IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JOSEPH MOMOT, et al., *Plaintiffs/Appellees*,

v.

SILKWORTH MANOR LLC, *Defendant/Appellant*.

No. 1 CA-CV 17-0274
FILED 1-23-2018

Appeal from the Superior Court in Maricopa County
No. CV2015-013746
The Honorable Lori Horn Bustamante, Judge

AFFIRMED

COUNSEL

Law Office of Timothy M. Collier, PLLC, Scottsdale
By Krystle Delgado, Timothy M. Collier
Counsel for Plaintiffs/Appellees

Michael Goldenberg
Corporate Counsel for Defendant/Appellant

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Jennifer B. Campbell joined.

M c M U R D I E, Judge:

¶1 Silkworth Manor, L.L.C. ("Silkworth") appeals the superior court's order striking Silkworth's answer and entering a default judgment against Silkworth.[1] For the following reasons, we affirm.

FACTS[2] AND PROCEDURAL BACKGROUND

¶2 Silkworth is a sober living facility owned and managed by John Mulligan. In July 2014, Joseph Momot signed an admission application and a Resident Rental Agreement and Responsibilities Statement, and moved into Silkworth. Joseph Momot paid $23,793 for a six-month stay. After four months, Silkworth discharged Joseph Momot after he attempted to illegally obtain prescription drugs.

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[1] Silkworth's opening brief does not contain a caption, a table of contents, or a table of citations. Thus, it does not comply with Arizona Rule of Civil Appellate Procedure ("ARCAP") 4 and 13(A), which could constitute waiver. *See In re Aubuchon*, 233 Ariz. 62, 64–65, ¶ 6 (2013). However, in the exercise of our discretion, we decide the appeal on its merits. *See Varco, Inc. v. UNS Electric, Inc.*, 242 Ariz. 166, 170, ¶ 12, n.5 (App. 2017) (finding waiver for failure to comply with ARCAP 13(A) is discretionary); *see also Clemens v. Clark*, 101 Ariz. 413, 414 (1966) (court "remain[ed] inclined to decide cases on their merits," despite appellant's brief not complying with procedural rules).

[2] Roxanne Momot claims Silkworth's opening brief's statement of facts lacks appropriate citations to the record and, therefore, asks us to disregard it. We rely on our review of the record for our recitation of the facts. *See State Farm Mut. Auto Ins. Co. v. Arrington*, 192 Ariz. 255, 257, n.1 (App. 1998).

¶3 In December 2015, Joseph Momot filed a complaint against Silkworth, John Mulligan, and four other corporate entities[3] alleging: (1) a Fair Housing Act violation; (2) breach of contract; (3) fraud; (4) fraudulent misrepresentation; (5) negligent misrepresentation; (6) breach of the covenant of good faith and fair dealing; (7) unjust enrichment; and (8) intentional infliction of emotional distress. On January 4, 2016, Joseph Momot died. His sister, Roxanne Momot, moved to substitute herself as plaintiff, and, after Silkworth did not object, the superior court granted the substitution motion.

¶4 Roxanne Momot moved for partial summary judgment on two counts of the complaint, and Silkworth moved for summary judgment on all counts. Oral argument on the motions was scheduled for January 27, 2017. In November 2016, Mulligan moved to have his wife represent the defendants, and on December 6, 2016, Silkworth's original attorney applied to withdraw as Silkworth's attorney with client consent. The superior court ruled Mulligan could "appear *on his own behalf*," but explained "all corporate defendants must be represented by an attorney," and directed any unrepresented corporate defendants to retain counsel by December 30, 2016. The court later extended the deadline until January 20, 2016, and informed the parties that if a notice of appearance was not timely filed, "the court will enter default judgment against all corporate entities that are unrepresented and the Answer will be struck as to any corporate entity that is unrepresented."

