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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE FUNDING GROUP, an unincorporated association consisting of Hans Hüning and TCMS Investments, Inc., Plaintiff/Appellant, v. THE ESTATE OF FREDDY JO DEEN, deceased; RONALD DEEN, aka RON DEEN, aka RONALD DEEN, SR., aka RON DEEN, SR., and JANE DOE DEEN, his wife; JACK SAN FELICE and JANE DOE SAN FELICE, his wife; SILVER KING MINING COMPANY OF ARIZONA, LLC, an Arizona limited liability company; and SAN FELICE CRIMINAL SYNDICATE, an Arizona organization, Defendants/Appellees.	2 CA-CV 2010-0029 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CV200701884

Honorable William J. O'Neil, Judge

AFFIRMED

The Strojnik Firm LLC
By Peter Kristofer Strojnik
Phoenix
Attorneys for Plaintiff/Appellant

Ritter Law Group, L.L.C.
By Matthew A. Ritter Florence
Attorneys for Defendants/Appellees

E C K E R S T R O M, Judge.

¶1 Appellant The Funding Group (TFG) appeals from the trial court's grant of summary judgment in favor of appellees the Silver King Mining Company of Arizona, L.L.C. (SKMC), the estate of Freddy Joe Deen, Ronald Deen Sr., and Jack San Felice (collectively "Silver King"). TFG also appeals from the court's disqualification of its original counsel, Peter Strojnik, and from the denial of its motion for new trial. For the following reasons, we affirm the judgment.

Procedural History

¶2 This case arises out of a joint venture formed "for the purpose of mining, concentrating, refining and hallmarking precious metals" from a mining claim known as the Silver King or El Medico Mine. Ronald Deen Sr. and Jack San Felice were the members/directors of SKMC, the "ostensibl[e]" owners of the mining claim.[1] Hans Hüning and Richard Campbell formed Arizona Precious Metals, Inc. (APM) in order to join with SKMC in the Arizona Precious Metals-Silver King Joint Venture in August 2006. At that time, Ronald Deen purportedly transferred by quitclaim deed fifty percent of his interest in the mine to Campbell "in anticipation of . . . funding by APM." SKMC was to provide the mine and the equipment, and APM was to secure a loan and provide

[1]According to Silver King, the "record owners of the El Medico Mine are: (Freddy) Joe Deen, Ron Deen [Jr.], and Gary Deen," the sons of Ronald Deen Sr.

the funding to get the mine operations running. However, APM was unable to secure the loan. In addition, in November 2006, the United States Forest Service sent a letter to SKMC, ordering it to essentially cease mining operations because a plan of operations had not been approved and a reclamation bond had not been paid.

¶3 To address the issue of the reclamation bond and APM's inability to secure the financing, the parties executed a second agreement in late November, in which TFG was accepted as a member of the joint venture and agreed to pay the $140,000 reclamation bond.[2] In April 2007, after APM had still been unable to secure funding to resume the mining operations, Ronald Deen attempted to execute a quitclaim deed that transferred the fifty percent interest in the mine he had purportedly transferred to Campbell in August 2006 back to himself.[3]

¶4 TFG filed a complaint to quiet title in August 2007 and amended it in December to include claims of negligence, fraud, breach of contract, breach of the covenant of good faith and fair dealing, "participation in a criminal syndicate," and a "pattern of unlawful activity" in violation of A.R.S. § 13-2314.04. Essentially, TFG

[2]The members of TFG are Richard Campbell, Hans Hüning, and TCMS Investments, Inc.

[3]Much confusion surrounds this document. Supporting Silver King's interpretation, on the copy of the deed provided by the parties, Campbell is listed as the "grantor" by a handwritten correction to the typewritten designation of "grantee" on the form. On the other hand, TFG contends Campbell's signature on this document is a forgery, but nonetheless purports that Deen transferred the remaining fifty percent of the mine to Campbell. Ultimately, however, the confusion over the document need not be settled because, according to Silver King, "Ronald Deen, Sr., is not and never has been the owner of any interest in the El Medico Mine." This allegation is not disputed by TFG.

contended, as it does on appeal, that this was a "mining fraud" case in which San Felice and Ronald Deen misrepresented the true ownership and value of the mine in order to induce TFG to conduct business with SKMC.

