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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 07/12/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of the Guardianship) 1 CA-CV 11-0545
of and Conservatorship for:)
) DEPARTMENT B
GLORIA HORRIGAN,)
) **MEMORANDUM DECISION**
An Adult.) (Not for Publication -
) Rule 28, Arizona Rules
_____) of Civil Appellate
JOHN HORRIGAN, Trustee of the) Procedure)
Gloria Horrigan Living Trust,)
)
Plaintiff/Appellee,)
)
v.)
)
CLARA DIPARDO,)
)
Defendant/Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-098903 and PB2008-001747 (Consolidated)

The Honorable Robert D. Myers, Judge (Ret.)

AFFIRMED

Quindry Koniuszy & Follett, LLP
By Stephen W. Follett
Attorneys for Plaintiff/Appellee

Mesa

Clara DiPardo
Defendant/Appellant

Scottsdale

O R O Z C O, Judge

¶1 Appellant Clara DiPardo appeals the probate court's entry of default judgment against her on a breach of contract claim and motion for sanctions.¹ For the following reasons, we affirm the trial court's judgment.

FACTS AND PROCEDURAL HISTORY²

¶2 This appeal arises out of a civil action that was consolidated with guardianship/conservatorship proceedings for the parties' mother. The probate court appointed John Horrigan (Guardian) as the sole permanent guardian and conservator for Gloria Horrigan. Prior to Guardian's appointment, he and his sister, Ms. DiPardo, had been co-trustees of the Gloria Horrigan Living Trust (Trust).

¶3 Guardian filed a complaint against Ms. DiPardo and her husband, claiming Mr. DiPardo breached a contract in which he agreed to loan \$16,000 to the Trust, recorded an invalid deed of trust on real property in violation of Arizona Revised Statutes

¹ Default judgment was entered against both Clara DiPardo and her husband, Anthony DiPardo, individually and severally as sanctions, pursuant to Arizona Rules of Civil Procedure 16(f) and 37(f). However, only Clara has appealed the judgment.

² Ms. DiPardo failed to cite to the record in her opening brief as required by Arizona Rule of Civil Appellate Procedure 13(a)4, thus we disregard the facts set forth in her brief and instead rely on the answering brief's statement of facts and our own review of the record. See *State Farm Mutual Auto. Ins. Co. v. Arrington*, 192 Ariz. 255, 257 n.1, 963 P.2d 334, 336 n.1 (App. 1998).

(A.R.S.) section 33-420 (2007), and converted Trust property for his personal use. Although Mr. DiPardo recorded a deed of trust that reflected a loan was made to the Trust in the amount of \$16,000, Guardian alleged Mr. DiPardo actually loaned only \$9264. The complaint also alleged that Mr. DiPardo was repaid the entire \$9264 but refused to release the deed of trust, in violation of A.R.S. § 33-712 (2007). The complaint sought damages, attorney fees and costs.

¶14 After the complaint was filed, Ms. DiPardo, proceeding pro se, filed a request to consolidate the civil action with the probate action, which the court granted.

¶15 When the DiPardos failed to timely file an answer, Guardian filed an application for default judgment. Two weeks later, Ms. DiPardo filed an "objection" to the application for default, which was also an answer to the complaint.³ Guardian subsequently withdrew the application for default.

¶16 In January 2011, Guardian filed an Application for Order to Show Cause, alleging Ms. DiPardo refused to transfer her mother's property to Guardian, failed to provide an accounting,

³ The DiPardos were both served with the summons and complaint on November 3, 2010. Ms. DiPardo filed her answer on December 16, 2010, forty-three days after service. Arizona Rule of Civil Procedure 12(a) requires that defendants serve and file an answer within twenty days after the service of the summons and complaint. Ariz. R. Civ. P. 12(a).

and wrongfully took her mother's money, including the \$16,000 that was the subject of the complaint.⁴

¶17 At a February 2011 status conference, the court ordered Ms. DiPardo to attend her deposition on March 8, 2011. On March 4, 2011, Ms. DiPardo requested a continuance of her deposition, stating she had been in a car accident and was under the care of a doctor. She provided a note from her doctor requesting that she be excused from her deposition until further notice. The court granted a continuance of thirty days but warned Ms. DiPardo that if she continued to be unavailable "she shall, upon request of counsel, demonstrate the precise reasons she is unable to have her deposition taken."

