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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: 7/2/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

RAYMUNDO HERNANDEZ, an individual,) 1 CA-CV 12-0473
)
Plaintiff/Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication
) - Rule 28, Arizona
BLANCA GRIEGO GUZMAN and JOHN DOE) Rules of Civil
GUZMAN, wife and husband; VINCENTE) Appellate Procedure)
SOTO ESPINOZA and JANE DOE ESPINOZA,)
husband and wife,)
)
Defendant/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-013583

The Honorable Colleen L. French, Commissioner

REVERSED AND REMANDED

Salvador Perez-Saldaña Attorney at Law Phoenix
By Salvador Perez-Saldaña
Attorney for Plaintiff/Appellant

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By Tico A. Glavas
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Attorneys for Defendant/Appellee Vincente Soto Espinoza

N O R R I S, Judge

¶1 Plaintiff/Appellant Raymundo Hernandez appeals the superior court's dismissal of his case with prejudice for his counsel's failures to appear at a scheduled pretrial conference and file a joint pretrial statement. Because, on this record, the superior court should not have dismissed Hernandez's case as a sanction, we reverse the dismissal order and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL BACKGROUND

¶2 In April 2009, Hernandez sued Defendants/Appellees Blanca Griego Guzman and Vicente Soto Espinoza for negligence arising out of a car accident. After compulsory arbitration, an arbitrator entered an award in favor of Guzman and Espinoza. Hernandez appealed the arbitration award to the superior court and requested a jury trial.

¶3 The superior court set a three-day jury trial to begin on March 12, 2012. By minute entry filed on September 2, 2011, the court required "[c]ounsel who will be the trial lawyer on the case" to attend the final trial management conference on February 28, 2012 ("February 2012 conference"). The court also required counsel to file a final joint pretrial statement by February 21, 2012, pursuant to Rule 16(d) of the Arizona Rules of Civil Procedure. The parties, however, did not file such a statement.

¶14 At the February 2012 conference, Hernandez's counsel of record, Salvador Perez-Saldaña, did not appear. Instead, Alicia Montoya-Sanchez appeared as Hernandez's counsel ("new counsel"). Neither Perez-Saldaña nor new counsel had filed a notice of substitution or association of counsel.

¶15 Three days before the scheduled jury trial, on March 9, 2012, the superior court held a telephonic status conference with counsel regarding the trial ("March 2012 conference"). Perez-Saldaña appeared for Hernandez. Based on the failures of Perez-Saldaña, Hernandez's counsel of record "to comply with this Court's order regarding Rule 16(d)" and "appear and participate at the Final Trial Management Conference," the superior court dismissed Hernandez's case with prejudice and vacated the trial.¹ Subsequently, the court denied Hernandez's Rule 59 motion for new trial and to set aside the dismissal.

DISCUSSION

¶16 On appeal, Hernandez essentially argues the superior court abused its discretion by dismissing his case and sanctioning him for his counsel's conduct because it did not

¹Although the superior court dismissed Hernandez's case pursuant to its "authority under Rule 37(b)(2)(C)" of the Arizona Rules of Civil Procedure, this case, at least in part, involves a violation of Rule 16(f), not discovery violations under Rule 37. Nevertheless, Rule 16(f) authorizes the court to impose sanctions as prescribed by Rule 37(b)(2)(C), including dismissal.

hold an evidentiary hearing to determine whether he or his counsel was at fault, the violations were due to willfulness or bad faith, and lesser sanctions would have been appropriate. As discussed below, we agree.

¶17 Under Rule 16(f), "when a party or attorney fails to obey a scheduling or pretrial order," does not appear at a scheduling or pretrial conference, or "fails to participate in good faith in a scheduling or pretrial conference or in the preparation of the joint pretrial statement," the superior court "shall, except upon a showing of good cause, make such orders . . . as are just." Ariz. R. Civ. P. 16(f). The sanctions under Rule 16(f) mirror discovery sanctions under Rule 37(b); therefore, the standards and case law applicable to discovery sanctions apply to Rule 16(f) sanctions. *Estate of Lewis v. Lewis*, 229 Ariz. 316, 323, ¶ 18, 275 P.3d 615, 622 (App. 2012). Although we review sanctions for an abuse of discretion, when a court imposes severe sanctions, such as dismissal, striking a pleading, or entering a default judgment, "its discretion is more limited than when it employs lesser sanctions." *Id.* (citation and internal quotation marks omitted). Drastic sanctions that run counter to disposing of a case on the merits are generally disfavored and "must be based on a determination of willfulness or bad faith by the party being sanctioned." *Id.*

