

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

SHAMROCK FOODS COMPANY, AN ARIZONA CORPORATION,
Plaintiff/Appellee,

v.

LAWRENCE FOPPE,
Defendant/Appellant.

No. 2 CA-CV 2020-0076
Filed March 3, 2021

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20190729
The Honorable Leslie Miller, Judge

AFFIRMED

COUNSEL

Robert S. Wolkin, Tucson
Counsel for Plaintiff/Appellee

Lawrence Foppe, Scottsdale
In Propria Persona

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Eppich and Chief Judge Vásquez concurred.

BREARCLIFFE, Judge:

¶1 Lawrence Foppe appeals the trial court’s judgment in favor of Shamrock Foods Company. Foppe contends the court failed to impose both harsher and purported mandatory sanctions for Shamrock’s discovery and disclosure violations. He also contends that the judgment was contrary to the weight of the evidence. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court’s verdict. *See Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, ¶ 3 (App. 2004). Shamrock contracted with Bodega Scottsdale LLC in 2016. Foppe, the sole manager and statutory agent of Bodega, personally guaranteed the contract with Shamrock. In November 2018, Shamrock demanded that Foppe pay the full balance of Bodega’s account – \$17,577.83 – within ten days. A week later, Foppe notified Shamrock that he was cancelling Bodega’s account due to “repeated errors on receivables, posting checks received against the wrong invoices.” Foppe informed Shamrock he would make payments on “outstanding invoices (according to [his] records)” until he paid off the balance on the account.

¶3 Thereafter, Shamrock sued Bodega for breach of contract and Foppe under the guaranty. Bodega and Foppe were initially represented by counsel, but counsel withdrew before filing an answer on their behalf. Foppe then filed an answer pro se and on behalf of Bodega.

¶4 Foppe sent a subpoena to Shamrock in September 2019, requesting it produce the documents used to calculate the amount it claimed Bodega and Foppe owed it. Thereafter, the trial court ordered Shamrock to provide Foppe with the documents supporting its claims. Foppe then filed a motion to compel, to which Shamrock did not substantively respond. Following that motion, the court ordered Shamrock to disclose the “evidence necessary to establish the allegations against [Foppe]” within five days, or the evidence would be precluded at trial.

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Shamrock submitted a supplemental response to Foppe's motion to compel, attaching its disclosure statement, the contract between it and Bodega, and various invoices.

¶5 The trial was held before the court in October 2019, during which certain Shamrock accounting documents were identified that had not been disclosed to Foppe. Foppe objected to the documents, arguing that because they were not disclosed as ordered, they should be precluded. The court excluded the documents.

¶6 Following trial, but before the trial court rendered its judgment, Foppe filed a motion for sanctions against Shamrock for its failure to comply with disclosure and discovery rules and court orders. Shamrock responded to the motion, asserting that it had made complete disclosure as ordered. The court denied Foppe's motion, stating that his motion "request[ed] a variety of additional sanctions that [were] either not relevant to this case or untimely requested." It further concluded that, because Foppe had represented himself, there was no basis to award him attorney fees.

¶7 The trial court thereafter announced its judgment by a signed order in favor of Shamrock for the principal amount of \$8,249.62, with an order that Shamrock submit a request for its costs and attorney fees. But, due to Shamrock's failure to disclose relevant documents, the court denied Shamrock its contractual collection fees. Following entry of final judgment, Foppe appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 12-2101(A)(1).¹

¹Bodega was unrepresented at trial. Foppe filed his notice of appeal in his individual capacity, and Bodega did not appeal the trial court's judgment. We therefore only address on appeal the judgment against Foppe individually, as guarantor of Bodega's obligation, if any, to Shamrock, not the judgment against Bodega. See *Boydston v. Strole Dev. Co.*, 193 Ariz. 47, ¶ 7 (1998) (individual may represent himself in court without counsel); see also *Munger Chadwick, P.L.C. v. Farwest Dev. & Constr. of the Sw., LLC*, 235 Ariz. 125, ¶ 7 (App. 2014) (corporation "may not be represented by someone who is not authorized to practice law.").

