IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

COMERICA BANK, *Plaintiff/Appellee*,

v.

LAW OFFICE OF BRIAN K. STANLEY P.L.L.C., et al.,
Defendants/Appellants.

No. 1 CA-CV 17-0218
FILED 7-31-2018

Appeal from the Superior Court in Maricopa County
No. CV2015-006987
The Honorable Kerstin G. LeMaire, Judge

AFFIRMED

COUNSEL

Snell & Wilmer, L.L.P., Phoenix
By Andrew M. Jacobs, W. Danny Green
Counsel for Plaintiff/Appellee

Law Office of Brian K. Stanley P.L.L.C., Phoenix
By Brian K. Stanley
Counsel for Defendants/Appellants

MEMORANDUM DECISION

Presiding Judge Kenton D. Jones delivered the decision of the Court, in which Vice Chief Judge Peter B. Swann and Judge Jon W. Thompson joined.

J O N E S, Judge:

¶1 The Law Office of Brian K. Stanley P.L.L.C. and Brian K. Stanley (collectively, Stanley) appeal summary judgment entered in favor of Comerica Bank (the Bank). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In September 2014, Stanley deposited a check for approximately 54,000 U.S. dollars, issued by the Government of Canada, into the firm's Interest on Lawyer's Trust Account (IOLTA account) at the Bank.[1] The following month, Stanley transferred 50,000 U.S. dollars out of the IOLTA account. When the check was later returned to the Bank as "tampered with," the Bank reversed the credit, which left the account overdrawn by almost $44,000. When Stanley refused to pay the overdraft, the Bank filed a complaint alleging breach of contract, fraud, and unjust enrichment and seeking a judgment for the overdraft amount plus "all consequential damages incurred," including lost interest. The Bank also sought "a determination that the Corporate Veil has been pierced," which would allow the Bank to pursue the judgment against Stanley personally.

¶3 Along with its complaint, the Bank filed a certification stating the case was not subject to compulsory arbitration, which Stanley disputed. *See* Ariz. Rev. Stat. (A.R.S.) § 12-133(A)(1)[2] (permitting counties to set jurisdictional limits for compulsory arbitration not to exceed $65,000); Ariz. Local R. Prac. Super. Ct. (Maricopa) 3.10(a) (requiring civil cases with an

[1] "On appeal from a grant of summary judgment, we view all facts and reasonable inferences therefrom in the light most favorable to the party against whom judgment was entered." *Compassionate Care Dispensary, Inc. v. Ariz. Dep't of Health Servs.*, 244 Ariz. 205, 209 n.2, ¶ 3 (App. 2018) (quoting *City of Tempe v. State*, 237 Ariz. 360, 362 n.3, ¶ 1 (App. 2015)).

[2] Absent material changes from the relevant date, we cite the current version of rules and statutes.

amount in controversy less than $50,000 be submitted to an arbitrator). The Bank explained that its damages exceeded $50,000 and its request for a determination that it could pierce the corporate veil was "affirmative relief other than a money judgment" exempting it from compulsory arbitration. *See* Ariz. R. Civ. P. 72(b)(1)(A). The trial court agreed and found arbitration was not compulsory.

¶4 Thereafter, on March 25, 2016, the Bank served Stanley with twenty-five requests for admission (RFAs), asking Stanley to admit he knowingly deposited a fraudulent check into the firm's IOLTA account, caused an overdraft of the account when he transferred funds from the account, and thereafter refused to pay the overdraft amount in violation of his agreement with the Bank. The Bank also asked Stanley to admit he was the sole member, manager, and attorney at the firm and handled all of its banking transactions.

¶5 Stanley did not respond to the RFAs until June 13 — thirty-seven days later than the forty-day deadline prescribed by Arizona Rule of Civil Procedure 36(a) (2016). The Bank then moved for summary judgment based upon the facts conclusively established by virtue of Stanley's untimely responses. *See* Ariz. R. Civ. P. 36(a) ("The matter is admitted unless, within [forty] (40) days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney."), (c) ("Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission."). Six weeks later, Stanley filed a motion for enlargement of time to respond to the RFAs, explaining a calendaring error prevented his timely response. *See* Ariz. R. Civ. P. 6(b)(1) ("When an act may or must be done within a specified time, the court may, for good cause, extend the time . . . on motion made after the time has expired if the party failed to act because of excusable neglect."). At the same time, he filed a response to the summary judgment motion in which Stanley "assumed that [he] will be granted such relief" from the RFAs.

