DIVISION ONE
FILED: 05/26/2011
RUTH A. WILLINGHAM, CLERK
BY: JT

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRED BRIDGES and TONYA BRIDGES, Husband and wife,	No. 1 CA-CV 10-0514
Plaintiffs/Appellants,	DEPARTMENT D
v.	**MEMORANDUM DECISION**
SECURITY TITLE AGENCY, INC.,	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
Defendant/Appellee.	

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-005926

The Honorable Linda H. Miles, Judge

AFFIRMED IN PART, REVERSED IN PART, REMANDED

Roger Strassburg, P.L.L.C. Scottsdale
By Roger W. Strassburg, Jr.
Attorney for Appellants

Mariscal, Weeks, McIntyre & Friedlander, P.A. Phoenix
By Michael Scheurich
Anne L. Tiffen
Attorneys for Appellee

T I M M E R, Chief Judge

¶1 Fred and Tonya Bridges appeal the trial court's entry of summary judgment denying them relief in their action against Security Title Agency, Inc. and imposing sanctions for failing to comply with discovery orders. For the reasons that follow, we affirm the entry of summary judgment in part, reverse in part, and remand for additional proceedings. We affirm the trial court's imposition of discovery sanctions.

BACKGROUND[1]

¶2 Fred and Tonya Bridges entered in a contract to purchase 40 acres of improved and unimproved land located near Globe (the "Asbestin Property") from John and Dawn Schnetzer on November 28, 2001. Security Title Agency, Inc. ("Security Title"), through its employee, Gail Wefer, served as escrow agent for the sale. Wefer received a preliminary title report for the Asbestin Property on December 6, which showed the existence of both a purchase money lien held by J. W. Copeman and a five-year exclusive option to purchase 30 acres of the property for $400 in favor of GB Creek, LLC (the "GB Creek Option"). Wefer alerted one of the Schnetzers to the existence of the GB Creek Option, inquired about their plans for release prior to close of escrow, and was told the Schnetzers would "get

[1] We view the evidence and all reasonable inferences in the light most favorable to the Bridges as the parties against whom summary judgment was entered. *State v. Mabery Ranch, Co.,* 216 Ariz. 233, 239, ¶ 23, 165 P.3d 211, 217 (App. 2007).

back with" her. Wefer neither contacted the Bridges about the GB Creek Option nor supplied them with the preliminary title report.

¶3 In early January 2002, in accordance with the terms of his agreement with the Schnetzers, Copeman refused to accept a payoff of his note and release the lien on the Asbestin Property, effectively scuttling the sale to the Bridges. Undeterred, the Bridges and Schnetzers formulated a plan to "work around" this setback by agreeing to a swap of properties (the "Swap Agreement"). Under the terms of the Swap Agreement, the Bridges would purchase 60 acres of unimproved property owned by the Schnetzers (the "Jaquays Property") for the agreed-upon purchase price for the Asbestin Property and later swap the Jaquays Property for the Asbestin Property when Copeman eventually released his lien. The Swap Agreement was set forth in a written agreement but was never fully executed.

¶4 On January 15, to implement the objective of the Swap Agreement, the parties entered in a contract for the sale of the Jaquays Property and provided it to Wefer in the account originally opened for the sale of the Asbestin Property. The terms of the new contract required the same earnest money deposit and purchase price as the sales contract for the Asbestin Property. According to Wefer, she believed the parties elected to substitute a new purchase contract for the original

contract, making the existence of the GB Creek Option on the Asbestin Property irrelevant.

