IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

MICHAEL SMITH AND SANDI SMITH,
HUSBAND AND WIFE,
Defendants/Counterclaimants and Third-Party Plaintiffs/Appellants,

v.

D.C. CONCRETE COMPANY, INC., DAVID ALAN CONNOR, GREGORY JOHN CONNOR, AND REBECCA CONNOR,
Third-Party Defendants/Appellees.

No. 2 CA-CV 2021-0093
Filed January 28, 2022

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NOT FOR PUBLICATION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. C20130545
The Honorable Gary J. Cohen, Judge

AFFIRMED

COUNSEL

Michael Smith and Sandi Smith
In Propria Personae

Rai and Barone P.C., Phoenix
By Rina Rai, Tom Duer and Brock Kaminski
Counsel for Third-Party Defendants/Appellees

MEMORANDUM DECISION

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

B R E A R C L I F F E, Judge:

¶1 Appellees David A. Connor, Gregory J. Connor, Rebecca J. Connor, and D.C. Concrete Company, Inc. ("D.C. Concrete") were awarded sanctions against Appellants Michael and Sandi Smith for post-judgment discovery violations. The Smiths appeal from that award as well as from the trial court's order denying a motion for a protective order and related motion for reconsideration. We affirm.

Factual and Procedural Background[1]

¶2 "We view the facts in the light most favorable to upholding the trial court's ruling." *Hammoudeh v. Jada*, 222 Ariz. 570, ¶ 2 (App. 2009). In 2013, the Smiths filed third-party claims for breach of contract and fraudulent misrepresentation against D.C. Concrete, a subcontractor, in litigation first brought against the Smiths by their residential general contractor, SK Builders. After approximately four years of litigation, the trial court granted summary judgment in favor of D.C. Concrete on the Smith's claims. The court awarded D.C. Concrete $259,092.70 in attorney fees, $5,299.34 in costs, and $30,564.94 in sanctions pursuant to Rule 68(g), Ariz. R. Civ. P. After we affirmed the judgment on appeal, the trial court entered a supplemental judgment against the Smiths in favor of D.C. Concrete, incorporating both the trial court awards and our award on appeal. Since then, D.C. Concrete has engaged in post-judgment execution efforts, including issuing written discovery requests and notices of deposition seeking the Smith's financial information.

---

[1]We note that both parties assert facts in the opening and answering briefs not supported by citations to the record as required by Rule 13(a)(5), Ariz. R. Civ. App. P. The Smiths' opening brief in particular has multiple pages of "facts" that do not contain any record citations. We advise both parties that the failure to comply with the rules of this court in the future may result in waiver or the imposition of sanctions.

¶3 In late 2018, following D.C. Concrete's service of discovery requests and subpoenas for the depositions of the Smiths, the Smiths filed a motion to quash the subpoenas. The Smiths argued that, because they are residents of Australia, and not residents in any county in Arizona, D.C. Concrete could not obtain a court order to make them appear for a deposition nor issue a subpoena compelling them to appear for a deposition. In January 2019, the trial court denied the motion. The court ordered the parties to "meet and confer to arrange for a mutually convenient time for the depositions" and further ordered that "if the Smiths fail [to] appear for their depositions within the next 60 days, . . . the Court will entertain a motion for contempt."

¶4 After substantial related and tangential motion practice, in December 2019, D.C. Concrete served a Notice of Videotaped Deposition of Michael Smith, and Nonuniform Interrogatories and Requests for Production. The deposition was to occur on January 27, 2020 in Tucson, Arizona. Days before the deposition date, the Smiths notified D.C. Concrete that Michael would not appear. They subsequently also stated that they would not respond to the written discovery. The Smiths claimed that there was no court order requiring Michael to sit for a deposition or answer interrogatories and that Michael had not been properly served with the deposition notice under Rule 5(c)(4), Ariz. R. Civ. P. Following a hearing on March 5, 2020, the trial court recognized that the Smiths were making the same arguments they had earlier made when seeking to quash the subpoenas and, again, rejected their arguments. The court determined that service of the deposition notice on the Smith's attorney was proper; it also ordered that the Smiths answer the interrogatories and produce the requested documents.

¶5 The Smiths then filed a Motion for Stay of Proceedings based on their special action filing in this court as to the denial of their notice of change of judge. On March 30, 2020, the trial court granted the motion in part and stayed "[t]he Ruling of March 5, 2020" and "[a]ny resolution of disputes over the interrogatories." The court stated that "[o]nce the Court of Appeals decides the Special Action, either this Court or another Division will need to set a Status Conference so that deadlines can be reset." We issued a decision order on the special action on April 16, 2020. *Smith v. Metcalf*, No. 2 CA-SA 2020-0014 (Ariz. App. Apr. 16, 2020) (decision order).

