IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JAY CALHOUN; and THE CALHOUN LAW FIRM, an Arizona professional limited liability company,
Plaintiffs/Appellants,

v.

JOSEPH WAESCHE and JANE DOE WAESCHE, husband and wife; COMMUNITY LEGAL SERVICES, INC., an Arizona corporation,
Defendants/Appellees.

No. 1 CA-CV 14-0852
FILED 03-22-2016

Appeal from the Superior Court in Maricopa County
No. CV2013-016208
The Honorable John Christian Rea, Judge

AFFIRMED

COUNSEL

The Calhoun Law Firm, PLC, Tempe
By Jay Calhoun
Counsel for Plaintiffs/Appellants

Broening Oberg Woods & Wilson, P.C., Phoenix
By Donald Wilson, Jr., Kevin R. Myer
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Randall M. Howe joined.

T H U M M A, Judge:

¶1 Plaintiffs Jay Calhoun and the Calhoun Law Firm (collectively, Calhoun) appeal from the dismissal of their claims against defendants Joseph and Jane Doe Waesche (Waesche) and Community Legal Services (CLS) as time-barred. Calhoun argues the superior court erred by finding the complaint was not timely filed, by awarding certain costs, by improperly identifying the interest rate on the judgment and by failing to impose discovery sanctions. Because Calhoun has shown no error, the judgment is affirmed.

FACTS AND PROCEDURAL HISTORY

¶2 In 2010, Calhoun successfully represented a client in judicial proceedings to evict tenant Rain Morgan, a ruling upheld on appeal where Waesche, as a CLS attorney, represented Morgan. In 2012, after the eviction proceedings ended and while self-represented, Morgan filed a civil case against Calhoun claiming Calhoun violated various statutory provisions and abused process in the eviction proceedings. Calhoun claims Waesche "ghost wrote" some of Morgan's filings in this 2012 case. In August 2012, the superior court granted Calhoun's motion to dismiss the 2012 case with prejudice, certifying the ruling as a final, appealable order. *See* Ariz. R. Civ. P. 54(b) (2016).[1] However, no appeal was taken. In January 2013, the superior court entered a judgment in the 2012 case that awarded Calhoun costs. *See* Ariz. R. Civ. P. 54(c). Again, however, no appeal was taken.

¶3 In December 2013, Calhoun filed this case, alleging wrongful institution of civil proceedings (malicious prosecution) against Waesche and CLS. During discovery, Waesche and CLS subpoenaed documents from non-party Arizona Public Service (APS). APS responded that it had no responsive documents before the court could consider Calhoun's motion

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[1] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

to quash the subpoena. Upon notice of APS' response, the court deemed Calhoun's motion to quash moot.

¶4 Waesche and CLS deposed Calhoun for approximately three hours, asking Calhoun numerous questions about her qualifications as an attorney and attorney discipline. The deposition became heated at times, and Calhoun refused to answer questions she considered inappropriate, irrelevant or harassing.

¶5 Calhoun served requests for admission on Waesche and CLS asking they admit to having represented Morgan in the eviction action. Defendants, however, denied such representation. Calhoun then unsuccessfully moved for sanctions, claiming defendants did, in fact, represent Morgan.

¶6 Waesche and CLS moved to dismiss, arguing Calhoun's action was barred by the applicable one-year limitations period. The superior court granted the motion, finding Calhoun's cause of action accrued in August 2012, when the superior court entered a final, appealable order pursuant to Rule 54(c) dismissing the 2012 case. The court then entered judgment in favor of Waesche and CLS and imposed $1,132.98 in taxable costs against Calhoun (representing the cost of her deposition and the APS subpoena), "plus interest at the rate of one percent over prime per annum from the date of Judgment."

¶7 Calhoun timely appealed from this judgment. This court has jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 8-235, 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

¶8 Calhoun argues the superior court erred by (1) finding her complaint was time-barred, (2) ordering Calhoun to pay the cost of her deposition and the APS subpoena, (3) incorrectly setting the interest rate on the taxable costs and (4) failing to award her sanctions for defendants' responses to her requests for admission.

