DIVISION ONE
FILED: 05/24/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IRIS NAVARRETE and ALMA OLIVA,	)	1 CA-CV 11-0224
	)	
Plaintiffs/Appellants,	)	Department D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
WELLS FARGO BANK, NA,	)	Rule 28, Arizona Rules
	)	of Civil Appellate
Defendant/Appellee.	)	Procedure
	)	

Appeal from the Superior Court of Maricopa County

Cause No. CV2009--019605

The Honorable Eileen S. Willett, Judge

AFFIRMED

Law Office of Gary L. Lassen, PLC — Tempe
by Gary L. Lassen
Attorneys for Plaintiffs/Appellants

Fisher & Phillips LLP — Phoenix
by Pavneet Singh Uppal
and Shayna H. Blach
Attorneys for Defendant/Appellee

T H O M P S O N, Judge

¶1 Appellants assert that the trial court erred in dismissing their complaint against their former employer Wells Fargo Bank (Wells Fargo) claiming employment discrimination on the basis of national origin. Appellants further assert that the award of

attorneys' fees to Wells Fargo was improper. Finding no error, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Appellants filed an employment discrimination complaint alleging one count of a violation of the Arizona Civil Rights Act and one count of wrongful termination in violation of Arizona's Employment Protection Act in June 2009. Appellants filed for a default judgment, then withdrew the application for default judgment by stipulation. Wells Fargo filed a successful partial motion to dismiss.[1] Wells Fargo then filed an answer on the remaining count and requested fees. The remaining claim was dismissed without prejudice from the inactive calendar for lack of prosecution in a signed document entitled "judgment" in May 2010. In late June 2010, Wells Fargo requested $44,608 in fees as the prevailing defendant in a civil rights action pursuant to Arizona Revised Statutes (A.R.S.) § 41-1481(j)(2004)[2]; Wells Fargo also sought $1,892.76 in costs. Wells Fargo sought those fees against appellants and their counsel.

¶3 Appellants did not respond and in late July the trial

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[1] The motion targeted the violation of the Arizona Employment Protection Act count as well as a claim against a named-supervisor. Appellants did not respond to the motion to dismiss but, after it was granted by the trial court, stipulated to the dismissal.

[2] The fees were generated primarily from drafting the motion to dismiss, undertaking disclosure obligations and initiating discovery requests. The motion for fees asserted that the appellants' claims were baseless and unjustified.

court granted all of the requested fees and some of the costs. Wells Fargo lodged a proposed form of judgment August 16, 2010. Appellants objected, asserting, in part: mistake and inadvertence in failing to respond to the attorneys' fees request; that no award could be made under A.R.S. § 41-1481(J) as there had been no ruling that appellants' action was frivolous; and arguing fees were not available to Wells Fargo under either Arizona Rule of Civil Procedure 54(g) or 37(c). Wells Fargo responded, asking the court to strike appellants' fees arguments as untimely and submitting evidence[3] that disputed appellants' claim of "inadvertence or mistake." After considering the objections and response, the trial court signed the second "judgment" and it was filed on September 21, 2010. Appellants filed a motion for new trial on October 5, 2010. Wells Fargo objected. The motion for new trial was denied by an unsigned minute entry filed on November 12, 2010. A third "judgment" addressing the prior dismissal, fees and the recently denied motion for new trial was entered on January 28, 2011. Appellants filed a notice of appeal on February 25, 2011.

DISCUSSION

¶4 We have an independent duty to determine whether we have jurisdiction. *Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 465, 957 P.2d 1007, 1008 (App. 1997). Our jurisdiction is

[3] An exhibit to the response was a Wells Fargo letter to appellants' counsel regarding ongoing settlement negotiations and indicating that when Wells Fargo filled its forthcoming request for attorneys' fees on June 21, 2010, the offer would then be off the

statutorily prescribed, and we have no authority to consider appeals over which we do not have jurisdiction. *See Hall Family Properties, Ltd. v. Gosnell Dev. Corp.*, 185 Ariz. 382, 386, 916 P.2d 1098, 1102 (App. 1995). Wells Fargo contends that the appeal, and the time-extending motion for new trial, were both untimely. We disagree.