¶6 Following the special action, the Smiths produced evidence of approximately $18,000 in checking accounts, registration and insurance for a 2018 Hyundai, social security information, and a copy of an attorney fees judgment in favor of the Smiths and against SK Builders. The Smiths did

not respond to the interrogatories. D.C. Concrete notified the Smiths that these documents were insufficient, and unless they fully responded to the discovery requests—providing all supporting documentation, answering requests for production, and providing potential dates for Michael Smith's deposition—it would move for an order of contempt, request again that the Smiths comply with the trial court's order, and seek recovery of attorney fees.

¶7 The Smiths did not comply with D.C. Concrete's requests but moved for an order of protection pursuant to Rule 26(c), Ariz. R. Civ. P., and argued: (1) D.C. Concrete is not the real party in interest; (2) Rule 5(c)(4) applies to post-judgment discovery disputes and was not complied with; and (3) the trial court's March 30, 2020 stay justified not responding to D.C. Concrete's discovery request.

¶8 For its part, D.C. Concrete moved for Rule 37 and Rule 11, Ariz. R. Civ. P., sanctions based on the Smiths' refusal to comply with the trial court's March 5, 2020 discovery ruling. On June 11, 2021, after a hearing, the court granted D.C. Concrete's motions for sanctions pursuant to Rules 11 and 37 and denied the Smiths' motion for a protective order, expressly rejecting each of their arguments. The Smiths filed a motion to reconsider, which the court denied.

¶9 The Smiths have now appealed the trial court's June 11, 2021 discovery and sanctions order and its denial of their motion to reconsider. We have jurisdiction pursuant to A.R.S. § 12-2101(2).[2]

---

[2]D.C. Concrete claims that we lack jurisdiction because the order that the Smiths are appealing is a non-appealable interlocutory order. It claims that the order does not fall under § 12-2101(A)(2) as a special order because it does not pertain to the execution of the judgment. *See Sotomayor v. Sotomayor-Muñoz*, 239 Ariz. 288, ¶¶ 9, 11 (App. 2016) (order is appealable as a special order after judgment pursuant to § 12-2101(A)(2) if the issues raised by the appeal from the order are different from those that would arise from an appeal of the judgment and the order affects the judgment or relates to its execution). We disagree. The order here relates to the execution of the judgment—D.C. Concrete's ability to collect its judgment and resulting sanctions—and does not raise the same issues on appeal as would an appeal of the judgment. And, although protective orders are often properly addressed in special actions, because the protective order here is being challenged together with the order for sanctions, and both were issued after a final judgment, we conclude in this context the order is

Analysis

¶10 The Smiths argue on appeal that the trial court abused its discretion in denying their motion for a protective order and in granting D.C. Concrete's motions for sanctions. Specifically, the Smiths argue the court erred when it: (1) allowed the "Rules of Discovery" to govern post-judgment proceedings; (2) did not apply the applicable Rules of Civil Procedure to deposition time limitations and interrogatory limitations; (3) ruled that D.C. Concrete is a real party in interest with a right to seek collection of the judgment; (4) ruled on the motions for sanctions prior to ruling on the motion for a protective order; and (5) granted sanctions pursuant to the March 5, 2020 order despite no resetting of deadlines following the resolution of the special action. We address each argument in turn.[3]

¶11 "We review a ruling on a protective order for an abuse of discretion." *Zwicky v. Premiere Vacation Collection Owners Ass'n*, 244 Ariz. 228, ¶ 22 (App. 2018). And we "review a trial court's sanction for discovery violations for a clear abuse of discretion." *Seidman v. Seidman*, 222 Ariz. 408, ¶ 18 (App. 2009). We review the court's interpretation and application of statutes de novo. *See Zwicky*, 244 Ariz. 228, ¶ 10.

Application of the Civil Discovery Rules

¶12 The Smiths argue that A.R.S. § 12-1631 provides the only means of obtaining post-judgment discovery and that the civil discovery rules, Rule 26 to Rule 37, Ariz. R. Civ. P., relied on by the trial court, are not applicable here. The Smiths do not cite to any authority for this proposition, and we find none. Although § 12-1631 expressly applies to post-judgment discovery—allowing for the court-ordered deposition of a judgment debtor—it does not preclude the application of the Rules of Civil Procedure

---

appealable under § 12-2101(A)(2). *See Ingalls v. Superior Court*, 117 Ariz. 448, 449 (App. 1977); *Vanoss v. BHP Copper Inc.*, 244 Ariz. 90, ¶¶ 3, 30 (App. 2018) (we have jurisdiction to review ruling on Rule 37 sanctions on appeal).

