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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 02/11/2010
PHILIP G. URRY, CLERK
BY: GH

KERMICK Z. DORSEY,) 1 CA-CV 08-0472
)
Plaintiff/Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
)
ROBERT MICHAEL DELCUPP, III, and)
MAKDA TEWOLDEMEDHIN KAHSSAY) Not for Publication -
DELCUPP, husband and wife,) (Rule 28, Arizona Rules
) of Civil Appellate Procedure)
Defendants/Appellees.) **FILED 02-11-2010**
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2006-000439

The Honorable F. Pendleton Gaines, Judge

AFFIRMED

Craig A. Stephan
Attorney for Plaintiff/Appellant

Scottsdale

Robert and Makda DelCupp
In Propria Persona

Aurora, CO

G E M M I L L, Judge

¶1 Kermick Z. Dorsey ("Dorsey") appeals from the trial court's grant of summary judgment in favor of Robert DelCupp

("Robert") and Makda DelCupp ("Makda") (collectively, "DelCupps"). Dorsey argues the trial court erred (1) in denying his motion for additional disclosure and discovery, (2) in granting the DelCupps' motion for summary judgment, (3) in denying his motion for leave to amend the complaint, (4) in its ruling on his request for clarification, and (5) in denying his motion for sanctions. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶12 Dorsey met Mihret Kahssay ("Mihret") via an online agency in 2002. Dorsey traveled from the United States to Ethiopia, where Mihret lived, and married her on November 17, 2002. After returning alone to the United States, Dorsey obtained a K-3 visa for Mihret. At all relevant times, Mihret's sister, Makda, has resided in Colorado with her husband, Robert. Mihret came to the United States on July 19, 2003. On August 7, 2003, Mihret left Dorsey, and Dorsey has not seen Mihret since. Their marriage was annulled on May 18, 2005.

¶13 On January 10, 2006, Dorsey filed a complaint against the DelCupps and some of Mihret's other relatives setting forth eight causes of action.¹ Dorsey alleged the defendants

¹ The eight causes of action were racketeering, slander, intentional infliction of emotional distress, aiding and abetting tortious conduct, willful or wanton conduct (aggravated negligence), negligence per se, negligence, and negligent infliction of emotional distress.

fraudulently induced Mihret to marry Dorsey² and then facilitated Mihret's abandonment of him. The DelCupps filed an answer denying any involvement in facilitating Mihret's abandonment or disappearance and asserted counterclaims for the filing of a malicious lawsuit, defamation and emotional distress. They subsequently filed a motion to dismiss alleging that the court lacked personal jurisdiction over them and that any fraud claims were barred by the statute of limitations. The court denied the motion. Thereafter, the parties engaged in discovery.

¶4 On June 29, 2006, the court dismissed the action against all defendants who had not been served, leaving only the DelCupps in the case. The DelCupps filed a motion for summary judgment. The court limited the DelCupps' motion to the issue of whether there was personal jurisdiction over them.

¶5 Dorsey scheduled depositions of the DelCupps in Colorado and the DelCupps failed to appear. Dorsey moved for sanctions, on which the court deferred ruling.

¶6 On January 10, 2007, the court issued an order allowing Dorsey to subpoena the DelCupps' telephone records from Cingular Wireless for the period August 1, 2003 through

² In his "Response to Motion to Quash," Dorsey alleges that the gist of his action is that family members "colluded against Plaintiff to induce him to marry Mihret . . . in order to use Plaintiff to facilitate getting Mihret out of Ethiopia to the west."

September 30, 2003. Additionally, Dorsey sought discovery from the DelCupps of "financial records evidencing payment to or on behalf of Mihret Kahssay from February 1, 2002, to September 30, 2003." The court ordered that such financial records "which say or specifically relate or refer to Mihret Kahssay on their face" be produced to the court in-camera. Dorsey filed a motion for clarification, which was denied.

¶17 On May 7, 2007, the court issued a ruling finding there was personal jurisdiction over the DelCupps because they filed a permissive counterclaim. The court suspended the remainder of the DelCupps' motion for summary judgment.

