DIVISION ONE
FILED: 02/04/2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

EDWARD P. ALBREKTSEN and MARY B. ALBREKTSEN, husband and wife; JOHN CAVINESS and JULIE LISS, husband and wife; RICHARD WARDELL, a single man; and PATSY KING, a single woman, Plaintiffs/Appellees, v. BRAD DIEPHOLZ and KAREN DIEPHOLZ, husband and wife, Defendants/Appellants.	1 CA-CV 08-0707 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-013316

The Honorable J. Kenneth Mangum, Judge
The Honorable Kristin Hoffman, Judge

APPEAL CONSIDERED AS SPECIAL ACTION;
JURISDICTION ACCEPTED; RELIEF DENIED

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I R V I N E, Judge

¶1 Petitioners Brad Diepholz and Karen Diepholz (collectively "Diepholz") seek relief from an order finding them in contempt for failing to comply with or make good-faith and reasonable efforts to comply with the court's preliminary injunctive orders. Contempt orders issued pursuant to Arizona Revised Statutes ("A.R.S.") section 12-864 (1992) are not appealable. *Little v. Superior Court In and For County of Maricopa*, 180 Ariz. 328, 329, 884 P.2d 214, 215 (App. 1994); *Van Baalen v. Superior Court in and for Maricopa County*, 19 Ariz. App. 512, 513, 508 P.2d 771, 772 (1973). However, Diepholz has separately moved for this appeal to be considered as a special action, and in our discretion we accept jurisdiction as a special action pursuant to A.R.S. § 12-120.01(A)(4) (2003).

¶2 On the basis of the following, we consider the appeal as a petition for special action relief, accept jurisdiction but deny relief.

FACTS AND PROCEDURAL HISTORY

¶3 The respondents (collectively "Albrektsen") applied for a preliminary injunction on July 27, 2007, seeking to stop Diepholz from continuing construction on a house in the Happy Valley Ranch subdivision. Albrektsen based the application on Diepholz's alleged violation of the subdivision's covenants, conditions and restrictions ("CC&Rs") which state:

> No structure shall be erected, altered, placed or permitted to remain on any of the lots in the Subdivision other than one (1) detached single family dwelling, one (1) guest house, outbuildings, tennis courts and a private garage, each structure not to exceed one (1) story and not to exceed twenty-six (26) feet in height.

The court scheduled an evidentiary hearing and warned Mr. Diepholz that he continued building at his own risk. In response to the application for preliminary injunction, Diepholz argued that the term "one story" was not defined in the CC&Rs and was too ambiguous to strictly enforce. Diepholz agreed that the structure violated the height restriction but cited numerous opinions from other jurisdictions to support the argument that, while the height restriction could be enforced, the "one-story" restriction could not. Upon completion of the evidentiary hearing on September 26, 2007, the court verbally granted a preliminary injunction wherein the court stated that the house "needs to become a single story home no higher than 26 feet." The court specifically found that a wide-spread abandonment of the CC&Rs had not occurred[1] and that the term "one story" or "single story" had a common, well-known meaning that was not ambiguous. The court also set a $60,000 bond and indicated that Albrektsen could submit a form of preliminary injunction. The

[1] Diepholz does not appeal the superior court's decision in regard to the validity and enforceability of the CC&Rs.

court's verbal order was followed by a minute entry stating the same requirements.

¶4 On October 2, 2007, Albrektsen lodged a proposed form of preliminary injunction and supporting findings of fact and conclusions of law. Most important, the proposed order stated:

> 1. Defendants' home must become a one story home no more than 26 feet in height and Defendants are ordered forthwith to remove the second story addition constructed pursuant to the City of Scottsdale's Building Permit issued June 4, 2007; and
>
> 2. Defendants are restrained and enjoined from building any structure that does not comply with the Happy Valley Ranch Unit 3 CC&Rs.

At Albrektsen's request, the court held a status conference to address a question of the scope of the court's order. During the conference on October 4, 2007, the court clarified that Diepholz needed to obtain the necessary building permits for a structure permitted by the CC&Rs which could not be a two-story structure.[2] Based on the results of the hearing, the court agreed that the previously filed proposed order could be withdrawn and a new form filed.

