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UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

DR. BRIEN HARVEY and JENANN ISMAEL, husband and wife; DR.
BRYAN SHANAHAN, an individual; and DR. BRIAN WILSON and
JACQUELYN WILSON, husband and wife, *Petitioners*,

v.

THE HONORABLE MARK H. BRAIN, Judge of the SUPERIOR COURT
OF THE STATE OF ARIZONA, in and for the County of MARICOPA,
Respondent Judge,

DR. ROBERT G. GRIEGO, an individual; DR. MICHAEL J. RADCLIFFE,
an individual; DR. PHILIP MOOBERRY, an individual; DR. RICHARD
SNOW, an individual; DR. ROY DANIELS, an individual; TENA
DISCHLER, an individual; and TIMOTHY J. STEPHENSON, an
individual, *Real Parties in Interest*,

THE ARIZONA DENTAL ASSOCIATION, an Arizona nonprofit
corporation, *Intervenor*.

No. 1 CA-SA 13-0264

FILED 12-12-2013

Petition for Special Action from the Superior Court in Maricopa County
No. CV 2010-032594
The Honorable Mark H. Brain, Judge

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

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By Richard R. Thomas, Stephen C. Biggs

Counsel for Petitioners

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By Michael C. Manning, Larry J. Wulkan

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By Kraig J. Marton, David N. Farren

Counsel for Intervenor

MEMORANDUM DECISION

Presiding Judge Maurice Portley delivered the decision of the Court, in which Judge John C. Gemmill and Judge Kent E. Cattani joined.

P O R T L E Y, Judge:

¶1 This special action asks whether the superior court erred by staying trial court proceedings as to Petitioners, the remaining defendants to the underlying action, pending the resolution of the appeal between Plaintiffs and Defendant Arizona Dental Association (“AzDA”). For the reasons that follow, we exercise special action jurisdiction and grant relief to the extent Petitioners are seeking a ruling on their request for permission to file dispositive motions.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Real Parties in Interest/Plaintiffs Dr. Robert Griego, Dr. Michael Radcliffe, Dr. Philip Mooberry, Dr. Richard Snow, Dr. Roy Daniels, Tena Dischler, and Timothy Stephenson sued AzDA and Drs. Brien Harvey, Bryan Shanahan, and Brian Wilson (the “Individual Defendants” or “Petitioners”) for defamation, false light, injurious falsehood, intentional interference with business relationships, breach of fiduciary duty and civil conspiracy for their alleged role in the 2010 Delta

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Dental of Arizona board of directors election that resulted in Plaintiffs being ousted from the board.¹ The superior court subsequently granted the motion for summary judgment filed by AzDA. The court signed and filed a judgment for AzDA and certified that it was a final judgment pursuant to Arizona Rule of Civil Procedure 54(b). Plaintiffs appealed the judgment.²

¶3 Plaintiffs filed a motion to stay the superior court proceedings as to Petitioners pending resolution of the appeal, but withdrew it to allow the parties to take some depositions. Plaintiffs also filed a motion for Rule 60(c) relief from judgment. We suspended Plaintiffs' appeal to allow the superior court to consider Plaintiffs' motion, which was denied. Plaintiffs then challenged the denial by filing a notice of appeal. Subsequently, Plaintiffs filed another request for stay of the superior court proceedings. Over the objection of Petitioners, the court granted the stay.

DISCUSSION

A. Jurisdiction

¶4 We have discretion to exercise special action jurisdiction when there is not an "equally plain, speedy, and adequate remedy by appeal." Ariz. R.P. Spec. Act. 1(a); *Potter v. Vanderpool*, 225 Ariz. 495, 498, ¶ 7, 240 P.3d 1257, 1260 (App. 2010) (finding jurisdiction proper to challenge interlocutory orders). Special action jurisdiction is appropriate when a court stays trial court proceedings pending resolution of an appeal because there is no other method to seek review of the order. *Southwest Gas Corp. v. Irwin ex rel. Cnty. of Cochise*, 229 Ariz. 198, 201, ¶ 6, 273 P.3d 650, 653 (App. 2012).

¶5 Petitioners seek relief from the stay order, which stayed all trial court proceedings until the completion of the appeal between Plaintiffs and AzDA. Petitioners contend in particular that (1) the court erred by granting Rule 54(b) certification and (2) alternatively, they should be permitted to file dispositive motions without waiting for the conclusion

¹ The breach of fiduciary duty and civil conspiracy claims were later dismissed by the superior court.

² After Plaintiffs filed their appeal, the superior court subsequently entertained and denied their motion for new trial. The appeal is currently styled as Griego et al. v. AzDA, et al., 1 CA CV 12-0879.

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of the appeal. Because Petitioners do not have an equally plain, speedy or adequate remedy on appeal, we accept jurisdiction over their petition. *See id.* (stating that this court is “inclined to accept special action jurisdiction when a party cannot obtain justice by other means”).

B. Analysis

¶6 In a special action, we may review whether the trial court failed to exercise its discretion, proceeded without legal authority, or abused its discretion. Ariz. R.P. Spec. Act. 3. We review the stay order pending appeal for abuse of discretion. *See State v. Ott*, 167 Ariz. 420, 428, 808 P.2d 305, 313 (App. 1990) (“Whether to grant a stay is within the trial court’s discretion.”). A trial court abuses its discretion if it “commits an ‘error of law . . . in the process of reaching [a] discretionary conclusion.’” *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 254, ¶ 10, 63 P.3d 282, 285 (2003) (quoting *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 456, 652 P.2d 507, 529 (1982)).