¶5 TFG filed a motion for summary judgment as to its quiet title claim in February 2008. After a hearing in April, the court denied the motion, finding a "material issue of fact [exists] relating to the Quit Claim Deeds themselves" and there are "issues regarding discovery [that] need to be resolved by counsel." Silver King then filed a notice to the court, stating that Ronald Deen and San Felice would not be appearing for the depositions scheduled for the next day, as they "adamantly object[ed] to being deposed by their former counsel, Mr. Strojnik."[4] The notice also stated that Silver King had filed a complaint with the Arizona State Bar Association against Strojnik and would "refrain from being subjected to depositions until the ethical matters have been resolved." A few days later, TFG filed a motion to compel discovery, specifying the instances in which Silver King had failed to comply with discovery rules.

¶6 Silver King then filed a "motion for determination of counsel," in which it asked the court to disqualify Strojnik from representing TFG. The court set a hearing on TFG's motion to compel and cautioned Silver King "that discovery is mandatory in Arizona and should be ongoing." The parties reached a tentative settlement of the case in June and the court vacated the hearing it had set on the motion to compel. A couple of weeks later, the parties notified the court that the settlement had failed. At that time,

[4]Strojnik was general counsel for both APM and the joint venture, and until he was disqualified by the trial court, he was also counsel for TFG in this case.

TFG asked the court to reset a hearing on the pending motions. The court ordered the parties to reschedule a settlement conference and denied TFG's request to reschedule the hearing "pending completion of the settlement conference."

¶7 Before a settlement conference took place, Silver King moved for summary judgment. TFG moved to strike the motion based on Silver King's failure to provide discovery and failure to file a statement of facts in support of its motion. In the alternative, TFG moved for an extension of time to respond to summary judgment "for [Silver King] to make Rule 26.1 disclosure and respond to all outstanding discovery" requests pursuant to Rule 56(f), Ariz. R. Civ. P. Five days later, Silver King filed a statement of facts in support of its motion.

¶8 The trial court granted TFG's Rule 56(f) motion in December 2008 and at the same time, granted Silver King's motion to disqualify Strojnik as TFG's counsel. Shortly thereafter, Strojnik's son, attorney Peter Kristofer Strojnik, filed a notice of appearance on behalf of TFG. TFG filed a special action petition in this court, challenging the trial court's disqualification of Strojnik. We declined to accept special action jurisdiction on February 4, 2009. At a review hearing at the end of January, the trial court had ordered that TFG's response to summary judgment was due "20 days after the ruling on the Special Action by the Court of Appeals."

¶9 TFG then filed a petition for review to the Arizona Supreme Court. Upon being notified of TFG's intent to seek review, the trial court extended the time for TFG to respond to the motion for summary judgment "pending review by the Arizona Supreme Court." The supreme court denied review on June 30. On August 7, Silver King moved

the trial court to enter summary judgment in its favor. Three days later, the court granted its motion, finding the time for a response "ha[d] long since expired" and TFG had failed to "show by competent evidence specific facts that create a genuine issue for trial." TFG's motion for a new trial followed, which the trial court denied, and this appeal followed.

Summary Judgment

¶10 After TFG failed to respond to Silver King's motion, the trial court granted summary judgment in favor of Silver King, finding an "absence of any factual issue to be resolved at trial." Rule 56(e), Ariz. R. Civ. P., provides in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Summary judgment is appropriate if the court's review of the record shows "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). We review de novo a trial court's grant of summary judgment, and we view the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Hourani v. Benson Hosp.*, 211 Ariz. 427, ¶ 13, 122 P.3d 6, 11 (App. 2005).

¶11 TFG argues the trial court erred when it granted summary judgment in favor of Silver King after earlier agreeing "that [TFG] needed more time to respond to

the motion pending [Silver King's] disclosures and responses to discovery."[5] Although the trial court had granted TFG's Rule 56(f) motion, it had done so eight months before it ruled on the summary judgment motion, and in the intervening time had expressly ordered TFG to respond upon conclusion of special action review by this court and our supreme court. TFG failed to do so once both courts had completed their reviews. Nor did TFG file another Rule 56(f) motion or any other motion seeking further time to respond. *Cf. Birth Hope Adoption Agency, Inc. v. Doe*, 190 Ariz. 285, 287-88, 947 P.2d 859, 861-62 (App. 1997) (finding court did not abuse discretion in denying request for continuance under Rule 56(f) when depositions sought could have been completed earlier and were not necessary to oppose summary judgment); *Wells Fargo Credit Corp. v. Smith*, 166 Ariz. 489, 493-94, 803 P.2d 900, 904-05 (App. 1990) (trial court did not abuse discretion by denying motion to compel in light of counsel's failure to file Rule 56(f) affidavit or request ruling on motion to compel discovery). From this, the trial court reasonably could have concluded that TFG had either declined to respond to the motion for summary judgment or was choosing to proceed on its own litigation schedule rather