I. The Superior Court Did Not Err By Finding The Complaint Was Time-Barred.

¶9 A malicious prosecution action "shall be commenced and prosecuted within one year after the cause of action accrues, and not afterward." A.R.S. § 12-541. "A malicious prosecution action does not accrue until the prior proceedings have terminated in the defendant's

favor." *Moran v. Klatzke*, 140 Ariz. 489, 490 (App. 1984) (citations omitted). This court reviews de novo the application of the statute of limitations, including when the cause of action accrues. *Cook v. Town of Pinetop-Lakeside*, 232 Ariz. 173, 175 ¶ 10 (App. 2013).

¶10 Calhoun argues the superior court erred in finding her cause of action accrued in August 2012. Instead, citing *Owen v. Shores*, 24 Ariz. App. 250, 251 (1975), she argues her cause of action accrued in January 2013, because the 2012 case was then "terminated in her favor" when the court entered judgment awarding her taxable costs. Although admitting the August 2012 dismissal was a final, appealable order, Calhoun claims it was not favorable, meaning it did not trigger the limitations period for the malicious prosecution claim she makes in this case. *See id.* at 252.

¶11 In *Owen*, the question was whether a malicious prosecution action accrued when the time for a motion for rehearing on appeal expired, or when the mandate on appeal issued. *Id.* at 251. *Owen* held that the issuance of the mandate (not the expiration of the time for rehearing) triggered caused accrual: "In our opinion it cannot be said that there was a termination of the prior proceedings favorable to appellant prior to the issuance of the appellate court mandate." *Id.* at 253-54. That issue, however, is not present here because the 2012 case terminated in the superior court. Although an appeal terminates when the mandate issues -- which had not occurred in *Owen* -- proceedings in the superior court terminate upon the issuance of a final, appealable order from which no appeal is taken.

¶12 The superior court dismissed the 2012 case with prejudice in August 2012, granting Calhoun's motion to dismiss for failure to state a claim, in an order signed by the court expressly stating it was a final, appealable order. *See* Ariz. R. Civ. P. 54(b). Although Calhoun did not receive any monetary award until later, the dismissal of the 2012 case with prejudice in August 2012 after the court granted Calhoun's motion to dismiss was a favorable termination. *See* Restatement (Second) of Torts § 674 cmt. j (1977) ("A favorable adjudication may be by a judgment rendered by a court after trial, or upon demurrer or its equivalent."); *see also Frey v. Stoneman*, 150 Ariz. 106, 109-10 (1986) (citing Restatement § 674 comment j). Although Morgan had 30 days in which to appeal from that decision, Ariz. R. Civ. App. P. 9(a), no such appeal was taken. As a result, the August 2012 favorable termination became final in September 2012. Accordingly, by no later than the end of September 2012, the claim in the 2012 case was finally terminated in Calhoun's favor, meaning Calhoun's malicious prosecution claim accrued. On this record, the superior court properly found Calhoun's

December 2013 complaint for malicious prosecution in this case was time-barred.

II. The Superior Court Did Not Err By Awarding Costs And Imposing Interest.

¶13 "The successful party to a civil action shall recover from his adversary all costs expended or incurred therein unless otherwise provided by law." A.R.S. § 12-341. Although the award of costs is mandatory, where objection to certain costs is made, the decision of which costs to allow is within the discretion of the trial court. *Trollope v. Koerner*, 21 Ariz. App. 43, 47 (1973).

A. The Court Did Not Err By Awarding Costs For Calhoun's Deposition.

¶14 The judgment appealed from awarded defendants $749.70 in costs incurred in taking Calhoun's deposition. "Costs in the superior court include . . . [c]ost of taking depositions," A.R.S. 12-332 § (A)(2), which are to be imposed for depositions "taken in good faith, even though the deposition is not used," *In re Nelson*, 207 Ariz. 318, 324 ¶ 26 (2004) (citation omitted). A factor to consider in awarding deposition costs is whether a party objected to the deposition. *See Reyes v. Frank's Service and Trucking, LLC*, 235 Ariz. 605, 611 ¶ 22 (App. 2014).

¶15 Calhoun argues on appeal that because a malicious prosecution action is dependent on what the defendant knew, her deposition could not have provided any relevant information. Coupled with the contentious nature of the deposition, she claims the deposition was taken in bad faith. But Calhoun did not seek a protective order precluding her deposition. *See* Ariz. R. Civ. P. 26(c). Moreover, Calhoun has not shown the superior court abused its discretion in finding the deposition was taken in good faith. Accordingly, Calhoun has not shown the superior court erred in awarding defendants costs for taking her deposition.

