NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 05-06-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DAVID STOBAUGH and JOYLENE LAMBARD, Plaintiffs/Appellants, FRANCIS P. SMITH, Attorney/Appellant, v. EDWARD S. BARON, a single man; and TERESA DE LA TORRE, a single woman, Defendants/Appellees.	No. 1 CA-CV 09-0380 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. No. CV2006-019462

The Honorable Edward O. Burke, Judge

AFFIRMED AND REMANDED

Francis P. Smith Attorney at Law — Phoenix
By Francis P. Smith
Attorney for Plaintiffs/Appellants

The Law Office of Mark A. Tucker, P.C. — Mesa
By Mark A. Tucker
Attorneys for Defendants/Appellees

S W A N N, Judge

¶1 In this conversion action, Plaintiffs-Appellants, David Stobaugh and Joylene Lambard (collectively, "Plaintiffs") appeal from the trial court's grant of judgment in favor of Edward S. Baron and Teresa de la Torre (collectively, "Defendants") and from the court's award of sanctions and fees against Plaintiffs and their attorney. For the reasons that follow, we affirm the judgment on the merits and the award of sanctions against Plaintiffs' counsel. We remand, however, for the entry of findings concerning the award of sanctions against Plaintiffs individually.

FACTS AND PROCEDURAL HISTORY

¶2 In November 2003, Ms. de la Torre entered into a commercial lease agreement with tenants, Mr. Stobaugh and James Worthy.[1] Mr. Worthy and Mr. Stobaugh opened a furniture store on the premises and early in 2004, Ms. Lambard became a co-owner of the business.[2]

¶3 In 2004 Plaintiffs experienced problems with a leaking roof, and contend that on December 8, 2004, the roof "collapsed."[3] Plaintiffs asked Ms. de la Torre to have the roof

[1] The court found that Mr. Baron was Ms. de la Torre's business partner. That finding is not at issue in this appeal.

[2] Mr. Worthy died in May 2004.

[3] At trial, Mr. Baron controverted Ms. Lambard's testimony with respect to the extent of the damage to the roof. He testified that "as far as the whole roof caving in, that's a very

professionally repaired because they were dissatisfied with her previous attempts to stop the leaks. Plaintiffs stopped paying rent in December 2004, and Ms. de la Torre refused to fix the leak until the rent was paid. To protect their inventory, Plaintiffs moved several items to a 10 X 20 storage container.[4]

¶4 Because Plaintiffs failed to pay their rent, Ms. de la Torre filed a forcible entry and detainer action ("FED") in justice court in December 2004. But because she failed to comply with conditions precedent to bringing suit, the action was dismissed and Mr. Stobaugh was awarded judgment for fees and costs.

¶5 In January 2005, Ms. de la Torre filed a second FED against Mr. Stobaugh. Mr. Stobaugh did not respond because he was not served with the summons and complaint. Nonetheless, the justice court entered a default judgment against him and awarded Ms. de la Torre possession of the store as well as damages, costs and fees totaling $4,478.

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farfetched exaggeration." The type of leak that occurred as a result of a cracked ceiling would not have caused the owners to stop operating their business. And although a defense witness did testify that there was a "little bit of mold," he denied that the ceiling caved in.

[4] Ms. Lambard testified that she could not determine the value of the inventory that was placed in the storage container, but stated that their claim for conversion did not include these items.

¶6 Pursuant to the default judgment, a constable served a writ of restitution on February 8, 2005, and delivered possession of the store and the remaining inventory to Defendants. At trial, Ms. Lambard testified that although Mr. Stobaugh was given approximately ten minutes to remove any items that he wished, he took nothing from the premises at that time. A witness for Defendants testified, however, that after the constable left, Plaintiffs took two trailers full of inventory from the premises.[5]

¶7 On March 1, 2005, Mr. Stobaugh moved pursuant to Ariz. R. Civ. P. 60(c) to vacate the justice court's default judgment. That motion was denied. Mr. Stobaugh appealed that ruling to the superior court, which ultimately vacated the justice court judgment in a minute entry filed on July 18, 2006.

¶8 But while the motion to vacate the default judgment was pending, Defendants scheduled an auction for April 16, 2005, to sell the remaining inventory. To prepare for the auction, the auction company removed two truckloads of merchandise. Two days before the scheduled auction, on April 14, 2005, Mr.