¶5 Section 12-2101(B)[4] vests jurisdiction in this court for an appeal "[f]rom a final judgment" in superior court. Wells Fargo first asserts that the appeal should have been taken from the first document entitled "judgment" issued on or about June 1, 2010. The June 1, 2010, judgment despite being signed was not a final judgment from which appellants could have appealed. An order is final and appealable under A.R.S. § 12-2101(B) if it "'decides and disposes of the cause on its merits, leaving no question open for judicial determination.'" *Properties Inv. Enters., Ltd. v. Found. for Airborne Relief, Inc.*, 115 Ariz. 52, 54, 563 P.2d 307, 309 (App. 1977) (quoting *Decker v. City of Tucson*, 4 Ariz. App. 270, 272, 419 P.2d 400, 402 (1966)). Because the attorneys' fees issues were outstanding, an appeal could only have been taken if the June judgment included 54(b) language and it did not. *See* Ariz. R. Civ. P. 58(a). Thus, the time for appeal began to run from the entry of the second "judgment" which disposed of all issues as to all

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table.

[4] This was the relevant statute as of the dates of the judgments in this case and the one we will cite to. The statute section has since been renumbered as A.R.S § 12-2101(A)(1) (2011).

parties. Clearly, appellants could have appealed within thirty days after entry of the September judgment which disposed of all issues and resulting fees.

¶6 However, rather than appeal directly from the second judgment, appellants filed a motion for new trial. Wells Fargo asserts that the motion was untimely. We disagree. A motion for new trial may be filed within fifteen days of the entry of the judgment. Ariz. R. Civ. P. 59(d). The judgment was entered by the trial court on September 21, 2010 and the motion was filed on the fifteenth day. Thus, appellants timely filed their motion for new trial.

¶7 Wells Fargo next asserts, citing Arizona Rule of Civil Appellate Procedure (ARCAP) 9(b)(4), that appellants' appeal was untimely as it failed to come within thirty days of the minute entry denying the motion for new trial rather than thirty days from the entry of the signed third "judgment" in January, 2011. Admittedly, this is an area of some confusion. Wells Fargo computes the expiration of the time for appeal from the "entry of the order which disposes of the last remaining motion," asserting that the order is embodied in the minute entry denying the motion for new trial. *See* ARCAP 9(b). If appellants had filed an appeal during the thirty days after the minute entry denying the motion for a new trial, the appeal would have been premature.

¶8 Indeed, our supreme court in *Craig v. Craig*, recently

addressed the premature appeal situation. 227 Ariz. 105, 107, ¶ 13, 253 P.3d 624, 626 (2011) (no appellate jurisdiction where any party's time-extending motion was pending). In *Craig*, the Arizona Supreme Court, discussing the exception to the final judgment rule, affirmed *Barassi v. Matison*, 130 Ariz. 418, 636 P.2d 1200 (1981). In *Barassi,* an appeal was taken following the original judgment and the subsequent denial of a new trial by minute entry but prior to a new formal judgment being issued. 130 Ariz. at 419, 636 P.2d at 1201. The supreme court called such an appeal "premature" because the order had not been signed and entered, but allowed jurisdiction as a limited exception where there was no prejudice and where the subsequent final judgment was entered. *Id.* at 421-22, 636 P.2d 1203-04. The application of *Craig* and *Barrassi* to this case is that an appeal after the denial of the motion for new trial by minute entry, but before the January 2011 judgment, would have been premature. Thus, under A.R.S. § 12-2101(B) the notice of appeal filed within thirty days of the third judgment was timely.

¶9 Appellants raise the following issues on appeal:

(1) Whether the dismissal without prejudice for failure to prosecute was in error; and

(2) Whether the trial court's award of fees against appellants and their counsel was in error due to a lack of findings, a lack of a hearing or an abuse of discretion.

¶10 Arizona Rule of Civil Procedure 38.1(d) requires that "every case in which a Motion to Set and Certificate of Readiness has not been served within nine months after the commencement thereof" shall be placed on the "Inactive Calendar." Under that rule, cases remaining on the Inactive Calendar for two months without either the filing of a Motion to Set or a court order allowing continuance on that Calendar "shall be dismissed without prejudice for lack of prosecution." *Id.* Appellants were on notice that unless they filed a Motion to Set and Certificate of Readiness by March 9, 2010, the case would put on the inactive calendar and be dismissed on or after May 10, 2010 without further notice. Appellants did not file the Motion to Set and Certificate of Readiness. The case was dismissed in late May.