¶18 On June 15, 2007, the court ordered all discovery to be concluded by November 15. On August 27, the DelCupps requested leave of court to file a motion for summary judgment, which the court subsequently accepted for filing on September 10. The court extended the discovery deadline to November 30, 2007, granted Dorsey's request for Arizona Rules of Civil Procedure³ ("Ariz. R. Civ. P.") 56(f) relief, and stated it would defer ruling on the motion for summary judgment until discovery was completed.

¶19 On December 10, Dorsey filed a response to the DelCupps' motion for summary judgment, an alternative motion for

³ Unless otherwise noted, all subsequent references to Rules will be to the Arizona Rules of Civil Procedure.

leave to amend the complaint, and a cross-motion for summary judgment on the DelCupps' counterclaims. Dorsey stated he intended to pursue only his racketeering claim⁴ and his aiding and abetting tortious conduct claim "which is essentially a claim for Conspiracy to Defraud," and requested leave to amend the complaint to plead such causes of action with greater specificity.

¶10 On March 5, 2008, the court issued a ruling granting the DelCupps' motion for summary judgment, denying Dorsey's motion for leave to amend the complaint, and granting Dorsey's motion for summary judgment on the DelCupps' counterclaims. On April 12, Dorsey moved for additional disclosure and discovery based on "newly discovered evidence" regarding certain telephone records. Dorsey also moved for reconsideration of the summary judgment ruling and requested a ruling on his motion for sanctions that the court had previously deferred. The court issued final judgment on May 5, 2008, denying all of Dorsey's motions. Dorsey timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

⁴ Dorsey abandoned his racketeering claim in his motion for reconsideration, which was confirmed in his docketing statement. Thus, the racketeering claim is not at issue on appeal.

DISCUSSION

I. Motion for Additional Discovery

¶11 Dorsey argues the trial court erred by denying his motion for additional disclosure and discovery. We review a trial court's ruling on discovery matters for an abuse of discretion. *Lewis v. Arizona Dep't of Economic Security*, 186 Ariz. 610, 616, 925 P.2d 751, 757 (App. 1996). A court abuses its discretion when the reasons given for the court's conclusions are "clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983).

¶12 The "newly discovered evidence" Dorsey offers is an interpretation of the codes on Makda's cellular telephone records. The evidence purports to show that Makda's cellular telephone was in Phoenix on August 7, 2003, the day Mihret left Dorsey. The trial court denied Dorsey's motion for additional discovery explaining, in part:

Plaintiff's counsel says that, after he received the Court's ruling on the cross-motions for summary judgment . . . he and his client "spent considerable time reviewing all the evidence." This review included contacting a private investigator in Houston, a cell phone expert at AT&T and a cell phone expert in Arkansas. Plaintiff and his counsel later learned, according to them, that a certain code on Ms. DelCupp's cellular telephone bills established that her cellular telephone (and, by inference, she) was in Phoenix on the day her sister

left Mr. Dorsey.

. . . [T]he proffered evidence is untimely, confusing, inconclusive and inconsistent. It includes multiple hearsay. It is non-probative and irrelevant.

. . . Here, Plaintiff's new "evidence" (actually a new interpretation of previous evidence) was not obtained until long after the discovery cutoff of November 30, 2007.

. . .

Plaintiff has shown no reason why his new "evidence" could not and should not have been discovered sooner.

We perceive no abuse of discretion in the trial court's ruling.

