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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In the Matter of the Guardianship and the Conservatorship of:

HELEN VANDERHYE, An Adult.

In the Matter of:

VANDERHYE FAMILY REVOCABLE TRUST,
dated February 26, 2007, Robert Vanderhye, Trustee.

EAST VALLEY FIDUCIARY SERVICES, INC.,
Petitioner/Appellee,

v.

ROBERT VANDERHYE, *Respondent/Appellant.*

ROBERT A. VANDERHYE, *Petitioner,*

v.

THE HONORABLE KERSTIN G. LEMAIRE, Commissioner of the
SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County
of Maricopa, *Respondent Commissioner,*

EAST VALLEY FIDUCIARY SERVICES, INC.,
Real Party in Interest.

No. 1 CA-CV 15-0823
No. 1 CA-SA 15-0296
(Consolidated)
FILED 5-9-2017

Appeal from the Superior Court in Maricopa County
No. PB2014-051600
The Honorable Kerstin G. LeMaire, Judge

AFFIRMED IN PART AND REMANDED IN PART

COUNSEL

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By Taylor C. Young, Peter A. Silverman
Counsel for Appellant Robert Vanderhye

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By Bradley S. Braun, Gregory M. Kuzel, Jason M. Ray
Counsel for Petitioner/Appellee East Valley Fiduciary Services, Inc.

MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Chief Judge Michael J. Brown and Judge Patricia Starr¹ joined.

T H U M M A, Judge:

¶1 Robert Vanderhye challenges the superior court's rulings removing him as trustee of a trust and ordering him to prepare an accounting, and awarding attorneys' fees and double damages against him, as well as rulings holding him in contempt and issuing a fiduciary arrest warrant. Because the court did not make factual findings that Vanderhye acted in bad faith, the award of double damages is remanded for further proceedings. In all other respects, the rulings are affirmed.

FACTS AND PROCEDURAL HISTORY

¶2 In 2007 while living in Scottsdale, Vanderhye's father Arthur and step-mother Helen formed the Vanderhye Family Revocable Trust. Arthur and Helen were trustors and co-trustees; Vanderhye, an attorney,

¹ The Honorable Patricia Starr, Judge of the Arizona Superior Court, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

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was named successor trustee and attorney-in-fact for Arthur and Helen. The Trust provides that, on the death of either Arthur or Helen, the remainder of the trust estate (excluding a parcel of real property) “shall be held for the benefit of” the survivor. The Trust has a Scottsdale mailing address and an Arizona choice of law provision. The tangible assets listed in the Trust document are two parcels of land in Scottsdale.

¶3 By mid-2014, Helen and Arthur had developed medical issues and were incapacitated. Vanderhye moved Arthur to Virginia, Helen remained in Scottsdale and Vanderhye became trustee of the Trust. Vanderhye purported to “dissolve[] the Trust and divide[] the major Trust assets evenly between Arthur and Helen.” These assets included proceeds from the sale of a Scottsdale house owned by the Trust. Vanderhye directed the proceeds to be deposited into two E*Trade accounts, one of them (account 5196) titled in his and Arthur’s names as tenants in common. The record also contains references “to a bank account used to support housing for Helen’s son . . . , who required special care because of developmental disabilities, and a bank account in the name of Helen and” her son.

¶4 At some point, Adult Protective Services became involved with Helen’s care and contacted appellee East Valley Fiduciary Services, Inc. (EVFS). In July 2014, EVFS filed a petition to be appointed Helen’s guardian and conservator, noting Vanderhye “lives in another state and is unable to care for” her. EVFS filed a declination of appointment, signed by Vanderhye, in which he declined appointment as successor attorney-in-fact for Helen and expressly “[c]onsent[ed] to, and join[ed] in, the” petition. In late July 2014, following an evidentiary hearing, the court appointed EVFS as Helen’s temporary guardian and conservator and set a September 2014 hearing to address the permanent guardian and conservator request. On September 1, 2014, Arthur died in Virginia. Vanderhye’s counsel then filed a notice of appearance with the court. At the September 2014 hearing, where Vanderhye’s counsel participated, the hearing was reset for October 2014.