¶11 We review the trial court's order dismissing an action for failure to prosecute under Rule 38.1 for an abuse of discretion. *Cooper v. Odom*, 6 Ariz. App. 466, 469, 433 P.2d 646, 649 (1967); *see also Jepson v. New*, 164 Ariz. 265, 274-75, 792 P.2d 728, 737-38 (1990). "An 'abuse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Quigley v. City Court*, 132 Ariz. 35, 37, 643 P.2d 738, 740 (App. 1982) (citation omitted).

¶12 On appeal, appellants make a bare bones assertion that the dismissal was inappropriate but fail to give substantive reasons why that is so. Appellants fail to cite to case law

supporting error in the dismissal of their case for failure to prosecute. Appellants assert that this dismissal was "based upon the[ir] lack of a filing of a timely disclosure statement and discovery responses . . ."; they do not dispute that they failed to participate in discovery or disclosure or assert that they filed the Certificate of Readiness and Motion to Set. We find no abuse of discretion in the trial court's dismissal for failure to prosecute.

¶13 Appellants primary focus on appeal, as with the motion for new trial below, is on the award of attorneys' fees against appellants and counsel, joint and severally. To this end, appellants argue that the award cannot be sustained because:

(1) the dismissal was without prejudice and thus not on the merits;

(2) there was never a finding of a frivolous action which they assert is required to support an award of fees under A.R.S. § 41-1481(J)[5] in a civil rights action;

(3) to award fees against appellants' counsel required a hearing to determine sanctions against counsel, and

(4) counsel was generally deprived of notice and due process.

¶14 In response, Wells Fargo asserts that appellants failed to respond to the motions for attorneys' fees and costs and cannot raise those issues for the first time in a motion for new trial.

[5] Section 41-1481(J) reads: In any action or proceeding under this section the court may allow the prevailing party, other than the division, a reasonable attorney's fee as part of the costs.

Wells Fargo points to its motion which specifically requests fees to be awarded against appellant and their counsel as both the prevailing party and because the lawsuit was frivolous. In support of its claim of a frivolous suit, Wells Fargo points to the prior claim dismissed with prejudice on Arizona Rule of Civil Procedure 12(b)(6) grounds and appellants "utter failure to prosecute their [remaining] case." Wells Fargo asserts that it would have been successful on the merits as well, asserting one plaintiff had voluntarily resigned due to the commute and the other was terminated after an internal investigation discovered improper "gaming."

¶15 The grant or denial of attorneys' fees is within the discretion of the trial court, and this court will not overrule such a decision if it is reasonably supported by the record. *West v. Salt River Agriv. Imp. and Power Dist.*, 179 Ariz. 619, 626, 880 P.2d 1165, 1172 (App. 1994) (citation omitted). When a party fails to timely respond, the trial court has discretion to grant the motion summarily. Ariz. R. Civ. P. 7.1(b); *Choisser v. State ex rel. Herman*, 12 Ariz. App. 259, 260, 469 P.2d 493, 494 (1970). Because appellants failed to file a timely response to the fees motion, the trial court could consider it a consent to the request. *See* Ariz. R. Civ. P. 7.1(b). We also note the general rule that issues raised for the first time in a motion for new trial are waived. *Watson Constr. Co. v. Amfac Mortgage. Corp.*, 124 Ariz.

570, 582, 606 P.2d 421, 433 (App. 1979) (citing *Beliak v. Plants*, 93 Ariz. 266, 379 P.2d 976 (1963)).

¶16 On appeal, appellants focus on the following:

> A prevailing defendant in a civil rights action may be awarded fees pursuant to A.R.S. section 41-1481(J) only upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even if it was not brought in subjective bad faith.