¶13 The telephone records for Makda's cellular telephone were first produced in January 2007. Dorsey's counsel contacted the Cingular Wireless compliance department about the records and was apparently told that information about "RSYS" numbers was not available and that "as a result" counsel and Dorsey "turned their attention to analyzing factual data contained in the records." Dorsey further contends that if he had not been misled into believing information about RSYS numbers was not available, he would have pursued the information more vigorously. However, the DelCupps were not the ones who (even arguably) misled Dorsey. Further, it does not appear that Dorsey retained his cellular telephone experts and private investigator until after the court granted the DelCupps' motion for summary judgment. Dorsey waited well over a year after

receiving the phone records to contact these experts to further investigate the RSYS codes. When a motion for summary judgment is filed, that is the time for an opposing party to come forth with specific facts to controvert the motion. *Patton v. Paradise Hills Shopping Center, Inc.*, 4 Ariz. App. 11, 14, 417 P.2d 382, 385 (App. 1966); see also *Lujan v. MacMurtrie*, 94 Ariz. 273, 278, 383 P.2d 187, 190 (1963) ("A party cannot sit idly by on the presentation of a motion for summary judgment which may well resolve the entire case and fail to urge his defense."). In fact, the court specifically extended the time to reply to the DelCupps' motion until discovery was completed.

¶14 Dorsey argues the new evidence establishes the DelCupps had contacts with Arizona on August 7, 2003, and it supports "an undeniable inference" that the DelCupps assisted Mihret in abandoning Dorsey. A conspiracy is an agreement to accomplish an unlawful purpose that causes damages. *Baker v. Stewart Title & Trust of Phoenix, Inc.*, 197 Ariz. 535, 542, ¶ 30, 5 P.3d 249, 256 (App. 2000). See *infra* ¶ 19. Even if the DelCupps were in Arizona on August 7 and had contact with Mihret that day, that evidence does not establish the DelCupps were part of a conspiracy to defraud Dorsey. A trip to Phoenix does not show there was an agreement to defraud.

¶15 Finally, Dorsey argues that the DelCupps never explained what happened on August 7 and that "the trial court

placed the entire burden in this matter on plaintiff ... without regard to the fact that" the DelCupps obstructed discovery. It is Dorsey's burden to prove the DelCupps were part of a conspiracy to defraud him. See *Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 499, ¶ 100, 38 P.3d 12, 37 (2002) (noting the burden of proof for civil conspiracy is one of clear and convincing evidence). Dorsey has not submitted any admissible evidence to show the DelCupps, or anyone on their behalf, took any action to defraud him.

¶16 The trial court did not abuse its discretion in denying the motion.

II. Summary Judgment

¶17 Dorsey argues the trial court erred in granting the DelCupps' motion for summary judgment and in denying his motion for reconsideration.⁵ A court properly grants summary judgment when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c). On appeal, we determine de novo whether genuine issues of material fact exist and whether the superior court erred in applying the law. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). Additionally, we

⁵ Dorsey makes the same arguments on appeal as he did in his motion for reconsideration.

view the facts in the light most favorable to the party against whom summary judgment was entered. *Orme School v. Reeves*, 166 Ariz. 301, 309-10, 802 P.2d 1000, 1008-09 (1990). We will affirm a grant of summary judgment if the trial court was correct for any reason. *City of Tempe v. Outdoor Sys., Inc.*, 201 Ariz. 106, 111, ¶ 14, 32 P.3d 31, 36 (App. 2001). We review the denial of a motion for reconsideration for an abuse of discretion. *Tilley v. Delci*, 220 Ariz. 233, 238, ¶ 16, 204 P.3d 1082, 1087 (App. 2009).

¶18 In granting the DelCupps' motion for summary judgment, the trial court ruled:

Plaintiff's counsel describes Plaintiff's case as consisting of circumstantial evidence. It does not rise to that level. It consists of speculation and innuendo.

The DelCupps have consistently maintained and stated under oath that they never met Plaintiff, have never been to Arizona, had nothing to do with Plaintiff's marriage to . . . Mihret Plaintiff has done nothing to challenge these facts. As noted in the Court's order of May 7, 2007, the most that Plaintiff can show is that, on August 7, 2003, the day that Plaintiff's wife allegedly abandoned him, one of the DelCupp Defendants may have had four telephone calls on a cellular telephone to which Plaintiff's wife allegedly had access at a time when she, according to Plaintiff, was still in Arizona. Plaintiff also offers evidence that Mrs. DelCupp may have spoken to her sister a number of times from August 7 through August 27, 2007, through a Getachew Yeneneh in Aurora, Colorado, although this evidence is far from clear.