[3]The Smiths reference, in passing, their argument below that Michael Smith was not served pursuant to Rule 5(c)(4), Ariz. R. Civ. P. However, they do not develop this argument on appeal. Accordingly, we do not address it. *See Polanco v. Indus. Comm'n of Ariz.*, 214 Ariz. 489, n.2 (App. 2007) (undeveloped arguments are waived); Ariz. R. Civ. App. P. 13(a)(7)(A) (appellant's brief must contain argument with citations to authority).

in such proceedings. Indeed, Rule 69(c), Ariz. R. Civ. P., provides the court may allow post judgment discovery "as provided *in these rules* and other applicable law." (emphasis added). And nothing in the civil discovery rules themselves confines their application to pre-trial discovery proceedings. (The Smiths' motion for a protective order in fact was made pursuant to Rule 26(c).) The trial court did not err by employing the civil discovery rules in post-judgment collection proceedings.

¶13 The Smiths further argue that if the civil discovery rules do apply here, the trial court erred in not applying the limits of Rule 30, and Rule 33, Ariz. R. Civ. P., to D.C. Concrete's discovery requests. The Smiths did not, however, make this argument below. Therefore, we do not address it. *See McDowell Mountain Ranch Land Coal. v. Vizcaino*, 190 Ariz. 1, 5 (1997) (parties may not raise arguments for the first time on appeal).

D.C. Concrete as the Real Party in Interest

¶14 The Smiths also argue D.C. Concrete is not a real party in interest and thus, pursuant to Rule 17(a)(1), Ariz. R. Civ. P., it may not pursue collection of the judgment. They claim that D.C. Concrete assigned the debt or judgment to its insurer, NGM Insurance Company, which, ostensibly, must be the one to pursue collection.

¶15 Rule 17(a)(1) provides that "[a]n action must be prosecuted in the name of the real party in interest." Rule 25(c), Ariz. R. Civ. P., states that "[i]f a party's interest is transferred, the action may be continued by or against that party, unless the court . . . orders the transferee to be substituted in the action or joined with the original party." At the hearing on the motions below, the trial court rejected the Smiths' argument that Rule 17(a)(1) barred D.C. Concrete's collection efforts "primarily because of [Rule] 25(c)." The court interpreted Rule 25(c) as providing it the discretion to either order the substitution of a succeeding party or allow the original judgment creditor to proceed.

¶16 On appeal, the Smiths do not address the trial court's application of Rule 25(c). Indeed, the Smiths do not even mention Rule 25(c) in their opening brief, despite the court's express reliance on it. The Smiths first address Rule 25(c) in their reply brief; however, we do not consider arguments made for the first time in a reply brief. *See Dawson v. Withycombe*, 216 Ariz. 84, ¶ 91 (App. 2007).

¶17 Consequently, the Smiths have failed to properly present any argument that the trial court erred in its application of Rule 25(c), and we thus find any objection to the court's allowing D.C. Concrete's claim to

proceed under Rule 25(c) waived. *See Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62 (App. 2009) (appellant's failure to "present and address significant arguments, supported by authority that set forth the appellant's position on the issue in question" may "constitute abandonment and waiver of that claim").

Ruling on Motion for a Protective Order

¶18 The Smiths argue that the trial court erred in ruling on and granting the motions for sanctions before determining the motion for a protective order.[4] Even if the sequence of the court's rulings makes any appreciable difference, we disagree with the Smiths' characterization of that sequence.

¶19 Before the hearing on the Smiths' motion for protective order and D.C. Concrete's two sanctions motions, the Smiths filed their responses to the sanctions motions. At the hearing, the trial judge explained that he believed the motion for a protective order and the motions for sanctions could be combined and dealt with "all at one time." He then assured the parties that he had "read everything multiple times." A dialogue between the court and each party's attorney followed, with arguments made by each side. At the conclusion of the hearing, the court stated it was "going to issue the following rulings. The Motion for Protective Order is denied." It then recited its rejection of each argument made in the motion. The court then addressed the motions for sanctions, granting both. It stated that it found the Smiths' efforts to forestall discovery "were not in good faith, needlessly increased the cost of litigation, were unreasonable, were not substantially justified, were brought primarily for delay and harassment, unreasonably expanded and delayed these proceedings, and engaged in an abuse of discovery process."

¶20 Based on the transcript before us, there is no evidence that the trial court ruled on the sanctions motions before denying the motion for protective order. Accordingly, as a matter of underlying fact, we find no merit to this argument.