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Analysis

¶8 Rule 26.1(a)(1), Ariz. R. Civ. P., requires each party to disclose to the other party “the factual basis of each of the disclosing party’s claims or defenses.” If a party or attorney engages in “unreasonable, groundless, abusive, or obstructionist conduct in connection with discovery,” the trial court may impose appropriate sanctions. Ariz. R. Civ. P. 26(h). Foppe argues on appeal that the court failed to sufficiently sanction Shamrock for its purported discovery and disclosure violations. “We will not disturb a trial court’s decision regarding sanctions for a disclosure violation absent an abuse of discretion.” *Vanoss v. BHP Copper Inc.*, 244 Ariz. 90, ¶ 30 (App. 2018). We will affirm the court’s ruling if it is correct for any reason apparent in the record. See *Forszt v. Rodriguez*, 212 Ariz. 263, ¶ 9 (App. 2006).

¶9 Foppe first claims that the trial court was required to exclude Shamrock’s witnesses and exhibits because Shamrock “willfully and knowingly ignored two court orders to disclose without good cause.” And specifically, that “[u]nder Rule 26.1(c), Ariz. R. Civ. P., the trial court must automatically exclude witnesses and exhibits where no good cause for a failure to disclose has been shown.” Rule 26.1(c), however, applies only to the disclosure of electronically stored information, and also mandates no such sanction. Consequently, the court did not err or abuse its discretion in failing to impose such sanctions under that Rule.

¶10 Foppe then claims that the trial court erred in failing to order Shamrock “to pay [his] expenses” under Rule 37(b)(2)(C), Ariz. R. Civ. P.² He asserts, incorrectly, that, under the rule, “the Court must order the disobedient party” to pay such expenses. Rule 37(b)(2)(C) actually states that “[i]nstead of or in addition to the orders above” – those identified in Rule 37(b) – “the court *may* order the disobedient party . . . to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.” (emphasis added). An award of expenses to a party as a disclosure or discovery sanction is therefore discretionary. See *Poleo v. Grandview Equities, Ltd.*, 143 Ariz. 130, 133 (App. 1984) (“The trial court has discretion in imposing sanctions pursuant to Rule 37(b).”).

²In his opening brief, Foppe claims the trial court erred by making “no order to pay Plaintiff’s” – that is, Shamrock’s – “expenses.” We will assume for purposes of this appeal that he meant “Defendant Foppe’s” expenses.

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Because Foppe misreads Rule 37(b)(2)(C) as obligatory rather than discretionary, he makes no argument as to how the court abused its discretion in failing to award him his litigation expenses. He merely argues that the court had no discretion and must impose such a sanction. Because there is no mandatory sanction as Foppe argues, the court did not err in failing to impose one. And, because Foppe fails to argue under the correct standard that the court abused its discretion, that argument is waived. *See Ritchie v. Krasner*, 221 Ariz. 288, ¶¶ 61-62 (App. 2009) (failure to cite to appropriate legal authority can constitute waiver of claim).

¶11 Additionally, Foppe argues that the trial court erred by not dismissing Shamrock’s cause of action altogether. Foppe asserts that “[u]nder Rule 26.1(c) and 37(b)(2)(C), trial courts are empowered with an inherent authority to impose sanctions for blatant violations of the spirit of the rules.” He fails to cogently argue how, in fact, those two rules do any such thing. Instead, Foppe extensively argues that the Federal Rules of Civil Procedure and several extra-jurisdictional, federal cases empower a court to dismiss a cause of action for a discovery violation.

¶12 But we need not look to the federal rules or case law for guidance because the Arizona rules expressly permit a trial court to dismiss a claim or claims as a sanction for a discovery violation. Rule 37(b)(2)(A)(v), Ariz. R. Civ. P., states: “If a party or a party’s officer, director, or managing agent . . . fails to obey an order to provide or permit discovery . . . the court where the action is pending may . . . dismiss[] the action or proceeding in whole or in part.” Nonetheless, the imposition of any sanction – including the sanction of dismissal of the action – is, again, discretionary. *Poleo*, 143 Ariz. at 133. Our courts avoid such a drastic sanction as dismissal of a claim, “which should be employed with caution and restraint.” *Zakroff v. May*, 8 Ariz. App. 101, 104 (1968). And, even in cases where there has been willful disregard of discovery obligations, bad faith, or intentional destruction of evidence, our courts have still held that sanctions such as dismissal of complaints and striking of answers are discretionary, not mandatory. *See Austin v. City of Scottsdale*, 140 Ariz. 579, 581 (1984) (dismissal of complaint for discovery violation is discretionary); *Roberts v. City of Phoenix*, 225 Ariz. 112, ¶ 27 (App. 2010) (striking answer discretionary for discovery violation). Although Foppe is correct that dismissal of an action is a potential sanction for discovery violations, he does not show how the trial court abused its discretion in failing to impose it.

