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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/30/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FLASH & THE BOYS LLC, an Arizona) No. 1 CA-CV 11-0704
limited liability company; ALBERT)
J. SCHILLINGER, JR., as Trustee) DEPARTMENT A
of Nationwide Mortgage Plan and)
Trust,) **MEMORANDUM DECISION**
)
Plaintiffs/Appellants,) (Not for Publication -
) Rule 28, Arizona Rules of
v.) Civil Appellate Procedure)
)
GREENBERG TRAURIG, LLP,)
)
Defendant/Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-010004

The Honorable Eileen S. Willett, Judge

APPEAL DISMISSED

SPECIAL ACTION JURISIDCTION ACCEPTED; RELIEF GRANTED

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T I M M E R, Presiding Judge

¶1 Flash & The Boys, LLC, and Albert Schillinger, Jr. (collectively, "Flash") appeal the trial court order awarding attorney's fees and expenses to the law firm of Greenberg Traurig, LLP ("GT") pursuant to Arizona Rule of Civil Procedure ("Rule") 37. Because GT is not entitled to an award of fees and expenses for representing its own interests in the lawsuit, we vacate the court's award.

BACKGROUND

¶2 In the course of litigating this note-collection case, a dispute arose regarding the accuracy of discovery responses by defendant Brian Lesk and his former counsel, GT.¹ Consequently, plaintiff Flash moved the court to strike Lesk's answer, enter judgment for Flash, and impose monetary and non-monetary sanctions against Lesk and GT pursuant to Rules 37(b)(2)(C), 37(c), and 37(d). Lesk and GT responded to the motion separately, and GT filed a cross-motion pursuant to Rule 37(a)(4)(B) for an award of attorney's fees and expenses incurred in opposing the motions.

¶3 The trial court denied Flash's motions and awarded GT its reasonable attorney's fees and expenses incurred in

¹ After the challenged discovery responses, GT withdrew from representing Lesk with his consent due to a fee dispute.

defending the motions.² After additional briefing and argument regarding the court's authority to award fees, the court reiterated the award, reasoning "[i]f a party can be sanctioned for conduct in violation of Rule 37(b), (c), (d) . . . so too should a party be entitled to fees and costs incurred for successfully defending the same alleged conduct deemed by the Court not to have run afoul of Rule 37." After the court entered a signed order awarding fees and expenses to GT, Flash timely filed a notice of appeal.

ANALYSIS

I. Jurisdiction

¶4 Before considering the merits of this appeal, we must consider our jurisdiction to do so. *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304, 812 P.2d 1119, 1122 (App. 1991) (noting court of appeals has a duty to review jurisdiction and dismiss an appeal if jurisdiction is lacking). Our appellate jurisdiction is generally limited to reviewing judgments disposing of all claims and parties unless the trial court directs the entry of final judgment "upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Ariz. R. Civ. P.

² The court denied a similar request for fees and costs by Lesk because the merits of the complaint against him remained to be adjudicated.

54(b); see *Musa v. Adrian*, 130 Ariz. 311, 312-13, 636 P.2d 89, 90-91 (1981). The order challenged in this appeal does not contain Rule 54(b) language. Because Flash's claims remain pending against Lesk and others, we do not have appellate jurisdiction, and we therefore dismiss the appeal.

¶15 Nevertheless, we exercise our discretion to treat this appeal as a petition for special action, and we accept jurisdiction. See *Lloyd v. State Farm Mut. Auto. Ins. Co.*, 189 Ariz. 369, 375, 943 P.2d 729, 735 (App. 1996) (noting court of appeals can treat inappropriately initiated appeal as a petition for special action). Flash lacks a plain, speedy, and adequate remedy by appeal as GT is not a party to the underlying lawsuit and may attempt to immediately seek collection of the awarded fees and expenses. See Ariz. R.P. Spec. Act. 1(a).

II. Fees for self-representation

¶16 Although the majority of the parties' arguments focuses on whether the fee-shifting provisions of Rule 37(a)(4) apply to all motions filed under Rule 37, we need not resolve that dispute. Even assuming Rule 37(a)(4)(B) authorized the court to award fees against Flash as the non-prevailing party on its motions, GT did not incur any attorney's fees and expenses and was therefore not entitled to any reimbursement.³

³ GT argues Flash waived the "self-representation" challenge to the fee award by raising it in a disguised motion for

¶17 In order to be reimbursed attorney's fees, a party must have (1) an attorney-client relationship with counsel, and (2) a genuine financial obligation to pay fees and expenses to such counsel. *Lisa v. Strom*, 183 Ariz. 415, 419, 904 P.2d 1239, 1243 (App. 1995).⁴ GT does not satisfy either factor.