¶5 A few weeks before the October 2014 hearing, EVFS filed a petition to remove Vanderhye as trustee, to appoint EVFS as successor trustee and for an accounting of Trust assets. EVFS alleged that Vanderhye “ceased to act as [an] impartial fiduciary and began acting solely on his own behalf as a descendant of Arthur;” “has proven to have a conflict concerning his own eventual beneficial interest in the Trust;” “has not been fair and impartial toward Helen” and was holding “trust assets outside of the Trust” that he refused to return. At about this same time, Vanderhye’s counsel withdrew. Vanderhye filed a pro se opposition to the petition, stating he was making a “special appearance to contest jurisdiction.”

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¶6 Vanderhye did not appear at the October 2014 hearing, at which the court set an evidentiary hearing for late November 2014. The resulting minute entry made plain that Vanderhye was required to personally attend the November 2014 hearing:

If Robert Vanderhye wishes to participate, he must appear in person. Mr. Vanderhye is admonished, as Trustee who has engaged [in] activities as Trustee in Arizona, the Court will exercise jurisdiction over him and he will be subject to sanctions for any activities deemed detrimental to the Ward.

Vanderhye, however, did not appear at the November 2014 hearing, where the court heard testimony, received exhibits and heard argument and exercised personal jurisdiction over Vanderhye. Because Vanderhye has not submitted any transcripts from any of the hearings, this court presumes the record supports the court's actions, including its factual determinations regarding jurisdiction. *See Cullison v. City of Peoria*, 120 Ariz. 165, 168 n.2 (1978). The court granted EVFS' petitions, appointed EVFS as permanent guardian and conservator for Helen, removed Vanderhye as trustee, appointed EVFS as successor trustee and ordered Vanderhye to prepare and submit an accounting of Trust assets by December 31, 2014.

¶7 Notwithstanding the court's order, Vanderhye failed to submit an accounting, prompting EVFS to file a motion for order to show cause. On February 10, 2015, the court entered an order requiring Vanderhye to appear at an April 15, 2015 at 1:30 p.m. hearing "to show cause, if any there be, why he should not be held in contempt for his failure to prepare an accounting" as ordered by the court. The court also imposed a constructive trust over the E*Trade accounts and set a hearing to determine damages in conjunction with the show cause hearing.

¶8 On February 20, 2015, Vanderhye obtained a temporary restraining order from the United States District Court for the Eastern District of Virginia enjoining E*Trade from disbursing any funds from account 5196 without further order of that court. By March 19, 2015, the Virginia court granted E*Trade's motion to dismiss and, as a result, the temporary restraining order was dissolved. At about that same time, Vanderhye filed a complaint against EVFS in Virginia state court alleging various tort claims arising out of EVFS' contact with E*Trade.

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¶9 Back in Arizona, Vanderhye failed to attend the April 15, 2015 hearing. Based on information provided, the court found Vanderhye

acted unreasonably by failing to respond to the orders of [the court], by failing to submit to the jurisdiction of [the court], by initiating proceedings against E*Trade . . . and [EVFS] . . . in another jurisdiction for claims that were already subject to jurisdiction in Arizona, and by refusing to adhere to the expressed mandates of the Vanderhye Family Trust while acting as Trustee.

The court (1) imposed damages against Vanderhye totaling \$49,822.34 (doubled to \$99,644.68 pursuant to Arizona Revised Statutes (A.R.S.) section 14-3709 (2017));² (2) awarded reasonable attorneys' fees and costs to EVFS in an amount to be determined; (3) found Vanderhye was in contempt of court for his failure to provide an accounting of Trust assets by December 31, 2014 and (4) directed that a fiduciary arrest warrant issue for Vanderhye. The fiduciary arrest warrant issued the next day.³

¶10 Resulting judgments awarded EVFS \$99,644.68 in double damages; \$40,410 in attorneys' fees and \$983.04 in taxable costs. Vanderhye timely appealed and filed a petition for special action to challenge the civil contempt order and fiduciary arrest warrant. This court accepted special action jurisdiction, and consolidated that matter with this appeal. This court has jurisdiction over Vanderhye's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

² Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

³ In late April 2015, Vanderhye moved for reconsideration of the April 15, 2015 order, arguing that a purported April 7, 2015 accounting he claimed to have submitted in Virginia complied with the November 2014 order that he provide an accounting of Trust assets by December 31, 2014; that Arizona lacked personal jurisdiction and that there was no evidence or authority supporting the award of damages and fees. That motion apparently had not been ruled upon before his appeal.