West, 179 Ariz. at 626, 880 P.2d at 1172. We agree that even where a defendant does prevail on the merits of a civil rights claim, that alone does not create an entitlement to an award of fees. *See Sees v. KTUC, Inc.*, 148 Ariz. 366, 369, 714 P.2d 859, 862 (App. 1985).[6] The question becomes, however, whether such a finding is required in the absence of timely opposition to the fee request and with no request for findings. Our supreme court, in *Trantor v. Fredrikson*, examined a similar issue when determining whether the failure to make required findings was reversible error when the

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6 Appellants argue that a dismissal without prejudice does not constitute a decision on the merits for purposes of an attorneys' fees award. When an action has been dismissed without prejudice, the defendant is still considered a "successful party" for purposes of some attorneys' fees matters, even though the dismissal does not operate as an adjudication upon the actual merits. *See Mark Lighting Fixture Co. v. Gen. Elec. Supply Co.*, 155 Ariz. 65, 70–71, 745 P.2d 123, 128–29 (App. 1987) (holding that the defendant in an action dismissed without prejudice for failure to prosecute is the "successful party" in that particular proceeding for purposes of awarding costs and attorneys' fees under A.R.S. § 12-341.01), vacated on other grounds, 155 Ariz. 27, 745 P.2d 85 (1987), superseded by statute; *see also Harris v. Reserve Life Ins. Co.*, 158 Ariz. 380, 385, 762 P.2d 1334, 1339 (App. 1988) (affirming award of costs when complaint was dismissed for failure to prosecute: "The fact that the action is dismissed without prejudice and that plaintiff can refile is not relevant.").

opposing party failed to object. *See* 179 Ariz. 299, 878 P.2d 657 (1994) (addressing an award of attorneys' fees in a contract action under A.R.S. § 12-349 which required findings under A.R.S § 12-350). The *Trantor* court found that findings must be requested or they are waived. It said:

> Because a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on appeal, absent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal. *Van Dever v. Sears, Roebuck & Co.*, 129 Ariz. 150, 151-52, 629 P.2d 566, 567-68 (1981); *United States v. Globe*, 113 Ariz. 44, 51, 546 P.2d 11, 18 (1976). Even if the doctrine of fundamental error applied to civil cases, *see Johnson v. Elliott*, 112 Ariz. 57, 61, 537 P.2d 927, 931 (1975), it would only apply when the error goes to the foundation of the case or deprives a party of a fair trial. Although findings of fact and conclusions of law are certainly helpful on appellate review, they do not go to the foundation of the case or deprive a party of a fair hearing. If the court has failed to make findings and a party wants them, all one has to do is to make that issue known in the trial court. . . . But by failing to act at all, a litigant is not in the position to complain about how helpful findings would have been on appeal.

Id. at 300-01, 878 P.2d at 658-59. No findings were timely requested and, appellants may not now complain of it.

¶17 We next address appellants' final claim that sanctions issued against their attorneys required due process including notice of possible sanctions and a hearing. While we generally agree "the imposition of sanctions should be preceded by some form of notice and opportunity to be heard on the propriety of imposing the sanctions," a hearing is not always required. *See Precision*

Components, Inc. v. Harrison, Harper, Christian & Dichter, P.C., 179 Ariz. 552, 555, 880 P.2d 1098, 1101 (App. 1993). The appellant in *Precision Components* complained on appeal after being told to write-off their fees for a particular motion and were told:

> Appellant argues due process violations, stating that it did not receive notice or an opportunity to be heard on the court's desire to impose sanctions. However, as previously noted, appellant, experienced attorneys, failed to raise this issue below and never requested a hearing during the proceedings in chambers or after the minute entry was filed, by way of motion or otherwise. In addition, appellant never gave the trial court the opportunity to reconsider the imposition of sanctions in light of its belief that they were unconstitutionally imposed.

179 Ariz. 552, 555-56, 880 P.2d 1098, 1101-02. In the instant matter, appellants were on notice from the motion for fees that over $44,000 in fees was being sought joint and severally against them and their counsel. They failed to respond. They have waived this issue.

¶18 Appellants request fees on appeal pursuant to "A.R.S. § 12-341.03." Appellants' request for fees is denied.

CONCLUSION

¶19 For the above stated reasons, the judgment of the trial court is affirmed in all respects.

/S/

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JON W. THOMPSON, Judge

CONCURRING:

/S/

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PETER B. SWANN, Presiding Judge

/S/

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MICHAEL J. BROWN, Judge