IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JOE S. BAILEY and ANNETTE L. BAILEY, *Petitioners*,

v.

THE HONORABLE DANIEL G. MARTIN, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, *Respondent Judge,*

YAM CAPITAL III, LLC, *Real Party in Interest*

No. 1 CA-SA 22-0147
FILED 9-20-2022

Appeal from the Superior Court in Maricopa County
No. CV2020-002929
The Honorable Daniel G. Martin, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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By Richard K. Walker
Counsel for Petitioners

Quarles & Brady LLP, Phoenix
By Brian A. Howie, Jason D. Curry, Anthony F. Pusateri
Counsel for Real Party in Interest

MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Cynthia J. Bailey and Vice Chief Judge David B. Gass joined.

T H U M M A, Judge:

¶1 Petitioners Joe S. and Annette L. Bailey seek special action relief from an order that any supersedeas bond be in the full amount of a civil judgment entered against them. The court finds that exercising special action jurisdiction is appropriate, but because Petitioners have not shown the bond amount was error, the court denies relief.

FACTS AND PROCEDURAL HISTORY

¶2 Real party in interest YAM Capital III, LLC, obtained a judgment against Petitioners for more than $5 million. Petitioners' appeal from that judgment is pending before this court. In superior court, Petitioners moved to stay execution of the judgment and set a supersedeas bond. Relying on Arizona Revised Statutes (A.R.S.) section 12-2108(A) and ARCAP 7(a)(4), and March 2022 declarations they provided, Petitioners claimed to have a negative net worth of nearly $6 million and asked that any bond be set at $0. YAM opposed the motion, arguing Petitioners failed to meet their burden to prove a negative net worth. YAM disputed Petitioners' claims with a competing declaration, attaching deposition transcripts, judgments and other documents. Petitioners' reply attached a supplemental declaration and attachments seeking to dispute YAM's evidence.

¶3 After full briefing and oral argument, the superior court denied Petitioners' motion**.** The court found Petitioners "failed to meet their burden to prove their net worth by a preponderance of the evidence," adding Petitioners' evidence, "in light of the controverting evidence adduced by YAM, does not support their requested finding of a negative net worth."

¶4 Petitioners moved to stay in the appeal, which this court denied without prejudice, noting such a challenge "must be sought by special action." Petitioners then filed this special action, arguing the evidence they provided "established their negative net worth as a prima

facie matter" and YAM did not rebut that prima facie showing, meaning the court's order was clearly erroneous.

DISCUSSION

I. Special Action Jurisdiction Is Appropriate.

¶5 Discretionary special action jurisdiction is proper when a party has no "equally plain, speedy, and adequate remedy by appeal." Ariz. R.P. Spec. Act. 1(a). Challenges to the setting of a supersedeas bond can be a circumstance where special action jurisdiction is appropriate. *See, e.g.*, *AOR Direct L.L.C. v. Bustamante*, 240 Ariz. 433, 435 ¶ 2 (App. 2016). Thus, this court accepts special action jurisdiction.

II. Petitioners Have Shown No Grounds for Special Action Relief.

A. The Applicable Legal Standards.

¶6 Petitioners argue the superior court's order was "clearly erroneous." "'A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *State v. Burr*, 126 Ariz. 338, 339 (1980) (citation omitted).

¶7 As applicable here, a supersedeas bond "shall be set as the lesser of the following: 1. The total amount of damages awarded excluding punitive damages[;] 2. Fifty percent of the appellant's net worth[; or] 3. Twenty-five million dollars." A.R.S. § 12-2108(A); *accord* ARCAP 7(a)(4).[1] Petitioners have the burden to "prove net worth by a preponderance of the evidence." ARCAP 7(a)(4). Petitioners argue these provisions "manifest a clear preference for appellate bonds to be set based on the appellant's net worth." The statute and rule, however, reflect no such preference. Instead, they direct that any bond must be set at the lesser of three listed alternatives, nothing less but nothing more.

¶8 Petitioners repeatedly argue that "legislative history" and "legislative intent" for A.R.S. § 12-2108(A) support their arguments about what the text should mean. However, "'[t]he best and most reliable index of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction.'" *State ex rel.*

[1] No argument is made that any of the ARCAP 7(a)(9) exceptions apply.

Montgomery v. Harris, 234 Ariz. 343, 344 ¶ 8 (2014) (quoting *State v. Hansen*, 215 Ariz. 287, 289 ¶ 7 (2007)).

