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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

LINDA S. MASARYK, *Petitioner,*

v.

THE HONORABLE J. RICHARD GAMA, Judge of the SUPERIOR
COURT OF THE STATE OF ARIZONA, in and for the County of
MARICOPA, *Respondent Judge,*

MENDELSON CONSTRUCTION, L.L.C., a limited liability company,
Real Party in Interest

No. 1 CA-SA 13-0261

FILED 12-10-2013

Petition for Special Action from the Superior Court in Maricopa County
CV2009-020422

The Honorable, J. Richard Gama Judge

**JURISDICTION ACCEPTED,
RELIEF DENIED IN PART AND GRANTED IN PART**

COUNSEL

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Counsel for Petitioner

Mathew & Associates, Phoenix
By Ivan K. Mathew

Counsel for Real Party in Interest

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MEMORANDUM DECISION

Judge John C. Gemmill delivered the decision of the Court, in which Presiding Judge Maurice Portley and Judge Kent E. Cattani joined.

G E M M I L L, Judge:

¶1 In this special action proceeding, we accept special action jurisdiction and grant relief in part, as explained herein.

BACKGROUND

¶2 This special action arises out of a contract dispute between Petitioner Linda S. Masaryk and Mendelsohn Construction (“Mendelsohn”). The contract concerns a home that Masaryk hired Mendelsohn to build for her. A sub-contractor initiated litigation and named both Masaryk and Mendelsohn as defendants. Subsequently, both Masaryk and Mendelsohn filed cross-claims against each other.

¶3 Eventually, the trial court granted Mendelsohn summary judgment on its statutory prompt payment claim against Masaryk, awarding over \$650,000 in principal, prejudgment interest, taxable and non-taxable costs, and attorneys’ fees. Summary judgment on the claim was certified as final and appealable under Arizona Rule of Civil Procedure 54(b) (“Rule 54(b)”), and Masaryk’s appeal of that judgment is pending in this court.

¶4 Meanwhile, the trial court held an evidentiary hearing to determine the amount required for the supersedeas bond that Masaryk must file in accordance with Arizona Rule of Civil Appellate Procedure (“ARCAP”) 7 as she appeals the Rule 54(b) judgment against her. Masaryk testified at that hearing, and no other evidence was presented. After considering the evidence presented, the trial court set the supersedeas bond at the full amount of the judgment. Masaryk now brings this special action, presenting two issues: (1) whether the trial court erred by certifying the summary judgment award against her as final under Rule 54(b), and (2) whether the trial court erred by incorrectly applying ARCAP 7(a)(2) (“Rule 7(a)(2)”) in setting the supersedeas bond in the amount of the full judgment.

JURISDICTION

¶5 Special action jurisdiction is proper when a party has no “equally plain, speedy, and adequate remedy by appeal.” Ariz. R.P. Spec. Act. 1(a). Exercising special action jurisdiction is highly discretionary with the court in which the action is filed. *State Compensation Fund of Arizona v. Fink*, 224 Ariz. 611, 612, ¶ 4, 233 P.3d 1190, 1191 (App. 2010). Challenges to the setting of a supersedeas bond can be a circumstance where special action jurisdiction is appropriate. *See Salt River Sand & Rock Co. v. Dunavant*, 222 Ariz. 102, 105-06, ¶ 7, 213 P.3d 251, 254-55 (App. 2009); *Bruce Church, Inc. v. Superior Court*, 160 Ariz. 514, 515, 774 P.2d 818, 819 (App. 1989). Accordingly, we exercise jurisdiction over this special action.

ANALYSIS

I. The Trial Court’s Rule 54(b) Certification

¶6 Masaryk’s challenge to the Rule 54(b) certification of the statutory prompt payment judgment against her is an issue that must be raised and addressed in the civil appeal that is pending in this court, 1 CA- CV 13-0085. If the Rule 54(b) certification was not legally appropriate, the result may be a lack of appellate jurisdiction in that appeal. A separate special action is not the appropriate vehicle to challenge the presence of appellate jurisdiction in a pending appeal. Accordingly, we deny relief regarding the Rule 54(b) certification of the prompt payment judgment against Masaryk, without prejudice to her pursuing this issue in the pending civil appeal in this court, 1 CA- CV 13-0085.¹

II. The Trial Court’s Application of ARCAP 7(a)(2)

¶7 In determining the supersedeas bond amount, the trial court erred by placing an incorrect burden of proof on Masaryk and by apparently applying the previous version of Rule 7(a)(2), rather than the recently amended version.

¶8 The trial court’s order concludes as follows:

¹ We express no opinion regarding the propriety of this Rule 54(b) certification.

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Having considered the evidence presented at this hearing, the Court finds that Masaryk has failed to carry her burden of providing a secure alternative to the usual bond amount and has failed to demonstrate the existence of extraordinary circumstances that call for a departure [from] the usual bond amount.

This approach was appropriate under former Rule 7(a)(2) and our case law interpreting it.² See *Bruce Church, Inc.*, 160 Ariz. at 517, 774 P.2d at 821; *Salt River Sand & Rock Co.*, 222 Ariz. at 106 n.3, ¶¶ 8-9, 213 P.3d at 255 n.3. In those cases, we recognized that former Rule 7(a)(2) gave the trial court discretion to set a supersedeas bond in an amount lower than the full judgment if “for good cause shown” the party required to post bond establishes “the existence of a secure alternative to the usual cash bond.” *Salt River Sand and Rock Co.*, 222 Ariz. at 106, ¶¶ 8-9, 213 P.3d at 255.