[2] Interestingly, at the conclusion of the hearing, Diepholz questioned the necessity for a formal preliminary injunction order since the court had already issued a minute entry spelling out the order in general. Albrektsen and the court agreed that a signed order was needed for appeal purposes but on appeal Diepholz now argues that contempt may not be found when there is no signed written order.

¶5 On October 30, 2007, Diepholz filed a motion for approval of a redesign of the structure that essentially only removed the windows from the second story and called it an "open outdoor deck" while reducing the height of the structure. No building permit for such a design change had been requested or obtained by Diepholz. Attempts to negotiate a proposed form of order were unsuccessful so, on November 19, 2007, Albrektsen filed a second proposed preliminary injunction order. The substantive change to the proposed order was the addition of a requirement that Diepholz obtain a building permit.

¶6 On November 21, 2007, Albrektsen filed an application for an order to show cause regarding contempt by Diepholz. Albrektsen cited Diepholz's failure to apply for a building permit before seeking the court's approval of the October 30, 2007, proposed redesign, continuation of construction on the second story including the installation of windows and other materials to enclose the prohibited second story, and making offers of settlement in bad faith including requiring the plaintiffs to pay for modifications to the design and structure. On November 30, 2007, Diepholz filed an objection to the proposed form of order. The objections were insubstantial and pertained to the findings of fact and conclusions of law and not to the actual injunctive portion of the order which stated:

> 1. Defendants' home must become a one story home no more than 26 feet in height and Defendants are ordered forthwith to bring the home into compliance with the CC&Rs pursuant to a validly issued City of Scottsdale building permit which authorizes and approves the construction activities necessary to bring the home into compliance; and
>
> 2. Defendants are restrained and enjoined from building any structure that does not comply with the Happy Valley Ranch Unit 3 CC&Rs.

At the December 7, 2007, return date on the order to show cause, the court found that Diepholz appeared to be in violation of the court's order and set the issue for an evidentiary hearing. On December 19, 2007, Albrektsen submitted a final proposed preliminary injunction order to which Diepholz did not object. The injunctive portion of the order remained unchanged from the previously-submitted draft.

¶7 At the February 11, 2008 evidentiary hearing on contempt, testimony and evidence indicated that, while construction had appeared to cease on the structure between June and September 2007, construction resumed in September or October including the installation of windows on the second story. In December 2007, additional construction included wrapping the house, including the second story, in preparation for exterior stucco. While the roof had been modified to meet the height requirement, the only efforts to make the house a single story

structure involved the preparation of engineering drawings which left more than two-thirds of the second story in tact but removed the stairway leading to that level. On the basis of the hearing, approximately four months after the court first verbally imposed a temporary restraining order, the court found:

> The Defendants' presently approved plans with the City of Scottsdale call for a two story home. The Defendants' current proposed modification to those plans of removal of less than all the floor trusses between the great room and the loft does not comply with the Court's order to make the home a one story home in conformance with the CC&Rs.
>
> The Court does not find that the Defendants substantially complied with its prior orders or that their actions were based on a good-faith and reasonable interpretation of the Court's orders. THE COURT FINDS that the Defendants did not make a good faith attempt to comply with the Court's orders.

The court ruled that Diepholz was in contempt and identified what was necessary to purge the contempt. The court also ruled that Albrektsen could file an application for reasonable attorneys' fees incurred from October 5, 2007 (i.e., when the court clarified its orders at Albrektsen's request) through and including the contempt hearing and could seek monetary and other sanctions should Diepholz fail to comply with the contempt order.

¶8 After the contempt hearing but before the issuance of the contempt order, the court signed the final proposed form of preliminary injunction to which Diepholz had not objected. Diepholz did not request the court reconsider the contempt ruling and did not file a special action to challenge that ruling. Instead, Diepholz acted to comply with the court's order and, within 30 days, filed a notice of purging contempt. The parties and the court continued to discuss the necessity of a permanent injunction and the case was eventually resolved on Diepholz's motion for summary judgment on the basis that the issue was made moot by Diepholz's compliance with the preliminary injunction. On June 10, 2008, the court awarded Albrektsen $19,230.00 in attorneys' fees related to the contempt ruling. In addition, the court further ordered that Albrektsen could seek those fees not ordered as a sanction for contempt in an application for attorneys' fees in the case in general. The final judgment in Albrektsen's favor included the attorneys' fees for the contempt sanction and an additional $125,000 in attorneys' fees plus costs.