---

[4]The Smiths also argue that pursuant to Rule 37(f)(2), Ariz. R. Civ. P., a motion for sanctions should not even be filed until there is a decision on a pending motion for a protective order. Again, this argument was not made in response to the motions for sanctions, at the hearing on the motions, or in the motion for reconsideration. We thus do not address it. *See McDowell Mountain Ranch Land Coal.*, 190 Ariz. 1, 5.

Ruling on Motions for Sanctions

¶21 For its final argument, the Smiths correctly recount that the trial court had stayed its March 5, 2020 discovery ruling until the resolution of the Smiths' then-pending special action petition and recognized that a status conference would be needed to reset certain deadlines in the case. From that they argue, once the special action was resolved and the stay essentially lifted, they were not required to respond to D.C. Concrete's discovery requests until those deadlines were reset. Consequently, they could not be sanctioned for resisting that discovery. The Smiths did not make this argument in their motion for a protective order, but only in their response to D.C. Concrete's motions for sanctions.

¶22 At the hearing on the motions, in June 2021, the trial court questioned the Smiths as to why, after the April 2020 special action was decided, the parties needed to go back to the court and do anything, and why they could not just set the deposition and Smiths provide any supplemental interrogatory answers and document production without involving the court. The court ultimately ruled that

> [w]ith regards to the Motion for Sanctions, the Court finds that the arguments and assertions by the Smiths in the motion to compel and their positions taken in precluding the D.C. parties' discovery requests, I'm sorry, the D.C. parties' post-judgment discovery requests were not in good faith, needlessly increased the cost of litigation, were unreasonable, were not substantially justified, were brought primarily for delay and harassment, unreasonably expanded and delayed these proceedings, and engaged in an abuse of the discovery process.

¶23 We agree with the trial court's determination that the Smiths cannot, in good faith, raise this argument after over a year of D.C. Concrete seeking discovery to which it is entitled. We further find the record replete with instances of the Smiths attempting to evade discovery.

¶24 D.C. Concrete has time and time again attempted to depose Michael Smith and requested production and responses to interrogatories. In each instance, the Smiths tactically evaded discovery by either claiming the existence of a new argument that they had not made in their previous

motions or repeating the same argument that the trial court had already rejected. The Smiths do not claim on appeal that the stay of the March 2020 order forever precluded D.C. Concrete's discovery requests. Indeed, they concede that "[i]t has never been the position of the Smiths that the stay issued on March 30, 2020 precluded [D.C. Concrete's] discovery requests after the Special Action." And yet, since April 2020, D.C. Concrete has been attempting to depose Michael Smith, and obtain supplemental responses to its interrogatories and requests for production; all to no avail.

¶25 The trial court determined that the Smiths' motion for a protective order was in itself another instance of the Smiths attempting to delay these proceedings and engage in an abuse of the discovery process. The court did not abuse its discretion in ordering sanctions based on its determination that the Smiths efforts to evade discovery requests were not in good faith and were brought primarily for delay and harassment.

¶26 The Smiths fail to make any persuasive argument that the trial court abused its discretion in denying the motion for a protective order and ordering sanctions. We thus find no abuse of discretion.[5]

Attorney Fees on Appeal

¶27 D.C. Concrete requests attorney fees on appeal pursuant to A.R.S. § 12-341.01 and costs pursuant to A.R.S. § 12-341 and Rule 21, Ariz. R. Civ. App. P. Because D.C. Concrete prevailed on appeal and this action arises out of a contract, *see* § 12-341.01, they are entitled to such an award.

¶28 D.C. Concrete did not seek attorney fees and sanctions under Rule 25, Ariz. R. Civ. App. P., nonetheless, we conclude that D.C. Concrete is entitled to attorney fees on appeal pursuant to Rule 25. It is clear to this court that the Smiths' repeated and redundant efforts to block D.C. Concrete from identifying the Smiths' assets and collecting its judgment against them is facially gamesmanship. The Smiths' argument here, often without legal citation whatsoever, is but the continuation of their taxing of judicial resources merely for the purpose of delay and harassment.

---

[5] Because we affirm the trial court's order, and the motion for reconsideration asserted the same argument addressed in the motion for a protective order—namely, that D.C. Concrete is not the real party in interest—we necessarily conclude the trial court did not abuse its discretion by denying the motion for reconsideration.

¶29 We therefore award D.C. Concrete attorney fees and costs on appeal pursuant to A.R.S. §§ 12-341, 12-341.01 and Rule 25, Ariz. R. Civ. App. P., upon their compliance with Rule 21, Ariz. R. Civ. App. P.

Disposition

¶30 We affirm the trial court's order denying the Smiths' motion for a protective order and granting D.C. Concrete's motions for sanctions. We also affirm the denial of the related motion for reconsideration.