¶5 As the escrow progressed for sale of the Jaquays Property, the Schnetzers failed to make a required payment to Copeman, placing them at risk of losing the Asbestin Property to foreclosure. The Schnetzers also struggled to make a monthly payment to a lienholder on the Jaquays Property. To ensure the Schnetzers would retain both properties and carry out the terms of the Swap Agreement, the Bridges advanced significant monies to the Schnetzers from February 5 to May 9 by depositing funds into the escrow and instructing Wefer to release them on specified conditions. For example, the parties provided Wefer with a supplemental escrow instruction on February 5 to release $20,000 to the Schnetzers "to be applied to their February payment," which the Schnetzers would repay at the close of escrow. On March 7, the parties instructed Wefer to immediately use a $200,000 wire deposit from the Bridges to pay two service accounts – one maintained by Security Title and one maintained by Pioneer Title.

¶6 The Bridges eventually sought security for their monetary advances. Thus, the parties instructed Wefer on March 8 to transfer ownership of a parcel of the Jaquays Property known as "J56" "free and clear of any and all liens" to the Bridges if the escrow cancelled. On May 9, the parties

additionally instructed they would modify any closing instructions as necessary to satisfy an anticipated Arizona Department of Real Estate decision due in late May concerning the Jaquays Property but, if no modification occurred, "the [J56] transfer will occur automatically." The parties also instructed that escrow would close by June 30.

¶7 Escrow did not close by June 30 as the Bridges were unable to get funding in place, but neither party cancelled the escrow. The Bridges continued efforts to obtain financing after June 30, but their efforts ultimately proved futile. GB Creek exercised its option on the Asbestin Property, which was deeded to GB Creek on August 2. Sometime later, the Schnetzers lost ownership of the Jaquays Property through foreclosure or sale. The Schnetzers never repaid the amounts advanced by the Bridges, and J56 was never deeded to the Bridges.

¶8 The Bridges sued Security Title alleging multiple causes of action, including breach of fiduciary duty. After the parties engaged in discovery, Security Title filed a motion for summary judgment, which the trial court granted. The court also imposed discovery sanctions against the Bridges pursuant to Arizona Rule of Civil Procedure ("Rule") 37(b)(2). After the entry of final judgment, this timely appeal followed.

¶9 We review the entry of summary judgment de novo. *Hunt v. Richardson*, 216 Ariz. 114, 118, ¶ 8, 163 P.3d 1064, 1068

(App. 2007). The court properly entered summary judgment for Security Title if no genuine issues of material fact existed, and it was entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c); *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). Due to the trial court's broad discretion when imposing discovery sanctions, we review the imposition of those sanctions for an abuse of discretion. *J-R Constr. Co. v. Paddock Pool Constr. Co.,* 128 Ariz. 343, 344, 625 P.2d 932, 933 (App. 1981); *Sears Roebuck & Co. v. Walker,* 127 Ariz. 432, 437, 621 P.2d 938, 943 (App. 1980).

ANALYSIS

I. Summary judgment

¶10 As an escrow agent, Security Title owed fiduciary duties to the Bridges and the Schnetzers to disclose facts and circumstances that a reasonable escrow agent would perceive as evidence of fraud being committed on either party and to strictly comply with the terms of the escrow agreement. *Burkons v. Ticor Title Ins. Co. of Cal.*, 168 Ariz. 345, 353, 813 P.2d 710, 718 (1991); *Maganas v. Northroup*, 135 Ariz. 573, 576, 663 P.2d 565, 568 (1983). The Bridges argue the trial court erred by entering summary judgment on their claims that Security Title, through Wefer, breached each of these duties because material issues of disputed fact exist whether Wefer (1) failed to disclose evidence of fraud by not informing the Bridges of

the GB Creek Option, and (2) failed to strictly comply with the terms of the escrow agreement by not transferring ownership of J56 to the Bridges when escrow failed to close on June 30, 2002. We address each argument in turn.