[5] This witness testified that Plaintiffs also removed approximately three loads of inventory *before* the constable served the writ on February 8, 2005. His testimony indicated that Plaintiffs had removed the majority of the inventory before February 8, 2005.

Stobaugh sought and obtained a temporary restraining order ("TRO") in superior court enjoining the April 16 auction.

¶9 On August 3, 2005, Ms. de la Torre sought bankruptcy protection, listing Mr. Stobaugh, Ms. Lambard and their attorney, Mr. Smith, as creditors.

¶10 In October 2005, despite his awareness of the court's injunction, Mr. Baron hired a friend to sell or give away the property seized at the store. The superior court held a show cause hearing to address Plaintiffs' contention that this sale violated the TRO, and ordered that "no further property shall be sold until the [TRO] is lifted." Mr. Stobaugh was given one week to remove his personal property, and Mr. Baron was to provide an accounting of any property sold and the value received. The court ordered that Defendants could dispose of any property not removed by November 3, 2005, and no accounting would be required with respect to such property.

¶11 On November 21, 2005, Ms. Lambard filed a motion for relief from the automatic bankruptcy stay. She asserted that equipment that was listed as an asset in the bankruptcy estate was also the subject of two civil suits: the FED and the TRO. The bankruptcy court granted Ms. Lambard's motion and allowed "termination of the automatic stay to allow the Maricopa County Superior Court cases[] to proceed to conclusion."

¶12 On December 8, 2005, the bankruptcy court discharged Ms. de la Torre's debts. The Explanation of Bankruptcy Discharge provided that "[t]he discharge prohibits any attempt to collect from the debtor a debt that has been discharged. For example, a creditor is not permitted . . . to file or continue a lawsuit. . . . A creditor who violates this order can be required to pay damages and attorney's fees to the debtor."

¶13 On February 27, 2006, Plaintiffs filed a Motion to Extend the TRO Case on Inactive Calendar and a Motion for Leave to File Complaint. The superior court concluded that it had already addressed the relief requested by Plaintiffs - namely a TRO, an order requiring the return of property, and an accounting. Accordingly, in March 2006, the court dismissed the TRO case and denied Plaintiffs' request to extend the case on the inactive calendar and their request for leave to file a complaint for conversion.

¶14 On December 20, 2006, undeterred by the court's ruling in the TRO case, Plaintiffs filed a new complaint for conversion in superior court. Plaintiffs sought damages in the amount of $118,966 – the alleged fair market value of the remaining inventory. In their answer, Defendants asserted "all the affirmative defense[s] of abuse of access, failure to mitigate, fraud, misrepresentation, and all other affirmative defenses set forth in Rule 8(c)." Defendants filed an expedited motion to

vacate trial and for sanctions, arguing that Plaintiffs' action was filed in bad faith and in violation of Defendants' bankruptcy stay. They requested that the court vacate trial and moved for sanctions pursuant to Ariz. R. Civ. P. 11 and A.R.S. § 12-349. After conducting oral arguments on Defendants' motion to vacate trial and sanctions, the court dismissed Ms. de la Torre from the case pursuant to the bankruptcy discharge and took the motion for sanctions under advisement.

¶15 After a one-day bench trial, the court found that Plaintiffs' estimate of the fair market value of inventory items was neither credible nor supported by the evidence. Accordingly, the trial court granted judgment in favor of Mr. Baron on all of Plaintiffs' claims.

¶16 Plaintiffs filed a motion to reconsider the judgment, which was summarily denied. Nearly three months after the trial's conclusion, Plaintiffs filed a motion to vacate the order dismissing Ms. de la Torre from the suit. The trial court denied Plaintiffs' post-trial motion and awarded sanctions against Plaintiffs and their attorney in the amount of $7,875 and costs of $191. Plaintiffs moved for a new trial, or in the alternative, to amend the judgment pursuant to Ariz. R. Civ. P. 59(l) or 60(a) by limiting the sanction to Plaintiffs' attorney. The court summarily denied the motions.

¶17 After several attempts, Defendants perfected this appeal. We have jurisdiction pursuant to A.R.S. § 12-120.21(A)(1) (2003).[6]

DISCUSSION

¶18 On appeal, Plaintiffs argue that the trial court erred because (1) Plaintiffs proved a prima facie case of conversion that was not rebutted by Defendants; (2) Ms. de la Torre should not have been dismissed from the case; (3) the sanctions were excessive, or alternatively they should have been limited to Plaintiffs' attorney; and (4) Plaintiffs were denied a fair trial. We address each argument in turn.