DISCUSSION

I. The Superior Court Had Personal Jurisdiction Over Vanderhye.

¶11 Vanderhye argues the superior court could not properly exercise jurisdiction over him by reason of: (1) constitutional minimum contacts; (2) A.R.S. § 14-10202(A) or (3) the notice of appearance filed by his attorney. If jurisdiction is proper under any one of these alternatives, the court had personal jurisdiction over Vanderhye. Because the Arizona court properly could exercise personal jurisdiction over Vanderhye given his contacts with Arizona, this court does not address the two alternative grounds.

¶12 This court reviews questions of personal jurisdiction de novo. *Duckstein v. Wolf*, 230 Ariz. 227, 233 ¶ 19 (App. 2012). “Arizona courts may exercise personal jurisdiction to the maximum extent allowed by the United States Constitution.” *Planning Group of Scottsdale, L.L.C. v. Lake Mathews Mineral Properties, Ltd.*, 226 Ariz. 262, 266 ¶ 12 (2011); accord Ariz. R. Civ. P. 4.2(a). Specific jurisdiction is proper where the party “has sufficient contacts with the state to make the exercise of jurisdiction ‘reasonable and just’ with respect to that claim.” *Id.* at 265 ¶ 13 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)). “Arizona may exercise specific personal jurisdiction over an out-of-state defendant when the aggregate of the defendant’s contacts with this state demonstrate (1) purposeful conduct by the defendant targeting the forum, . . . (2) a nexus between those contacts and the claim asserted and (3) that exercise of jurisdiction would be reasonable.” *Beverage v. Pullman & Comley, LLC*, 232 Ariz. 414, 417 ¶ 9 (App. 2013) (citation omitted); accord *A. Uberti & C. v. Leonardo*, 181 Ariz. 565, 570-76 (1995). This “inquiry focuses on the relationship between the defendant, the forum, and the litigation.” *Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 271 (1987).

¶13 Vanderhye argues Arizona lacks personal jurisdiction over him “because he took no action in Arizona as trustee.” The record, however, is to the contrary.

¶14 Vanderhye’s conduct was purposeful and targeted Arizona. He accepted appointment as trustee of the Trust, created by and for the benefit of two Arizona residents who were the sole beneficiaries. The tangible Trust assets were two parcels of Arizona real estate. Vanderhye, as putative trustee, sold Arizona real estate owned by the Trust and admits he “paid bills and settled claims for Helen,” who has lived in Arizona at all times relevant here, and Arthur, whom Vanderhye moved to Virginia from

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Arizona in 2014. By selling the Arizona real estate and then transferring at least some of the proceeds to his personal account, Vanderhye engaged in purposeful conduct that targeted Helen, an Arizona resident. Stated differently, because Helen is a beneficiary of the Trust, and most of Vanderhye's actions were targeted directly at Trust assets, with a direct impact on Helen, Vanderhye targeted Helen, an Arizona resident. *See Beverage*, 232 Ariz. at 417 ¶ 9 (requiring "purposeful conduct by the defendant targeting the forum").

¶15 This same conduct shows a nexus between Vanderhye's purposeful targeting of Arizona and the claims asserted. That conduct provides the basis for many of EVFS' claims against Vanderhye. EVFS' petition to remove Vanderhye as trustee, and the resulting judgments, arose as a result of Vanderhye's conduct with Trust assets targeting Arizona. EVFS has demonstrated "a nexus between those contacts [by Vanderhye] and the claim asserted" by EVFS. *See Beverage*, 232 Ariz. at 417 ¶ 9.

¶16 Finally, exercise of personal jurisdiction over Vanderhye is reasonable. Because the other two showings are present, the burden on this point rests with Vanderhye, who "must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Beverage*, 232 Ariz. at 420 ¶ 27. Factors to consider include: (1) "the burden on the defendant;" (2) "the interests of the forum State;" (3) "the plaintiff's interest in obtaining relief" and (4) the "judicial system's interest in obtaining the most efficient resolution of controversies." *Planning Group*, 226 Ariz. at 270 ¶ 37 (quoting *Asahi Metal Indus. Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 113 (1987)).