A. Failure to disclose GB Creek Option

¶11 The Bridges argue Wefer failed to disclose evidence of fraud by withholding the preliminary title report and by failing to otherwise inform the Bridges of the GB Creek Option. They contend the preliminary title report suggested the possibility of fraud because it showed the Schnetzers were trying to sell the Asbestin Property twice. Although Wefer admitted the GB Creek Option was material to the sale of the Asbestin Property, Security Title contends the existence of the option did not constitute evidence of fraud because the option became moot when the parties substituted a new contract for sale of the Jaquays Property. Security Title also argues that because the parties did not inform Wefer of their intention to eventually swap the Jaquays Property for the Asbestin Property, and she did not serve as the escrow agent for the Swap Agreement, she was not obligated to inform the Bridges of the GB Creek Option.

¶12 Viewing the facts in the light most favorable to the Bridges, we have no difficulty concluding that the existence of the GB Creek Option constituted evidence the Schnetzers were attempting to defraud the Bridges by inducing them to purchase

the Jaquays Property with the promise of an eventual swap of the Asbestin Property while knowing the Schnetzers could not convey unencumbered title to the Asbestin Property in light of the GB Creek Option. *See Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 483, ¶ 19, 38 P.3d 12, 21 (2002) (holding "a party may be liable for acts taken to conceal, mislead or otherwise deceive, even in the absence of a fiduciary, statutory, or other legal duty to disclose"); *Lombardo v. Albu*, 199 Ariz. 97, 99, ¶ 8, 14 P.3d 288, 290 (2000) (recognizing seller of property has duty to disclose facts material to transaction to buyer); *Mammas v. Oro Valley Townhouses, Inc.*, 131 Ariz. 121, 123, 638 P.2d 1367, 1369 (App. 1981) (concluding seller of property could be liable for fraud by failing to correct misrepresentation about size of home after learning of falsity of original representation). A jury could conclude the existence of the option was material to the Swap Agreement because no reasonable buyers would have entered in the agreement and advanced monies in reliance on it knowing the Schnetzers would not likely be in a position to transfer ownership of the Asbestin Property or, assuming transfer, GB Creek could exercise its option for a mere $400. The propriety of summary judgment, however, turns on whether sufficient evidence exists that Wefer knew of the Swap Agreement and

therefore knew that the GB Creek Option was evidence of fraud that should have been disclosed to the Bridges.

¶13 Our review of the record reveals sufficient evidence to support a finding that Wefer knew of the Swap Agreement. Significantly, John Schnetzer testified he discussed the Swap Agreement with Wefer on at least three occasions, although he was unable to provide details of the conversations. He also stated he was a "hundred percent sure it was discussed because it would have to be because there's no way we could hide this back and forth when we are all doing paperwork," and that "everything was discussed." Finally, Schnetzer testified he watched as the partially signed Swap Agreement was faxed to Wefer.

¶14 Although Wefer maintained she was unaware of the Swap Agreement, a jury could conclude otherwise. Wefer testified she knew the Bridges and the Schnetzers planned to do something with the properties. The purchase price and earnest money for the Jaquays Property were identical to the amounts for the Asbestin Property, which is consistent with the notion of an intended swap of properties. Furthermore, Wefer made payments from the escrow account advanced by the Bridges to a Security Title servicing account in the amount of $19,966 and to a Pioneer Title servicing account in the amount of $188,205.95. Security Title does not dispute the Schnetzers used the Security Title

account to refinance part of their obligation to Copeman on the Asbestin Property; Wefer served as the escrow agent for the refinance transaction. According to expert witness Terri Hanson, the payment of monies from the escrow to service debt on the Asbestin Property should have alerted Wefer that the Bridges still intended to purchase the Asbestin Property. In Hanson's words, "what rational buyer would pay such a large sum of money for the sole purpose of benefitting a property he no longer wanted to buy?" Hanson opined that if Wefer really thought the Bridges no longer had an interest in acquiring the Asbestin Property, she should have inquired about the reason for the payments. Wefer's failure to do so would support a finding she refrained from making the inquiry because she knew of the Swap Agreement. *See Burkons,* 168 Ariz. at 354, 813 P.2d at 719 (concluding that when confronted with a "highly unusual" real estate transaction, "[t]he factfinder could conclude that the escrow agent, with all its experience, must have been aware of these circumstances").

