

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 12/20/2012
RUTH A. WILLINGHAM,
CLERK
BY: mjt

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

TONTO SUPPLY, INC., an Arizona) 1 CA-CV 11-0495 SA
corporation,)
) DEPARTMENT B
Plaintiff/Appellee,)
) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 28, Arizona Rules
ROBBIN D. HERREN and JOHN DOE) of Civil Appellate
HERREN, husband and wife,) Procedure)
)
Defendants/Appellants.)
)

Appeal from the Superior Court in Mohave County

Cause No. L8015CV200907079

The Honorable Randolph A. Bartlett, Judge

AFFIRMED

The Vakula Law Firm, PLC, Prescott
by Alex B. Vakula
Cody Johnson
Attorneys for Plaintiff/Appellee

Knapp & Roberts, P.C. Phoenix
by David L. Abney
Attorneys for Defendants/Appellants

H O W E, Judge

¶1 Robbin D. Herren appeals five partial-summary judgment rulings in favor of Tonto Supply, Inc. ("Tonto") in a contract

dispute over construction of a mining operation. She argues that the summary judgments were based on an erroneous sanction against her for her attorney's failure to timely respond to Tonto's discovery request for admissions of certain matters. Because she failed to adequately raise a genuine dispute of material fact for trial under Arizona Rule of Civil Procedure ("Rule") 56, we find no error and affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In July 2008, Tonto and Herren agreed to develop a gravel-mining operation in Mohave County on land that Herren had leased from the federal government.¹ In exchange for exclusive rights to mine and sell the gravel, Tonto agreed to widen the nearby highway, build access roads, and pay Herren royalties and commissions. Herren agreed to obtain the necessary permits and provide staking, striping and testing for the highway-widening work.

¶3 During the highway-widening phase of development, the Arizona Department of Transportation ("ADOT") stopped construction pending the Arizona Department of Environmental Quality ("ADEQ")'s approval of a Storm Water Pollution

¹ The contract was between Tonto and R&G Gravel, a name that Herren and her business partner, Gregory Huke, used to conduct this transaction. For clarity, we refer to Herren when discussing R&G Gravel because Herren is the only defendant appealing.

Protection Plan ("SWPP Plan"). Herren refused to pay for the cost of the SWPP Plan, arguing that it was necessary only because Tonto deviated from the construction plan.

¶4 In March 2009, Herren notified Tonto that she believed it had breached the contract provisions regarding royalties and construction of the access roads. Tonto denied the allegations, and argued that Herren must pay for the SWPP Plan because she had assumed responsibility for any "engineering and design for environmental approvals" as part of its agreement "to provide and maintain necessary permits" for the highway-widening project. Herren declared Tonto in material breach of contract and demanded that Tonto vacate the premises and forfeit equipment it had pledged as collateral under the contract.

¶5 Two months later, Tonto sued Herren in superior court.² After settlement negotiations failed, Tonto obtained a temporary restraining order ("TRO") to uphold the status quo and mailed a copy of the TRO to each defendant and Herren's attorney in California. Herren objected to the TRO, arguing that it had been obtained "without notice" and that Tonto was not entitled

² Tonto's complaint alleged the following causes of action: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) interference with business expectancy; (4) quiet title; (5) declaratory judgment; (6) unjust enrichment; (7) conversion; (8) breach of fiduciary duties; and (9) wrongful ejection. The complaint requested injunctive relief and attorneys' fees.

to an injunction because it had materially breached the contract and was thus trespassing. Herren requested that Tonto be enjoined from mining and using the access roads.

¶6 The court extended the TRO on June 26, 2009, and ordered that "[t]he parties will exchange discovery in a short time frame. Each party shall comply within five days from the date received or ten days from today's date. Any other information necessary is to be provided as requested." Tonto deposed Herren and Huke on July 15, 2009, but Herren took no depositions.

¶7 On July 20, 2009, Tonto applied for entry of default because Herren had not filed an answer or other responsive pleading. Eight days later, she answered the complaint raising five counterclaims.³

¶8 Tonto then filed four separate motions for partial summary judgment ("MSJ #1 to #4") that, together, covered the issues of liability under the contract for royalties, construction of access roads, and compliance with regulations. Tonto sent Herren a request for admission of twenty-five factual matters ("request for admissions") pertaining to the alleged breaches of contract on August 11, 2009. Six days later, Tonto

³ In addition to denying the claims in the complaint, Herren raised the following counterclaims: declaratory judgment; conversion; unjust enrichment; trespass to chattel; breach of contract; and fraud in the inducement.

moved to dismiss Herren's tort counterclaims and filed a fifth motion for partial summary ("MSJ #5") regarding the counterclaims for declaratory judgment and breach of contract based on the same allegations in MSJ #1 to #4.

¶9 Herren failed to respond to the first four motions for partial summary judgment before the September 6, 2009 deadline, prompting Tonto to request a continuance of an evidentiary hearing. The court continued the hearing until December and extended the time for Herren to respond to the summary-judgment motions until October 12, 2009. Herren did not respond to the summary-judgment motions or the request for admissions. Tonto then moved to deem the matters admitted.