¶17 Although Vanderhye, a Virginia resident, asserts that litigating in Arizona would be inconvenient, as noted more than 35 years ago, "[m]odern means of communication and transportation have tended to diminish the burden of defense of a lawsuit in a distant forum." *Ins. Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1271 (9th Cir. 1981). Arizona, Helen and EVFS have substantial interests in the administration of an Arizona Trust, owning Arizona real property, with a vulnerable Arizona resident as a beneficiary, and protecting that vulnerable Arizona resident.⁴ Finally, when considering efficient resolution of controversies, courts "have

⁴ Indeed, in dismissing Vanderhye's suit against EVFS in Virginia federal court for lack of personal jurisdiction, the court stated "because all of the claims asserted by [Vanderhye] arise out of proceedings occurring in Arizona, it is difficult to conceive of any forum having an interest in this dispute other than Arizona."

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looked primarily at where the witnesses and the evidence are likely to be located.” *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1489 (9th Cir. 1993). In this case, the witnesses and evidence largely will be in Arizona. For these reasons, Vanderhye also has failed to show that these considerations would render jurisdiction in Arizona unreasonable.

¶18 Vanderhye primarily relies on two cases he claims are “on point” to show Arizona cannot exercise personal jurisdiction over him: *Hoag v. French*, 238 Ariz. 118 (App. 2015) and *Farris v. Boyke*, 936 S.W.2d 197 (Mo. App. 2000). Both are distinguishable, meaning neither govern the analysis.

¶19 *Hoag* involved fraudulent concealment claims against a prior trustee by a judgment creditor. 238 Ariz. at 120 ¶¶ 1-7. The judgment creditor also named as a defendant the successor trustee, an entity based in Bermuda, which had “no offices or employees in Arizona; does not transact, advertise or solicit business in Arizona; and administers the [trusts] from its office in the Bahamas. The trust assets [shares of stock] are not located in Arizona, and the parties signed the documents transferring trusteeship . . . in Florida.” *Id.* at 158 ¶ 23. On this distinguishable record, *Hoag* held that Arizona did not have personal jurisdiction over the successor trustee located in Bermuda. *Id.* at 121-22 ¶ 15. The trust in *Hoag*, however, had no assets in Arizona and certainly no Arizona real property. *Id.* at 123 ¶ 23. Moreover, other than making distributions to the beneficiary, the successor trustee had no contact with Arizona of any type at any time relevant to that case. *Id.* at 123 ¶ 24. Thus, *Hoag* addressed a far different set of facts than those presented here, where the Trust was created in Arizona by Arizona residents, one of the two beneficiaries is an Arizona resident and the target of the trustee’s conduct and the sale of real property took place in Arizona.

¶20 *Farris* similarly is distinguishable. In that case, a Missouri resident sought a constructive trust over the beneficiaries’ interests in land. 936 S.W.2d at 199. Affirming the dismissal for lack of personal jurisdiction, *Farris* noted most beneficiaries were residents of Illinois, the trust was created by an Illinois resident and the division of real property took place in Illinois. 936 S.W.2d at 202. Here, by contrast and as discussed in the previous paragraph, the facts show sufficient minimum contacts to exercise personal jurisdiction over Vanderhye.

¶21 Collectively, these relevant inquiries show that exercising personal jurisdiction over Vanderhye is reasonable. Accordingly, because sufficient “minimum contacts” have been shown, exercising personal jurisdiction over Vanderhye in this case “does not offend “traditional

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notions of fair play and substantial justice.”” *Planning Group*, 226 Ariz. at 266 ¶ 14 (quoting *International Shoe*, 326 U.S. at 316). Thus, the superior court’s exercise of personal jurisdiction over Vanderhye is affirmed.

