

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000179-001 DT

05/07/2014

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT

J. Eaton

Deputy

VELDA ROSE ESTATES HOME OWNERS
ASSOCIATION

CHARLES E MAXWELL

v.

EDITH POGGI (001)

EDITH POGGI
4132 N 3RD AVE #2
PHOENIX AZ 85013

JOSEPH I VIGIL
MESA JUSTICE CT-EAST
REMAND DESK-LCA-CCC
MCSO CIVIL DIVISION
111 S 3RD AVE
2ND FLOOR
PHOENIX AZ 85003

MINUTE ENTRY

Lower Court Case No. CC2012–132551.

MCSO File No. C286247.

Plaintiff-Appellant Velda Rose Estates Homeowners Association (Plaintiff) filed a procedural motion requesting that this Court strike all references to the Report and Order Imposing Sanctions. For the reasons stated below, this Court denies Plaintiff's Motion.

On February 21, 2014, Plaintiff filed a Procedural Motion asking that this Court strike (1) the Report and Order Imposing Sanctions (the Report); and (2) any reference to this Report from Defendant Edith Poggi's Appellant Memorandum. Plaintiff claimed the Report was attached in "an effort to besmirch the reputation of Plaintiff's legal counsel and improperly prejudice this Court." Plaintiff also claimed the Report had no relation to Defendant's appeal and the inclusion of the Report violated the "civil, professional, and courteous treatment of all participants in the legal process."¹ Plaintiff did not state how or why the inclusion of the Report violated the civil, professional and courteous treatment of the participants in the legal process or why the Report is "immaterial, impertinent, and scandalous."²

¹ Plaintiff's Procedural Motion—Refer To Superior Court, Motion To Strike filed Feb. 21, 2014, at p. 2, ll. 3–5.

² *Id.* at p. 2, ll. 5–8.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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05/07/2014

Defendant responded (1) the Report related to counsel's prior misconduct; and (2) Plaintiff's counsel committed fraud upon the court in the current case. This Court will not rule on the merits of the appeal at this time. In her responsive pleading, Defendant alleged counsel's character is relevant because he authored the 1997 CC&Rs, and did not serve Defendant with the 1997 CC&Rs when he first served the Complaint. Defendant also asserted Plaintiff's counsel had a conflict of interest in this case. Defendant did not support this contention. In addition, Defendant included a number of claims relating to the underlying appeal. This Court will not rule on the merits of the underlying appeal in the guise of ruling on the procedural motion.

This Court notes the Report may be immaterial or impertinent and not relate to Defendant's appeal. Because this Court has not yet reviewed the trial court file or the appellate memoranda from the parties, this Court cannot determine the relevancy of the Report. However, this Court doubts the Report is necessarily scandalous as it was created under the auspices of the Arizona Supreme Court/Acting Presiding Disciplinary Judge. This Court notes, however, the Report is currently being appealed to the Arizona Supreme Court³ and the Acting Presiding Disciplinary Judge issued a stay of the Hearing Panel's decision of reprimand set forth in the Hearing Panel's Report and Order Imposing Sanctions dated July 19, 2013.⁴

Generally, when confronted with Motions To Strike, the granting of the Motion is disfavored. Our Supreme Court commented:

It is the usual rule that while the granting of a motion to strike may be reversible error, the denying of such a motion, although perhaps erroneous, is not such as a rule, and the whole matter is usually in the sound discretion of the trial court.

MacNeil v. Vance, 48 Ariz. 187, 193, 60 P.2d 1078, 1080 (1936). Accord, *Birth Hope Adoption Agency, Inc. v. Doe*, 190 Ariz. 285, 287, 947 P.2d 859, 861 (Ct. App. 1997) holding:

Denial of a motion to strike falls within the sound discretion of the trial court, and we review for an abuse of that discretion.

See also, *Engel v. Landman*, 221 Ariz. 504, 509, 212 P.3d 842, 847 n. 2 (Ct. App. 2009) stating:

We note that the use of "motions to strike" to challenge all manner of items in the record, though regrettably common in practice, should be avoided except when authorized by rule. Motions to strike are not properly used to voice objection to the content of a court order. "Rule 12(f) motions are generally viewed with disfavor 'because striking a portion of a pleading is a drastic remedy and because it is often sought by the movant simply as a dilatory tactic.'" *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 347 (4th Cir.2001) (quoting 5A A. Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1380, 647 (2d ed.1990)). The use of motions to strike beyond the narrow purpose articulated in the rules frequently has the consequence of impeding the efficient

³ SB-14-0004-AP.

