

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STAR STUDIO PROFESSIONAL PHOTOGRAPHY, INC.,
Plaintiff/Appellant,

v.

ARIZONA ESCROW AND FINANCIAL CORPORATION,
Defendant/Appellee.

No. 1 CA-CV 09-0625
FILED 8-29-2017

Appeal from the Superior Court in Maricopa County
No. CV 2008-070497
The Honorable Harriett E. Chavez, Judge (Retired)

AFFIRMED IN PART; VACATED AND REMANDED IN PART

COUNSEL

Casler Law Office PLLC, Avondale
By Carlton C. Casler
Counsel for Plaintiff/Appellant

Jaburg & Wilk PC, Phoenix
By Roger L. Cohen, Kathi M. Sandweiss
Counsel for Defendant/Appellee

STAR STUDIO v. AZ ESCROW
Decision of the Court

MEMORANDUM DECISION

Judge Margaret H. Downie delivered the decision of the Court, in which Presiding Judge Paul J. McMurdie and Judge Maria Elena Cruz joined.

D O W N I E, Judge:

¶1 Star Studio Professional Photography, Inc. (“Star Studio”), appeals the dismissal of its complaint against Arizona Escrow & Financial Corporation (“Arizona Escrow”) and the award of attorneys’ fees to Arizona Escrow. For the following reasons, we affirm the order dismissing Star Studio’s complaint but vacate the award of attorneys’ fees and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY¹

¶2 In September 2008, Star Studio filed a complaint against Arizona Escrow. According to the complaint, Star Studio sold real and personal property to certain buyers (“Buyers”) in 2001, with Arizona Escrow serving as escrow agent. Buyers signed a promissory note and deed of trust in favor of Star Studio, and Arizona Escrow acted as the account servicing agent. Star Studio alleged that Arizona Escrow later prepared and recorded a release of the deed of trust without its consent or knowledge. Star Studio asserted claims against Arizona Escrow for breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, tortious interference with contract, conversion, and negligence. Star Studio sought to recover the unpaid balance due on

¹ Our review is limited to the superior court’s record. We have not considered documents Star Studio submitted in an appendix that are not part of that record. *See State v. Martinez*, 134 Ariz. 119, 120 (App. 1982) (“Appellate courts will review only those matters which appear in the records of the trial court.”); *Am. Nat’l Fire Ins. Co. v. Esquire Labs of Ariz., Inc.*, 143 Ariz. 512, 520 (App. 1984) (It is not the appellate court’s responsibility “to supplement the appellate record in a civil case where the parties have done nothing in that regard.”).

STAR STUDIO v. AZ ESCROW
Decision of the Court

the note (\$40,758.21), plus interest, fees, and costs, and Star Studio certified that the case was subject to compulsory arbitration.

¶3 In its answer, Arizona Escrow discussed earlier litigation between Star Studio and Buyers, stating that the court in that proceeding had set a bond in the amount owing under the note, which Arizona Escrow held in an interest-bearing account pending resolution of the dispute. Arizona Escrow stated that it released the deed of trust “in accordance with the terms and conditions of the Recordation Provision and Arizona law.”

¶4 On January 6, 2009, Arizona Escrow requested leave to file an amended answer. As relevant here, Arizona Escrow sought to add an “affirmative allegation that this matter is not brought by the real party in interest and is subject to dismissal for failure of [Star Studio] to join indispensable parties.” Arizona Escrow argued:

. . . upon review of public records, after the filing of the initial Answer, undersigned counsel discovered that [Star Studio] transferred and assigned its beneficial interest in the subject Deed of Trust to its lawyer in this case, Carlton Casler. Public records show that, thereafter, Mr. Casler transferred and assigned his interest in the Deed of Trust to an Arizona limited liability company called Delinquent Accounts, LLC. Mr. Casler is the manager and sole member of Delinquent Accounts. Accordingly, Mr. Casler and his company are the real parties in interest with respect to any claims of interest or wrongdoing in connection with the Deed of Trust. It is therefore appropriate that Arizona Escrow add, as an affirmative defense, the failure to bring this action in the names of the real parties in interest - Mr. Casler and Delinquent Accounts, LLC.

The record does not reflect that Star Studio responded to Arizona Escrow’s request to file an amended answer, and the superior court granted that request.