1. Rule 54(b) Certification

¶7 Petitioners first argue that the superior court abused its discretion by granting Rule 54(b) certification to the judgment for AzDA. We will not address the issue because the appeal is pending, and Petitioners have filed an answering brief that challenges the finality of the summary judgment. Whether Rule 54(b) certification was appropriate and effective to support appellate jurisdiction is an issue that should be addressed in the pending appeal, Griego et al. v. AzDA, et al., 1 CA CV 12-0879.

2. Discretion to Issue the Stay Order

¶8 Petitioners next contend that the court abused its discretion by granting a stay of all superior court proceedings pending resolution of Plaintiffs’ appeal. Petitioners argue that the court erred by not applying the four-part, sliding-scale test outlined in *Smith v. Arizona Citizens Clean Elections Comm’n*, 212 Ariz. 407, 410, ¶ 10, 132 P.3d 1187, 1190 (2006), and instead applying *Southwest Gas Corp.*, 229 Ariz. at 203, ¶ 15, 273 P.3d at 655. In *Smith*, our supreme court examined and provided an “analytical framework for evaluating requests for stays in the appellate context” by stating that a party seeking a stay on appeal must prove: “1) a strong likelihood of success on the merits; 2) irreparable harm if the stay is not granted; 3) that the harm to the requesting party outweighs the harm to the party opposing the stay; and 4) that public policy favors the granting

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of the stay.” *Id.* at 410, ¶¶ 9-10, 132 P.3d at 1190 (citing *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990)).

¶9 Although Petitioners seek to have *Smith* apply, it has yet to be applied to stay requests at the superior court where some, but not all, parties to the litigation have appealed a ruling of the superior court. In fact, the superior court did not rely on *Smith*, but on *Southwest Gas Corp.* even though that decision did not analyze whether the court had discretion to grant a stay of proceedings pending an appeal. *Southwest Gas Corp.*, 229 Ariz. at 203, ¶ 15, 273 P.3d at 655 (noting that the court granted the stay after thinking it lost jurisdiction and not because the court thought it was exercising discretion over the docket).

¶10 Although *Southwest Gas Corp.* does not support the ruling, the trial court has broad discretion in managing its docket, especially when deciding whether to grant or deny a stay of a judgment when one party appeals a dispositive ruling. *See, e.g., F.C.Y. Constr. & Equip. Co. v. Superior Court*, 24 Ariz. App. 596, 597, 540 P.2d 722, 723 (1975) (stating that a trial court has discretion to stay a judgment when there is a proper showing of necessity); *see also Filtrol Corp. v. Kelleher*, 467 F.2d 242, 244 (9th Cir. 1972) (recognizing that a district court has discretion to stay proceedings pending the outcome of a separate action to “promote economy of time and effort for itself, for counsel, and for litigants” (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936))). A stay, as a result, is an “exercise of judgment, which must weigh competing interests and maintain an even balance.” *Landis*, 299 U.S. at 254-55; *see also Ass’n of Irrigated Residents v. Fred Schakel Dairy*, 634 F.Supp.2d 1081, 1094 (E.D. Cal. 2008) (noting that resolving the appeal could alter the remaining proceedings and not granting the stay would waste judicial and party resources).

¶11 Here, Plaintiffs argued to the superior court that “[s]ignificant depositions must be taken by the remaining parties” before the end of the discovery period and suggested that a stay would be an appropriate way to save time pending the resolution of the appeal. In response, Petitioners noted that nearly all of Plaintiffs and one of the Individual Defendants had been deposed without the participation of AzDA and that only two of the Individual Defendants had not yet been deposed; and that Plaintiffs had waived the right to a stay during their appeal of the AzDA judgment. Petitioners also argued that they should be able to test the First Amendment implications of the lawsuit by filing dispositive motions.

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¶12 After argument, the superior court stated it had discretion to manage its docket and that “the results of the currently pending appeal may have a dramatic effect on further proceedings.” Specifically, the court noted the two possible consequences of Plaintiffs’ appeal: (1) if unsuccessful, Plaintiffs’ remaining issues would be weakened because it would be clear that the statements were not defamatory; or (2) if the appeal was successful and the matter was remanded, the court would prefer to have one trial.

¶13 The court did not, however, specifically address Petitioners’ contention that they should be allowed to file their dispositive motions to test the First Amendment implications of the lawsuit. In their response to Plaintiffs’ stay motion, Petitioners quoted from the court’s July 6, 2011 minute entry that recognized that “the [c]ourt will be receptive to a discovery schedule which allows [Petitioners] to test the allegations under the appropriate First Amendment standards long before full discovery is completed” and then argued “that the *only* effect a stay would have would be to further prejudice the Individual Defendants’ ability to seek a speedy resolution of Plaintiffs’ . . . claims against them.”

¶14 Although the superior court has inherent discretion to stay proceedings pending an appeal, the court did not address whether Petitioners should have been allowed to file their dispositive First Amendment-related motions prior to the resolution of the appeal between Plaintiffs and AzDA. Given that the parties have taken a number of depositions without AzDA’s participation and Petitioners seek the opportunity to file their dispositive motions, the superior court should address whether to allow Petitioners to file their dispositive motions and, if necessary, to allow Plaintiffs to take depositions necessary to respond to those motions.

CONCLUSION

¶15 Based on the foregoing, we accept special action jurisdiction and grant relief to allow the superior court to address whether to allow Petitioners to file their dispositive motions before the resolution of the pending appeal between Plaintiffs and AzDA.



Ruth A. Willingham - Clerk of the Court
FILED: rmt