II. The Superior Court Properly Imposed Sanctions.

¶22 Vanderhye challenges the sanctions imposed against him on three grounds: (1) his conduct was not unreasonable under A.R.S. § 14-1105; (2) the court lacked authority to award attorneys’ fees and costs arising from the litigation in Virginia and (3) an award of double damages under A.R.S. § 14-3709(D) requires an express finding of bad faith, which was not made. This court reviews awards of attorneys’ fees and costs for an abuse of discretion. *In re Indenture of Trust Dated January 13, 1964*, 235 Ariz. 40, 51 ¶ 41 (App. 2014). The interpretation of a statute is reviewed de novo. *Hanley v. Pearson*, 204 Ariz. 147, 149 ¶ 5 (App. 2003).

A. The Superior Court Properly Found Vanderhye’s Conduct Was Unreasonable.

¶23 Vanderhye argues the superior court erred because he was “reasonable on the facts and the law in contesting jurisdiction. Yet it was this very refusal by Vanderhye to submit to the jurisdiction of the trial court that formed the basis of the court’s findings of unreasonableness.” Vanderhye asserts the court should not have found his conduct unreasonable because he had a good faith belief that the court lacked personal jurisdiction, adding “[i]t cannot be unreasonable to contest jurisdiction in an improper forum.”

¶24 It was not unreasonable for Vanderhye to contest personal jurisdiction. Vanderhye, however, acted at his own peril when he ignored the court after it decided to exercise personal jurisdiction over him. Vanderhye could have properly preserved his objection for appeal and complied with the orders of the superior court or sought special action review. He elected to follow a different path. Accordingly, the court did not abuse its discretion in determining Vanderhye was unreasonable for refusing to comply with its orders after finding it properly could exercise personal jurisdiction over him. The award of attorneys’ fees and costs against Vanderhye is affirmed. And, although Vanderhye filed a petition for special action challenging the contempt order and fiduciary arrest warrant, he has not shown how that order or warrant were issued in error. Accordingly, they also are affirmed.

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B. The Award Of Costs Related To The Virginia Litigation Was Not In Error.

¶25 Vanderhye asserts awarding costs in connection with the Virginia litigation was erroneous because the superior “court’s authority does not include awarding costs and attorneys’ fees when the fees and costs arise from entirely separate litigation between the parties in another state.” However, A.R.S. § 14-1105 contains no such limitation. Instead, that statute provides that if a trust incurs costs as a result of a party’s unreasonable conduct, the court may order that party to pay it “for some or all of the fees and expenses as the court deems just under the circumstances.” A.R.S. § 14-1105. Vanderhye’s unreasonable conduct by suing EVFS in Virginia, even though Arizona was the proper forum, reduced the Trust’s assets. By forcing the Trust to deplete those assets, Vanderhye harmed the Arizona Trust. The court therefore properly could have considered a return of some of those depleted assets “just under the circumstances.” A.R.S. § 14-1105. Moreover, Vanderhye does not allege that the award includes attorneys’ fees and costs awarded by the Virginia court. Accordingly, the fees and costs awarded here are affirmed.

C. The Award Of Double Damages Is Remanded For Factual Findings Regarding Bad Faith.

¶26 The superior court imposed double damages under A.R.S. § 14-3709(D), which provides that if a court finds “a person has concealed, embezzled, conveyed or disposed of any property of a decedent . . . a judgment shall be for double the value of the property.” As Vanderhye correctly states, to impose double damages under A.R.S. § 14-3709(D), the court must make specific findings that the person took one or more of those actions in bad faith. *See Matter of Estate of Jorgenson*, 159 Ariz. 214, 217 (App. 1988). The record provided does not show that the “court made any factual determination that [Vanderhye’s actions were] in bad faith and, hence, that [h]e had ‘concealed, embezzled, conveyed or disposed of any property’ within the meaning of the statute.” *Id.* at 217. Accordingly, the issue of double damages is remanded to allow the court to consider whether the record supports the facts required for double damages to be imposed and, if so, to make appropriate findings of fact.

¶27 EVFS requests attorneys’ fees on appeal, without citing any substantive basis. Accordingly, that request is denied without prejudice to the superior court addressing such fees on remand. *See* Ariz. R. Civ. App. P. 21(a)(2). Each party shall bear their own costs on appeal.

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CONCLUSION

¶28 The award of double damages against Vanderhye is remanded for further factual findings consistent with this decision. In all other respects, the rulings are affirmed.



AMY M. WOOD • Clerk of the Court
FILED: AA