¶18 Here, the superior court did not find, and the record does not reflect, Hernandez was personally at fault for his counsel's failure to appear at the February 2012 conference and to file a joint pretrial statement. See *id.* at 326, ¶ 29, 275 P.3d at 625 ("under Rule 37(b), the fault of an attorney is not attributed to a client" and a client "should not suffer default as a result of his counsel's guilty conduct") (citation omitted); *Green v. Lisa Frank, Inc.*, 221 Ariz. 138, 154, ¶ 45, 211 P.3d 16, 32 (App. 2009) (courts typically consider "whether the violations were committed by the party or by counsel"); *Nesmith v. Superior Court In & For Cnty. of Maricopa*, 164 Ariz. 70, 71, 790 P.2d 768, 769 (App. 1990) ("Dismissal is warranted only when the plaintiff personally shares complicity in the abusive behavior.").

¶19 Further, the superior court did not find, and the record does not reflect, Hernandez's counsel's nonappearance was willful or made in bad faith, or that Guzman or Espinoza had suffered any prejudice. See *Green*, 221 Ariz. at 154, ¶ 45, 211 P.3d at 32 (other factors for dismissal include "whether the conduct was willful or in bad faith and whether the violations were repeated or continuous," and "prejudice to the other party, both in terms of its ability to litigate its claims and other harms caused by the disobedient party's actions"). Although

Hernandez's counsel of record, Perez-Saldaña, did not appear at the February 2012 conference, new counsel appeared "on behalf of" Perez-Saldaña, addressed trial issues, and stated "we're ready to go [to trial] on March 12th." While Hernandez, through his counsel, should have filed a notice of substitution or association of counsel, neither Guzman nor Espinoza objected to new counsel's appearance nor demonstrated any prejudice from the new representation, and the court's minute entry only required "[c]ounsel who will be the trial lawyer on the case" -- rather than counsel of record -- to appear at the February 2012 conference.

¶10 Additionally, the superior court did not find -- and the record before it when it dismissed Hernandez's case does not reflect, one way or the other -- whether Hernandez's counsel willfully failed to participate in the preparation of the joint pretrial statement, and whether the Rule 16(d) violation prejudiced Guzman and Espinoza.

¶11 Although on appeal, Guzman and Espinoza argue the March 2012 conference "lasted twelve minutes and allowed [Hernandez] time to explain" the violations to the court, the superior court, in dismissing Hernandez's case, did not find, and the record before us does not reflect, Hernandez was personally at fault, his counsel had committed the violations

willfully or in bad faith, or the opposing parties were prejudiced by the violations.

¶12 Finally, and of critical importance here, before the superior court was entitled to impose the ultimate sanction of dismissal, at a minimum, Hernandez was entitled to an evidentiary hearing to determine whether he or his counsel was at fault and whether the violations were willful or in bad faith. *Seidman v. Seidman*, 222 Ariz. 408, 411-12, ¶¶ 19-20, 215 P.3d 382, 385-86 (App. 2009) (before entering default judgment, due process requires court to hold evidentiary hearing and make express findings as to (1) whether fault lies with client or counsel; (2) whether violation was committed willfully or in bad faith; and (3) whether egregiousness warrants dismissal or lesser sanction); *Robinson v. Higuera*, 157 Ariz. 622, 625, 760 P.2d 622, 625 (App. 1988) ("When questions arise as to a party's bad faith or willful misconduct in violating a[n] . . . order, fundamental fairness requires that the court hold an evidentiary hearing prior to entry of default judgment or dismissal"); *cf. Hammoudeh v. Jada*, 222 Ariz. 570, 572-73, ¶¶ 7, 12, 218 P.3d 1027, 1029-30 (App. 2009) (evidentiary hearing unnecessary when it was apparent from the record client, not counsel, was responsible for violation). The March 2012 conference, however, did not meet these requirements. Therefore, on this record, the

superior court should not have dismissed Hernandez's case with prejudice.

CONCLUSION

¶13 For the foregoing reasons, we reverse the superior court's order dismissing Hernandez's case and remand for further proceedings, see the authorities cited in ¶ 12 *supra*, consistent with this decision. As the successful party on appeal, we award Hernandez his costs on appeal contingent upon his compliance with Rule 21 of the Arizona Rules of Civil Appellate Procedures. A.R.S. § 12-341 (2003).

/S/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/S/
MICHAEL J. BROWN, Judge

/S/
JOHN C. GEMMILL, Judge