[5]TFG also argues the trial court erred when it granted summary judgment without ruling on its motion to strike. However, it is an "established rule that 'a motion which is not ruled upon is deemed denied by operation of law.'" *McElwain v. Schuckert*, 13 Ariz. App. 468, 470, 477 P.2d 754, 756 (1970). Thus, we deem that motion denied. And to the extent TFG has argued the court erred by denying the motion because Silver King violated Rule 37(c), Ariz. R. Civ. P., when it "relied on several pieces of evidence that had never been disclosed to [TFG] via a Rule 26.1[, Ariz. R. Civ. P.,] disclosure or in response to discovery requests," TFG does not explain exactly what these pieces of evidence contain or their significance to the case. And neither Silver King's motion with its accompanying memorandum nor its statement of facts contain attached exhibits. We find no error.

than that set by the court. We find no error in the court's granting summary judgment despite its earlier granting of TFG's Rule 56(f) motion.

¶12 TFG also argues the trial court erred in failing to consider TFG's prior motion for summary judgment and statement of facts before granting judgment for Silver King. But the court acknowledged in its ruling that it had a duty to review the entire record before granting summary judgment, and we presume a court "'know[s] and follow[s] the law.'" *Maher v. Urman*, 211 Ariz. 543, ¶ 13, 124 P.3d 770, 775 (App. 2005), *quoting State v. Ramirez*, 178 Ariz. 116, 128, 871 P.2d 237, 249 (1994). In turn, we presume the court considered all relevant evidence that was presented with the prior motion for summary judgment.[6] *See Occidental Chem. Co. v. Connor*, 124 Ariz. 341, 344, 604 P.2d 605, 608 (1979); *Byars v. Ariz. Pub. Service Co.*, 24 Ariz. App. 420, 425, 539 P.2d 534, 539 (1975). We find no error in the grant of summary judgment in favor of Silver King.

Disqualification of Counsel

¶13 TFG argues the trial court erred by disqualifying its counsel, Peter Strojnik. Specifically, it contends "counsel never represented any of the adverse parties at any time" because Strojnik never individually represented San Felice, Deen, or SKMC.

[6]TFG also makes vague and unsupported assertions that Ronald Deen's admission that he was not the record title holder of the mine proves fraud in the inducement and that "the record is replete with controverting evidence and testimony" to defeat summary judgment. Such assertions are insufficient to raise the argument on appeal that genuine issues of material fact exist as to its claims against Silver King. *See* Ariz. R. Civ. App. P. 13(a)(6) (requiring appellant to develop argument in opening brief for each contention raised); *State Farm Mut. Auto. Ins. Co. v. Novak*, 167 Ariz. 363, 370, 807 P.2d 531, 538 (App. 1990) (failure to properly develop argument results in waiver on appeal).

Strojnik was general counsel for both APM and the joint venture. He was also a permanent member of the joint venture's policy committee. Silver King moved to disqualify Strojnik based primarily on the conflict of interest between his representation of San Felice and Deen as part of the joint venture and his representation of TFG in the lawsuit against Silver King.[7]

¶14 We review a trial court's ruling disqualifying counsel for an abuse of discretion. *Amparano v. ASARCO, Inc*., 208 Ariz. 370, ¶ 19, 93 P.3d 1086, 1092 (App. 2004). Trial courts should consider the following factors when deciding whether to grant a motion to disqualify opposing counsel:

> (1) whether the motion is being made for the purposes of harassing the defendant, (2) whether the party bringing the motion will be damaged in some way if the motion is not granted, (3) whether there are any alternative solutions, or is the proposed solution the least damaging possible under the circumstances, and (4) whether the possibility of public suspicion will outweigh any benefits that might accrue due to continued representation.

Alexander v. Superior Court, 141 Ariz. 157, 165, 685 P.2d 1309, 1317 (1984).[8] In a lengthy minute entry, the trial court granted Silver King's motion to disqualify Strojnik.

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[7]The motion was also brought on other grounds, none of which is necessary to describe here in detail.