¶10 On October 13, 2009—one day after the extended deadline—Herren filed an objection to MSJ #1 through #4. Herren also filed an untimely consolidated opposition to Tonto's statements of undisputed facts, attaching only Huke's unverified declaration. Tonto meanwhile supplemented its statements of undisputed facts in support of MSJ #1 to #4 with additional documentary evidence. On October 22, 2009, nearly one month after the deadline to answer the requests for admission, Herren

answered the requests and objected to the motion to deem certain matters admitted.⁴

¶11 At the November 4, 2009, hearing to resolve the pending motions, Tonto argued that the matters should be deemed admitted because under Rule 36(c), Herren did not show cause for relief and that Tonto would "suffer serious prejudice" for working hard to comply with the court's order to move the case along "rapidly." Herren's counsel told the court that it was her failure to timely respond to the request for admissions. She told the court that Herren had provided her with responses, but that she failed to forward them to Tonto and then simply forgot about it. She urged the court not to penalize Herren for her oversight because Tonto would not be prejudiced now that Herren's response to the request for admissions had been filed.

¶12 The court found that Herren failed to demonstrate a basis for granting relief under Rule 36 and ordered that the matters in Tonto's request for admissions be deemed admitted and conclusively established. The court then heard argument on the motions for summary judgment.

⁴ The first ten responses to the request for admissions challenged Tonto's claims for breach of contract and declaratory judgment, alleging that the contract Tonto submitted had not been fully integrated. The next four responses argued that Tonto was not an Arizona contractor and that Tonto had deviated from the construction plans. The remaining eleven responses merely stated "Deny," without explanation.

¶13 Tonto argued that Herren failed to provide any reliable evidence to contest its statements of undisputed facts and that the court should grant judgment as a matter of law on MSJ #1 to #4. Tonto noted that Herren never responded to MSJ #5. At first, Herren's counsel claimed that she never received MSJ #5. After a short recess, she conceded that Herren had received MSJ #5 about three weeks earlier but stated that she had not looked at it. The trial court took another recess so that she could review MSJ #5.

¶14 Herren's counsel argued that each of Tonto's motions should be denied because a reasonable jury could conclude that the contract was void or could interpret the contract in Herren's favor. Tonto answered that Herren's response failed to cite to the record, as Rule 56(c) requires. Tonto also reminded the court that contract interpretation is a "question of law for the court," not a question of fact for the jury.

¶15 Afterward, and noting that the matters in the request for admissions had been deemed admitted, the court granted Tonto's summary-judgment motions because Herren failed to procedurally comply with the requirements of Rule 56. The court also found that "independent evidence as well as legal authority" supported its decision that no genuine issue of material fact existed and that Tonto was entitled to judgment as

a matter of law on MSJ #1 to #5. The court then dismissed the counterclaims.

¶16 The trial court signed its ruling on the motions on February 1, 2010, and included Rule 54(b) language.⁵ Although the judgment was not entered until June 20, 2011, the trial court extended the time to file a notice of appeal by seventeen days. This appeal followed.

¶17 In response to this Court's request for supplemental briefing regarding jurisdiction, Herren argued that this Court lacked jurisdiction because the trial court had exceeded its authority by extending the time for appeal beyond fourteen days.

⁵ This Court requested supplemental briefing to determine whether the trial court erred in including Rule 54(b) language. Based on our review of the briefs and the record, we find no abuse of discretion. See *Cont'l Cas. v. Superior Court*, 130 Ariz. 189, 191, 635 P.2d 174, 176 (1981) (explaining that the decision to include Rule 54(b) language is made "within the sound discretion of the trial court" and in the "interest of sound judicial administration"). Rule 54(b) language is appropriate if the judgment involves claims that are "separate and distinct" from the remaining claims and there is no just reason for delay. *Id.* at 192, 635 P.2d at 177. A claim is "separate and distinct" from others if "no appellate court would have to decide the same issues more than once even if there are subsequent appeals." *Id.* at 191, 635 at 176 (internal quotation omitted). The claims in this appeal were "separate and distinct" from the remaining claims because (i) resolution of the remaining claims did not involve the issues and allegations raised in MSJ #1 to #5 and the counterclaims, and (ii) the issues here would not have to be revisited in a subsequent appeal of the remaining claims. Also, Herren has not challenged the trial court's determination that there was no just reason for delay. We thus find no abuse of discretion.

Ariz. R. Civ. App. P. 9(a). Although we agree, we accept special action jurisdiction, noting that the appellate briefs had already been filed and the unique circumstances of this case. See *Lloyd v. State Farm Mut. Auto. Ins., Co.*, 189 Ariz. 369, 375, 943 P.2d 729, 735 (App. 1996).

DISCUSSION

¶18 Herren argues that she should not have been sanctioned for her counsel's incompetence in failing to respond to Tonto's request for admissions. Because the trial court relied on those admissions, Herren argues that the sanction "changed the course of the case" and amounted to a dismissal of her claims or a default judgment in favor of Tonto.

