IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

GEORGE IKNADOSIAN, et al., *Plaintiffs/Appellants*,

v.

TERRY GODDARD, et al., *Defendants/Appellees*.

No. 1 CA-CV 17-0781
FILED 11-15-2018

Appeal from the Superior Court in Maricopa County
No. CV2010-009700
The Honorable Daniel J. Kiley, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge James P. Beene delivered the decision of the Court, in which Judge Michael J. Brown and Judge James B. Morse Jr. joined.

B E E N E, Judge:

¶1 George Iknadosian, X-Caliber Guns, LLC, and X-Caliber Properties, LLC ("Iknadosian") appeal the superior court's dismissal of their case against Terry Goddard and the State of Arizona (the "State"), and Aimee Smith, Arthur Widawski, and the City of Phoenix (the "City"), including the court's award of attorneys' fees. For the reasons stated below, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In March 2009, George Iknadosian, a federally licensed firearms dealer, was prosecuted for multiple criminal offenses, but was eventually acquitted of all charges. The State also filed two related forfeiture cases, which were resolved in Iknadosian's favor: 1) in October 2009, the court dismissed the first forfeiture case with prejudice, ordering the release of all seized property; and 2) the second forfeiture case was dismissed in February 2011, also with prejudice.

¶3 In March 2010, Iknadosian filed a lawsuit against the State and the City, alleging that Aimee Smith and Arthur Widawski, Phoenix police officers, "conspired with at least one Bureau of Alcohol, Tobacco, Firearms and Explosives special agent" to "wrongfully obtain at least two seizure warrants" to "falsely arrest Mr. Iknadosian" in May 2008 and to initiate his "wrongful[] and malicious[]" criminal prosecution.[1] In the complaint, Iknadosian asserted that the State and the City were liable for malicious prosecution, conversion of real and personal property, intentional infliction of emotional distress, loss of income, tortious interference with a business expectancy, and defamation.

[1] In 2015, we affirmed the superior court's dismissal of Alex Mahon as a party to the lawsuit. *See Iknadosian v. Mahon*, 1 CA-CV 13-0205, 2014 WL 2548975, at *1 (Ariz. App. June 5, 2014).

¶4 On July 11, 2016, the State filed a Motion to Dismiss for Failure to Prosecute, Motion for Sanctions, and Motion to Compel (the "Motion"). On July 18, 2016, the City joined in the State's Motion. On July 29, 2016, Iknadosian filed a motion to extend time to file a response, requesting a deadline of August 12, 2016. On August 12, Iknadosian filed a second motion to extend the response time, requesting a new deadline of August 19, 2016. The court granted Iknadosian's second extension request. Iknadosian, however, never filed a response. On October 7, 2016, the court dismissed the case without prejudice. On October 26, 2016, Iknadosian filed a motion for new trial, which the court denied. The superior court later granted, in part, the State's Motion for Attorneys' Fees filed pursuant to Arizona Revised Statutes ("A.R.S.") section 12-349.

¶5 Iknadosian timely appeals. Although the case was dismissed without prejudice, *see McMurray v. Dream Catcher USA, Inc*., 220 Ariz. 71, 74, ¶ 4 (App. 2009) (an order dismissing a case without prejudice is generally not an appealable order as "an appeal lies only from a final judgment"), the statute of limitations had run on all causes of action before the entry of the dismissal, and no motion triggering the savings statute having been filed, *see* A.R.S. § 12-504(A), the dismissal effectively determined the action. *See Garza v. Swift Transp. Co*., 222 Ariz. 281, 284, ¶ 15 (2009). We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, A.R.S. §§ 12-120.21(A)(1), and -2101(A)(3).

DISCUSSION

¶6 Iknadosian argues the superior court abused its discretion by: 1) dismissing the lawsuit for failure to prosecute; 2) denying Iknadosian's motion for a new trial; 3) finding Iknadosian unreasonably delayed the court proceeding; and 4) awarding the State attorneys' fees, which the court determined were incurred as a result of the delay.

A. The Superior Court Acted Within Its Discretion in Dismissing the Case for Failure to Prosecute.

¶7 We review for abuse of discretion a superior court's decision to dismiss a case for failure to prosecute. *Slaughter v. Maricopa County*, 227 Ariz. 323, 326, ¶ 14 (App. 2011). According to the procedural rules, the superior court may summarily grant any motion to which the opposing party failed to file a responsive memorandum. Ariz. R. Civ. P. 7.1(b)(2); *Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 65, ¶ 17 (App. 2010) (a party's failure to file a timely response to a motion to dismiss empowered the superior court "to grant the motion *for that reason*

alone") (emphasis added). Similarly, if a party fails to comply with procedural rules or a court order, the other party "may move to dismiss the action or any claim against it." Ariz. R. Civ. P. 41(b).