[8]The test set forth in *Alexander* expressly applied only to motions to disqualify counsel based on an appearance of impropriety. 141 Ariz. at 165, 685 P.2d at 1317. Our ethical rules have changed since *Alexander* was decided; an "appearance of impropriety" is no longer an express ground for disqualifying an attorney, although it continues to be something attorneys should be aware of and consider when evaluating whether a conflict of interest exists and whether to withdraw representation. *See Sellers v. Superior Court*, 154 Ariz. 281, 289, 742 P.2d 292, 300 (App. 1987). The supreme court has expanded the application of the considerations in *Alexander* to cover challenges to opposing counsel on

It concluded that disqualification was necessary because of "clear and unequivocal conflicts of interest that arose even at the time of the entry of the agreements" and that Strojnik had "fail[ed] to formally disclose the intertwined relationships and obtain [i]nformed consent [for] the representation."

¶15 The trial court made extensive findings of fact that are supported by the record. The court also considered each of the *Alexander* factors as well as the standards governing attorneys set forth in the Restatement (Third) of the Law Governing Lawyers. Although TFG repeatedly emphasizes that Strojnik did not represent either Ronald Deen or San Felice as individuals, it nonetheless concedes "there are difficulties in determining the existence of an attorney-client relationship when a lawyer represents a small entity with 'extensive common ownership and management,' such as a limited partnership."

¶16 But even had the trial court erred in disqualifying Strojnik, TFG has not shown, or even argued, that it suffered prejudice as a consequence.

> In order to justify the reversal of a case, there must not only be error, but it must be prejudicial to the substantial rights of the person assigning this error, and it will not be presumed that an error is prejudicial so as to require reversal, but the prejudice must appear from the record.

Dykeman v. Ashton, 8 Ariz. App. 327, 329, 446 P.2d 26, 28 (1968); *accord Walters v. First Fed. Sav. & Loan Ass'n of Phoenix*, 131 Ariz. 321, 326, 641 P.2d 235, 240 (1982).

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other grounds, such as conflict of interest. *See Gomez v. Superior Court*, 149 Ariz. 223, 226, 717 P.2d 902, 905 (1986); *see also Turbin v. Superior Court*, 165 Ariz. 195, 199, 797 P.2d 734, 738 (App. 1990) (discussing evolution of *Alexander* test); *Sellers*, 154 Ariz. at 290, 742 P.2d at 301 (noting first three considerations in *Alexander* applied to discussion of disqualification based on other ethical rules).

Accordingly, TFG has not sustained its burden to show it is entitled to relief even had the trial court abused its discretion.

Motion for New Trial

¶17 Finally, TFG argues the trial court erred when it denied TFG's motion for new trial. We review the denial of a motion for new trial for an abuse of discretion. *Delbridge v. Salt River Project Agric. Improvement & Power Dist.*, 182 Ariz. 46, 53, 893 P.2d 46, 53 (App. 1994). TFG argued in its motion for new trial that the court had erred in granting summary judgment without allowing it time to respond. TFG contended that it was surprised by the fact that the court had ruled on the motion for summary judgment only six days after this court issued its mandate in the special action. The trial court denied the motion, finding that TFG had provided "no good reason . . . for its failure to respond." The court further stated, "There was no irregularity in the proceedings of this Court nor an abuse of discretion that deprived Plaintiff of a fair and impartial trial but rather apparent inattention or neglect or intentional delay by Plaintiff. No accident or surprise occurred that could not have been prevented by ordinary prudence."

¶18 We have already concluded the trial court did not err in granting summary judgment under Rule 56(e) based on TFG's failure to respond. Similarly, we find no abuse of discretion in the court's denial of a new trial on the same basis. Nothing in the court's scheduling orders suggested that the mandate was the controlling event for triggering TFG's duty to respond to the motion for summary judgment. In fact, the trial court's first order stated a response was due "20 days after the ruling on the Special Action by the Court of Appeals." Moreover, TFG contended below that it had the

response ready and had just been waiting to file it, but did not explain why it did not file the response promptly when Silver King moved for entry of summary judgment, three days before the court ruled.

¶19 Silver King contends "sanctions [should be] imposed against both Plaintiff/Appellant and its counsel." To the extent this could be construed as a request for attorney fees on appeal, Silver King has not articulated the basis under which it would be entitled to such an award. In our discretion, we deny the request. *See Bank One, Ariz., N.A. v. Beauvais*, 188 Ariz. 245, 251-52, 934 P.2d 809, 815-16 (App. 1997).

Disposition

¶20 The judgment is affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge