

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

PETER FUENTES,
Plaintiff/Appellant,

v.

WALMART INC.,
Defendant/Appellee.

No. 2 CA-CV 2022-0087
Filed October 13, 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NOT FOR PUBLICATION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 Maricopa County
No. CV2019013628
The Honorable Roger E. Brodman, Judge
The Honorable M. Scott McCoy, Judge

AFFIRMED

COUNSEL

Peter Fuentes, Avondale
In Propria Persona

Bryan Cave Leighton Paisner LLP, Phoenix
By Gregory B. Iannelli
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Eckerstrom authored the decision of the Court, in which Chief Judge Vásquez and Judge Cattani concurred.

ECKERSTROM, Presiding Judge:

¶1 Peter Fuentes appeals from the trial court’s order dismissing with prejudice his civil rights complaint as a discovery sanction. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the ruling of the trial court. *Sholes v. Fernando*, 228 Ariz. 455, ¶ 2 (App. 2011). In November 2019, Peter Fuentes filed a civil rights complaint, as a self-represented litigant, claiming violations of 42 U.S.C. § 1981 and A.R.S. § 41-1471. The complaint alleged Walmart had violated federal and state civil rights statutes by discriminating him against based on his national origin. He sought monetary damages as compensation for purported emotional and medical harms, wage-related losses, and other costs, as well as an award of attorney fees.

¶3 In October 2020, Fuentes twice failed to appear for scheduled depositions with Walmart, including after having been ordered by the trial court to appear. The court then ordered Fuentes to appear for a third attempted deposition. Fuentes appeared at the December 2020 deposition. However, he refused to answer many of the questions posed, stating repeatedly that he could not remember, that he objected, and that the information requested was personal, privileged, or irrelevant.

¶4 In January 2021, the trial court held a hearing relating to several discovery disputes raised by both parties, including Fuentes’s refusal to respond to questions at his deposition. The court instructed Fuentes that it was for the court, not Fuentes, to decide if the questions posed to him during a deposition were relevant. However, Fuentes “announced that he was not going to answer additional questions,” leading the court to state that it would not “waste everyone’s time by ordering [Fuentes] to be redeposed, simply to obtain the same result.” The court further reasoned that, if Fuentes “refuse[d] to answer relevant questions, he

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w[ould] have to live with the consequences” and the parties would “proceed on the record as it currently exists.” Based on the court’s direction, Walmart filed a motion requesting discovery sanctions against Fuentes in the form of dismissal of the case, as provided by Rule 37, Ariz. R. Civ. P. Walmart asserted that the court should dismiss the case as an independent sanction based on Fuentes’s refusal to answer questions, or alternatively, should preclude Fuentes from testifying at trial, which would render him unable to prove his case and thus require dismissal of the case.

¶5 In April 2021, after a second hearing, the trial court granted Walmart’s request and entered a final order dismissing Fuentes’s complaint with prejudice. Fuentes timely appealed in May 2021. However, that same day, he also filed a motion for relief from judgment pursuant to Rules 59 and 60, Ariz. R. Civ. P.¹ One week later, he filed an amended, substantially similar motion for the same relief, premised on the same procedural rules and arguments.

¶6 In July 2021, Fuentes filed a motion to disqualify the trial judge, claiming bias arising out of a purported financial interest in Walmart. In August 2021, a new trial judge issued a ruling stating that Fuentes’s motion for disqualification was moot, because the original trial judge had retired. In September 2021, in an unsigned minute entry, the trial court denied Fuentes’s motion for relief from judgment. The following week, we stayed Fuentes’s appeal.

¶7 In October 2021, we continued the stay of appeal, noting that upon entry of a final ruling, Fuentes was entitled to file a timely amended notice of appeal. The following week, the trial court issued a minute entry to add a signature to the original order denying post-judgment relief. We lifted the stay in November 2021. Fuentes has filed no supplemental notices of appeal.

Discussion

¶8 Fuentes recites six separate claims of error in his statement of issues on appeal. As an initial matter, the opening brief contains numerous

¹As we noted in our order of September 29, 2021 staying the appeal, Fuentes’s motion was untimely under Rule 59(b)(1), Ariz. R. Civ. P., and was not a time-extending motion under Rule 9(e)(1), Ariz. R. Civ. App. P. As such, the trial court lacked jurisdiction to adjudicate the Rule 59 motion. Thus, the only possible avenue for relief would have arisen under Rule 60, the other ground Fuentes cited in his motions for relief from judgment.

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factual assertions for which Fuentes has provided no record support. Rule 13(a)(7), Ariz. R. Civ. App. P., instructs that an appellant's opening brief must contain argument with "appropriate references to the portions of the record on which the appellant relies" and, "[f]or each contention, references to the record on appeal where the particular issue was raised and ruled on." We therefore disregard all factual allegations made in the opening brief that are not supported by citations to the record, as well as any issues arising from such allegations. See *Flood Control Dist. of Maricopa Cnty. v. Conlin*, 148 Ariz. 66, 68 (App. 1985); *Sholes*, 228 Ariz. 455, ¶ 16.

¶9 Additionally, our appellate jurisdiction is defined by statute, and we generally lack direct appellate jurisdiction over matters not resolved by a final judgment. See A.R.S. § 12-2101(A)(1) (appeal may be taken from "final judgment entered in an action . . . commenced in a superior court"); *Bridgeman v. Certa*, 251 Ariz. 471, ¶ 6 (App. 2021) (appellate jurisdiction defined by statute). Consequently, we do not address Fuentes's claims of error that relate to issues beyond those resolved by the final judgment on appeal.