¶8 Here, the procedural rules required Iknadosian to respond to the motion to dismiss by July 21, 2016. *See* Ariz. R. Civ. P. 7.1(a)(3). Iknadosian requested, and the court granted, two extensions of that deadline. The new date was set, upon Iknadosian's own request, for August 19, 2016. Iknadosian, however, never filed a response, despite being ordered to do so by the court. As a result, the court dismissed the case without prejudice on October 7, 2016.

¶9 Iknadosian argues the superior court granted the motion to dismiss as a discovery sanction. The court itself, however, rejected this reason and clearly stated in its order that "[d]ismissal of a case for failure to prosecute is not a sanction, and a 'culprit hearing' is not necessary prior to dismissing a case for failure to prosecute." We agree. As the court properly concluded, it did not need to "conduct a hearing to determine *why* a party failed to respond to a motion to dismiss; a party's failure to respond to a motion to dismiss is 'alone' sufficient justification to grant the motion." *7th & Roosevelt Partners*, 224 Ariz. at 65, ¶ 17.

¶10 Moreover, the superior court's finding of failure to prosecute was supported by the record; throughout the case, Iknadosian failed to prosecute on several occasions. In 2015, Iknadosian failed to respond to discovery requests, which resulted in a successful motion to compel. Further, when the court ordered Iknadosian to respond to specific unanswered interrogatories, Iknadosian failed to comply with that court order, prompting the court to issue a second order regarding the same interrogatories. In 2016, Iknadosian failed to disclose the basis for damages calculation before a court-ordered settlement conference. As a result, the settlement conference was initially continued, but eventually vacated, because Iknadosian failed to timely provide the calculations. Furthermore, Iknadosian conceded at oral argument before us that the case remained dormant for approximately two years, while Iknadosian pursued an unsuccessful appeal. *See Iknadosian v. Mahon*, No. CA-CV 13-0205, 2014 WL 2548975, at *1 (Ariz. App. June 5, 2014). Lastly, Iknadosian failed to respond to the City's separate motion to compel due in September 2016, a motion the court granted.

¶11 Because "we are obliged to affirm the trial court's ruling if the result was legally correct for any reason," *State v. Perez*, 141 Ariz. 459, 464 (1984), these additional failures by Iknadosian support our affirmation of

the superior court's dismissal for failure to prosecute. *See also State v. Boteo–Flores,* 230 Ariz. 551, 553, ¶ 7 (App. 2012) (appellate court will uphold ruling if correct for any reason). The record reflects the court acted within its discretion in dismissing Iknadosian's case and we find no error. *See* Ariz. R. Civ. P. 7.1, 41(b); *7th & Roosevelt Partners*, 224 Ariz. at 65, ¶ 17.

B. The Motion for a New Trial Was Properly Denied.

¶12 Iknadosian contends the superior court erred by denying its motion for a new trial because Iknadosian complied with the court's disclosure and discovery rulings and the court should have held an evidentiary hearing before dismissing the case as a sanction.

¶13 "We review a denial of a motion for new trial for an abuse of discretion," and "do not weigh the evidence." *Keg Rests. Ariz., Inc. v. Jones*, 240 Ariz. 64, 78, ¶ 49 (App. 2016). Rule 59 authorizes, but does not require, the superior court to grant a new trial "on any of the following grounds materially affecting the party's rights," and lists eight grounds for a new trial. Ariz. R. Civ. P. 59 (a)(1)(A)-(H).

¶14 On appeal, as well as at the superior court, Iknadosian did not specifically argue which of the enumerated grounds of Rule 59(a) applied to the case; Iknadosian made no references to any parts of the record corresponding with any one of the Rule 59 grounds. Accordingly, Iknadosian waived the argument. *See* ARCAP 13(a)(7)(A) (requiring appellant's brief to contain arguments with "citations of legal authorities and appropriate references to the portions of the record on which the appellant relies"). In our discretion, however, we will review the superior court's order on the merits. *See Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342 (App. 1984) (recognizing that courts prefer to decide each case upon its merits rather than dismissing on procedural grounds).