¶15 In conclusion, the Bridges presented sufficient evidence concerning Wefer's knowledge of the Swap Agreement to withstand Security Title's motion for summary judgment on the claim it breached its fiduciary duty by failing to inform the Bridges of the GB Creek Option. We therefore reverse the portion of the summary judgment addressing this contention. In

light of our decision, we need not address the parties' remaining arguments concerning the Swap Agreement, the pertinence of the GB Creek Option, or the admissibility of parts of Hanson's affidavit.

B. J56 property

¶16 The Bridges next contend Wefer breached her duty to strictly comply with escrow instructions by failing to transfer J56 when escrow failed to close on June 30, 2002. Security Title counters that Wefer was unable to transfer J56 to the Bridges because conditions for transfer stated in the supplemental escrow instructions never occurred. We agree with Security Title.

¶17 The supplemental escrow instructions supplied by the parties to Wefer provided in pertinent part that, "if this escrow cancels, Seller will furnish Buyer an executed [d]eed for J56 free and clear of any and all liens," unless further instructions are needed before that time in light of an anticipated decision by the Arizona Department of Real Estate. Thus, in order for Wefer to transfer the property, the escrow had to be cancelled and any encumbrances on J56 had to be released.

¶18 The record does not reflect that escrow was cancelled, and, therefore, as a matter of law, Wefer strictly complied with her instructions by not transferring J56 to the Bridges. The

parties set forth the following mechanism for cancelling escrow in their purchase contract/escrow instructions:

> Any party who wishes to cancel this Contract because . . . escrow fails to close by the agreed date, and who is not himself in breach of this Contract except for any breach occasioned by a breach by the other party, may cancel this Contract by delivering to escrow company a notice containing the address of the party in breach and stating that this Contract shall be cancelled unless the breach is cured within the 13 days following the delivery of the notice to the escrow company. Within three days after receipt of such notice, the escrow company shall send it by United States Mail to the party in breach at the address contained in the notice and no further notice shall be required. If the breach is not cured within the 13 days following the delivery of the notice to the escrow company, this Contract shall be cancelled.[2]

Because the parties included this thirteen-day notice provision in their agreement, the escrow did not automatically cancel on June 30, 2002, when escrow failed to close. *Horizon Corp. v. Westcor, Inc.*, 142 Ariz. 129, 135-36, 688 P.2d 1021, 1027-28

[2] The purchase contract for the Jaquays Property submitted with Security Title's moving papers is set forth on the identical pre-printed form as the original contract for the Asbestin Property. The thirteen-day notice provision is contained on the reverse-side of the form. Although the reverse-side of the Jaquays Property contract is not set forth in the moving papers, the Bridges do not dispute that the Jaquays Property contract contained the reverse-side provisions. Regardless, our decision would remain the same as the Bridges did not provide any authority supporting a conclusion that the escrow cancelled automatically if the closing date passed without an extension by the parties.

(App. 1984) ("It is clear that the thirteen-day letter requirement is not merely for the benefit of the escrow but is the only way in which the parties here could cancel the contract."). According to Wefer, no party acted to cancel the escrow after June 30; the Bridges offered no contrary evidence. Consequently, as Wefer was instructed to transfer J56 only upon cancellation of the escrow, and escrow never cancelled, she complied with the parties' instructions by not transferring the property. Additionally, because the record reflects the existence of a lien on J56 as of June 30, 2002, Wefer could not have transferred the property until it was released pursuant to the parties' instructions. The trial court correctly entered summary judgment on the Bridges' claim that Security Title breached the escrow instructions by failing to transfer J56 to them.