¶5 Arizona Escrow subsequently filed a “Motion to Dismiss for Failure to Prosecute in Name of Real Party in Interest; Alternate Motion to Join [Indispensable] Parties.” Arizona Escrow argued that Star Studio’s complaint should be dismissed unless the real parties in interest (identified as Carlton Casler, Jane Doe Casler, and Delinquent Accounts, LLC) joined or substituted as plaintiffs. Appended to Arizona Escrow’s

STAR STUDIO v. AZ ESCROW
Decision of the Court

motion were copies of: (1) a recorded Assignment of Beneficial Interest Under Deed of Trust, whereby Star Studio assigned its interest in the deed of trust executed by Buyers to Casler; and (2) a recorded Assignment of Beneficial Interest Under Deed of Trust, whereby Casler assigned his interest in the deed of trust to Delinquent Accounts, LLC. Star Studio opposed the motion to dismiss, arguing, among other things, that Delinquent Accounts, LLC had assigned all of its interest in the deed of trust back to Star Studio and that Star Studio was the only party with standing to sue Arizona Escrow. Star Studio attached an unrecorded assignment as an exhibit to its response.

¶6 The case proceeded to compulsory arbitration, where the assigned arbitrator ruled in favor of Arizona Escrow. For reasons not clear from the record, the arbitrator's award was never filed.

¶7 Thereafter, in a minute entry filed April 10, 2009, the superior court ruled as follows on Arizona Escrow's pending motion:

The Court is in receipt of the Motion to Dismiss for Failure to Prosecute in Name of Real Party in Interest; Alternative Motion to Join Indispensable Parties, filed January 27, 2009 by Defendant.

IT IS ORDERED the Complaint is dismissed without prejudice, effective May 4, 2009, unless an amended complaint is properly filed joining or substituting Carlton Casler and Jane Doe Casler, Husband and Wife, and Delinquent Accounts, LLC.

After the court-imposed deadline passed without an amended complaint being filed, the court issued a minute entry on May 28, 2009, stating:

This case was previously scheduled for dismissal unless specified action occurred on or before May 4, 2009. The date has passed and no further action has been taken.

IT IS ORDERED dismissing this case without prejudice for lack of prosecution.

¶8 On July 2, 2009, Arizona Escrow filed an application for attorneys' fees pursuant to Arizona Rule of Civil Procedure 11, and Arizona Revised Statutes ("A.R.S.") sections 12-341.01(A) and (C), and 12-349. Arizona Escrow asked the court to award fees against Star Studio, Carlton and Jane Doe Casler, and Delinquent Accounts, LLC. Star Studio

STAR STUDIO v. AZ ESCROW
Decision of the Court

opposed Arizona Escrow's application, arguing, among other things, that the request was untimely. In a signed minute entry filed August 7, 2009, the superior court awarded fees of \$19,941 and costs of \$709.80 pursuant to A.R.S. §§ 12-341.01 and -349.² Star Studio timely appealed.³

DISCUSSION

I. Jurisdiction

¶9 An appellate court has a duty to inquire into its own jurisdiction. *Grand v. Nacchio*, 214 Ariz. 9, 15, ¶ 12 (App. 2006). An order dismissing a case without prejudice is typically not appealable. *Canyon Ambulatory Surgery Ctr. v. SCF Arizona*, 225 Ariz. 414, 418-19, ¶ 14 (App. 2010). However, there are exceptions to this general rule. *See Garza v. Swift Transp. Co.*, 222 Ariz. 281, 284, ¶ 15 (2009) (recognizing an exception for dismissals without prejudice entered after the statute of limitations has expired).

¶10 We asked the parties to file supplemental briefs addressing this Court's jurisdiction. Arizona Escrow took "no position on the jurisdictional issues identified," but noted that Star Studio has been administratively dissolved by the Arizona Corporation Commission. Star Studio responded that all of its claims were barred by the statute of limitations as of the date of the superior court's dismissal order. Under these circumstances, we conclude this Court has jurisdiction to consider

² The minute entry incorrectly stated that fees and costs were awarded to "Plaintiff." Arizona Escrow lodged a form of judgment reflecting that the award was actually in favor of Arizona Escrow and against "Plaintiff Star Studio Professional Photography, Inc., its attorney Carlton Casler, and the real parties in interest Carlton Casler and Jane Doe Casler, husband and wife, and Delinquent Accounts, LLC." The record does not include any objection to the lodged form of judgment, which the superior court signed.