¶18 Two days before her rescheduled deposition, set for April 11, 2011, Ms. DiPardo asked for a second continuance, alleging she was "still under doctors [sic] care and needs to be excused until further notice." She attached the same doctor's note she provided with her first request for a continuance. Ms. DiPardo also claimed to have an appointment with a surgeon during

⁴ The Application for Order to Show Cause alleged Ms. DiPardo "admitted that she accepted \$16,000.00 from her husband, Anthony DiPardo, which was wrongfully obtained as set forth in a complaint in this matter."

the time set for her deposition.⁵ The court never ruled on this second request for a continuance.

¶9 The following week, Guardian filed a Motion for Sanctions, seeking to compel discovery and sanction the DiPardos. On the same day he filed the Motion for Sanctions, Guardian also filed a Motion for Rule 16 Management Conference and a Motion to Amend his complaint in the contract action.

¶10 Guardian certified that the DiPardos failed to respond to any written communication, including discovery requests, and refused to accept certified mail sent from his office. Guardian averred that he "decided to avoid the expected costs and fees" and cancelled the depositions without waiting for the court to rule on the motion to continue because he believed, based on prior dealings, that the DiPardos would not appear for their depositions.

¶11 Guardian also contended the DiPardos' conduct was sanctionable because they knowingly and intentionally failed to comply with the Arizona Rules of Civil Procedure, causing the Trust to incur unnecessary attorney fees and costs. As a sanction, counsel requested the court order the DiPardos to pay the following: (1) all attorney fees incurred by the Trust as a

⁵ Mr. DiPardo was also scheduled to have his deposition taken and allegedly emailed Guardian's lawyer to request a last-minute continuance but never filed a formal request with the court.

result of the DiPardos' failure to appear at depositions and respond to discovery; (2) costs associated with rescheduling the depositions; and (3) costs for Guardian's counsel to appear at a Rule 16 scheduling conference. In addition to the proposed monetary sanctions, counsel requested the court order the DiPardos to accept certified mail at an address of their choice and respond to discovery requests by court-imposed deadlines.

¶12 After the DiPardos missed the deadline to file responses to Guardian's Motion for Rule 16 Management Conference, Motion for Sanctions, and Motion to Amend, Guardian requested a hearing on the motions. Guardian also requested a hearing on his Application for Order to Show Cause because Ms. DiPardo twice disregarded the court's order that she appear at her deposition. On May 5, 2011, the court set a hearing for June 2, 2011 on the Application for Order to Show Cause and the Motion for Sanctions. The court also ordered an oral argument on the Motion to Amend Complaint and Motion for Rule 16 Management Conference to immediately follow the Order to Show Cause hearing.

¶13 Ms. DiPardo filed an "objection" to the various motions on May 13, 2011. Specifically, she objected to the hearing being held on June 2 because she claimed she was under the care of two doctors and "will not be released until June 22, 2011 from one of them." Ms. DiPardo attached to her objection a note from a doctor stating she was "under [the doctor's] medical care and may

not return to work at this time. . . . She may return to work on 06/22/2011."

¶14 Guardian replied to Ms. DiPardo's objection by asking the court to deny her request for a continuance and order her to appear telephonically only if she could provide sufficient proof of good cause. Guardian opined, "If Clara DiPardo truly has a serious issue, then she can describe it with more than a generic doctor's note that she cannot work. . . . Attendance at a hearing is different than returning to work." Guardian claimed that during the time Ms. DiPardo had allegedly been "under doctor's care" she had twice traveled out-of-state and attended legislative hearings. Guardian contended that continuing the hearing would cause him prejudice because Ms. DiPardo "has not returned personal property, documents, accountings or money as ordered by the Court, or cooperated in any way."

¶15 In a minute entry dated May 26, 2011 and filed May 31, 2011, the court denied Ms. DiPardo's request for a continuance and encouraged her to attend the hearing.

¶16 On June 2, 2011, both Ms. DiPardo and her husband failed to appear. The court proceeded with a hearing on Guardian's Application for Order to Show Cause and Motion for Sanctions; argument on the Motion to Amend Complaint; and the Rule 16 Management Conference. Guardian requested to proceed by default on the original civil complaint. The court ordered the

DiPardos to turn over: (1) all personal property and papers of Gloria Horrigan; (2) all cash, valuables, and stocks held for the benefit of Gloria Horrigan; and (3) all photographs and videos taken of Gloria Horrigan. Additionally, the court ordered the DiPardos "bear the cost of attorney fees related to their failure to cooperate as provided under the Rules of Civil Procedure as a sanction."

¶17 Ms. DiPardo filed a motion to reconsider on June 16.⁶ She complained that she had provided a valid medical excuse and did not find out about the denial of her request for a continuance until the day of the hearing. She requested the court vacate its findings and allow her to appear telephonically at a new hearing.