II. Discovery sanctions

¶19 The Bridges provided their initial disclosure statement pursuant to Rule 26.1 to Security Title on August 24, 2007, listing the Schnetzers as witnesses but providing their attorney's address as the sole contact information. Although the Bridges filed a supplemental disclosure statement on May 9, 2008 that again included the Schnetzers as witnesses, additional contact information was not provided. On August 11, three weeks after the deadline to disclose non-expert witnesses, Security

Title sent interrogatories to the Bridges requesting the Schnetzers' addresses. On January 12, 2009, the Bridges answered the interrogatories and filed a second supplement to their disclosure statement but failed to provide the requested addresses. On motion by Security Title, the trial court on March 11 ordered the Bridges, among other things, to disclose the Schnetzers' addresses within ten days. The court also extended the discovery deadline to June 30. Before the deadline, the Bridges' counsel arranged for John Schnetzer's ("John") deposition, which took place on June 24.

¶20 Although the Bridges complied with aspects of the court's March 11 order, they failed to disclose the Schnetzers' addresses despite several follow-up requests by Security Title, prompting Security Title to file a renewed motion to exclude witnesses or for alternate relief. At a hearing on December 14, the Bridges stated they did not comply with the court order regarding Dawn Schnetzer ("Dawn") because they did not know her address, although counsel for the Bridges stated he also represented her and was in contact with her via telephone and email. The trial court ruled that the Bridges had ignored disclosure and discovery rules by failing to disclose the Schnetzers' addresses and had disregarded the court's March 11 order without good cause. As a result, the court sanctioned the Bridges pursuant to Rule 37(b)(2) by (1) prohibiting the Bridges

from using Dawn as a witness,[3] (2) precluding the Bridges from conducting further discovery, and (3) awarding Security Title $3,960 in attorneys' fees and costs incurred to file a renewed motion to preclude Dawn as a witness. The court also ordered the Bridges to disclose Dawn's address. The Bridges complied with that order, and Security Title deposed Dawn on January 28, 2010.

¶21 The Bridges argue the trial court abused its discretion in several respects. The Bridges initially contend the court erred by finding they failed to disclose the Schnetzers' addresses because they provided the Schnetzers' attorney's address in the initial Rule 26.1 disclosure statement, and nothing showed the Bridges ever had better information. We reject this contention because the Bridges' counsel admitted he represented Dawn and was in contact with her.[4] He also contacted John and arranged for his deposition after the March 11 order. Even assuming the Bridges did not have addresses for the Schnetzers at the time of the initial

[3] The court declined to exclude John as a witness because Security Title had deposed him after March 11.

[4] Indeed, the Bridges paradoxically complain their counsel was "caught between a rock and a hard place" because Dawn had instructed him not to disclose her address. Putting aside consideration of the duties counsel owed to all clients, his remedy was to either refrain from listing Dawn as a witness or obtain relief from application of Rule 26.1 and Rule 33 from the court – not simply ignore the rules and the court's March 11 order.

disclosure statement, the court could have correctly found that the Bridges later obtained the information yet failed to disclose it pursuant to court rules and court order.

¶22 Next, the Bridges argue the sanctions imposed were "too harsh, disproportionate, and unfairly prejudice[ial]" because (1) the Bridges substantially complied with the March 11 order by producing reams of documents, (2) Security Title did not suffer prejudice from the delay in learning the Schnetzer's contact information, and (3) the Bridges were prejudiced by the exclusion of Dawn as their witness and by having their discovery rights truncated. We disagree.

¶23 Rule 37(b)(2)(B) provides that if a party "fails to obey an order to provide or permit discovery," the court may enter any appropriate order, including prohibiting introduction of designated evidence. The court in this case acted within the discretion afforded by the rule. Although the Bridges partially complied with the court's March 11 order, they did not disclose the Schnetzers' addresses within ten days as required. The fact that John disclosed his address at his deposition three months later and the Bridges ultimately disclosed Dawn's address seven months after that date did not excuse disobedience of the March 11 order. Court orders are not advisory and must not be taken lightly; the court acted well within its discretion by imposing

sanctions for the Bridges' failure to abide by the March 11 order.