¶6 After briefing, the trial court rejected the calendaring-error excuse, finding it "would have been better taken if the motion to enlarge time had been promptly filed upon the[] discovery of the mistake rather than waiting another six weeks," and denied Stanley's request for an enlargement of time. After considering the matters deemed admitted in accordance with Rule 36, the court found no material question of fact remained, entered judgment in favor of the Bank on all claims, and determined Stanley was personally responsible for the debt as the alter ego

of the corporation. Five days later, Stanley moved, unsuccessfully, to withdraw or amend his admissions. *See* Ariz. R. Civ. P. 36(c). Stanley timely appealed the final judgment, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

¶7 Stanley argues the trial court erred in denying his motion to withdraw or amend his admissions to the RFAs because it did not consider whether granting the motion would promote the presentation of the merits or prejudice the Bank. We review the court's decision to deny a request to amend or withdraw admissions for an abuse of discretion. *See DeLong v. Merrill*, 233 Ariz. 163, 166-67, ¶ 11 (App. 2013) (citing *Raiser v. Utah Cty.*, 409 F.3d 1243, 1245-46 (10th Cir. 2005)).

¶8 The trial court may abuse its discretion when it does not consider all the relevant factors in evaluating whether a party should be permitted to amend or withdraw his admissions. *Id.* at 168, ¶ 18. The Bank concedes that, generally, the court must consider whether amendment or withdrawal would promote the presentation of the merits or cause prejudice to any party, in addition to whether the moving party presents good cause for his failure to timely respond. *See id.* at 166-68, ¶¶ 11-17. However, the court "is not required to apply [those factors] *sua sponte* when a party declines to file the required motion." *Quasius v. Schwan Food Co.*, 596 F.3d 947, 952 (8th Cir. 2010) (cited favorably by *DeLong*, 233 Ariz. at 167, ¶ 11).

¶9 The record reflects that Stanley did not move to amend or withdraw his admissions to the RFAs until five days after the motion for summary judgment was granted.[3] "Without some filing by [Stanley] aimed at withdrawing his admissions, it was not an abuse of discretion for the [trial] court to consider the admissions in resolving the motion for summary judgment." *Quasius*, 596 F.3d at 952. And, despite Stanley's protests otherwise, these admissions support the award of summary judgment. *See supra* ¶ 4.

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[3] Although Stanley suggests his motion to enlarge time to respond to the RFAs should have been treated as a motion to amend or withdraw his admissions, Stanley waived this argument by raising it for the first time in his reply brief and depriving the Bank of an opportunity to respond. *Varsity Gold, Inc. v. Porzio*, 202 Ariz. 355, 357, ¶ 9 (App. 2002) (citing *State v. Cannon*, 148 Ariz. 72, 79 (1985)).

¶10 Finally, Stanley argues the trial court erred by declining to refer the case to compulsory arbitration. However, the arbitrator in cases subject to compulsory arbitration has no authority to rule on "motions for summary judgment that, if granted, would dispose of the entire case as to any party." Ariz. R. Civ. P. 74(d)(1)(E) (formerly Rule 74(c)(1)(E)). Therefore, even if the case had been referred to arbitration, the court alone would have had authority to decide the summary judgment motion. Because the court here exercised that authority appropriately, we need not consider whether the case would otherwise have been subject to compulsory arbitration.

CONCLUSION

¶11 The trial court's order granting summary judgment in the Bank's favor is affirmed.

¶12 Stanley requests an award of attorneys' fees on appeal pursuant to A.R.S. § 12-341.01. Because he is not the successful party, we deny the request. As the successful party, the Bank is awarded its costs incurred on appeal upon compliance with ARCAP 21(b).

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