¶9 Petitioners next argue that their superior court filings "established their negative net worth as a prima facie matter," and YAM's conflicting evidence failed "to rebut" that "prima facie showing." The Legislature (by statute) and the Arizona Supreme Court (by rule) sometimes reference "prima facie" evidence or showings. *See* A.R.S. § 12-671 (insufficient funds checks); Ariz. R. Sup. Ct. 30(g) (verbatim recording of judicial proceedings). The statute and rule at issue, however, do not. The presence of "prima facie" requirements in other enactments, but its absence here, means this court will not read "prima facie" into the requirements of the statute or the rule. *See Callen v. Rogers*, 216 Ariz. 499, 507 ¶ 31 (App. 2007) ("'[w]hen the legislature has specifically included a term in some places within a statute and excluded it in other places, courts will not read that term into the sections from which it was excluded'") (citation omitted); *Potter v. Vanderpool*, 225 Ariz. 495, 500 ¶ 13 (App. 2010) ("[A]ppellate courts are 'not free to rewrite' rules.") (citation omitted). The statute and rule here contain no evidentiary presumption or prima facie showing that YAM needed to rebut. Instead, Petitioners always had the burden of proof to show their net worth. *See* ARCAP 7(a)(4) (burden of proof is on the party requesting a stay to "prove net worth by a preponderance of the evidence"); *accord* Ariz. R. Evid. 301 (noting, even where a presumption applies, the burden of persuasion constantly "remains on the party who had it originally").

B. Applying the Applicable Legal Standards to the Facts Presented.

¶10 In substance, Petitioners argue that unless their evidence was found to be "inherently incredible," "inherently unreliable" or "inherently unbelievable," the superior court had to grant their motion. Petitioners base this argument on their "prima facie showing" assertion, which as discussed above is inapplicable here. More broadly, the superior court did not have to accept Petitioners' own statements about their net worth without question. And contrary to Petitioners' argument, YAM provided controverting evidence, in the form of a declaration and attachments, suggesting Petitioners' claimed net worth was substantially understated.

¶11 Petitioners argue that YAM did not request an evidentiary hearing and that YAM "was repeatedly invited to examine Dr. Bailey at the bond hearing . . . but it chose to forego that opportunity." However, as movants, Petitioners had the burden of proof, which the superior court

recognized. As the hearing on the motion began, the court acknowledged an offer to allow one of the Petitioners to be questioned. The court added, however, that Petitioners "are obviously free to call your client to provide testimony if you wish to do so, or if you want to argue the papers, that also is fine. It's your motion, and I'm actually happy to proceed either way, which – whichever you see fit." Petitioners then elected not to testify.

¶12 Although mainly arguing a clearly erroneous standard of review applies, Petitioners suggest that the superior court's ruling "was tantamount to a grant of summary judgment" and that the evidence should be viewed in a light most favorable to Petitioners. Petitioners cite no authority for that proposition, and this court has found none. Moreover, applying a de novo standard of review applicable to a grant of summary judgment cannot be squared with the clearly erroneous standard Petitioners primarily advance. Thus, this court reviews the order to determine whether it was clearly erroneous.

¶13 The superior court was presented with conflicting evidence about Petitioners' net worth. In the end, the court noted that Petitioners' declarations, "when viewed in light of the controverting evidence adduced by YAM, do[] not support their requested finding" of a negative net worth. That ruling shows the court did not accept, in its entirety, Petitioners' March 2022 declarations that they had a negative net worth of nearly $6 million. For many reasons, Petitioners have not shown that this decision was clearly erroneous.

¶14 Petitioners' March 2022 declarations differ significantly from their September 2017 statement of financial condition showing a positive net worth of more than $91 million. The March 2022 declarations also did not include supporting documentation. And YAM credibly showed that the March 2022 declarations omitted significant assets. YAM also noted Petitioners had decreased the value of various assets, including reducing real estate valued at more than $3 million in September 2017 to less than $300,000 in March 2022. As another example, stock valued at $50 million in September 2017 was not listed as an asset in March 2022, and no proceeds from that stock were apparent.

¶15 Finally, the September 2017 statement listed as an asset litigation involving Laser Spine Institute valued at more than $37 million. The March 2022 declarations list as assets "awards" and "collections," apparently related to that same litigation, totaling more than $386 million. The March 2022 declarations, however, allocate no value to those assets, noting collections were in process and a contingent fee was owed. Even if

the assets related to the litigation were valued at a few cents on the dollar, Petitioners' net worth would support a bond in the full amount of the judgment.

¶16 The superior court could have weighed and assessed this conflicting evidence differently. But it did not. Nor was the court required to detail why it found Petitioners failed to meet their burden of proof. Given the conflicting evidence, the court properly could conclude that Petitioners failed to meet their burden of proof. On the record presented, this court is not "'left with the definite and firm conviction that a mistake has been committed.'" *Burr*, 126 Ariz. at 339 (citation omitted). Thus, Petitioners have not shown that the superior court's decision requiring any supersedeas bond to be in the full amount of the judgment was clearly erroneous.[2]

CONCLUSION

¶17 For these reasons, the court accepts special action jurisdiction but denies relief.

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

[2] Given this conclusion, this court need not (and expressly does not) address Petitioners' argument about the applicability of preliminary injunction standards to the relief sought.