¶18 The court denied her motion, offering the following in response:

This litigant has a long history in this case of requests for continuances to which this court has been very tolerant. Ms. DiPardo was given every reasonable opportunity to [sic] her requests for more time and she has been given continuances in most instances. However, repeated failures to follow court rules and legal requirements have now, unfortunately for her, left her in a 'no help' position. She has failed to show good cause for the relief requested in her Motion for Reconsideration. The consequences of her failures have now resulted in a judgment against her for attorneys' fees and costs. She has not

⁶ A formal judgment had not yet been entered at that time.

responded to the requests for this judgment in favor of [Guardian's Counsel].

¶19 In the judgment filed June 28, 2011, the court also found:

Anthony DiPardo and Clara DiPardo have consciously and purposefully frustrated the purpose of the Arizona Rules of Civil Procedure, discovery rules and orders of this Court. Anthony DiPardo and Clara DiPardo failed to appear at the hearing and scheduling conference on June 2, 2011.

THEREFORE, pursuant to the Court's inherent authority, Rule 16(f) and Rule 37(f);

IT IS ORDERED:

1. DEFAULT JUDGMENT is entered against Anthony DiPardo and Clara DiPardo; individually and severally

Therefore, Guardian was awarded the damages requested in the civil complaint, costs, and attorney fees.

¶20 Ms. DiPardo timely appealed the judgment. We have jurisdiction pursuant to A.R.S. §§ 12-120.21.A.1 (2003) and - 2101.A.1 (Supp. 2011).

DISCUSSION

¶21 "[A] party who conducts a case without an attorney is entitled to no more consideration from the court than a party represented by counsel, and is held to the same standards expected of a lawyer." *Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, 287, ¶ 16, 17 P.3d 790, 793 (App. 2000) (citations omitted). Guardian requests that we summarily dismiss the appeal

because Ms. DiPardo has failed to cite the record or any legal authority in support of her position as required by Arizona Rule of Civil Appellate Procedure 13. Because we prefer to decide cases on the merits, *Clemens v. Clark*, 101 Ariz. 413, 414, 420 P.2d 284, 285 (1966), in our discretion we address Ms. DiPardo's argument as best as we can understand it.

¶22 The essence of Ms. DiPardo's argument is that she was denied due process because the court wrongfully denied her request to continue the June 2, 2011 hearing. Motions for a continuance are left to the sound discretion of the trial court and rulings on such motions will not be disturbed on appeal absent a clear abuse of discretion. *Dykeman v. Ashton*, 8 Ariz. App. 327, 330, 446 P.2d 26, 29 (1968).

¶23 Ms. DiPardo has not shown that the court abused its discretion in denying her request to continue the June 2 hearing. As previously indicated, the record reflects numerous requests for continuances by Ms. DiPardo over the course of the proceedings, which was noted by the court in its denial of her motion to reconsider. The court had previously advised Ms. DiPardo that she would need to be more specific in her reasons for being unable to attend court proceedings if she sought additional continuances. Guardian also requested Ms. DiPardo describe with specificity her physical inability to attend hearings. Still, Ms. DiPardo provided only a general doctor's

note stating that she could not return to work until June 22, 2011. The note did not purport to excuse Ms. DiPardo from court appearances or otherwise describe why she would be unable to attend a court hearing either in person or by telephone. Ms. DiPardo was advised of the defects in her supporting documentation yet failed to take corrective action.

¶124 Furthermore, this court has previously found that a doctor's note which merely "recommended that [plaintiff] have two week's rest" was not a sufficient supporting affidavit for purposes of a motion for continuance on the grounds of illness. *Modla v. Parker*, 17 Ariz. App. 54, 58, 495 P.2d 494, 498 (1972) (citing 68 A.L.R.2d 470 (1959)). Thus, we cannot say the court erred in finding Ms. DiPardo's doctor's note was insufficient because it did not disqualify her from appearing in court.

¶125 Lastly, we note that Ms. DiPardo appears to argue that the court did not have the authority to deny her request for a continuance as a sanction. However, she does not cite any authority or anything in the record in support of this statement, and the record does not indicate that the court denied her request for a continuance as a sanction.

CONCLUSION

¶126 For the foregoing reasons, we affirm the probate court's judgment. Guardian has requested attorney fees and costs under A.R.S. §§ 12-341.01 (2003) and 33-420 and sanctions,

attorney fees, and costs under A.R.S. § 12-349 (2003). We will award Guardian an amount of reasonable attorney fees incurred in connection with this appeal under § 12-341.01.A, as well as his taxable costs, upon his compliance with Arizona Rule of Civil Appellate Procedure 21(a).

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

JON W. THOMPSON, Judge

/S/

JOHN C. GEMMILL, Judge