¶24 The sanctions imposed were also appropriate to the circumstances and did not disproportionately prejudice the Bridges. *See Roberts v. City of Phoenix*, 225 Ariz. 112, 119-20, ¶ 27, 235 P.3d 265, 273 (App. 2010) (citation omitted) (holding sanctions "must be appropriate to the circumstances"). The court appropriately precluded Dawn as a witness for the Bridges because the Bridges did not disclose her address until after ordered a second time to do so and well after expiration of the discovery deadline.[5] *See B & R Materials, Inc. v. U.S. Fid. & Guar. Co.*, 132 Ariz. 122, 123-24, 644 P.2d 276, 277-78 (App. 1982) (deciding it appropriate for the trial court to exclude evidence a party failed to provide to the opposing party during discovery). Nothing suggested Dawn was an important witness. The Bridges did not offer details to the trial court regarding the significance of Dawn's testimony to their case or how her version of events differed from John's version. Indeed, the Bridges admitted Dawn was not part of the "three conversations with Gail Wefer about the swap agreement. . . . [John Schnetzer is] just an honest witness, and he is the sole witness

[5] The court recognized that although the Bridges also failed to timely disclose John's address, Security Title was able to depose him before expiration of the discovery deadline so preclusion was not warranted.

that anybody's been able to find who's knowledgeable about that topic." Although the Bridges recite on appeal that Dawn can say the contract for the Jaquays Property was a "clerical" replacement for the Asbestin Property contract, other witnesses, including John, provide this testimony.

¶25 We also reject the notion that the court unduly prejudiced the Bridges by precluding them from conducting further discovery and by imposing monetary sanctions. The Bridges had ample time to engage in discovery before the expiration of the original discovery deadline. And Security Title was only granted four additional months of discovery due to the Bridges' failure to comply with the rules and the March 11 order. The monetary sanctions were limited to the amount of attorneys' fees expended by Security Title to compel the Bridges to comply with the rules and court order. We do not discern error.

¶26 Finally, the Bridges argue the trial court erred by imposing monetary sanctions because Security Title's attorneys' fee affidavit contained impermissible "block billing" and listed tasks that would have been completed regardless of the discovery dispute. A fee affidavit should include the following: the type of legal work done, the date the work was performed, the attorney performing the work (if multiple attorneys were involved), and the amount of time spent performing the work.

Schweiger v. China Doll Rest., Inc., 138 Ariz. 183, 188, 673 P.2d 927, 932 (App. 1983). "In order for the court to make a determination that the hours claimed are justified, the fee application must be in sufficient detail to enable the court to assess the reasonableness of time incurred." *Id.* Security Title's affidavit for attorneys' fees included all the required information. After examining the contents of this affidavit, we decide the entries were specific enough to allow the court to assess the reasonableness of the time spent and whether the tasks were necessary to the discovery dispute as required by *China Doll*.

ATTORNEYS' FEES ON APPEAL

¶27 Security Title request attorneys' fees on appeal pursuant to Arizona Revised Statute § 12-341.01 (2003). We decline this request because no party has yet prevailed in this action in light of our decision to partially reverse the entry of summary judgment. At the conclusion of proceedings before the trial court, however, that court may exercise its discretion to award attorneys' fees to the prevailing party for fees incurred in this appeal.

CONCLUSION

¶28 For the foregoing reasons, we affirm in part and reverse in part the trial court's grant of summary judgment in favor of Security Title. We affirm the award of sanctions. We

decline to award attorneys' fees on appeal without prejudice to the trial court to later award fees to the prevailing party.

/s/
Ann A. Scott Timmer, Chief Judge

CONCURRING:

/s/
Patrick Irvine, Presiding Judge

/s/
John C. Gemmill, Judge