Noticeably absent and missing from Plaintiff's colorful tales of Mrs. DelCupp's family in Ethiopia and their efforts to bring various sisters to the West is evidence of any kind that either of the DelCupps was involved in activity or actions directed toward Plaintiff. On this record, they were not.

There is no submissible jury issue. . . . There is nothing to suggest the DelCupps were involved in a conspiracy to defraud.^[6]

¶19 "For a civil conspiracy to occur two or more people must agree to accomplish an unlawful purpose or to accomplish a lawful object by unlawful means, causing damages." *Baker*, 197 Ariz. at 542, ¶ 30, 5 P.3d at 256 (citations omitted). To incur liability for civil conspiracy there must be an agreement plus a wrongful act. *Id.* (citations omitted). Essentially, a civil conspiracy requires the conspirators to agree to commit an underlying tort. *Id.* at ¶ 42; see also *Wells Fargo Bank*, 201 Ariz. at 498, ¶ 99, 38 P.3d at 36. Here, the underlying tort is fraud -- entering into a sham marriage unbeknownst to Dorsey.

⁶ The DelCupps argue that conspiracy to defraud was never a cause of action in the case. Although the conspiracy to defraud claim was not specifically pleaded, it was addressed by the trial court and became the controlling issue in the case. See *MacRae v. Betts*, 40 Ariz. 454, 458-59, 14 P.2d 253, 254-55 (1932) (explaining that although fraud was not specifically pleaded, the facts showing fraud were elicited and fraud became the controlling issue in the case); *Pruitt v. Pavelin*, 141 Ariz. 195, 205-06, 685 P.2d 1347, 1357-58 (App. 1984) (noting the purpose of Rule 9(b), requiring fraud to be pleaded with particularity, is to eliminate surprise; and where parties are not prejudiced, insufficiency of pleadings will not require reversal).

"A conspiracy may be established by circumstantial evidence through the nature of the acts, the relationship of the parties, the interests of the conspirators, or other circumstances." *Dawson v. Withycombe*, 216 Ariz. 84, 103, ¶ 53, 163 P.3d 1034, 1053 (App. 2007).

¶20 Dorsey first argues that the trial court's evaluation "begins backwards" by assuming the DelCupps' assertions were true and by making initial credibility determinations. Dorsey challenges the finding by the trial court that the DelCupps consistently maintained that they never met Dorsey, have never been to Arizona, and had nothing to do with Dorsey's marriage. However, Dorsey then states it is irrelevant that the DelCupps never met him or whether the DelCupps have ever traveled to Arizona.⁷

¶21 The issue on appeal is whether there is any genuine issue of material fact regarding Dorsey's claim for conspiracy to defraud. "A 'genuine' issue is one that a reasonable trier

⁷ Dorsey also challenges two "facts" cited by the court in granting the DelCupps' motion for summary judgment. However, for purposes of this review, we accept all of Dorsey's facts as true. Thus, we accept that Mihret abandoned Dorsey on August 7, 2003; Makda used her cellular telephone to call Mihret four times on August 7; Mihret had possession of Dorsey's Cricket telephone; Makda called a third party (Getachew Yeneneh) residing in Aurora, Colorado forty times between August 9 and August 26, 2003; and Mihret was in Aurora with Yeneneh during that time. Because neither of the two facts Dorsey challenges affect the grant of summary judgment, we decline to address this argument.

of fact could decide in favor of the party adverse to summary judgment on the available evidentiary record." *Martin v. Schroeder*, 209 Ariz. 531, 534, ¶ 12, 105 P.3d 577, 580 (App. 2005). We conclude there are no genuine issues of material fact based on this record.