³ The original appellants were Star Studio, Casler Law Office, PLLC, and Carlton and Tami Casler. Carlton and Tami Casler filed for bankruptcy protection in January 2010, and an automatic stay took effect. *See* 11 U.S.C. § 362(a)(1). The bankruptcy court issued a discharge order as to the Caslers, and this Court instructed appellants to advise whether the discharge also affected appellant Casler Law Office. Nothing was filed by the stated date, and this Court dismissed Carlton and Tami Casler, as well as Casler Law Office, leaving Star Studio as the only appellant.

STAR STUDIO v. AZ ESCROW
Decision of the Court

Star Studio's appeal. See A.R.S. § 10-1405(B)(6) (Dissolution of a corporation does not "[a]bate or suspend a proceeding pending by or against the corporation . . . on the effective date of dissolution.").

II. Dismissal Order

¶11 We review an order dismissing a case for failure to prosecute for an abuse of discretion. *Jepson v. New*, 164 Ariz. 265, 269 (1990). Star Studio has demonstrated no such abuse here.

¶12 The superior court gave ample warning that the action would be dismissed unless an amended complaint was filed "joining or substituting Carlton Casler and Jane Doe Casler, Husband and Wife, and Delinquent Accounts, LLC." Star Studio did not request reconsideration of that order, seek interlocutory relief, or file an amended complaint. As far as the record reflects, it simply ignored the court's directive. Under these circumstances, the superior court did not abuse its considerable discretion by dismissing the action for lack of prosecution. See *Cooper v. Odom*, 6 Ariz. App. 466, 469 (1967) ("Trial courts have the inherent power to dismiss a case on their own motion if the case has not been diligently prosecuted.").

III. Attorneys' Fees⁴

¶13 Star Studio also contends the court improperly awarded attorneys' fees to Arizona Escrow because its fee application was untimely. Insofar as the fee award was based on A.R.S. § 12-341.01(A), we agree.

¶14 The version of Arizona Rule of Civil Procedure 54(g)(2) that was in effect when the superior court ruled required motions for attorneys' fees to "be filed within 20 days from the clerk's mailing of a decision on the merits of the cause, unless extended by the trial court." Rule 54(g)(2) (2009). Arizona Escrow's fee application was filed 35 days after the May 28 dismissal order was entered. The superior court did not extend the 20-day deadline. Arizona Escrow's reliance on *Britt v. Steffen*,

⁴ Delinquent Accounts, LLC did not appeal, and the Casler appellants have been dismissed. We thus consider the fee award only as it relates to Star Studio, rendering moot the question of whether the court erred by awarding fees and costs against non-parties to the litigation.

STAR STUDIO v. AZ ESCROW
Decision of the Court

220 Ariz. 265 (App. 2008), is unavailing. Indeed, *Britt* upheld a fee award under the version of Rule 54(g) at issue here – in part because the fee request was filed within 20 days of the dismissal for lack of prosecution. *See id.* at 270, ¶ 22 (“Because the defendants filed their motion for attorneys’ fees on the twentieth day, the court had jurisdiction to rule on their request for attorneys’ fees pursuant to A.R.S. § 12-341.01(A).”). Because Arizona Escrow’s fee application was untimely, the superior court lacked jurisdiction to issue a fee award pursuant to A.R.S. § 12-341.01(A).

¶15 However, the Rule 54(g)(2) deadline does not apply to requests for fees as a sanction. *Britt*, 220 Ariz. at 271, ¶¶ 24–25; *see also* Rule 54(g)(4) (2009) (provisions of Rule 54(g)(2) inapplicable to claims for fees as “sanctions pursuant to statute or rule”). But even assuming Arizona Escrow’s sanction-based fee request was filed within a reasonable time, one of the stated bases for awarding such fees is not supported by the record. The superior court stated it was awarding fees under A.R.S. § 12-349 “for the frivolous appeal from arbitration and later abandonment of prosecution.” (Emphasis added.) However, the arbitrator never filed an award, and Star Studio never filed an “appeal from arbitration.” We have no way of knowing whether the superior court would have awarded fees pursuant to A.R.S. § 12-349 based solely on Star Studio’s failure to comply with its April 10, 2009 order. Under these circumstances, we vacate the fee award in favor of Arizona Escrow and remand for further proceedings to determine the propriety of a fee award under A.R.S. § 12-349.

CONCLUSION

¶16 We affirm the order dismissing Star Studio’s complaint. We vacate the fee award in favor of Arizona Escrow and remand for further proceedings consistent with this decision. Because each side has partially prevailed on appeal, we make no award of attorneys’ fees or taxable costs.



AMY M. WOOD • Clerk of the Court
FILED: AA