¶18 First, because GT represented itself in the Rule 37 proceedings, it could not serve as both attorney and client and thus did not have an attorney-client relationship. *Hunt Inv. Co. v. Eliot*, 154 Ariz. 357, 362, 742 P.2d 858, 863 (App. 1987) ("It is undisputed in Arizona that one who acts on his own behalf, including an attorney, is not engaged in the practice of law."); *Connor v. Cal-Az Props., Inc.*, 137 Ariz. 53, 56, 668 P.2d 896, 899 (App. 1983) (to same effect). GT does not dispute

reconsideration after the court had granted the cross-motion for fees. We disagree. Flash raised the argument in its objections to the application for fees, GT responded to it, and a hearing was held on this and other objections before the trial court entered the order that is the subject of this special action. Flash sufficiently raised the argument to the trial court. *Cf. Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, 240, ¶ 15, 159 P.3d 547, 550 (App. 2006) (stating generally issues raised for first time in motion for reconsideration not properly raised because opposing party deprived of opportunity to respond).

⁴ In a brief footnote, GT asserts the *Lisa* line of cases is distinguishable because the attorneys in those cases were parties to the litigation. But GT does not explain the relevancy of this factual distinction, and we do not discern any. The policies underlying the holdings in these cases - avoiding windfalls, treating non-attorney and attorney pro se litigants similarly - are applicable whether the attorney-litigant is a party or a non-party. See *infra* ¶ 9.

this principle but instead argues that because the Rule 37 allegations against it were "inextricably intertwined" with those against Lesk, and GT also sought to protect Lesk's interests, it should not be denied fees simply because it had withdrawn from representing Lesk days before Flash filed its motions. We disagree. Regardless of GT's advocacy for Lesk's benefit, the fact remains GT did not represent Lesk during the Rule 37 proceedings, so no attorney-client relationship existed between GT and Lesk. And because Lesk had retained new counsel, who separately responded in opposition to Flash's motions, it was not necessary for GT to participate in the Rule 37 proceedings to protect Lesk's interests, as it implicitly contends.

¶19 Second, GT did not incur any financial obligation to pay the fees or expenses⁵ awarded to it by the trial court. The trial court's award, therefore, constitutes the type of "windfall" our courts seek to avoid: "The general rule against awarding fees to attorney-litigants is based upon a perception that such awards are windfalls to persons who have spent no money and incurred no debt for legal representation." *Lisa*, 183 Ariz. at 419, 904 P.2d at 1243. And as with non-attorney-

⁵ According to GT's application for attorney's fees and expenses, it incurred \$517.20 in copy charges. Neither the application nor accompanying affidavit reflects GT paid an outside vendor to copy documents.

litigants, attorney-litigants are not entitled to compensation for lost opportunities to represent fee-paying clients as a result of the time expended representing themselves. *Id.*

¶10 In sum, even assuming Rule 37(a)(4)(B) authorized the trial court to reimburse GT its attorney's fees and expenses incurred in defending Flash's motion, the court erred in doing so because GT did not actually incur any attorney's fees and expenses due to its self-representation. In light of our decision, we need not address the parties' remaining arguments.

ATTORNEY'S FEES ON SPECIAL ACTION REVIEW

¶11 Both parties request an award of attorney's fees in this special action pursuant to Rule 37. Even assuming Rule 37 authorizes a fee award, we deny both requests. GT is not entitled to an award of fees for the reasons previously explained. *See supra* ¶¶ 6-10. Flash requests fees pursuant to Rule 37(c)(1), which authorizes an imposition of sanctions, including attorney's fees, against a party who fails to timely disclose information pursuant to Rule 26.1. In light of the trial court's denial of Flash's motions, which Flash has not contested, sanctions are not warranted. As the prevailing party in this special action, however, Flash is entitled to its taxable costs upon compliance with Arizona Rule of Civil Appellate Procedure 21(a). *See Ariz. R.P. Spec. Act. 7(i)*

(making civil appellate rules applicable to the extent not inconsistent).

CONCLUSION

¶12 For the foregoing reasons, we dismiss this appeal for lack of jurisdiction. We exercise our discretion to treat the appeal as a petition for special action, accept jurisdiction, and grant relief by vacating the trial court's order entered August 30, 2011.

/s/
Ann A. Scott Timmer, Presiding Judge

CONCURRING:

/s/
John C. Gemmill, Judge

/s/
Margaret H. Downie, Judge