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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
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



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FILED: 05-04-2010
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BY: GH

SCHIFF, KREIDLER-SHELL, INC., an) 1 CA-CV 09-0260
Ohio corporation,)
) DEPARTMENT A
Plaintiff/Appellant,)
) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 28, Arizona Rules of
MICHAEL J. ADICK and MARY K.) Civil Appellate Procedure)
ADICK, husband and wife; and)
ELYTE ATM SERVICES, INC., an)
Arizona corporation,)
)
Defendants/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-030327

The Honorable Bethany G. Hicks, Judge

VACATED AND REMANDED

Francis J. Slavin, P.C.
by Francis J. Slavin
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Phoenix

P O R T L E Y, Judge

¶1 Schiff, Kreidler-Shell, Inc., ("Appellant") appeals the trial court's denial of its request for a preliminary injunction. For the following reasons, we vacate the judgment and remand to the trial court for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 Appellant is an Ohio corporation that provides insurance brokerage services. Appellant provided its services to Defendant Michael Adick, his family, and his companies. Adick's companies include Elyte ATM Services, Inc., ("Elyte Arizona")¹ and Elyte Pacific ATM Services of Hawaii LLC ("Elyte Pacific"), both of which are in the business of servicing bank ATM machines.

¶3 During 2006 and 2007, Appellant advanced money to Adick and Elyte Arizona to pay the insurance premiums for Elyte Arizona and Elyte Pacific's crime coverage insurance policy. In return, Adick, on behalf of Elyte Arizona, signed two due on demand promissory notes payable to Appellant; one in the amount of \$171,095.00, and the other for \$91,000. Additionally, Adick executed a personal guaranty of the notes on August 13, 2008, and signed a third due on demand promissory note for \$281,316.00, that also included his personal guaranty.

¹ Elyte ATM Services, Inc., has its headquarters in Phoenix.

¶14 Neither Elyte Arizona nor Adick made any payments. Sometime in November 2008, Appellant learned that Adick planned to sell Elyte Pacific for one dollar at the end of the month. Soon thereafter, Appellant filed a verified complaint for breach of contract, and sought monetary damages, a temporary restraining order, a preliminary and permanent injunction, and a prejudgment attachment. Appellant simultaneously sought a temporary restraining order without notice.

¶15 A hearing was held and a temporary restraining order was issued. The order prevented the sale of Elyte Pacific "without reasonably equivalent value therefor." After service, Defendants filed a verified answer and a counterclaim for tortious interference with a contract and business expectancy.

¶16 The preliminary injunction hearing was held on February 5, 2009. Appellant also sought a writ of attachment without notice. The trial court denied the preliminary injunction application, the prejudgment writ of attachment without notice,² and dissolved the temporary restraining order. Appellant appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(F)(2) (2003).

² Appellant does not appeal the trial court's denial of the prejudgment writ of attachment without notice.

DISCUSSION

¶7 We review an order on a preliminary injunction for an abuse of discretion. *Kromko v. City of Tucson*, 202 Ariz. 499, 501, ¶ 4, 47 P.3d 1137, 1139 (App. 2002). A party seeking a preliminary injunction has to establish that there is: "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury if the requested relief is not granted, (3) a balance of hardships favoring that party, and (4) public policy favoring a grant of the injunction." *Ariz. Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, 12, ¶ 12, 219 P.3d 216, 222 (App. 2009) (citations omitted). The trial court can grant the injunction if the movant proves either: that there is probable success on the merits and the possibility of irreparable injury; or that there is the presence of serious questions and the balance of hardships is in the movant's favor. *Id.* (quoting *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410-11, ¶ 10, 132 P.3d 1187, 1190-91 (2006)).

¶8 Appellant argues that the trial court erred when it denied the preliminary injunction on the grounds that Appellant had an adequate remedy with its contract action.³ Although

³ No answering brief was filed. "Although we may regard [the] failure to respond as a confession of reversible error, we are not required to do so." *Gonzales v. Gonzales*, 134 Ariz. 437, 437, 657 P.2d 425, 425 (App. 1982).

Appellant contends that the trial court misunderstood that it was trying to prevent a fraudulent transfer of assets,⁴ it is uncontested that the trial court did not issue findings of fact or conclusions of law.

¶9 Arizona Rule of Civil Procedure 52(a) requires that "in granting or refusing interlocutory injunctions the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action." See *Miller v. McAlister*, 151 Ariz. 435, 437, 728 P.2d 654, 656 (App. 1986) ("The trial court must make findings of fact (1) if a party requests findings, or (2) if the remedy sought is a preliminary injunction."). We need "a sufficient factual basis that explains how the trial court actually arrived at its conclusion" in order to "examine more closely the basis on which the trial court relied in reaching the ultimate judgment." *Miller v. Bd. of Supervisors*, 175 Ariz. 296, 299, 855 P.2d 1357, 1360 (1993).

¶10 Here, the trial court made no findings of fact and conclusions of law. In open court, the trial judge stated, "I

⁴ Appellant argued that the sale or the transfer of Elyte Pacific for one dollar was not a reasonably equivalent value in exchange for the company. A fraudulent transfer is "[a] transfer made or obligation incurred by a debtor . . . if the debtor made the transfer" "[w]ithout receiving a reasonably equivalent value in exchange for the transfer," and the debtor "[i]ntended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due." A.R.S. § 44-1004(A) (2003).

also don't think that there are grounds for a preliminary injunction because I don't think there's sufficient grounds for the injunction. You[r] . . . relief . . . is really in the form of a contract action, a judgment and collection on that judgment, that's your adequate remedy at law not a provisional remedy."

¶11 Although findings of fact stated on the record are permissible, see Ariz. R. Civ. P. 52.2(a), they need to be "sufficiently specific to allow an appellate court 'to test the validity of the judgment.'" *Miller*, 175 Ariz. at 299, 855 P.2d at 1360 (quoting *Gilliland v. Rodriguez*, 77 Ariz. 163, 167, 268 P.2d 334, 337 (1954)). Here, the trial court did not mention why the requisite factors required to issue a preliminary injunction were not applicable. Nor did the court discuss why statutory injunctive relief to preclude an alleged fraudulent transfer was inapplicable.⁵

¶12 Although it can be argued that there was no irreparable injury to Appellant because the trial court stated that the contract action was adequate, we "must be able to discern more than a *permissible* interpretation of the trial

⁵ In an action for relief against a fraudulent transfer, a creditor's remedies include "[a]voidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim," and "[a]n injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property." A.R.S. § 44-1007(A)(2), (4)(a) (2003).

court's analysis." *Miller*, 175 Ariz. at 299, 855 P.2d at 1360. Because there were no factual findings, we cannot determine whether the trial court erred and allowed Adick to dispose of a viable asset. Consequently, we reverse the ruling and remand for further proceedings. *Id.* at 300, 855 P.2d at 1361 (holding that a court's failure to make the required findings may be reversible error, and generally we remand the case to the trial court for further findings).

¶13 Finally, Appellant requests an award of attorneys' fees and costs incurred on appeal pursuant to A.R.S. § 12-341.01 (2003). We grant the request for reasonable attorneys' fees and costs on appeal subject to compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶14 Based on the foregoing, we vacate the trial court's order and remand for further findings.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

LAWRENCE F. WINTHROP, Judge

/s/

MARGARET H. DOWNIE, Judge