B. The Court Did Not Err By Awarding Costs For The Subpoena to APS.

¶16 The judgment appealed from awarded defendants $122.28 in issuance and service costs for the subpoena directed to APS. Calhoun claims it was error for the superior court to deny her motion to quash this subpoena because it sought information "not relevant to any issue in this litigation." Consequently, Calhoun argues, it was error to order her to pay the costs of the subpoena.

¶17 The superior court did not deny the motion to quash; instead, that court ruled the motion to quash was moot because APS had already responded. Moreover, "[t]he trial court has broad discretion to resolve discovery matters, which we will not disturb absent a showing of abuse." *MM&A Prods., LLC v. Yavapai-Apache Nation*, 234 Ariz. 60, 66 ¶ 18 (App. 2014). Here, defendants sought information from APS related to Morgan's eviction, which they hoped would help show the actions in the 2012 case were not malicious. On this record, Calhoun has not shown the superior court abused its discretion in finding the motion to quash was moot or awarding defendants' costs for the APS subpoena.

C. Calhoun Has Shown No Reversible Error In The Interest Rate Used In The Judgment.

¶18 "[I]nterest on any judgment shall be at the lesser of ten per cent per annum or at a rate per annum that is equal to one per cent plus the prime rate as published by the board of governors of the federal reserve system in statistical release H.15 . . . . The judgment shall state the applicable interest rate and it shall not change after it is entered." A.R.S. § 44-1201(B). The judgment here awarded "interest at the rate of one percent over prime per annum from the date of Judgment." Calhoun argues this is error, because the judgment does not state a numerical interest rate, meaning "the trial court effectively granted no interest rate, [and] the actual rate must be determined as zero if the matter is not remanded or reversed."

¶19 The judgment set the interest rate at "one percent over prime." And the statute upon which the judgment is based provides clear guidance on where to find information that allows the ready determination of that rate. *See* A.R.S. § 44-1201. To the extent clarification is necessary, the prime interest rate on October 27, 2014, as listed in statistical release H.15, was 3.25 percent, a rate unchanged from January 2009 to November 2015. *See* http://www.federalreserve.gov/releases/h15/data.htm.Selected Interest Rates – H.15. On this record, Calhoun has shown no reversible error in the interest rate used in the judgment.

III. The Superior Court Did Not Abuse Its Discretion By Not Awarding Expenses For Defendants' Failure To Admit The Requests For Admission.

¶20 "If a party fails to admit the . . . truth of any matter as requested [in a request for admission], and if the party requesting the admissions thereafter proves the . . . truth of the matter, the requesting party may" seek an order to recover "the reasonable expenses incurred in making

that proof," which should be imposed unless the court finds that "the admission sought was of no substantial importance." Ariz. R. Civ. P. 37(e). This court reviews an order addressing sanctions for an abuse of discretion, *Seidman v. Seidman*, 222 Ariz. 408, 411 ¶ 18 (App. 2009), affirming if the ruling was "correct for any reason, even if that reason was not considered" by the superior court, *Parkinson v. Guadalupe Pub. Safety Ret. Local Bd.*, 214 Ariz. 274, 277 ¶ 12 (App. 2007).

¶21 The superior court denied Calhoun's motion for expenses without prejudice, pending the outcome of a then-scheduled arbitration hearing. When the court issued the order denying the motion, defendants had filed their motion to dismiss, which the court granted weeks later. Because the case was dismissed as time-barred, the court reasonably could have concluded that the "admission[s] sought [were] of no substantial importance." Ariz. R. Civ. P. 37(e). Accordingly, Calhoun has not shown the superior court abused its discretion by not awarding Calhoun expenses for defendants' failure to admit the requests for admission.

IV. Costs On Appeal.

¶22 All parties request taxable costs on appeal. Calhoun's request is denied because Calhoun is not the successful party on appeal. Because Waesche and CLS are successful parties on appeal, their requests for taxable costs on appeal are granted contingent upon compliance with Ariz. R. Civ. App. P. 21.

CONCLUSION

¶23 The superior court's judgment is affirmed.

Ruth A. Willingham · Clerk of the Court
FILED: RT