¶9 In 2011 the legislature enacted Arizona Revised Statutes (“A.R.S.”) section 12-2108, which states:

A. If a plaintiff in any civil action obtains a judgment under any legal theory, the amount of the bond that is necessary to

² Prior to the amendment effective on January 1, 2012, Rule 7(a)(2) provided:

The bond shall be conditioned for the satisfaction in full of the judgment remaining unsatisfied, together with costs, interest, and any damages reasonably anticipated to flow from the granting of the stay including damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and costs, interest, and damages as the appellate court may adjudge and award, unless the superior court, after notice and hearing and for good cause shown, fixes a different amount or orders security or imposes conditions other than or in addition to the bond. In determining the amount of the bond, the court shall consider, among other things, whether there is other security for the judgment, or whether there is property in controversy which is in the custody of the sheriff or the court.

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stay execution during the course of all appeals or discretionary reviews of that judgment by any appellate court shall be set as the lesser of the following:

1. The total amount of damages awarded excluding punitive damages.
2. Fifty per cent of the appellant's net worth.
3. Twenty-five million dollars.

B. Notwithstanding subsection A, if an appellee proves by clear and convincing evidence that an appellant is intentionally dissipating assets outside the ordinary course of business to avoid payment of a judgment, the court may require the appellant to post a bond in an amount up to the full amount of the judgment.

C. Notwithstanding subsection A, if an appellant proves by clear and convincing evidence that the appellant is likely to suffer substantial economic harm if required to post bond in an amount required under subsection A, the trial court may lower the bond amount to an amount that will not cause the appellant substantial economic harm.

(Emphasis added.) Similarly, Rule 7(a)(2) was amended as of January 1, 2012, and now provides:

(2) Amount of the Bond. The amount of the bond shall be set as the lesser of the following:

- (A) The total amount of damages awarded, excluding punitive damages;
- (B) Fifty per cent of the appellant's net worth;
- (C) Twenty-five million dollars.

Notwithstanding the foregoing, the court may require an appellant to post a bond in an amount up to the full amount of the judgment if an appellee proves by clear and convincing evidence that the appellant is intentionally

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dissipating assets outside the ordinary course of business to avoid payment of a judgment. The trial court may also lower the bond amount to an amount that will not cause an appellant substantial economic harm if the appellant proves by clear and convincing evidence that the appellant is likely to suffer substantial economic harm if required to post a bond in the amount set pursuant to the provisions of (A), (B), or (C) above. In determining the amount of the bond, the court may consider whether there is other security for the judgment, or whether there is property in controversy which is in the custody of the sheriff or the court.

(Emphasis added.)

¶10 The language of A.R.S. § 12-2108 and new Rule 7(a)(2) change the standards by which a supersedeas bond amount is set. The initial focus in setting a bond is no longer automatically on the amount of the “judgment remaining unsatisfied,” as under former Rule 7(a)(2). The process instead requires consideration of the provisions of A.R.S. § 12-2108(A) and Rule 7(a)(2)(A)-(C). Whether a party responsible for a bond can show good cause for a reduced bond amount or a reasonable alternative to the usual cash bond is not part of an initial analysis under § 12-2108(A) and Rule 7(a)(2)(A)-(C), although these options may ultimately be considered if an appellant seeks a lower bond amount from what is initially indicated by applying the new statutory and rule provisions.

¶11 Under the statute and new rule, the trial court in this case must consider, first, the “total amount of damages awarded,” in accordance with § 12-2108(A)(1) and Rule 7(a)(2)(A) and, second, whether Masaryk carried her burden of proving by a preponderance of the evidence³ that fifty per cent of her net worth was less than the damages awarded against her, in accordance with § 12-2108(A)(2) and Rule

³ Section 12-2108 and Rule 7(a)(2) do not specifically prescribe the standard of proof applicable to a judgment debtor attempting to prove her net worth. In a civil action, the “typical evidentiary standard in civil cases is by a preponderance of the evidence.” *Rasmussen v. Fleming*, 154 Ariz. 207, 224, 741 P.2d 674, 691 (1987) (citation omitted); see also *Aileen H. Char Life Interest v. Maricopa Cnty.*, 208 Ariz. 286, 291, ¶ 11, 93 P.3d 486, 491 (2004) (noting “usual rule” in civil actions requires proof “by a preponderance of the evidence”).

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7(a)(2)(B). The trial court may further consider whether Mendelsohn Construction has established by clear and convincing evidence that Masaryk intentionally dissipated assets outside the ordinary course of business to avoid paying the judgment, in order to support fixing the bond at the “full amount of the judgment.” A.R.S. § 12-2108(B); ARCAP 7(a)(2). Other relevant considerations may exist under the new statute and rule as well.

¶12 Because we are unable to determine whether the trial court conducted the necessary analysis under § 12-2108 and Rule 7(a)(2), we remand for a new determination of the supersedeas bond amount.

¶13 Finally, Masaryk requests an award of attorneys’ fees. In our discretion, we decline to award attorneys’ fees because the ultimate prevailing party is not yet determined.

CONCLUSION

¶14 For the preceding reasons, we exercise our special action jurisdiction in this matter. We deny relief (without prejudice) regarding the trial court’s Rule 54(b) certification of the prompt payment judgment entered in favor of Mendelsohn against Masaryk. We grant relief regarding determination of the amount of a supersedeas bond by vacating the trial court’s order filed May 9, 2013 and remanding for further proceedings in accordance with A.R.S. § 12-2108 and Rule 7(a)(2).



Ruth A. Willingham · Clerk of the Court
FILED: mjt