ANALYSIS

Issues on Appeal

¶9 Albrektsen asserts that several issues raised by Diepholz on appeal have been waived for failure to raise them below. "As a rule, arguments not made at the trial court cannot

be asserted on appeal." *City of Tempe v. Fleming*, 168 Ariz. 454, 456, 815 P.2d 1, 3 (App. 1991). However, the rule is procedural, not jurisdictional, and we may suspend it in our discretion when the record contains facts determinative of an issue that will resolve the action, *id*., or when the questions raised are substantive law issues of a general public nature not affected by questions of fact. *See Resolution Trust Corp. v. City of Scottsdale*, 177 Ariz. 234, 237, 866 P.2d 902, 905 (App. 1993). While some of the issues asserted on appeal may not have been clearly raised in regard to the issue of contempt, it is apparent from the record that the issues raised by Diepholz here were raised to the superior court at various other times such as in the initial response to the application for preliminary injunction (e.g., the definition or ambiguity of the term "one story.").

Standard of Review

¶10 We review contempt orders for an abuse of the superior court's discretion, *Munari v. Hotham*, 217 Ariz. 599, 605, ¶ 25, 177 P.3d 860, 866 (App. 2008), and view the record in the light most favorable to upholding the superior court's order. *Danielson v. Evans*, 201 Ariz. 401, 412, ¶ 42, 36 P.3d 749, 760 (App. 2001). "We review entitlement to attorneys' fees and the amount of an award for an abuse of discretion." *City of Tempe v.*

Outdoor Systems, Inc., 201 Ariz. 106, 113, ¶ 31, 32 P.3d 31, 38 (App. 2001).

Effectiveness of the Injunctive Order

¶11 Rule 65(h) of the Arizona Rules of Civil Procedure requires that:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance and shall be specific in terms. It shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained, and it is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

The rules for injunctive relief do not contain any explicit requirement that the injunctive order be in any particular form, signed or unsigned by the court. While Diepholz argues that the court's order was verbal and thus unenforceable, it is clear from the court's transcript and minute entry of September 26, 2007, that the court's order was not simply verbal and did contain the requirements specified in Rule 65(h). In addition, from the time the court issued its minute entry through the court's signing of the final proposed form of order submitted by Albrektsen, the injunctive order did not significantly change. That is, the order remained that the house being constructed had to be a single-story home no higher than 26 feet. The order was

further clarified in the court's October 4, 2007, minute entry to include the requirement that Diepholz must obtain a building permit and abide by the CC&Rs' guidelines. From this point on, the signing of a final order submitted by Albrektsen was essentially a formality not actually required by the rules in order for the preliminary injunction to be enforced.

¶12 Thus, we conclude that the preliminary injunction was enforceable through the court's contempt powers.

Failure to Post Bond

¶13 The superior court's September 26, 2007 order, required Albrektsen to post a bond of $60,000 in connection with the issuance of the preliminary injunction. That bond was not posted by Albrektsen until after the contempt hearing and the signing of the proposed form or preliminary injunction order by the court. Diepholz argues that the preliminary injunction did not become effective until the bond was posted and thus the injunction could not be enforced by contempt.

¶14 Rule 26(e) of the Arizona Rules of Civil Procedure states that:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Prior to the enactment of this rule, our supreme court found that an injunctive order issued pursuant to its jurisdiction, as established by the terms of a contract between the parties, was enforceable without requiring a bond since the injunction was only prohibiting the parties from violating the terms of the contract. *Bank of Arizona v. Superior Court of Yavapai County*, 30 Ariz. 72, 80, 245 P. 366, 368 (1926). A later case, decided after the enactment of the rule, found *Bank of Arizona* not to be in conflict with the rule. *See Bayham v. Funk*, 3 Ariz. App. 220, 222, 413 P.2d 279, 281 (1966). *Bayham* also found that a preliminary injunction granted without imposition of a bond on the movants was enforceable. *Id*. More recently, we held that "[t]here is no longer any basis for concluding that a preliminary injunction is unenforceable unless a security bond has been issued." *Matter of Wilcox Revocable Trust*, 192 Ariz. 337, 341, ¶ 20, 965 P.2d 71, 75 (App. 1998). Finally, we observe the State Bar Committee note to the former Rule 65(f) of the Arizona Rules of Civil Procedure which states that:

