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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

VILLAGE AT GRAYHAWK OWNERS
ASSOCIATION, *Plaintiff/Appellee*,

v.

KATHRYN MARIE JONES, *Defendant/Appellant*.

No. 1 CA-CV 18-0016
FILED 12-20-2018

Appeal from the Superior Court in Maricopa County
No. CV2016-050453
The Honorable Aimee L. Anderson, Judge *Retired*

REVERSED AND REMANDED

COUNSEL

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By Joshua M. Bolen & Timothy Butterfield
Counsel for Plaintiff/Appellee

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By David L. Abney
Counsel for Defendant/Appellant

VILLAGE v. JONES
Decision of the Court

MEMORANDUM DECISION

Judge David D. Weinzweig delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Peter B. Swann joined.

WEINZWEIG, Judge:

¶1 Kathryn Jones appeals from a final default judgment and injunction order. We reverse and remand because the superior court abused its discretion in denying Jones' request for a continuance after her attorney was disbarred.

FACTS AND PROCEDURAL BACKGROUND

¶2 Jones owns a home in the Village at Grayhawk subdivision. All homeowners in the subdivision signed a condominium declaration, including Jones, which provides that the condominium association, Village at Grayhawk Owners Association, is responsible for maintaining all common area against termite infestation. Jones shares a wall of her garage with the common area, but she refused to remove personal property from the garage to make the common wall accessible for a termite inspection.

¶3 Village sued Jones in February 2016 for a declaration that Jones was in breach of the condominium declaration and sought an injunction requiring Jones to temporarily clear her garage for a termite inspection or authorizing Village to gain access and clean the garage at Jones' expense.¹

¶4 Jones filed an answer and counterclaim in May 2016. She denied the allegations and alleged that Village had breached the declaration "by failing to maintain the Common Elements so as to address the termite infestation," despite her repeated requests. She also asserted that Village had selectively enforced the declaration against her and its demand was unreasonable because the stored items in the garage were heavy and all three residents of the home (Jones, her husband and her son) were in poor health.

¹ Village also sued Jones' husband, but the superior court dismissed him from the action and he is not a party to this appeal.

VILLAGE v. JONES
Decision of the Court

¶5 In late November 2016, Village sought a preliminary and permanent injunction, plus an order to show cause why relief should not be granted. The court set an evidentiary hearing for March 24, 2017.

¶6 Jones' lawyer was disbarred less than a month before the hearing. He filed a notice of disbarment just 18 days before the hearing. Jones claims she first learned of her lawyer's disbarment from this notice. At Village's request, the court converted the hearing into a scheduling conference to discuss the impact of the disbarment, including new discovery issues relating to an inspection of Jones' garage and the taking of her deposition.

¶7 The court moved forward with the March 24 hearing. Jones did not attend for alleged health reasons and was unrepresented by counsel. She claims to have informed the court she could not attend in two voice messages on March 22 and during a telephone call with the bailiff on the day of the hearing. She also claims to have asked the bailiff for permission to participate telephonically, although the record does not indicate such a request. The judge confirmed during the hearing that Jones had left a voice message and spoke with her bailiff about not attending. The judge instructed the bailiff "to advise [Jones] that she needed to be here and if she failed to appear, the hearing would proceed in her absence."

¶8 Notwithstanding Jones' absence, the court ordered her to "make the garage accessible for a termite inspection" by April 7 and "make herself available for a deposition" by April 21. It stated that Jones' since-disbarred lawyer had agreed to the inspection and deposition and ordered they proceed "as previously agreed to between the parties when the Defendant was represented by counsel." The court further warned that if Jones failed to comply, Village had "leave to request an Order to Show Cause as to why [Jones] should not be held in contempt of Court" and "sanctions [could] be imposed, including, but not limited to, striking [Jones'] answers [and] allowing [Village] to proceed as way of default."

¶9 A week later, on March 31, Jones filed a request for a temporary "stay" in the proceedings. Jones explained that her since-disbarred lawyer had not provided her with any records or documents and had failed to return documents she had provided him. She requested assistance in obtaining the case documents and wrote that "[f]ollowing receipt of the above requested documents, I also require a 3-month stay in the proceedings. I require time to conduct a search for a new attorney. Because that search may not be successful, I will require time to assemble and prepare a proper defense. This is a reasonable request." She also

VILLAGE v. JONES
Decision of the Court

complained that plaintiff's counsel was "unethically pressuring" her to grant access for an inspection and demanding that she undergo a deposition within one week, but that she was "not comfortable doing so without attorney representation."