¶5 One day before the January 20 deadline, Mulligan moved for an extension of time to retain counsel until January 26, 2017. On January 23, 2017, Roxanne Momot applied for default judgment against Silkworth for Silkworth's failure to retain counsel as ordered by the court. On January 26, 2017, an attorney for Silkworth entered a Notice of Appearance and moved to continue the oral argument scheduled for the next day. Roxanne Momot objected to Silkworth's motions to extend the time to retain counsel and to continue the argument. The superior court denied the continuance motion, and after oral argument, denied Silkworth's motion for a new deadline, struck its answer, and entered a default judgment. Silkworth timely appealed the superior court's order striking Silkworth's answer and

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[3] Silkworth Manor is the only defendant who is a party to this appeal. The superior court dismissed Silkworth Institute D.O. from the case in February 2017, and the three other corporate defendants did not appeal. The proceedings regarding Mulligan were stayed pending the outcome of this appeal.

entering the default judgment, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

A. The Superior Court Did Not Err by Granting Roxanne Momot's Motion for Substitution of Plaintiff.

¶6 Under Arizona Rule of Civil Procedure 25, if a party dies, the superior court may order the substitution of a proper party. Any party or the decedent's successor or representative may file a motion to substitute. Ariz. R. Civ. P. 25(a)(1).[4] Silkworth argues the superior court erred by allowing Roxanne Momot to substitute as plaintiff. Silkworth contends Roxanne Momot failed to notify the court, file a notice of death, or serve notification on Silkworth, and that Roxanne Momot is not a "proper party" because she was not appointed the personal representative of Joseph Momot's estate.

¶7 On January 4, 2016, Joseph Momot died. On February 5, 2016, Roxanne Momot moved to substitute herself as plaintiff. "Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death . . . the action shall be dismissed as to the deceased party." Ariz. R. Civ. P. 25(a)(1). "[N]o affirmative duty exists to suggest death on the record," but suggesting death on the record triggers the time limit to move to substitute a party. *Heredia v. Indus. Comm'n of Arizona*, 190 Ariz. 476, 478 (1997). Roxanne Momot moved to substitute herself as plaintiff within 90 days of Joseph Momot's death, and Silkworth did not object to the substitution below.

¶8 None of the arguments raised by Silkworth on appeal were raised below. Issues not raised in the superior court are generally waived on appeal. *Romero v. Sw. Ambulance*, 211 Ariz. 200, 204, ¶ 7 (App. 2005). Accordingly, Silkworth waived any argument that the superior court erred by allowing Roxanne Momot to substitute as plaintiff and the superior court did not err by granting Roxanne Momot's unopposed motion.

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[4] Rule 25 was amended on January 1, 2017. We cite to the prior version of the rule because it was in effect at the time the superior court granted Roxanne Momot's motion to substitute.

B. The Superior Court Did Not Abuse its Discretion by Striking Silkworth's Answer and Entering a Default Judgment.

¶9 Silkworth argues the superior court abused its discretion by striking its answer and entering the default judgment. The superior court entered default pursuant to Arizona Rule of Civil Procedure 16(i) and 37(b)(2)(A)(iii), (vi), and (vii). Silkworth maintains the superior court was required to hold a hearing before entering a default judgment and that its conduct was "not out of bad faith or willful misconduct."[5]

¶10 Absent a showing of good cause, the superior court must enter sanctions against a party for failure to "obey a scheduling or pretrial order or [failure] to meet the deadlines set in the order." Ariz. R. Civ. P. 16(i)(1)(A). As a sanction, the court may, among other acts, strike a pleading, dismiss the action, or enter a default judgment. Ariz. R. Civ. P. 37(b)(2)(A)(iii), (v), (vi); Ariz. R. Civ. P. 16(i)(1) (the court "must enter such orders as are just, including, among others, any of the orders in Rule 37(b)(2)(A)(ii) through (vii)"). Because Rule 16(i) expressly incorporates the discovery sanctions imposed by Rule 37(b)(2)(A), we are guided by case precedent regarding Rule 37 discovery violations when reviewing a sanction under Rule 16. *See Estate of Lewis v. Lewis*, 229 Ariz. 316, 323, ¶ 18 (App. 2012).