I. Sufficiency of the Evidence

¶19 To prove conversion, Plaintiffs were required to demonstrate that Defendants (1) intentionally exercised dominion or control over the remaining inventory, and (2) interfered with Plaintiffs' right to control the inventory to an extent that they may justly be required to pay Plaintiffs the full value of the inventory. *Focal Point, Inc. v. U-Haul Co. of Ariz.*, 155 Ariz. 318, 319, 746 P.2d 488, 489 (App. 1986).

[6] By virtue of his status as Plaintiffs' attorney below, Francis Smith was not a party to the lower court's proceedings. But because he was aggrieved by the award of attorney's fees as a sanction, he is permitted to appeal from that portion of the judgment. *Wieman v. Roysden*, 166 Ariz. 281, 284, 802 P.2d 432, 435 (App. 1990).

¶20 Contrary to Plaintiffs' assertion in their briefs that the facts underlying their conversion case were undisputed, conflicting testimony was in fact presented at trial with respect to the amount of inventory that remained on the premises when Defendants took possession.[7] On this record, a reasonable fact finder could conclude, as Plaintiffs urged, that Plaintiffs removed only a small portion of the inventory from the premises on one occasion – just after the ceiling "collapsed" - leaving a substantial amount of property that Defendants converted. But a reasonable finder of fact could also determine from the evidence presented that Plaintiffs removed several loads of inventory and left only items of little value. The trial judge was in the best position to assess the credibility of the witnesses and weigh the evidence. *See Gutierrez v. Gutierrez*, 193 Ariz. 343, 347-48, ¶ 13, 972 P.2d 676, 680-81 (App. 1998). We review the trial court's findings for clear error and find none. Ariz. R. Civ. P. 52(a). Accordingly, we conclude that the trial court did not err in entering judgment in favor of Defendants.

[7] Even were we to agree with Plaintiffs' argument that they presented an unrebutted prima facie case for conversion, the trial court was not required to accept uncontradicted evidence of an interested party. *Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, 287, ¶ 12, 9 P.3d 314, 318 (2000).

II. Dismissal of de la Torre

¶21 Next, Plaintiffs argue that the trial court erred when it dismissed Ms. de la Torre from the case for two reasons. First, they contend the Bankruptcy Court's lift stay order permitted Plaintiffs to file a complaint for conversion against Ms. de la Torre. Second, they argue Defendants waived the affirmative defense of discharge by failing to plead it in their answer.[8]

A. Lift Stay

¶22 The Bankruptcy Court's order granting relief from the automatic stay allowed the "Maricopa County Superior Court cases[] to proceed to conclusion." Plaintiffs contend that the order should be construed broadly to include their complaint alleging conversion, which was filed after the issuance of the Bankruptcy Court's order. We disagree.

¶23 In *In re Wardrobe*, 559 F.3d 932, 937 (9th Cir. 2009), the Ninth Circuit held that claims not pending when the Bankruptcy Court issued its lift stay order were not subject to relief from the automatic stay. The court further noted that "orders granting relief from the automatic stay are to be strictly construed." *Id.* at 935 (citation omitted). Here, because the complaint for conversion was filed after the

[8] Though it might reasonably have been argued that the conversion claim was not subject to discharge pursuant to 11 U.S.C. § 523(a), Plaintiffs have taken the opposite position here.

Bankruptcy Court issued its order granting the lift stay, Plaintiffs were prohibited as a matter of law from bringing it against Ms. de la Torre.