¶10 The court summarily denied Jones' request in an April 3 minute entry order. The court found "no good cause present" but did not elaborate.

¶11 The case proceeded and Jones' defense and counterclaim rapidly unraveled. Just two days after her stay request was denied, Village arranged for a pest-control technician to inspect her garage. Jones refused to allow the homeowners' association manager to enter her garage. Then the technician was unable to conduct the inspection because Jones covered "the vast majority of the walls" in blue tarps and refused to remove them. The superior court refused to hold an emergency hearing on the issue, instead reminding the parties "of the contents of the minute entry" and the April 7 inspection deadline.

¶12 A few days later, on April 8, Jones sent a letter to Village saying she was available to participate in a deposition on either April 12 or April 13. Village responded on April 14, asserting that Jones had violated the court's order by refusing to remove the tarps from her garage for a termite inspection and that her deposition was premature until an inspection occurred. Village further complained that Jones tried to shorten the length of her deposition from four to two hours despite her since-disbarred lawyer's agreement.

¶13 Village then filed a request for sanctions on April 18. Village claimed Jones had willfully violated the court's orders regarding the termite inspection and her deposition. Village asked the court to "enforce its order by applying the sanctions it specifically warned of in its Minute Entry and strike [Jones'] Answer, allowing the Association to proceed [sic] through default."

¶14 The superior court ordered Jones to appear for a show-cause hearing on May 8, which was later continued until June 28. Meanwhile, Jones filed an opposition in which she explained, among other things, that she complied with the court's order and was undergoing surgical procedures.

¶15 On June 17, less than two weeks before the hearing, Jones filed a combined motion to dismiss Village's claim and grant her counterclaim, request for sanctions and request for reimbursement of legal fees, expenses

VILLAGE v. JONES
Decision of the Court

and termite treatment costs. Jones recounted the impact of her lawyer's disbarment and her medical conditions upon her ability to litigate. Village did not respond, and the superior court never set a briefing schedule.

¶16 Jones did not attend the show-cause hearing. The superior court determined that Jones failed to appear without good cause and proceeded in her absence. The court found Jones knew about the hearing, had received an order directing her to attend, and had filed documents with the court. The judge said she read Jones' combined June 17 motion three separate times and described Jones' "allegations" of her medical condition as "completely irrelevant to these proceedings."

¶17 Village offered testimony of two witnesses at the hearing, including the termite inspector and condominium association manager. At the hearing's end, the court summarily denied Jones' combined motion and found Jones had violated the March 24 order by (1) prohibiting Village's manager from participating in the inspection without "legal reason," (2) denying Village its "right to inspect the garage" and (3) depriving Village of the information needed to conduct her deposition. The court found that her concealment "was willful and defiant, constituting an evasive and incomplete disclosure in violation of the Arizona Rules of Civil Procedure 37(a)(4)." The court sanctioned Jones by striking her answer and counterclaim and authorizing Village to proceed against her by way of default.

¶18 Jones appeared to defend herself at the default hearing, but the commissioner found her arguments unpersuasive. Accordingly, the court entered default judgment against Jones, awarded Village its costs and attorney's fees in a total amount of \$22,797.64, and granted Village injunctive relief.

¶19 Jones timely filed a notice of appeal from the default judgment and injunction order, once revised to include Rule 54(c) language. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

DISCUSSION

¶20 We begin and end with Jones' request for a "temporary stay" on the heels of her litigation counsel's disbarment. We construe her hand-written request as a motion to continue, understanding that Jones was unrepresented at the time and unaware of the procedural lexicon.

¶21 We review the denial of a motion to continue for abuse of discretion, *Evans v. Scottsdale Plumbing Co.*, 10 Ariz. App. 184, 188-89 (1969),

VILLAGE v. JONES
Decision of the Court

which occurs when a court acts arbitrarily or inequitably, misapplies the law, or “make[s] decisions unsupported by facts or sound legal policy,” *City of Phoenix v. Geyler*, 144 Ariz. 323, 328-29 (1985); *see also Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, 350, ¶ 17 (App. 2006) (“To find an abuse of discretion, there must either be no evidence to support the superior court’s conclusion or the reasons given by the court must be clearly untenable, legally incorrect, or amount to a denial of justice.”) (quotation omitted).