¶22 First, there is no evidence of an agreement between the Delcupps and Mihret to defraud Dorsey. There is nothing connecting the DelCupps to Dorsey's actions of meeting Mihret through an online agency; choosing to fly to Ethiopia in 2002; and choosing to marry Mihret while in Ethiopia. Further, the allegations regarding Makda's alleged involvement in Mihret "agreeing" to marry Dorsey for the sole purpose of gaining entry into the United States are speculative at best. The first allegation is that Makda married a United States citizen in 1999 and therefore "understands the process involved in getting into the United States as the spouse of a . . . citizen." The fact that Makda immigrated to the United States after marrying a citizen does not prove the alleged conspiracy in this case. The second allegation is that after Mihret received telephone calls from Makda and two other sisters in November 2002, when Dorsey was in Ethiopia, Mihret appeared "very eager to get married." Notably, there is no evidence regarding the conversation between Makda and Mihret, and no evidence of any improper agreement. Dorsey merely speculates that Makda must have said something to

Mihret to peak Mihret's interest in marrying Dorsey. This theory, however, is not supported by any evidence, only speculation. The last allegation is that Dorsey had a conversation with Makda in 2003 and Makda told him that she was planning on having another sister "marry a gay guy . . . from the United States" so that her sister could get into the United States and get alien spousal benefits and then obtain a divorce. Dorsey has submitted no proof that this actually happened. Further, even if true, this allegation does not connect Makda's actions to Mihret or Dorsey. None of these allegations show any agreement between Makda and Mihret to defraud Dorsey.

¶23 The remainder of Dorsey's evidence goes to the DelCupps' apparent assistance to Mihret in leaving Dorsey. "Assistance to the tortfeasor by itself, however, which courts often use to infer a conspiratorial agreement, may be insufficient to prove an actual agreement to participate in the conspiracy." *Dawson*, 216 Ariz. at 103, ¶ 54, 163 P.3d at 1053. "This is because there is a qualitative difference between showing an agreement to participate in a tort (conspiracy) and a knowing action which might substantially aid the tortfeasor to commit a tort." *Id.* Here, even if the DelCupps provided assistance to Mihret in leaving Dorsey, that does not show the DelCupps were part of Mihret's supposed "plan" to enter into a sham marriage. Leaving a spouse, by itself, is not a tort. If

the DelCupps assisted a family member in leaving her spouse, we cannot conclude that such assistance raises a genuine issue of material fact regarding the existence of a conspiracy to defraud Dorsey.

¶24 Dorsey's evidence shows the DelCupps purchased Makda's cellular telephone on August 5, 2003. Dorsey alleges the DelCupps purchased the phone specifically for use on the August 7 Phoenix trip⁸ and to communicate with Mihret afterwards. He further maintains the cellular telephone's presence in Phoenix on August 7 shows evidence of collusion between the DelCupps and Mihret. Dorsey argues a reasonable person could infer that the DelCupps knew in advance that Mihret would abandon him and that they were conspiring with Mihret. We disagree. This evidence, even if it is appropriate to consider it, is simply too speculative.

¶25 Similarly, the fact that Makda's and Mihret's mother was in Colorado with Makda when Mihret abandoned Dorsey is irrelevant to the conspiracy issue. We fail to see any connection between Mihret's mother staying with Makda and Mihret leaving her husband.

¶26 Moreover, Dorsey's contention that Makda lied throughout the litigation does not mean summary judgment was

⁸ This Phoenix trip is based on the "newly discovered evidence." See *supra* ¶¶ 13-14.

improperly granted. Accepting all of Dorsey's assertions as true, if Makda lied about being in contact with her sister the day Mihret left Dorsey, there remains no evidence that Makda agreed with Mihret to commit a tort.

¶127 Next, Dorsey argues the evidence shows Mihret traveled to Colorado after she left Dorsey. Wherever Mihret traveled after leaving Dorsey is irrelevant to establish an agreement for purposes of a conspiracy to defraud Dorsey. The existence of an agreement to defraud would have to have been in place prior to the marriage. Even if Mihret joined her sister in Colorado after leaving her husband, that does not create any genuine issue of fact regarding a conspiracy.

