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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Richard Leland Neal,
10 Plaintiff,

11 v.

12 B Marc Neal, et al.,
13 Defendants.
14

No. CV-16-08291-PCT-DLR

ORDER

15
16 Before the Court is the Motion Regarding Judgment Creditor's Underlying
17 Judgment as Being Void as a Matter of Law filed on behalf of Defendants B. Marc Neal
18 ("Marc"), Michael Kenneth Neal ("Michael"), and Richard Wayne Neal ("Richard").
19 (Doc. 78.) The motion is fully briefed and no party requested oral argument. For the
20 following reasons, the motion is denied.

21 **I. Background**

22 In this action, Plaintiff Richard Leland Neal ("Neal") accuses Defendants of
23 mismanaging the assets of the Claude K. Neal Family Trust B ("Trust") and violating the
24 Racketeer Influenced and Corrupt Organizations ("RICO") Act in the process. (Doc. 27.)
25 Defendants have moved to dismiss the amended complaint, arguing in part that Neal
26 lacks standing to raise these claims because he is not a beneficiary of the Trust. (Doc.
27 38.) The Court currently has Defendants' motion to dismiss under review and will be
28 issuing a decision in due course.

1 Shortly after Defendants moved to dismiss Neal's amended complaint, non-party
2 Patricia Lewis moved to intervene as a plaintiff pursuant to Federal Rule of Civil
3 Procedure 24. (Doc. 48.) In her motion, Lewis represented that she is a judgment
4 creditor of Neal's in an action before the Mohave County Superior Court, holding
5 judgments in excess of \$4.6 million ("Superior Court Action"). In the Superior Court
6 Action, Lewis served a writ of garnishment upon Marc in his capacity as trustee of the
7 Trust. Lewis sought to intervene in this action "to protect her ability to collect her
8 judgments, and guard against the possibility of collusion between the parties now in this
9 suit to defeat her rights." (*Id.* at 2.) Defendants opposed Lewis' request. (Docs. 56, 73.)

10 After full briefing on Lewis' motion to intervene, Defendants filed the instant
11 motion, in which they contend that the underlying state court judgment upon which
12 Lewis' asserted right to intervene is based is unenforceable because it was not timely
13 renewed. Specifically, Defendants contend that Lewis filed her judgment renewal
14 affidavit one day late back in 2009. (Doc. 78.) In addition to renewing their request that
15 the Court deny Lewis' motion to intervene, Defendants ask the Court to declare the
16 underlying state court judgment void and to award Defendants their reasonable attorneys'
17 fees incurred in opposing Lewis' intervention.

18 **II. Discussion**

19 In response to Defendants' motion, Lewis withdrew her motion to intervene.
20 (Doc. 79.) Defendants' opposition to Lewis' intervention therefore is moot. The sole
21 remaining issue is whether Defendants are entitled to recover their reasonable attorneys'
22 fees incurred in opposing Lewis' intervention.

23 As an initial matter, the Court finds that Defendants are not entitled to their
24 attorneys' fees because they failed to articulate a basis for those fees in their motion.
25 Instead, Defendants merely request fees without explaining why they are entitled to them.
26 (Doc. 78 at 6.) Defendants cited for the first time in their reply memorandum five
27 sources potentially entitlement them to an award of fees: (1) Federal Rule of Civil
28 Procedure 41(a)(2), (2) A.R.S. § 12-349, (3) Rule 11, (4) A.R.S. § 14-11004, and (5)

1 Arizona Rules of Professional Conduct ("Ethical Rules") 3.3, 4.4 and 8.4. (Doc. 81.) But
2 "the district court need not consider arguments raised for the first time in a reply brief."
3 *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007). Indeed, Defendants' failure to raise
4 these arguments in their initial motion deprived Lewis of a meaningful opportunity to be
5 heard on them. Nevertheless, the Court finds on the merits that Defendants are not
6 entitled to fees under any of the provisions cited in their reply memorandum.

7 **A. Rule 41(a)(2)**

8 Rule 41 governs voluntary dismissals in federal court. As a general rule, "an
9 action may be dismissed at the plaintiff's request only by court order, on terms that the
10 court considers proper." Fed. R. Civ. P. 41(a)(2). A court order is not needed, however,
11 if a plaintiff files "a notice of a dismissal before the opposing party serves either an
12 answer or a motion for summary judgment," or "a stipulation of dismissal signed by all
13 parties who have appeared." Fed. R. Civ. P. 41(a)(1)(A). Relying on Rule 41(a)(2),
14 Defendants contend that Lewis cannot withdraw her motion to intervene without a court
15 order, and that the Court may require her to pay Defendants' reasonable attorneys' fees as
16 a condition of the voluntary dismissal.

17 Defendants' reliance on Rule 41(a)(2) is misguided. The rule applies only to the
18 voluntary dismissal of actions, and Lewis has not dismissed an action. Nor could she—
19 Lewis never was a party to this action because the Court did not rule on her motion to
20 intervene before she withdrew the request. Defendants' reliance on Rule 41(a)(2) would
21 be appropriate had the Court granted Lewis' request to intervene, Lewis filed her
22 complaint-in-intervention, Defendants either answered or moved for summary judgment
23 on the complaint-in-intervention, and Lewis thereafter sought to voluntarily dismiss her
24 intervener complaint. These hypothetical circumstances, however, are a far cry from
25 what has occurred here.