¶19 At first blush, this case juxtaposes competing policies between encouraging speedy and efficient resolution of disputes through procedural rules, and resolving cases on the merits when an attorney has violated procedure through no fault of the client. Indeed, the crux of Herron's argument on appeal is that deeming the matters admitted under Rule 36 gutted her case and unfairly deprived her of the right to judgment on the merits. Herren, however, mischaracterizes the procedural posture of this case and the underlying discovery violations. The record reveals that the trial court based its ruling not on Herren's discovery failures, but on the inadequacy of Herren's response to the summary-judgment motions. Assuming without deciding,

therefore, that the trial court erred in deeming the matters in the request for admissions admitted, we review whether the trial court correctly granted the motions for summary judgment regardless of the admissions.

¶20 This Court reviews the grant of summary judgment de novo, viewing the facts and reasonable inferences from the facts in the light most favorable to the nonmoving party. *Hourani v. Benson Hosp.*, 211 Ariz. 427, 432, ¶ 13, 122 P.3d 6, 11 (App. 2005). Pursuant to Rule 56(c), a party is entitled to summary judgment if “[t]he pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” The party opposing a motion for summary judgment “may not rest upon the mere allegations or denials of [its] pleading, but [its] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Ariz. R. Civ. P. 56(e) (emphasis added). “A party opposing the motion must file affidavits, memoranda or both within 30 days after service of the motion.” Ariz. R. Civ. P. 56(c).

¶21 Summary judgment resulting from the inadequacy of an adverse party’s response pursuant to Rule 56 is not a sanction. See *Tilley v. Delci*, 220 Ariz. 233, 238, ¶ 13, 204 P.3d 1082,

1087 (App. 2009). In *Tilley*, the trial court granted summary judgment against the defendant, who failed to timely respond to a request for admissions and a motion for summary judgment. It then denied his motion for reconsideration. This Court affirmed, noting that the defendant failed to attach his response to the request for admissions in his opposition to the motion for summary judgment and "submitted no competent evidence to create a genuine issue of material fact." *Id.* at 235-36, ¶¶ 5, 9, 10, 204 P.3d 1082, 1085-86. The defendant thus failed to carry his burden of bringing to the court's attention "those portions of the verified pleadings, deposition, answers to interrogatories and admission on file." *Id.* at 236, ¶ 10, 204 P.3d at 1085. Explaining that "summary judgment is not a sanction," we then rejected the contention that the court should have conducted an evidentiary hearing to consider the client's fault and lesser sanctions. *Id.* at 238, ¶ 13, 204 P.3d at 1087.

¶22 Like the defendant in *Tilley*, Herren failed to comply with the procedural requirements of both Rules 36(a) and 56(c). Therefore, the grant of summary judgment was not a sanction. Instead, Herren's failure to comply with Rule 56(c) was fatal to her case. Under Rule 56(c)(1), Herren's response to Tonto's summary judgment motions was due on September 6, 2009. Because Herren had not responded, the court extended the deadline to October 12. Without explanation, Herren did not respond until

after the extended deadline and only objected to MSJ #1 through #4. At the hearing, Herren's counsel admitted that she had failed to respond to MSJ #5 despite having been timely served with that motion.

¶23 In addition, Herren's response to the motions for summary judgment did not adequately establish a genuine issue for trial. Herren could not rely on the mere allegations or denials of her pleadings to oppose summary judgment, but was required to, "by affidavits or as otherwise provided in [Rule 56], set forth specific facts showing that there is a genuine issue for trial." *Tilley*, 220 Ariz. at 237, ¶ 11, 204 P.3d at 1086 (citing Rule 56(e)). Rule 56(e) provides that if Herren "d[id] not so respond, summary judgment, if appropriate, shall be entered against" her.

¶24 Moreover, Herren's response failed to comply with the summary judgment procedural requirements. Without citing any pleadings, deposition testimony or affidavit, Herren merely argued that Tonto's motions for summary judgment were premature and reasserted her claims that Tonto was the party in breach of contract. Herren did not attach an affidavit or other exhibit to support her claims. Although Herren also filed a consolidated objection to Tonto's statements of undisputed facts, she failed to even cite to it in her response to the motions for summary judgment. Moreover, she failed to attach any reliable evidence

to support her objections to Tonto's statement of undisputed facts. Although, Herren attached Huke's "declaration" to the objections, it was unverified and did not meet the formalities of an "affidavit." See Black's Law Dictionary 62 (8th Edition 2004) (defining affidavit as "[a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public."). In the few instances when Herren's objections referred to testimony from a hearing or deposition, she did not provide a copy of the relevant transcript. Our review of the transcripts, however, show that those citations were inaccurate, did not dispute a fact, or were irrelevant. In sum, Herren's response to Tonto's motions for summary judgment failed to cite to any pleading or reliable evidence in the record to show that a triable issue of material fact exists to preclude summary judgment. Likewise, Herren failed to attach any affidavit, deposition testimony, or other reliable evidence to contest Tonto's undisputed statement of facts.

¶25 Tonto, on the other hand, submitted deposition transcripts and other exhibits that provided independent grounds showing that no genuine dispute of material fact existed for trial and that Tonto was entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c)(1) and (2). Although Herren argues that the trial court did not rely exclusively on those

