

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2021-019511

08/30/2024

HONORABLE JOAN M. SINCLAIR

CLERK OF THE COURT
J. Lizardi
Deputy

JENNIFER DUNCAN, et al.

MATTHEW J SKELLY

v.

LABLONDE DEVELOPMENT
CORPORATION, et al.

BENJAMIN J BRANSON

J GREGORY CAHILL
TEODORO RODRIGUEZ DE LA ROSA
8414 S CENTRAL AVE LOT 58
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RINA K RAI
AMORETTE C RINKLEIB
KURT M ZITZER
JUDGE HERROD
JUDGE SINCLAIR

MINUTE ENTRY

The Plaintiffs Jennifer and Raymond Duncan (“the Plaintiffs”) filed a Motion for Stay of Enforcement of Judgment on June 28, 2024. The Defendants the LaBlonde Corporation and Thomas J. LaBlonde, Jr. (“the Defendants”) filed their Response on July 22, 2024. The Plaintiffs

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then filed their Reply on August 5, 2024. This motion was filed relative to the Court's judgment filed on June 13, 2024.

The Plaintiffs seek to stay enforcement of the Court's judgment until the Court rules on their Rule 59 motion. Because the Court now rules on that motion, a stay is not necessary. Therefore,

IT IS ORDERED denying the Plaintiffs' Motion for Stay of Enforcement of Judgment.

The Plaintiffs also filed a Motion to Vacate Judgment and Motion for New Trial Pursuant to Rule 59 ("Motion") on June 28, 2024. The Defendants filed their Response ("Response") on July 22, 2024. The Plaintiffs then filed their Reply on August 5, 2024.

The Court notes at the outset that a motion for a new trial may be directed against summary judgment. *Union Rock & Materials Corp. v. Scottsdale Conference Center*, 139 Ariz. 268, 273 (App. 1983) (citation omitted). In addition, "a party's mere dissatisfaction with his own counsel or allegations of his own counsel's neglect, inadvertence, or mistake do not justify the granting of a new trial in civil cases." *King v. Superior Court*, 138 Ariz. 147, 151 (1983) (citations omitted).

The Plaintiffs previously filed a Motion for Reconsideration under Rule 60 of the Arizona Rules of Civil Procedure contending that: the parties were not the same in this litigation as the ROC proceedings; the issues were not the same as in the ROC proceedings, and the Defendants waived all arguments raised in their motion for summary judgment when it litigated the case for over two years. See Motion for Reconsideration, filed February 24, 2024. The Plaintiffs raised jurisdictional issues concerning the ROC proceedings, claimed that they had no reason to appeal the administrative determination, and attached expert reports that were available at the time their response was filed to the underlying summary judgment motion. The Court previously denied these arguments as untimely by minute entry. See Minute Entry filed April 23, 2024.

The Plaintiffs argue here that the Court's judgment should be vacated because: the Court did not follow the "same evidence" test; the Defendants did not establish that the issues were "fully adjudicated" by the Registrar of Contractors ("ROC"); and the Defendants did not properly raise a res judicata defense. The claims made in this Motion for New Trial also raise new arguments not raised in the previous pleadings. While these new arguments are essentially asking for a third bite at the apple, the Court will address the issues raised.

The Plaintiffs cite three portions of Rule 59 in their Motion for New Trial: Rule 59(a)(1)(A) (irregularity depriving the party of a fair trial); Rule 59(a)(1)(B) (misconduct); and

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Rule 59(a)(1)(H) (contrary to law). Ariz. R. Civ. P. 59. The alleged irregularity and misconduct are, according to the Plaintiffs, that the Defendant “failed to allege res judicata as an affirmative defense in this Answer and failed to disclose res judicata as a legal theory in his Rule 26.1 disclosure statement.” Motion, p. 17. However, in the Defendants’ Answer, waiver and estoppel are noted as possible affirmative defenses, as well as general notice was provided of the assertion of all affirmative defenses under Rule 8(d)(1), which includes both estoppel and res judicata. See Defendants’ Answer filed April 18, 2022, p. 8, ¶¶ 11, 18; see also Rule 8(d)(1) of the Arizona Rules of Civil Procedure. Thus, the Defendants did provide notice of this defense. Moreover, the Plaintiffs cite to no prejudice from any alleged lack of notice in their motion. The Court notes that the Plaintiffs had every opportunity to respond to the underlying motion for summary judgment. The Court finds no irregularity here.

As to misconduct, the Plaintiffs primarily argue that the Defendants did not properly represent the underlying ROC proceedings. In the underlying pleadings, the Defendants did reference the other ROC proceedings. This was not rebutted by the Plaintiffs in their response.

To be prejudicial, attorney misconduct must be “(1) ...significant, such as knowing, deliberate violations of court orders; (2) [involve] essential and important issues; and (3) ...[be] apparently successful in achieving its goals.” *Varco, Inc. v. UNS Electric, Inc.*, 242 Ariz. 166, 172 (App. 2017) (internal quotations and citation omitted). There was no knowing, deliberate violation of a court order here. There was no disputed evidence offered to the Court in the pleadings for the summary judgment motion. Additional evidence was only offered later, once the ruling was issued, in the motion for reconsideration. That evidence, the additional expert reports, were dated March 10, 2023, and were certainly available to the Plaintiffs when the underlying pleadings were drafted, and oral argument held on the motion for summary judgment. The Court notes that those expert reports were in dispute and neither party requested that the Court make a determination of admissibility relative to those reports in the summary judgment pleadings. See LaBlonde Defendants’ Motion to Preclude Improperly Disclosed Expert Reports, filed November 27, 2023. The Defendants were successful on their motion for summary judgment, but the Court finds no nexus between that success and any violation of court orders relative to essential and important issues. There was no misconduct here.

The final argument undergirding the Plaintiff’s motion for a new trial under Rule 59 is that the Court’s ruling was contrary to law. When appellate courts review the granting of a motion for summary judgment, they “view the evidence in the light most favorable to the party against whom the motion was granted and give such party the benefit of all favorable inferences that may reasonably be drawn therefrom.” *Cecil Lawter Real Estate School, Inc. v. Town & Country Shopping Center Co., Ltd*, 143 Ariz. 527, 537 (App. 1984) (citations omitted) (“*Lawter*”). “When the moving party presents sworn proof of specific facts negating the adverse party’s assertions, the adverse party **must respond** with proof of specific facts showing a

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genuine issue of fact warranting a trial.” *Lawter, id. at 537* (citation omitted) (emphasis added). The Plaintiffs did not present the Court with specific facts controverting those in the Defendants’ motion for summary judgment.

The Plaintiffs claim that the Court did not follow the “same evidence” test. Motion, p. 8. The Court had before it at the time the motion for summary judgment was plead and argued evidence that the claims brought before the ROC were the same claims being made in this litigation. *See* Exhibits 4-9, attached to the Defendants’ Response. As noted above, the Plaintiffs did not provide the Court with specific facts controverting the claims made by the Defendants. To allow a new trial here, under this set of circumstances, would essentially allow the Plaintiffs a “do-over” on the motion for summary judgment.

Therefore, for the reasons noted above,

IT IS ORDERED denying the Plaintiffs’ Motion to Vacate Judgment and Motion for New Trial Pursuant to Rule 59.