26 Lewis never was a party to this action. She merely filed, then withdrew, a motion
27 to intervene. Defendants cite no authority applying Rule 41(a)(2) to these circumstances,
28 nor has the Court found any. To the contrary, parties typically are able to withdraw their

1 own motions at their own discretion. If a motion is withdrawn in bad faith or prejudices
2 the non-movant, other provisions or doctrines might entitle the non-movant to a fee
3 award, but Defendants fail to show that Rule 41(a)(2) is a source of any such entitlement.

4 **B. A.R.S. § 12-349**

5 Pursuant to A.R.S. § 12-349(A), the Court must assess reasonable attorneys' fees
6 against an attorney or party who:

- 7 1. Brings or defends a claim without substantial justification.
- 8 2. Brings or defends a claim solely or primarily for delay or
9 harassment.
- 10 3. Unreasonably expands or delays the proceeding.
- 11 4. Engages in abuse of discovery.

12 Defendants do not argue that Lewis engaged in abusive discovery or that she moved to
13 intervene solely or primarily for delay or harassment. Instead, they argue that Lewis
14 moved to intervene without substantial justification because she knew or should have
15 known that the underlying state court judgment was unenforceable. (Doc. 81 at 5.)
16 Relatedly (and somewhat circularly), Defendants contend that Lewis unreasonably
17 expanded and delayed this case by moving to intervene without substantial justification.
18 (*Id.*)

19 For purposes of § 12-349(A), however, "'without substantial justification' means
20 that the claim or defense is groundless *and not made in good faith.*" A.R.S. § 12-349(F)
21 (emphasis added). The party requesting fees must prove these elements by a
22 preponderance of the evidence. *See White Mountain Health Ctr., Inc. v. Maricopa Cty.*,
23 386 P.3d 416, 438 (Ariz. Ct. App. 2016). Here, although Defendants argue that Lewis'
24 motion to intervene was groundless because her asserted right to intervention was based
25 on an unenforceable judgment, they provide no evidence that Lewis sought to intervene
26 in bad faith. Accordingly, Defendants have not carried their burden to recover fees under
27 § 12-349(A).

28 **C. Rule 11**

1 Rule 11(b)(2) states, in relevant part, that:

2 By presenting to the court a pleading, written motion, or other
3 paper—whether by signing, filing, submitting, or later
4 advocating it—an attorney or unrepresented party certifies
5 that to the best of the person's knowledge, information, and
6 belief, formed after an inquiry reasonable under the
7 circumstances:

8 (1) it is not being presented for any improper purpose, such
9 as to harass, cause unnecessary delay, or needlessly increase
10 the cost of litigation;

11 (2) the claims, defenses, and other legal contentions are
12 warranted by existing law or by a nonfrivolous argument for
13 extending, modifying, or reversing existing law or for
14 establishing new law;

15 (3) the factual contentions have evidentiary support or, if
16 specifically so identified, will likely have evidentiary support
17 after a reasonable opportunity for further investigation or
18 discovery; and

19 (4) the denials of factual contentions are warranted on the
20 evidence or, if specifically so identified, are reasonably based
21 on belief or a lack of information.

22 "If, after notice and a reasonable opportunity to respond, the court determines that Rule
23 11(b) has been violated, the court may impose an appropriate sanction on any attorney,
24 law firm, or party that violated the rule or is responsible for the violation." Fed. R. Civ.
25 P. 11(c)(1).

26 Defendants contend that an objectively reasonable investigation would have
27 revealed that Lewis' proposed complaint-in-intervention was unwarranted by existing law
28 and lacked evidentiary support because the underlying state court judgment upon which
Lewis' asserted right to intervene was based is unenforceable. Defendants therefore urge
the Court to sanction Lewis and/or her attorney by ordering them to pay Defendants'
reasonable attorneys' fees.

Initially, the Court is not convinced that Lewis' counsel's oversight was per se
unreasonable. The judgment renewal affidavit was filed a mere one day late back in
2009. Notably, Defendants did not uncover this defect when they initially responded in
opposition to Lewis' motion to intervene. (*See* Docs. 56, 73.) Defendants brought this

1 issue to the Court's attention for the first time in mid-October 2017, over two months
2 after full briefing on Lewis' motion to intervene. This delay suggests that the defect in
3 the underlying state court judgment eluded counsel on all sides until relatively recently.

4 Assuming, however, that Lewis' counsel failed to perform an objectively
5 reasonable investigation prior to filing the motion to intervene, Defendants still are not
6 entitled to attorneys' fees under Rule 11(c) because they have not complied with the rule's
7 strict procedural requirements. Specifically, Rule 11(c)(2) requires a party moving for
8 sanctions to serve its motion on the other party twenty-one days prior to filing the motion
9 with the court in order to give the other party time to withdraw the frivolous filing. "The
10 Ninth Circuit Court of Appeals requires strict adherence to this 'safe harbor' provision."
11 *Miladinovic v. Tarvin*, No. CV-12-02614-PHX-SRB, 2013 WL 12190509, at *2 (D. Ariz.
12 Mar. 8, 2013).

13 Here, there is no evidence that Defendants complied with the safe harbor
14 provision. Indeed, their motion regarding the alleged invalidity of the underlying state
15 court judgment does not mention Rule 11. (Doc. 78.) Defendants first appealed to Rule
16 11 in their reply memorandum, and e-mail exchanges attached to the reply indicate that
17 Defendants discussed the Rule 11 issue with Lewis only after filing the instant motion.
18 (Docs. 81, 81-1.) Moreover, Lewis has since withdrawn the alleged frivolous filing,
19 which is precisely what Rule 11's safe harbor contemplates.

20 **D. A.R.S. § 14-11004**

21 Pursuant to A.R.S. § 14-11004:

22 A. A trustee or a person who is nominated as a trustee is
23 entitled to reimbursement from the trust for that person's
24 reasonable fees, expenses and disbursement, including
25 attorney fees and costs, that arise out of and that relate to the
26 good faith defense or prosecution of a judicial or alternative
dispute resolution proceeding involving the administration of
the trust, regardless of whether the defense or prosecution is
successful.

27 B. A court or arbitrator may order that a party's reasonable
28 fees, expenses and disbursements pursuant to subsection A be
paid by any other party or the trust that is the subject of the
judicial proceeding.

1 Defendants argue that they are entitled to fees under this section because Lewis sought,
2 through her proposed complaint-in-intervention, to enlarge the scope of assets from the
3 Trust available to satisfy her state court judgment. (Doc. 81 at 7.) This could be true, but
4 § 14-11004(B) is discretionary, and Defendants have wholly failed to explain why the
5 Court should order Lewis, rather than the Trust, to reimburse them for their reasonable
6 attorneys' fees. Defendants' request therefore is denied.

7 **E. Ethical Rules 3.3, 4.4, and 8.4**

8 Ethical Rule 3.3 provides, in relevant part, that "a lawyer shall not knowingly . . .
9 make a false statement of fact or law to a tribunal or fail to correct a false statement of
10 material fact or law previously made to the tribunal by the lawyer," or "offer evidence
11 that the lawyer knows to be false." Ethical Rule 4.4 provides that "a lawyer shall not use
12 means that have no substantial purpose other than to embarrass, delay, or burden any
13 other person[.]" Finally, Ethical Rule 8.4 provides that it is professional misconduct for a
14 lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation" or
15 "that is prejudicial to the administration of justice."

16 Defendants contend that Lewis' counsel violated these ethical obligations by filing
17 a motion to intervene in this case based on an unenforceable state court judgment. But
18 Defendants fail to show that Lewis' counsel knew that the state court judgment was
19 unenforceable at the time he filed the motion to intervene. As previously noted, Lewis
20 missed the deadline to renew her state court judgment by one day back in 2009. Since
21 then, Lewis filed another renewal affidavit in 2014, indicating that she did not realize her
22 2009 renewal affidavit was untimely. Moreover, no party to this case brought the
23 renewal issue to the Court's attention at the time Lewis filed her motion to intervene. The
24 issue apparently eluded everyone until October of this year. Lewis' counsel might have
25 filed the motion to intervene based on a mistake of fact, but there is no evidence that he
26 knowingly misled Defendants or the Court. To the contrary, once the renewal issue was
27 brought to Lewis' attention, she promptly withdrew her motion to intervene. Under the
28 circumstances, the Court finds no basis to shift attorneys' fees as an ethical sanction.

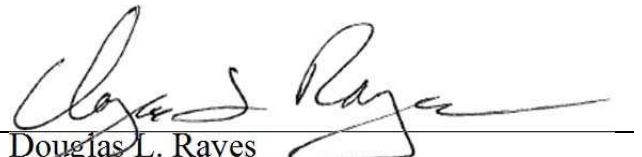
1 **III. Conclusion**

2 For the foregoing reasons, Defendants' opposition to Lewis' motion to intervene is
3 moot because Lewis has withdrawn her motion. Defendants have not shown that they are
4 entitled to their reasonable attorneys' fees and costs incurred in opposing Lewis'
5 intervention. Because the validity of Lewis' state court judgment has no bearing on the
6 claims asserted against Defendants by Neal, the Court has no reason to opine further on
7 the matter.

8 **IT IS ORDERED** that Defendants' Motion Regarding Judgment Creditor's
9 Underlying Judgment as Being Void as a Matter of Law (Doc. 78) is **DENIED**.

10 **IT IS FURTHER ORDERED** that Defendants' Request for Oral Argument on
11 Judgment Creditor Patricia Lewis' Motion to Intervene (Doc. 61) is **DENIED** as moot.

12 Dated this 1st day of December, 2017.

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17 Douglas L. Rayes
18 United States District Judge
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