¶13 In denying Foppe’s motion for sanctions, the trial court stated: “Defendant has filed a Motion for Sanctions regarding conduct of Plaintiff

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that occurred prior to trial. The trial has now been held and pursuant to prior Motions of Defendant, the Court excluded evidence offered by Plaintiff at trial.” The record reflects that, at trial, in response to Foppe’s objections, the court barred admission of exhibits offered by Shamrock that were not properly disclosed before trial. The court further sanctioned Shamrock by denying its contractual collection fees in the final judgment. Foppe has failed to argue or demonstrate why these sanctions were inadequate under the circumstances to address the violation, or why this court should second guess the trial court’s exercise of discretion in selecting the appropriate sanction. Based on Foppe’s argument and the record, we cannot say that the trial court abused its discretion in failing to impose harsher sanctions than those imposed.

¶14 Foppe also claims that he was “denied his right to a full and complete defense” because Shamrock “refus[ed] to provide any discovery.” Foppe asserts that his “case was to scrutinize [Shamrock’s] records by compar[ing] accounting records of [Shamrock] with his own to prove that the records are inaccurate.” Again, during trial, on urging from the court, Shamrock presented certain documents showing the amounts billed and credited to Foppe’s account, Foppe objected to these documents being admitted, and the trial court excluded them from trial. Foppe, therefore, received the remedy he sought—exclusion of the objected-to documents from trial. He fails to articulate how the court’s evidentiary ruling excluding the use of documents against him hampered his defense. We have no basis to find that it did.

¶15 Finally, Foppe argues that the decision of the trial court was “contrary to the weight of the evidence.” “When reviewing a verdict, we review the evidence in a light most favorable to sustaining the verdict.” *Castro v. Ballesteros-Suarez*, 222 Ariz. 48, ¶ 11 (App. 2009). Because the trial court is in the best position to judge the credibility of witnesses and weigh evidence, we will affirm its factual findings unless clearly erroneous. *Id.* On appeal, we will not reweigh the evidence “as long as substantial evidence supports the trial court’s ruling.” *CSA 13-101 Loop, LLC v. Loop 101, LLC*, 233 Ariz. 355, ¶ 29 (App. 2013). “Substantial evidence is any relevant evidence from which a reasonable mind might draw a conclusion.” *Higgins v. Assmann Elec., Inc.*, 217 Ariz. 289, ¶ 26 (App. 2007) (quoting *Mealey v. Arndt*, 206 Ariz. 218, ¶ 12 (App. 2003)).

¶16 On appeal, Foppe reiterates his claim that Shamrock failed to apply several other credits to his account, and that with those credits applied, he should only owe Shamrock \$3,670.58 at most. After reviewing

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the record presented on appeal, we conclude that substantial evidence supports the trial court's verdict. Shamrock presented evidence and testimony at trial that explained what was credited to Foppe's account to reduce the amount he owed from \$16,485.13 to \$9,261.97. Shamrock also stated it only found that Foppe paid one duplicate payment, which was credited to his account. Furthermore, Shamrock agreed to deduct \$291.93 for invoices for purchases from their warehouse, which it conceded in its closing argument, bringing the final balance Foppe owed to \$8,970.04. The trial court also stated that "[Foppe could not] identify a payment that was made that was not accounted for in the Shamrock records," and that he could not "provide[] a demonstration of payments." We conclude that Shamrock presented substantial evidence to support the amount the court determined Foppe owed, and we will not reweigh evidence or second guess who the trial court chose to believe.

Disposition

¶17 For the foregoing reasons, we affirm the trial court's judgment in favor of Shamrock as to Foppe. As the prevailing party on appeal, Shamrock is entitled to recover its costs upon compliance with Rule 21, Ariz. R. Civ. App. P. See *Aqua Mgmt., Inc. v. Abdeen*, 224 Ariz. 91, ¶ 23 (App. 2010). Shamrock also seeks attorney fees on appeal under A.R.S. § 12-341.01, as prevailing party in an action based upon contract, and expressly under the contract between the parties. We award Shamrock its attorney fees incurred on appeal upon its compliance with Rule 21.