¶10 In particular, we do not consider arguments relating to Fuentes's claim that the trial judge had a duty to recuse himself from the case due to an alleged conflict of interest. Fuentes's motion requesting disqualification was filed in July 2021, nearly three months after the trial court had entered its final judgment dismissing the action. Because Fuentes did not file an amended notice of appeal after that judgment, none of the post-judgment rulings entered in the trial court are properly before us. See Ariz. R. Civ. App. P. 9(e)(3) ("A party intending to appeal one or more of the orders disposing of" a post-judgment motion such as a motion for relief brought under Rule 60, Ariz. R. Civ. P., "must file a notice of appeal, a notice of cross-appeal, or an amended notice of appeal under Rule 8," Ariz. R. Civ. App. P.). Thus, we decline to consider arguments relating to Fuentes's motion to disqualify² or any arguments seeking to revive issues raised only in his motions for reconsideration.

²In any event, Fuentes's motion to disqualify the trial judge was untimely because it was filed after entry of final judgment, and we would also decline to consider his arguments on that independent ground. See *Taliaferro v. Taliaferro*, 186 Ariz. 221, 223 (1996) ("[o]nce judgment has been entered in a civil action, it is too late in the day to be worrying about who tried the case, short of true challenges for cause").

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¶11 Therefore, the only ruling at issue in this appeal is the trial court's final judgment dismissing Fuentes's complaint, lodged April 21, 2021. We review for abuse of discretion a court's decision regarding sanctions under Rule 37. *Vanoss v. BHP Copper Inc.*, 244 Ariz. 90, ¶ 30 (App. 2018). "We defer to the court's explicit or implicit factual findings and will affirm as long as such findings are supported by reasonable evidence." *Roberts v. City of Phoenix*, 225 Ariz. 112, ¶ 24 (App. 2010).

¶12 Rule 37(b)(2)(A)(v) provides that if a party "fails to obey an order to provide or permit discovery," the trial court may dismiss "the action or proceeding in whole or in part." Although a trial court has broad discretion to impose sanctions, its discretion is more limited when the court dismisses or otherwise fully disposes of an action as a sanction for a party's actions during discovery proceedings. See *Rivers v. Solley*, 217 Ariz. 528, ¶¶ 11, 13-14, 22, 28 (App. 2008) (affirming dismissal as sanction against party who "knowingly and continuously failed to disclose" crucial evidence throughout discovery period); *Poleo v. Grandview Equities, Ltd.*, 143 Ariz. 130, 133-34 (App. 1984) (affirming entry of default as sanction in light of "ample indicia of appellant's willful and bad faith failure to produce" documents and responses to interrogatories during discovery). Any sanction imposed for a discovery violation "must be appropriate" and "preceded by due process." *Montgomery Ward & Co. v. Superior Court*, 176 Ariz. 619, 622 (App. 1993). Before imposing a dispositive sanction such as dismissal, a court should make an "express finding that a party . . . has obstructed discovery," and that the court "has considered and rejected lesser sanctions as a penalty." *Wayne Cook Enters., Inc. v. Fain Props. Ltd. P'ship*, 196 Ariz. 146, ¶¶ 12, 14 (App. 1999) (reversing and remanding dismissal sanction to allow trial court to conduct evidentiary hearing to determine appropriate sanction).

¶13 Here, although the record lacks a transcript of the hearings in which the trial court considered and pronounced the dismissal of Fuentes's complaint,³ "the tenor of [Fuentes's] lack of cooperation is readily apparent" from the transcript of the deposition and the remainder of the record before us. *Poleo*, 143 Ariz. at 133. For example, Fuentes's complaint cited A.R.S. § 41-1472, which allows a plaintiff to collect "[a]ctual and

³See Ariz. R. Civ. App. P. 11(c)(1)(B) ("If the appellant will contend on appeal that a judgment, finding or conclusion, is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record transcripts of all proceedings containing evidence relevant to that judgment, finding or conclusion.").

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compensatory damages, including damages for emotional distress,” as well as court costs and preventative relief. Fuentes alleged compensable injuries including pain and suffering, loss of wages, medical expenses, and emotional distress. But once he finally appeared for his deposition, Fuentes refused to answer Walmart’s questions seeking information necessary to establish any actual injuries. And, as the court noted in its ruling on discovery disputes, Fuentes later “announced that he was not going to answer additional questions.” Thus, any effort by the court to order Fuentes, yet again, to appear at a deposition would have been futile.

¶14 Additionally, the trial court held a separate hearing specifically to consider Walmart’s request for discovery sanctions. According to the relevant minute entry, the court set forth its reasons on the record during the hearing. Because Fuentes has not produced a transcript of that hearing, we presume that the court made all factual findings necessary to support its ruling and that whatever transpired supported the court’s findings. *Cruz v. City of Tucson*, 243 Ariz. 69, ¶ 25 (App. 2017). Given that presumption, we conclude the court’s decision to dismiss the complaint as a discovery sanction was within its broad discretion and was appropriate given Fuentes’s course of conduct in the preceding litigation.

Disposition

¶15 For the foregoing reasons, we affirm the trial court’s dismissal of Fuentes’s complaint. As prevailing party, we award Walmart its costs on appeal, upon its compliance with Rule 21(b), Ariz. R. Civ. App. P. A.R.S. § 12-341. Because Fuentes is not the prevailing party, we deny his request for fees and costs on appeal.