendants Motion to Vacate
17 September 7, 2005 Writ of Restitution".

18 8. On August 31, 2007, the plaintiff filed "Plaintiff's Response to Motion to Vacate Writ of
19 Restitution".

20 9. On September 11, 2007, this Court denied the defendants' "Motion to Vacate September 7,
21 2005 Writ of Restitution".

22 10. On September 25, 2007, the defendants' appealed this Court's September 11, 2007, order
23 denying their "Motion to Vacate September 7, 2005 Writ of Restitution".
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1 11. On May 28, 2008, Judge Pro Tem William Schafer, acting in his appellate capacity, filed his
2 “minute entry opinion” which affirmed this Court’s September 11, 2007, order denying the defendants’
3 “Motion to Vacate September 7, 2005 Writ of Restitution”.

4 12. Judge Schafer sets-forth on page 1, paragraph 2, that, “This is an appeal from a justice court
5 denial of the **Stones’ motion to vacate a writ of restitution** issued by the justice court on September 7,
6 2005”.

7 13. Judge Schafer also sets-forth on page 3, paragraph 6, that “. . . it vacated only the writ of
8 restitution “Issued on 8-10-05””.

9 14. On June 6, 2008, the defendants’ filed with this Court, **“Motion to Vacate August 10, 2005**
10 **Judgment of Restitution”** pursuant to ARCP, Rule 60(c)(4), void for lack of jurisdiction.

11 15. On June 10, 2008, plaintiff filed **“Motion to Strike Defendants’ Motion to Vacate Writ of**
12 **Restitution (Filed June 6, 2008).**

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14 **B. ARIZONA STATE AND FEDERAL STATUTES**

15 **1. A.R.S. § 22-121(C) - Justices of the peace pro tempore powers and duties** - The judicial
16 powers and duties of the justice of the peace pro tempore shall be the same as a duly elected justice of
17 the peace and shall extend beyond the period of the justice of the peace pro tempore's appointment for
the purpose of hearing and determining any proceeding necessary for a final determination of a cause
heard by the justice in whole or in part during the period of the justice's appointment.

18 **2. A.R.S. § 12-1178(A) – Judgment of Restitution** - If the defendant is found guilty, the court
19 shall give judgment for the plaintiff for restitution. . . . as described in section 33-1314, subsection C,
as provided for in the rental agreement, and shall grant a writ of restitution.

20 **3. A.R.S. § 12-1178(C) - Writ of restitution** - provides: “No writ of restitution shall issue
21 until the expiration of five (5) days *after the rendition of judgment.*” “Emphasis supplied” Rule 58(a),
Rules of Civil Procedure, 16 A.R.S., as amended provides; “Entry. **All judgments shall be in writing**
22 **and signed by a judge or a court commissioner duly authorize 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, . . .
23 *Fridena v. Maricopa County, 18 Ariz.App.527*

24 **4. 11 U.S.C.A. § 362(a)(1) – Bankruptcy Automatic Stay** - A stay precludes commencement
25 or continuation of an action in a nonbankruptcy forum to recover a claim against the debtor that arose

1 before the commencement of the bankruptcy case and precludes any act to collect, assess, or recover
2 such a claim even if the nonbankruptcy forum has concurrent jurisdiction to hear the matter.

3 C. ARIZONA RULES OF CIVIL PROCEDURE

4 **1. Rule 60(c)(4)** provides: On motion and upon such terms as are just the court may relieve a
5 party or a party's legal representative from a final judgment, order or proceeding for the following
6 reasons: the judgment is void; . . . This rule does not limit the power of a court to entertain an
7 independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a
8 defendant. . . or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief
9 from a judgment shall be by motion as prescribed in these rules or by an independent action.

10 D. CASE LAW RELEVANT TO THIS CASE

11 **1.** A "void" judgment, as we all know, grounds no rights, forms no defense to actions taken there
12 under, and is vulnerable to any manner of collateral attack No statute of limitations or repose runs on its
13 holdings, **the matters thought to be settled thereby are not res judicata**, and years later, when the
14 memories may have grown dim and rights long been regarded as vested, any disgruntled litigant may
15 reopen old wound and once more probe its depths. And it is then as though trial and adjudication had
16 never been. *Fritts v. Krugh*, Supreme Court of Michigan, 92 N.W.2d 604, 354 Mich. 97 (10/13/58).

17 **2.** Judgments entered where court lacked either subject matter or personal jurisdiction, or that
18 were otherwise entered in violation of due process of law, must be set aside, *Jaffe and Asher v. Van*
19 *Brunt*, S.D.N.Y.1994, 158 F.R.D. 278.

20 **3.** If voidness of judgment is found then relief from judgment is not discretionary and any order
21 based upon that judgment is also void. *V.T.A., Inc. V. Airco, Inc.*, supra @ 221; *Veneable v. Haislip*,
22 721 F.2d 297, 298 (1983)

23 **4.** Order of court made without jurisdiction is void. *Button v. Nevin*, 36 P.2d 568, 44 Ariz. 247.

24 **5.** Arizona Supreme Court Case of *Olds Bros. Lumber Co., v. Rushing*, 64 Ariz. 199. "Forcible
25 entry and detainer actions are statutory proceedings and; an appellate court acquires no jurisdiction on
appeal where trial court or lower court had no jurisdiction of the cause, see well established rule of law."
4 C. J.S., Appeal and Error, § 41, page 121, at page 123; *Burt & Carlquist Co. v. Marks et al.*, 53 Utah
77, 177 P. 224.

6. Ariz.App. Div. 1 1994. If judgment or order is void, trial court has no discretion but to vacate.
16 A.R.S. Rules Civ.Proc., Rule 60(c)(4), *Martin v. Martin*, 893 P.2d 11, 182 Ariz. 11, review denied.

7. Arizona courts give great weight to federal courts' interpretations of Federal Rule of Civil
Procedure governing motion for relief from judgment in interpreting identical text of Arizona Rule of
Civil Procedure, *Estate of Page v. Litzenburg*, 852 P.2d 128, review denied (Ariz.App.Div. 1, 1998).