¶128 Finally, Dorsey argues that the DelCupps provided assistance to Mihret because Mihret had no financial means of her own to travel. There is no evidence the DelCupps provided financial assistance to Mihret, but even if the DelCupps did assist Mihret, financial assistance alone does not establish a conspiracy. The fact that Makda and her husband might help Mihret during a time of need does not give rise to an inference of a tortious conspiracy.

¶129 The evidence, even when viewed in the light most favorable to Dorsey, does not create a genuine issue of material fact that the DelCupps agreed to participate in a conspiracy to defraud Dorsey. The record shows that Dorsey traveled to

Ethiopia in 2002 after being introduced to Mihret online, married Mihret, and obtained the relevant documentation to have Mihret come to the United States. No evidence in the record shows the DelCupps had anything to do with Dorsey's marriage. The fact that the DelCupps may have known that Mihret was leaving Dorsey and provided assistance to her is insufficient to permit a finding by clear and convincing evidence of an agreement between the DelCupps and Mihret for Mihret to enter into a sham marriage and then abandon it. See *Dawson*, 216 Ariz. at 105, ¶ 59, 163 P.3d at 1055; and *Wells Fargo Bank*, 201 Ariz. at 499, ¶ 101, 38 P.3d at 37 (noting the difference between proving an agreement to participate in a tort and proving a knowing action that aids another to commit a tort). The trial court properly granted summary judgment to the DelCupps and did not abuse its discretion in denying Dorsey's motion for reconsideration.

III. Leave to Amend Complaint

¶130 Dorsey argues the trial court erred by denying his motion for leave to amend the complaint. Leave to amend should be granted liberally. *Owen v. Superior Court*, 133 Ariz. 75, 79, 649 P.2d 278, 282 (1982). "Amendments will be permitted unless the court finds undue delay in the request, bad faith, undue prejudice, or futility in the amendment." *MacCollum v. Perkinson*, 185 Ariz. 179, 185, 913 P.2d 1097, 1103 (App. 1996).

A motion for leave to amend is left to the trial court's sound discretion, and we will not disturb its ruling absent an abuse of discretion. *Romo v. Reyes*, 26 Ariz. App. 374, 375-76, 548 P.2d 1186, 1187-88 (1976).

¶31 Here, the trial court ruled:

Plaintiff's alternative motion to amend his complaint "to plead [his] causes of action with greater specificity" will be denied as moot and futile. It is moot because Plaintiff has addressed these issues, as have Defendants, in the current briefing. It is futile because the issue now is not pleading, but whether there are facts sufficient to withstand Defendants' motion. There are none.

We discern no abuse of discretion in this ruling.

¶32 When issues not raised in pleadings are tried by express or implied consent, they shall be treated as if they had been raised in the pleadings. Ariz. R. Civ. P. 15(b). Here, the court and both sides treated the complaint as including a claim for conspiracy to defraud. For instance, in the DelCupps' motion to dismiss, they alleged that Dorsey's action was "based on the false claim of a vast conspiracy to defraud him." Later, the court noted that Dorsey's theory was that the DelCupps allegedly committed acts in Arizona, "in furtherance of the alleged 'conspiracy' to deprive Plaintiff of his wife, or, perhaps, in furtherance of the alleged conspiracy to entice Plaintiff to fraudulently marry [Mihret] in Ethiopia to allow

her to [immigrate] to the United States." In its ruling on personal jurisdiction, the court explained Dorsey's allegations as a conspiracy among all the defendants inducing him to marry Mihret to bring her to the United States and then causing her to abandon Dorsey. In his eighth supplemental disclosure statement filed four months later, Dorsey alleged a civil conspiracy to defraud in conjunction with his aiding and abetting tortious conduct cause of action. The motion for leave to amend was filed over two months later. Thus, the court was correct that the issue was futile in that the pleading was not the issue, but only whether the facts supported the claim.

¶133 Because an amendment would not have changed the outcome of the action, we conclude the trial court did not abuse its discretion in denying the motion.

