

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2009-018180

06/14/2011

HONORABLE MARK H. BRAIN

CLERK OF THE COURT
T. Nosker
Deputy

KATHY ANN SIMPSON

JERRY C BONNETT

v.

ROBERT D MCCOY, et al.

PAUL J MCGOLDRICK

BRYAN F MURPHY
WARREN C RIDGE
WILLIAM F KING
TREASURE L VANDREUMEL
STATE BAR OF ARIZONA

HEARING

Prior to the commencement of the Hearing, Plaintiff's exhibits 1-3 and Defendant's exhibits 4-13 are marked for identification.

Courtroom ECB-814

11:03 a.m. This is the time set for Evidentiary Hearing on Defendants' Motion to Set Aside Entry of Default. Plaintiff, Kathy Ann Simpson, is represented by counsel, Jerry C. Bonnett, Warren C. Ridge and William F. King. Defendants, Robert D. McCoy and Lea McCoy, are represented by counsel, Paul J. McGoldrick. Defendant Robert D. McCoy is present. Defendants Larry W. Simpson, Sharon C. Simpson and Simpson Cattle Company Limited Partnership, are represented by counsel, Bryan F. Murphy. Defendants Larry W. Simpson and Sharon C. Simpson are present. Joe Keilp is present and represented by counsel, Treasure L. Van Dreumel.

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Court Reporter, Lisa Bradley, is present.

Court and counsel discuss the status of the case and Defendants' Motion to Set Aside Entry of Default.

Opening statements are presented.

Larry W. Simpson is sworn and testifies.

Exhibits 1-12 are received in evidence.

Sharon C. Simpson is sworn and testifies.

Joe Keilp is sworn and testifies.

For the reasons stated on the record,

The Court advises Mr. Keilp (Bar #003356) that due to his violation of the Ethical Rules, this matter will be sent to the State Bar Associate for disciplinary actions.

Closing arguments are heard.

IT IS ORDERED taking the matter of Defendants' Motion to Set Aside Entry of Default under advisement.

IT IS FURTHER ORDERED that Mr. Keilp's portion of the testimony shall only be provided to the attorneys present and the State Bar of Arizona absent further order of the Court.

12:12 p.m. Hearing concludes.

**JUDGE MARK H. BRAIN
MARICOPA COUNTY SUPERIOR COURT
EAST COURT BUILDING
101 WEST JEFFERSON
8th FLOOR, COURTROOM 814
PHOENIX, AZ 85003
602-372-1141 TEL**

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2010-117 and 2011-010. The Court may impose sanctions against counsel to ensure compliance with this requirement after May 1, 2011.

This matter came before the Court for an evidentiary hearing on whether the Simpsons' default should have been entered for failing to file a disclosure statement and obey the Court's subsequent orders. Plaintiff relies on a series of cases indicating that an attorney's failings are attributed to the client. E.g. Pantino v. City of Phoenix, 196 Ariz. 442, 999 P.2d 198 (2000). Arizona caselaw, however, makes clear that discovery issues are different, and that before pleadings can be struck or defaults entered, the Court must hold an evidentiary hearing to determine whether the failings are solely the work of the attorney, or are instead at least in part the fault of the client. Wayne Cook Enterprises v. Fain Properties Ltd Partnership, 196 Ariz. 146, 993 P.2d 1110 (App. 2000) ("The sanction of dismissal is warranted only when the court makes an express finding that a party, as opposed to his counsel, has obstructed discovery [citation omitted], and that the court has considered and rejected lesser sanctions as a penalty.")

Many facts are undisputed. At all pertinent times prior to their default being entered, the Simpsons¹ were represented by attorney Joe Keilp. The Simpsons failed to exchange a disclosure statement pursuant to Rule 26.1, leading to a motion to compel dated September 29, 2010. The Simpsons failed to respond, and the Court granted the motion to compel via minute entry dated October 28, 2010. That order invited plaintiff to seek monetary sanctions. Plaintiff did so through a motion for sanctions dated November 11, 2010, which again noted that the Simpsons had yet to exchange a disclosure statement. Again, the Simpsons failed to respond, and through an order dated December 8, 2010, the Court again ordered the Simpsons to comply, and assessed them \$4,150 in attorneys' fees. The Simpsons failure to exchange a disclosure statement continued, leading to plaintiff's second motion to compel dated January 13, 2011. The Simpsons again failed to respond; this time the Court effectively struck the Simpsons' answer, and ordered the Clerk to enter their default immediately. See Order dated February 9, 2011.

At the evidentiary hearing, Mr. Simpson testified that he spoke with Keilp with some regularity, but effectively testified that Keilp indicated that the case was proceeding regularly. Mr. Simpson expressly denied being notified of the numerous motions to compel, much less the \$4,150 in sanctions ordered against him. Ms. Simpson's testimony, while shorter, was to similar effect. And Keilp himself openly acknowledged that he had stood by and watched as the case went from bad to worse, and failed to honestly communicate with his clients much less appropriately defend them. From the testimony, it is clear that Keilp violated, at the least, Ethical Rules 1.1, 1.3, 1.4, 1.16, and 3.2.

¹ "The Simpsons" includes defendants Larry Simpson, Sharon Simpson, and Simpson Cattle Company Limited Partnership.

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To be sure, there was some testimony from Mr. Simpson's deposition suggesting that he received a few documents which might have placed him on timely notice that Keilp had effectively abandoned him, but he later corrected that testimony.² From the evidence presented at the hearing, however, it is virtually inconceivable that the Simpsons were aware of Keilp's failings, and their diligence in acting once they heard from a third-party that their default had been entered supports their testimony that they were misled by Keilp and unaware that he had effectively abandoned their interests.³

The Court finds that the Simpsons were not aware that Keilp was failing to properly defend them, nor were they on notice that he might not be properly defending them. In the circumstances, Keilp bears sole responsibility for the failure to obey the discovery rules and the Court's subsequent orders. The Court suspects (indeed, expects) that Keilp will pay dearly for his failings in the disciplinary proceedings before the State Bar that will surely ensue. Under the caselaw, however, the entry of the Simpsons' default was improper.

Accordingly,

IT IS ORDERED setting aside the Simpsons' default. The Motion to Set Aside Entry of Default (filed February 28, 2011) is GRANTED, and the Motion for Default Judgment (filed February 17, 2011) is DENIED.

One final word is in order. The Court expects that the Simpsons' new counsel will act expeditiously to bring current all discovery, and to agree to a set of deadlines that will bring this matter to a prompt resolution.

² For example, Mr. Simpson indicated at deposition that he had seen a motion to compel (transcript at p. 33, Bates PTF-00121), but then indicated he was not sure (transcript at p. 41, Bates PTF-00129).

³ The Court notes in passing that Keilp also failed to file an answer on the Simpsons' behalf until after plaintiff filed an application for their default. Had plaintiff mailed a copy of the application for default to the Simpsons, the result might have been different because the Simpsons would have been on notice of Keilp's lack of diligence. Apparently plaintiff's counsel was under the impression that mailing a copy of the application to the Simpsons themselves would be a prohibited ex-parte communication under Rule 4.2, but that rule allows such communications as authorized by law, and Rule 55(a)(1) requires it where a default is sought.