¶11 We review a superior court's sanctions for an abuse of discretion and "defer to the court's explicit or implicit factual findings and will affirm as long as such findings are supported by reasonable evidence." *Roberts v. City of Phoenix*, 225 Ariz. 112, 119, ¶ 24 (App. 2010). However, a superior court's discretion is more limited when it enters a default judgment or strikes a pleading than when it orders lesser sanctions. *Lewis*, 229 Ariz. at 323–24, ¶ 18. "Drastic sanctions," including striking a pleading or entering a default judgment, "must be based on a determination of willfulness or bad faith by the party being sanctioned." *Id.* at 324, ¶ 18;

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[5] Roxanne Momot argues a defaulted party must show mistake, inadvertence, or excusable neglect to have the default set aside, and that Silkworth did not argue mistake, inadvertence, or excusable neglect. *See* Ariz. R. Civ. P. 60(b)(1) ("[T]he court may relieve a party or its legal representative from a final judgment . . . for . . . mistake, inadvertence, surprise, or excusable neglect."); *Richas v. Superior Court (Motorola, Inc.)*, 133 Ariz. 512, 514 (1982). However, Silkworth never moved to set aside the default judgment, and the superior court expressly entered default pursuant to Rules 16(i) and 37(b).

Wayne Cook Enters., Inc. v. Fain Props. Ltd. P'ship, 196 Ariz. 146, 149, ¶ 12 (App. 1999) ("The sanction of dismissal is warranted only when the court makes an express finding that a party, as opposed to his counsel, has obstructed discovery . . . and that the court has considered and rejected lesser sanctions as a penalty." (citation omitted)). A "preference for a hearing to determine whether a [discovery violation] was willful or in bad faith and whether the circumstances justify drastic action" exists, but where evidence of a party's willfulness or bad faith is apparent from the record, a hearing is not required. *Robinson v. Higuera*, 157 Ariz. 622, 624 (App. 1988).

¶12 We first note the superior court allowed Silkworth and Mulligan an opportunity to be heard before imposing sanctions against Silkworth. At the scheduled oral argument regarding both parties' summary judgment motions, Silkworth's newly-retained attorney and Mulligan both spoke as to why counsel had not been retained in compliance with the court's order. Based on this record, the superior court had sufficient evidence to find Silkworth acted willfully or in bad faith for failing to obey the court's order without holding an additional hearing.[6]

¶13 A corporation cannot appear in court without a licensed attorney. Ariz. R. Sup. Ct. 31; *Ramada Inns, Inc. v. Lane & Bird Advert., Inc.*, 102 Ariz. 127, 128 (1967). The superior court repeatedly informed Silkworth and Mulligan of the need for Silkworth to retain counsel, and at the oral argument inquired why counsel was not retained as ordered. Mulligan explained he contacted "several attorneys," but could only name two, and that no attorney would accept the case due to the short notice. He further explained one attorney agreed to represent him, but backed out "at the last minute." The superior court asked Mulligan when he contacted these attorneys, and the only time frame he could give the court was the week prior to the oral argument. Silkworth's attorney stated Mulligan asked him "literally this week [to] step into this matter," and that he had to be approved as in-house counsel by the state bar before he could represent Silkworth. In its order striking Silkworth's answer and entering the default

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[6] Silkworth never requested an additional hearing after the superior court entered the default, which constitutes a waiver of the issue on appeal. *See Brake Masters Sys., Inc. v. Gabbay*, 206 Ariz. 360, 365, ¶ 15 (App. 2003); *Precision Components, Inc. v. Harrison, Harper, Christian & Dichter, P.C.*, 179 Ariz. 552, 555–56 (App. 1993) (court's imposition of sanctions without a hearing upheld because attorneys failed to raise the issue below, never requested a hearing, and never gave the superior court an opportunity to reconsider the sanctions).

against it, the superior court explained Silkworth "failed to secure representation pursuant to the Orders of this court and Rule 31, Rules of the Supreme Court of Arizona."

¶14 The superior court did not err by striking Silkworth's answer and entering the default judgment. Silkworth argues the superior court gave the company insufficient time to retain counsel. However, a trial date had already been set and Silkworth's initial attorney withdrew with client consent. The attorney's application to withdraw included a statement that "Mulligan state[s] . . . [Silkworth] can be ready and prepared and will made [sic] suitable arrangements for a trial on May 10, 2017." When Silkworth failed to meet the original deadline, the superior court granted Silkworth an extension of time to retain an attorney. While knowing for almost two months that an attorney would be required to proceed, Silkworth and Mulligan did not provide any evidence of their efforts to retain an attorney earlier than the January 20 deadline, aside from naming two attorneys Mulligan contacted one week earlier.