¶15 At oral argument in the superior court, Iknadosian raised subsections 1 and 8 of the past version of Rule 59(a), analogous with current Rule 59(a)(1)(A) and (H). Subsection A authorizes the court to grant a new trial if "any irregularity in the proceedings or abuse of discretion depriv[ed] the party of a fair trial." Ariz. R. Civ. P. 59(a)(1)(A). Because we have concluded, *supra*, the court did not abuse its discretion in granting the State's and the City's motion to dismiss, no irregularity in the proceedings occurred and we reject Iknadosian's subsection A argument.

¶16 According to subsection H, a court may grant a new trial if "the verdict, decision, findings of fact, or judgment is not supported by the evidence or is contrary to law." Ariz. R. Civ. P. 59(a)(1)(H). Not only was

the court's dismissal without prejudice not a "verdict, decision, finding[] of fact, or judgment," *see* Rule 59(a)(1)(H), it was also supported by Iknadosian's failure to file a response. Iknadosian's motion for a new trial was properly denied. *See Jones*, 240 Ariz. at 78, ¶ 49.

¶17 Iknadosian argues, however, the superior court dismissed the case as a sanction and was, thus, obligated to conduct an evidentiary hearing to determine whether a less severe sanction was appropriate. The superior court expressly disavowed its dismissal as a sanction. *See* ¶¶ 7, 9, *supra*.

¶18 Moreover, Iknadosian raised this argument in the superior court for the first time in its reply. The superior court properly ruled that Iknadosian waived the argument. *See* Ariz. R. Civ. P. 7.1(a)(3) ("[T]he moving party may file a reply memorandum, which may address only those matters raised in the responsive memorandum."); *see also Westin Tucson Hotel Co. v. Ariz. Dep't of Revenue*, 188 Ariz. 360, 364 (App. 1997) ("[A] claim raised for the first time in a reply is waived."). We do not consider arguments waived in the superior court. *See Pima County v. Testin*, 173 Ariz. 117, 119 (App. 1992) ("We will not consider on appeal a theory that was not presented to the trial court."); *see also* ARCAP 13(a)(7)(B) (appellate briefs must contain "references to the record on appeal where the particular issue was raised and ruled on").

C. The Attorneys' Fees Award Was Supported by Substantial Evidence.

¶19 Iknadosian argues the court erred by: 1) finding Iknadosian unreasonably delayed the court proceedings because a significant percentage of delays were caused by the State and the City; and 2) awarding attorneys' fees.

¶20 We review an attorneys' fees award for abuse of discretion. *Burke v. Ariz. State Ret. Sys.*, 206 Ariz. 269, 272, ¶ 6 (App. 2003). According to A.R.S. § 12-349, "the court shall assess reasonable attorney fees" against a party, if the party "[u]nreasonably expands or delays the proceeding." A.R.S. § 12-349(A)(3). Section 12-350 requires the superior court to "set forth the specific reasons for the award" made under § 12-349. A.R.S. § 12-350; *Bennett v. Baxter Group, Inc.*, 223 Ariz. 414, 421, ¶ 28 (App. 2010).

¶21 After finding that Iknadosian violated A.R.S. § 12-349(A)(3), the superior court requested additional briefing regarding the amount of fees to be awarded because the State's Application for Attorneys' Fees contained entries "clearly not related to any unreasonable expansion or

delay of the proceedings by the Plaintiffs." After oral argument on this issue, the court explained its ruling as to each instance of delay caused by Iknadosian: 1) failure to prosecute, leading the State and the City to prepare the motion to dismiss and respond to the motion for a new trial; 2) failure to comply with discovery obligations, leading to a successful motion to compel; 3) failure to provide disclosures of computation and measure of damages before a settlement conference, as well as prior to its rescheduled date; and 4) failure to offer any specific response or objection to requests for expert disclosure deadline extensions caused by Iknadosian's failure to respond to outstanding discovery requests.

¶22 In its October 2, 2017 order, the court analyzed each category of the requested award and specifically described the reasons for its award. Moreover, the court awarded the requested fees only in part because it found some of the requests were not caused by Iknadosian's actions or were not sufficiently established by the State. The court awarded $26,688 in fees out of the originally requested $38,911. Because substantial evidence supports the court's factual finding—Iknadosian caused unreasonable delay—and each item of the attorneys' fees award, its ruling was not clearly erroneous. *See City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 189, ¶ 58 (App. 2008).

D. Attorneys' Fees on Appeal.

¶23 Iknadosian requests an award of reasonable attorneys' fees and costs incurred on appeal pursuant to A.R.S. § 12-348. Because Iknadosian is not the prevailing party, we deny the request.

CONCLUSION

¶24 For the foregoing reasons, we affirm the superior court's judgment dismissing Iknadosian's case without prejudice and the award of attorneys' fees.