IV. Request for Clarification

¶134 Dorsey argues that the court abused its discretion in denying his request for clarification regarding the DelCupps' financial records. In December 2006, Dorsey served a request for production of documents specifically requesting financial records evidencing payments to or on behalf of Mihret from February 1, 2002 through September 30, 2003. The DelCupps objected. The court ruled that the request was broad, poorly phrased, and was potentially intrusive of the DelCupps' privacy. Accordingly, the court ordered an in-camera inspection of any

financial documents "which say or specifically relate or refer to Mihret Kahssay on their face." Dorsey filed a request for clarification asking whether the documents must specifically say "Mihret Kahssay" if they in some way relate to Mihret and whether documents specifically relate to Mihret if they show payments for or on behalf of Mihret, such as the purchase of airline or bus tickets. The court denied the motion, specifically stating "only documents which say, mention or refer to Mihret Kahssay need [to] be produced." No documents were produced as the DelCupps asserted they did not have any such documents.

¶135 Dorsey argues that this ruling placed an unreasonable restriction on discovery and deprived him of an opportunity to obtain relevant evidence because relevant financial records would not necessarily have the name Mihret Kahssay on them. As the DelCupps note, Dorsey was not so restricted in his discovery because he was given complete access to their telephone records and internet accounts, he deposed the DelCupps twice and submitted interrogatories.

¶136 The court did not abuse its discretion in limiting the discovery of financial documents and denying Dorsey's motion for clarification.

V. Motion for Sanctions

¶137 Dorsey argues the trial court erred in denying his

motion for sanctions for the DelCupps' failure to appear at their depositions. We review the denial of a motion for sanctions for an abuse of discretion, giving "considerable deference to the trial court's perspective and judgment." *State v. Meza*, 203 Ariz. 50, 55, ¶ 19, 50 P.3d 407, 412 (App. 2002).

¶138 On October 23, 2006, Dorsey noticed the depositions of the DelCupps for November 16 in Colorado. The DelCupps failed to appear for their depositions. However, Robert appeared the following day to defend Dorsey's deposition of a private investigator. Dorsey moved for \$1,559.49 in sanctions against the DelCupps. The DelCupps responded that the issue of personal jurisdiction had not been decided and that Dorsey's notice of deposition was "defective and invalid." The court eventually issued a ruling as follows:

The Court will not and need not recite the extended, tortured procedural history of this case. The Court was flooded with motions from both sides. Plaintiff, as well as Defendants, violated rules of procedure, defaulted in discovery obligations and responses and made frequent and unnecessary applications to the Court for relief against the other side's alleged defaults. The case was no model of procedural perfection.

.

Plaintiff's request for sanctions arises from Defendants' failure to appear for their

initially-noticed depositions in Denver, Colorado. The matter required Court intervention and was satisfactorily resolved. Defendants' legal reasons for not appearing were marginally persuasive, at best. Plaintiff's counsel was in Denver for two other depositions, which did occur. The Court deferred ruling on Plaintiff's motion for sanctions at the time and advised Plaintiff that he could renew his request after verdict or judgment. Plaintiff has now done so.

In the totality of circumstances of this case, and in the exercise of its discretion, the Court denies both motions for sanctions.^[9]

¶139 The trial court enjoys considerable discretion in rulings such as this one, and we find no abuse of discretion.

¶140 Additionally, if a party fails to appear for a deposition, the court has discretion to make orders in regard to the failure as are just. Ariz. R. Civ. P. 37(f). Although the court did not find the DelCupps' failure to appear to be substantially justified, it considered other circumstances, including the occurrence of another deposition in Colorado that Dorsey took during the same visit, the proceedings throughout the case regarding all of the discovery disputes, and the DelCupps' own motion for sanctions. The court impliedly found an award of expenses unjust. The court did not abuse its discretion.

⁹ The DelCupps requested sanctions against Dorsey under A.R.S. § 12-349 for filing a frivolous lawsuit, for which sanctions were denied.

CONCLUSION

¶41 For the foregoing reasons, we affirm the judgment of the trial court in favor of the DelCupps on Dorsey's claims against them.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
PETER B. SWANN, Presiding Judge

_____/s/_____
DIANE M. JOHNSEN, Judge