B. Waiver

¶24 Plaintiffs argue that even if the lift stay order did not authorize the filing of a new complaint against Ms. de la Torre, Defendants waived the affirmative defense of discharge in bankruptcy when they failed to plead it. The trial court concluded that while Defendants' general assertion of "all . . . affirmative defenses set forth in Rule 8(c)" did not sufficiently provide Plaintiffs with notice of Defendants' intent to plead the discharge in bankruptcy as an affirmative defense, that pleading deficiency did not constitute waiver. The court noted, and we agree, that the central purpose of Rule 8(c) is to provide notice of a defendant's intent to assert an affirmative defense and to prevent unfair surprise. *See City of Phoenix v. Linsenmeyer*, 86 Ariz. 328, 333, 346 P.2d 140, 143 (1959) (describing Rule 8(d), which has since been renumbered as Rule 8(c)). The trial court reasoned that because Plaintiffs actively litigated against Ms. de la Torre in Bankruptcy Court, they had actual notice of those proceedings and could not claim unfair surprise. We agree with the trial court's reasoning.[9]

[9] We note that even absent waiver, Ms. de la Torre's participation in the action would have been futile because

III. Sanctions

¶25 Plaintiffs object to the award of sanctions because (A) no statute or rule prescribes for an award of sanctions in the circumstances of this case; (B) the court did not make the requisite findings for entry of sanctions; (C) the fees were excessive; and alternatively, (D) the sanction should have been against Plaintiffs' counsel, not Plaintiffs themselves.

A. Sanctions Pursuant To A.R.S. § 12-349

¶26 A.R.S. § 12-349 permits a court to assess reasonable attorney's fees when an attorney or party "brings or defends a claim without substantial justification. . . . [or u]nreasonably expands or delays the proceeding." The commencement of a state court action against a debtor in a bankruptcy case without express authority of the Bankruptcy Court falls squarely within the scope of the statute. There is no substantial justification for such an action – it is prohibited by federal law. Moreover, the joinder of a debtor as a defendant in a case that could properly have been brought solely against another party constitutes an unreasonable expansion of the proceeding. In

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Plaintiffs would have had no enforcement remedy had they won their case. *See Stewart v. Underwood*, 146 Ariz. 145, 149, 704 P.2d 275, 279 (App. 1985) (discharge in bankruptcy is a bar to the enforcement of payment of debt by legal proceedings). At oral argument, counsel indicated that Plaintiffs achieved a recovery of some amount in the bankruptcy proceeding. This, of course, has no bearing on the enforceability of a state court judgment.

view of Plaintiffs' actual knowledge of Ms. de la Torre's status as a debtor at the time the complaint was filed, we cannot conclude that the trial court abused its discretion in awarding sanctions pursuant to the statute.

B. The Necessity of Findings

¶27 Plaintiffs contend that even if Arizona law supports the imposition of sanctions, we must reverse because the trial court failed to make specific findings in support of the award of attorney's fees. We disagree in part.

¶28 "Findings of fact and conclusions of law need only be specific enough to allow an appellate court 'to test the validity of the judgment.'" *Phoenix Newspapers, Inc. v. Dep't of Corrections*, 188 Ariz. 237, 243, 934 P.2d 801, 807 (App. 1997) (quoting *Miller v. Bd. of Supervisors of Pinal County*, 175 Ariz. 296, 299, 855 P.2d 1357, 1360 (1993)). Though the minute entry containing the order of sanctions against Plaintiffs and their counsel does not set forth the reasons for the court's ruling, the court's comments at oral argument make clear that the order was based on its finding that Plaintiffs unreasonably ignored the effect of the bankruptcy proceedings on their claims against Ms. de la Torre.[10] These comments are specific enough for us to determine that the award of sanctions against counsel

[10] A.R.S. § 12-350 does not prescribe any particular format in which the court may make its findings when it orders sanctions pursuant to A.R.S. § 12-349.

was based upon proper consideration of the factors articulated in the statute.

C. Excessive Fees

¶29 Plaintiffs next complain that the amount of the award was excessive because (1) the fees expended to defend Ms. de la Torre were duplicative of those expended to defend Mr. Baron and (2) the fees expended to defend Ms. de la Torre were excessive.

¶30 Though there was undoubtedly substantial overlap between the services provided for the defense of Ms. de la Torre and Mr. Baron, we conclude that the court could properly attribute the fees for those services to both defendants. A ruling to the contrary would fail to serve the statute's purpose of discouraging unnecessarily expansive litigation, because plaintiffs who choose to join defendants improperly could almost always minimize their exposure to sanctions by attributing expenses incurred to the defendants who are properly joined. Moreover, it is generally within the trial court's discretion whether and how much to sanction an offending party or counsel. *Resolution Trust Corp. v. W. Techs., Inc.*, 179 Ariz. 195, 204, 877 P.2d 294, 303 (App. 1994).