¶22 We hold the court abused its discretion when it denied Jones’ motion to continue because the decision is clearly untenable and amounts to a denial of justice. *See Friedman*, 213 Ariz. at 350, ¶ 17; *see also Fleming v. Fleming*, 710 So. 2d 601, 603 (Fla. App. 1998) (“Factors to be considered in determining whether the trial court abused its discretion in denying the motion for continuance [following disbarment of movant’s counsel] include [1] whether the denial of the continuance creates an injustice for the movant; [2] whether the cause of the request for continuance was unforeseeable by the movant and not the result of dilatory practices; and [3] whether the opposing party would suffer any prejudice or inconvenience as a result of a continuance.”).

¶23 Jones asked the court for a brief pause in the proceedings under unique and precarious circumstances. She hired a lawyer to represent her in a contentious lawsuit. That lawyer represented her for nearly a year before he was disbarred in the throes of litigation, with a meaningful evidentiary hearing on the horizon and deadlines fast approaching. Jones explains that she was “entirely dependent” upon her disbarred counsel, having given him “her key documents” and having retained “no case file.” As is normal and expected, Jones had placed her full faith and confidence in her chosen, then-licensed legal counsel to defend and pursue her interests. She was then left unrepresented in bustling litigation against an institutional adversary represented by experienced counsel. At that moment, she faced a daunting and unexpected to-do list comprised of gathering documents and correspondence to recreate the record, searching for new counsel, digesting the record and learning rudimentary litigation process and court procedure. Jones bore no fault for the unexpected disbarment of her attorney, which was entirely unrelated to this lawsuit.

¶24 Against that backdrop, the superior court summarily denied Jones’ motion with six hollow words: “There being no good cause present.” The court provided no further explanation for its decision. The disbarment of counsel in the midst of litigation would disadvantage any defendant and

VILLAGE v. JONES
Decision of the Court

especially Jones, an elderly woman suffering multiple medical conditions and disabilities, which she sought to substantiate through medical records. Village never disputed her medical predicament, which included an unsuccessful spinal fusion, atrial fibrillation and flutter, and pelvic issues that required inpatient surgeries, outpatient procedures, and narcotic pain medicine.

¶25 The court entered its critical March 24 order shortly after Jones' counsel was disbarred and without Jones present in the courtroom, directing her to make the garage available for inspection within two weeks and then sit for a deposition. The court explained that its order hinged upon agreements between counsel for Village and Jones' disbarred counsel "when [she] was represented by counsel." Jones asserts that she had not been advised of those agreements. Thus, at a minimum, Jones required a continuance to get a handle on the terms and conditions of binding agreements that existed between Village and her former since-disbarred counsel.

¶26 Jones suffered significant prejudice from the court's refusal to grant the requested continuance as is apparent from the rapid descent of her litigation prospects, ultimately resulting in irreparable sanctions, including the dismissal of her answer and counterclaim and eventual entry of default judgment. She was left unprepared and unrepresented for the inspection of her garage and subsequent deposition. Village, by contrast, had little or nothing to lose from a continuance. It never argued or demonstrated a continuance would cause it harm or inconvenience, never articulated any overriding interests or concerns, and never even opposed Jones' request in the superior court.

¶27 In sum, we hold it was an abuse of discretion for the superior court to refuse a brief litigation pause or continuance on the heels of the disbarment of Jones' attorney and the eve of critical discovery. Jones was not at fault for the disbarment of her attorney but suffered significant prejudice as a result by being forced to proceed without representation while facing hardships related to her medical conditions and disabilities.

¶28 Given our holding, we need not consider Jones' other arguments on appeal regarding accommodations, the propriety of sanctions and default judgment. *See, e.g., Strader ex rel. Estate of Strader v. Zeide*, 796 So. 2d 591, 593 (Fla. App. 2001) ("Since we believe that this issue is dispositive, we decline to address whether the Plaintiff's actions warranted the ultimate sanction of dismissal with prejudice.").

VILLAGE v. JONES
Decision of the Court

CONCLUSION

¶29 For these reasons, we reverse the superior court's entry of default judgment and sanctions against Jones and remand for further proceedings consistent with this decision.



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