⁴ PDJ-2012-9112 Order Staying Proceedings Pending Appeal dated August 13, 2013.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000179-001 DT

05/07/2014

resolution of cases and increasing the cost of litigation. The proper procedural vehicle by which to challenge the court's order in this case would have been a motion for reconsideration, which would not have required a response and reply absent the court's permission. ARFLP 35(D).

The terms "impertinent and immaterial" for purposes of a Motion To Strike have been persuasively defined as:

(Order—Granting motion to strike—General form)

Rule 12(f) authorizes a court to strike immaterial or impertinent matter from a pleading. "Immaterial" matter, in this context, is matter which has no essential or important relationship to the claim for relief or the defenses being pleaded, or which is outside the scope of the action. A statement of unnecessary particulars in connection with and descriptive of that which is material may be stricken as "immaterial" matter. For instance, settlement discussions are inadmissible to show fault, and accordingly, they may be stricken from a complaint as immaterial and potentially prejudicial.

"Impertinent" matter, for purposes of Rule 12(f), consists of any allegation not responsive or relevant to the issues involved in the action and which could not be put in issue or be given in evidence between the parties. It is generally said that there is considerable overlapping between the concepts of "impertinent" and "immaterial" matter.

61A Am. Jur. 2d Pleading § 466. Our Supreme Court commented on the history of the Motion To Strike in conjunction with A.R.C.P. Rule 11, and stated:

Thus, the provisions in Rule 11 for striking pleadings as "sham and false" if they were signed "with intent to defeat the purpose of this rule" will be appropriate only in those cases where the party or counsel intended some end or use not recognized as legitimate in our system of justice. *See, Risinger, Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 Minn.L.Rev. 1, 16–17 (1976–77) (describing the history of the rule and its evolution from the common law motion to strike—a motion which required a showing of both improper motive and falsity). We proceed, therefore, to examine the actions of plaintiff's counsel in light of the objectives of the rule.

Boone v. Superior Court In & For Maricopa Cnty., 145 Ariz. 235, 239, 700 P.2d 1335, 1339 (1985).

Persuasively, "scandalous" has been defined as:

Matters alleged in a pleading that are not material are impertinent, and if such matters are impertinent and reflect on character or contain recriminations, they are scandalous.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000179-001 DT

05/07/2014

Matters that are not material are impertinent. Allegations that are pertinent or contain matters material to the issues cannot be scandalous. However, if they are impertinent and reflect on character or contain recriminations, they are scandalous.

The courts discourage the making of unnecessary allegations when they tend to reflect on the character or standing of others or when they may expose them to public obloquy.

71 C.J.S. Pleading § 60.

"Scandalous," in the context of a motion to strike, refers to any allegation that unnecessarily reflects on the moral character of individual or states anything in repulsive language that detracts from the dignity of the district court.

35A C.J.S. Federal Civil Procedure § 479. See also Black's Law Dictionary defining scandalous matter as :

Civil procedure. A matter that is both grossly disgraceful (or defamatory) and irrelevant to the action or defense.

Black's Law Dictionary (9th ed. 2009). The complained of Report may prove to be irrelevant. Plaintiff has not provided this Court with any legal authority that a disciplinary ruling is scandalous. While this Court understands why counsel is opposed to including the disciplinary Report in Defendant's appeal, for this Court to strike the Report as scandalous, counsel must first demonstrate it is legally scandalous. Plaintiff's counsel failed to do so.

At this time this Court denies Plaintiff's Motion To Strike. Should a review of the Report in the context of Defendant's appeal indicate the Report is not relevant to Defendant's case, this Court may disregard the Report and any references Defendant made to the Report. This Court recognizes the Report is currently on appeal.

III. CONCLUSION.

Based on the foregoing, this Court denies Plaintiff's Motion To Strike.

IT IS THEREFORE ORDERED denying Plaintiff's Motion To Strike.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court

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