¶31 Plaintiffs also appear to argue that the time Defendants' counsel attributed to defending Ms. de la Torre does not comport with the prevailing community standards, and that the sanctions imposed were therefore excessive. Defendants'

application for fees stated that counsel expended 55.9 hours of attorney services for a total of $10,900.50 in attorney's fees, and the court limited the award for sanctions to $7,875. We find that the fee application was sufficiently detailed to permit the court to perform a meaningful review, and conclude that the time expended (and sanctions awarded) were reasonable. We therefore reject Plaintiffs' argument that the court abused its discretion in determining the amount of the sanctions.

D. Sanctions Issued Against Party and Attorney

¶32 A.R.S. § 12-349(B) provides: "[t]he court *may* allocate the payment of attorney fees among the offending attorneys and parties, jointly or severally, and may assess separate amounts against an offending attorney or party." (Emphasis added.) A.R.S. § 12-350 provides: "[i]n awarding attorney fees pursuant to § 12-349, the court shall set forth the specific reasons for the award." Though we find that the court's reasons for imposing sanctions against counsel are adequately stated on the record, the reasons for holding Plaintiffs jointly liable were never stated. We cannot determine from this record whether Plaintiffs had any reason to know, as their counsel did, that the bankruptcy rendered the very filing of the complaint against Ms. de la Torre frivolous. Nor can we determine whether the court concluded that other factors relating to Plaintiffs' conduct supported its award of sanctions against them. In the

context of dispositive sanctions, we have held that the court is required to conduct a hearing to determine whether the party "shared the blame" with counsel for sanctionable misconduct. Though no such hearing is required to impose fees under A.R.S. § 12-349, we conclude that the purpose of the statute is best served by requiring an express statement of the reasons for the allocation of liability among counsel and client. Accordingly, we remand for the limited purpose of permitting entry of an award of sanctions against counsel only, or against counsel and Plaintiffs accompanied by an express statement of the court's reasoning.

IV. Fair Trial

¶33 Finally, Plaintiffs contend that they were denied a fair trial because they were not given an opportunity to present a rebuttal argument. Plaintiffs' argument lacks merit. Barring a constitutional or statutory provision to the contrary, there is no absolute right to present closing arguments. *Fuentes v. Fuentes*, 209 Ariz. 51, 57, ¶ 31, 97 P.3d 876, 882 (App. 2004). In civil jury trials, Ariz. R. Civ. P. 39(o) provides that parties are entitled to arguments. With respect to civil bench trials, however, there is no constitutional or statutory provision that guarantees parties the right to present closing arguments. *See Fuentes*, 209 Ariz. at 58, ¶ 33, 97 P.3d at 883. "Indeed, it appears to be accepted practice for parties involved

in a bench trial to forgo closing argument." *Id.* at 57, ¶ 31, 97 P.3d at 882 (citation omitted). Because this civil case was tried before a judge, there was no error when the trial court did not allow Plaintiffs an opportunity to rebut Mr. Baron's closing argument.

¶34 Without citing to any authority, Plaintiffs also complain that the trial court erred when it admitted irrelevant, prejudicial evidence. The trial court has broad discretion concerning the admission of evidence over objections under Ariz. R. Evid. 402 and 403, and this discretion is at its apex when a case is tried to the bench. Moreover, reversible error occurs only if evidence is improperly admitted and the admission affects the substantial rights of a party, or if we are convinced that but for the admission there would have been a different verdict. *Carter-Glogau Labs., Inc. v. Constr., Production & Maint. Laborers' Local 383*, 153 Ariz. 351, 358, 736 P.2d 1163, 1170 (App. 1986); *see also* Ariz. R. Civ. P. 103(a). We are not persuaded that the admission of the testimony about which Plaintiffs complain - the background issues of the damage to the ceiling and Plaintiffs' payment of taxes and rent - adversely impacted their substantial rights.

ATTORNEY'S FEES ON APPEAL

¶35 Without citing to authority, both parties request fees on appeal. In our discretion, we decline to award either party attorney's fees on appeal.

CONCLUSION

¶36 For the foregoing reasons, we affirm and remand to permit the court to support or modify the order of sanctions against Plaintiffs personally.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
MAURICE PORTLEY, Presiding Judge

/s/
_____
LAWRENCE F. WINTHROP, Judge