¶15 We also note that Silkworth's behavior in defending the action was less than exemplary. Roxanne Momot moved to compel discovery three times prior to the court entering default, two of which the superior court granted. When granting the motions, the superior court noted Silkworth's discovery responses were untimely and inadequate, and awarded Roxanne Momot attorney's fees.[7] *See Hammoudeh v. Jada*, 222 Ariz. 570, 573, ¶ 11 (App. 2009) (The record below demonstrated the defaulted party "engaged in a pervasive pattern of intentional discovery delay and subterfuge. And, given the trial court's proximity to these events and its prior attempt to obtain compliance with discovery through monetary sanctions assessed directly . . . we cannot say the court abused its discretion in concluding an evidentiary hearing was not necessary to determine fault, finding lesser means unavailable to secure compliance with the discovery rules, and therefore striking [the] pleadings"). The court was able to assess Silkworth's entire actions before it in determining credibility and what sanctions to impose.

¶16 Under the facts of this case, the court did not abuse its discretion by entering a default judgment against Silkworth.

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[7] The superior court also imposed sanctions against Silkworth for Mulligan's failure to appear at a deposition, and a fourth motion to compel was granted after the superior court entered default judgment against Silkworth.

C. Roxanne Momot's Request for Attorney's Fees, Costs, and Sanctions.

¶17 On appeal, Roxanne Momot requests attorney's fees, costs, and sanctions pursuant to A.R.S. § 12-349 and ARCAP 21 and 25. Under ARCAP 25, this court may impose sanctions, including attorney's fees, if the court determines an appeal is frivolous, filed solely to delay, or if a party or attorney violates the ARCAP. Under § 12-349:

> (A) [I]n any civil action . . . the court shall assess reasonable attorney fees, expenses and, at the court's discretion, double damages of not to exceed five thousand dollars against an attorney or party . . . if the attorney or party does any of the following:
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> 1. Brings or defends a claim without substantial justification.
>
> 2. Brings or defends a claim solely or primarily for delay or harassment.
>
> 3. Unreasonably expands or delays the proceeding.
>
> 4. Engages in abuse of discovery.

¶18 Roxanne Momot argues Silkworth's "claims of misconduct and misrepresentation are solely for the purpose of harassment, completely groundless, and made in bad faith," and Silkworth's "claims were NOT valid based on the actual facts and circumstances." In addition to attorney's fees and costs**,** Roxanne Momot requests double damages on appeal.

¶19 Although Roxanne Momot's answering brief includes allegations that Silkworth intentionally misled this court and misrepresented facts, our review of the record does not establish Silkworth's appeal constitutes harassment, is groundless, and not made in good faith. *See Fisher on Behalf of Fisher v. Nat'l Gen. Ins. Co.*, 192 Ariz. 366, 370, ¶ 13 (App. 1998). Accordingly, we decline to award Roxanne Momot attorney's fees or sanctions. As the prevailing party on appeal, Roxanne Momot is entitled to costs upon her compliance with ARCAP 21.

CONCLUSION

¶20 For the foregoing reasons, we affirm.[8]

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

[8] Silkworth's attorney is an out-of-state attorney registered in Arizona as in-house counsel. *See* Ariz. R. Sup. Ct. 38(a). Under the Rules of the Supreme Court, however, an out-of-state attorney registered as in-house counsel must also secure *pro hac vice* status under Rule 39 before filing a brief or appearing in court on behalf of his corporate employer. *See* Ariz. R. Sup. Ct. 38(a)(10) ("In providing legal services to the lawyer's employer, a lawyer who has been issued a Registration Certificate under this rule may also secure admission *pro hac vice* . . . by complying with the requirements of Rule 39 of these rules."); Ariz. R. Sup. Ct. 42, ER 5.5(e) ("A lawyer admitted in another . . . jurisdiction . . . and registered pursuant to Rule 38(a) . . . may provide legal services in Arizona that are provided to the lawyer's employer . . . and are not services for which pro hac vice admission is required."); Ariz. R. Sup. Ct. 42, ER 5.5(g) ("Attorneys not admitted to practice in Arizona, who are admitted to practice law in another jurisdiction . . . and who appear in any court of record . . . in Arizona, must also comply with [the rule] governing *pro hac vice* admission."). Accordingly, we could strike Silkworth's opening brief. However, we decide this case on its merits and will refer Silkworth's attorney to the Arizona State Bar Association.