> This Committee believes that there should be security in the case of every injunction, but further believes that if in some instance security is omitted, the proper remedy is either a motion for security or an appeal, but not disobedience of the order.

On this basis we conclude that because Diepholz's remedy for Albrektsen's apparent failure to post a bond was not

disobedience of the injunctive order, the order could be enforced through the court's contempt powers.

Clarity of the Court's Injunctive Order

¶15 Diepholz argues that the court's order instructing that the house could be no more than one story was too vague to be enforced by contempt. However, while we might agree that the term "one story" could be ambiguous if used to enforce a specific height to a structure, its use is sufficiently common in a wide variety of circumstances, including in CC&Rs, to be considered unambiguous.

¶16 After the first hearing in this matter, the court found in its September 26, 2007 minute entry, that the term "single story" was not ambiguous. Albrektsen included that conclusion in the first proposed form of order to the court. At the October 4, 2007 clarification hearing, Diepholz did not request further clarification of the term. Diepholz objected to the placement of the statement "[t]he meaning of the term 'one story' in the CC&Rs is not ambiguous" in the findings of fact section of the proposed form of order but did not object to the statement itself. Nor did Diepholz object to the statement in the second or final proposed forms for order both submitted significantly before the contempt hearing. While Diepholz briefly raised the issue in the contempt hearing, it was not further briefed in preparation for that hearing or in a request

to reconsider the result thereof and upon the completion of the contempt hearing it took less than thirty days for Diepholz to come into compliance with the court's order and the CC&Rs including the "one-story" provision. On this basis, we do not find that the court's use of the term "one-story" was particularly ambiguous and the record does not suggest that the parties considered it to have been. *See National Broker Associates, Inc. v. Marlyn Nutraceuticals, Inc*., 211 Ariz. 210, 215, ¶ 25, 119 P.3d 477, 482 (App. 2005) (holding that a party could not just ignore a notice of deposition ordered by the court because of alleged technical defects without seeking clarification from the court or taking some other affirmative action).

Amount of Fees Awarded

¶17 We will not substitute our judgment for that of the trial court in regard to the award of attorneys' fees pursuant to contract if there is any reasonable basis to upholding its decision. *Radkowsky v. Provident Life & Acc. Ins. Co*., 196 Ariz. 110, 113, ¶ 18, 993 P.2d 1074, 1077 (App. 1999). We conclude in this case that the superior court had a reasonable basis for amount of fees awarded. *See Orfaly v. Tucson Symphony Society*, 209 Ariz. 260, 265, ¶ 18, 99 P.3d 1030, 1035 (App. 2004) ("We will not disturb the trial court's discretionary award of fees if there is any reasonable basis for it." (quoting *Hale v.*

Amphitheater Sch. Dist. No. 10 of Pima County, 192 Ariz. 111, 117, ¶ 20, 961 P.2d 1059, 1065 (App. 1998)). In addition, Diepholz's argument concerning the propriety of the amount of attorneys' fees awarded also fails since it is based primarily on the assertion that the finding of contempt was improper and thus the hearing thereon was unnecessary and unjustified. Therefore, we uphold the superior court's award of attorneys' fees to Albrektsen.

CONCLUSION

¶18 On the above bases, we affirm the superior court's finding of contempt against Diepholz and the award of costs and attorneys' fees to Albrektsen. In addition, pursuant to Rule 21(c) of the Arizona Rules of Civil Appellate Procedure and A.R.S. § 12-341.01 (2003) we award Albrektsen attorneys' fees on appeal.

/s/
_____
PATRICK IRVINE, Judge

CONCURRING:

/s/
_____
JOHN C. GEMMILL, Presiding Judge

/s/
_____
JON W. THOMPSON, Judge