



DIVISION ONE
FILED: 09/13/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STEVAN RAY DEWITT,) 1 CA-SA 12-0177
)
Petitioner,) DEPARTMENT B
)
v.) Maricopa County
) Superior Court
) No. FC 2012-002376
THE HONORABLE CHRISTOPHER)
WHITTEN, Judge of the SUPERIOR)
COURT OF THE STATE OF ARIZONA,) **DECISION ORDER**
in and for the County of)
MARICOPA,)
)
Respondent Judge,)
)
REBECCA DEWITT,)
)
Real Party in Interest.)
_____)

Stevan Ray Dewitt (Petitioner/Husband) petitions this Court for special action relief, challenging the family court's June 25, 2012 order finding him in contempt. Presiding Judge Maurice Portley and Judges Patricia A. Orozco and Randall M. Howe have considered the Petition for Special Action filed in this matter, as well as the Response to Petition for Special Action and Reply to the Petition for Special Action. Because Husband has no adequate remedy by way of appeal, we accept jurisdiction in this special action pursuant to Arizona Rule of Procedure for Special Actions 1(a) and Arizona Revised Statutes (A.R.S.) section 12-120.21.A.4 (2003). "The sanctions at issue are presented as

civil contempt orders, and such orders are not appealable. . . .
[W]e therefore accept special action jurisdiction." *Trombi v. Donahoe*, 223 Ariz. 261, 265, ¶ 14, 222 P.3d 284, 288 (App. 2009).

FACTS AND PROCEDURAL HISTORY

Husband and Real Party in Interest (Wife) are involved in a contentious dissolution action. Wife filed a petition for an order of protection in March 2012. The family court granted the petition and ordered Husband not to go to the family residence.

After the family residence was sold, Husband was allowed to go to the home, while supervised, only to "remove all of his personal property." Husband's removal of his property was supervised by Ms. Seefeldt, an employee of the realtor that listed the home for sale. Ms. Seefeldt testified that when she left the family residence the missing fixtures were at the home.

The realtor subsequently sent a letter to the family court indicating that Husband, in addition to removing his personal property from the home, also removed fixtures that should have remained with the residence, including: the sprinkler system controller, a patio ceiling fan and sunscreen, outdoor lights, light switches and controllers, misters, and speakers. The court set the matter for a contempt hearing on June 25, 2012.

During the hearing, Husband testified that some of the missing items were in his storage unit, but he did not intend to take them, some items he took because he thought he was entitled to take them and other items he did not take. After Husband was found in contempt by the family court, this special action was filed.

DISCUSSION

Husband raises the following issues:

1. Did the trial court err when it denied Husband's motion for directed verdict?
2. In the absence of any family court orders prohibiting Husband from removing fixtures from the marital residence, did the trial court abuse its discretion when it found Husband in contempt of its orders?
3. Did the trial court shift the burden of proof to Husband to prove that he was not in contempt of the court's orders?
4. Did the trial court apply the incorrect burden of proof?

Directed Verdict

Husband argues that the court should have granted his motion for directed verdict because there was insufficient evidence that he was responsible for taking the missing fixtures. Arizona Rule of Family Law Procedure 2.A states, "The *Arizona Rules of Civil Procedure* apply only when incorporated by

reference in these rules." Arizona Rule of Civil Procedure 50 provides for a court to consider a motion for directed verdict or judgment as a matter of law. The family law rules, however, do not have a provision similar to Rule 50. As a result, there is no right to a directed verdict or judgment as a matter of law in the family law rules. Therefore, the family court did not err by denying the motion for directed verdict.

Violation of a Specific Order

Husband next argues that it was not established that he "violated a specific and definite order of the court." He omits, however, that the order of protection prohibited him from going to the family residence. Although he was subsequently allowed to enter the residence "to remove all of his personal property" while supervised, husband violated the family court's specific order that he only remove his personal property when he removed fixtures from the family residence.

Shifting of the Burden of Proof

Husband next argues that the family court erred in shifting the burden of proof to require him to prove he did not violate the court's orders. To determine whether Husband was in contempt, the court had to find that he violated a specific court order by clear and convincing evidence. *BMO Harris Bank Nat'l Ass'n v. Bluff*, 229 Ariz. 511, 513, ¶ 6, 277 P.3d 216, 218

(App. 2012). Assuming the showing is made, the burden shifts to Husband to attempt to refute it. *Id.*

During Wife's case in chief, Ms. Seefeldt testified that the missing fixtures were present when she left the residence, indicating that the items went missing after she left. The parties agreed that the fixtures went missing on or before June 11. The evidence was sufficient to shift the burden of proof to Husband to prove that he did not or could not have taken the missing fixtures. The family court, as a result, did not impermissibly shift the burden of proof.

Sufficiency of the Evidence

Lastly, Husband argues that the family court applied the incorrect burden of proof. The family court was required to find that Husband violated the court order by clear and convincing evidence. *BMO Harris Bank Nat'l Ass'n*, 229 Ariz. at 513, ¶ 6, 277 P.3d at 218. Husband admitted that he had taken some of the fixtures but denied taking others. Also, Ms. Seefeldt testified that the missing fixtures were there when she left the residence; therefore, the family court could assume that the items were removed after she left. The court, as the trier-of-fact, then had to determine the credibility of the witnesses and the weight to be given to their testimony. As a result, it was not unreasonable for the family court to find

that Husband took the items after Ms. Seefeldt left the house in violation of the court order that he was only to remove his personal belongings. Thus, there was more than sufficient evidence that Husband violated the court order by clear and convincing evidence.

Attorney fees and costs

Wife requests her attorney fees and costs in defending this special action pursuant to A.R.S. § 25-324 (Supp. 2011) and Arizona Rule of Procedure for Special Actions 4(g). Because we do not have sufficient financial information from the parties, we deny Wife's request for fees subject to the family court considering the issue at the end of the case. As the prevailing party, Wife is entitled to her costs, upon compliance with ARCAP 21.

CONCLUSION

For the above stated reasons, we accept jurisdiction in this special action, but deny relief.

/S/

PATRICIA A. OROZCO, Judge