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



DIVISION ONE
FILED: 03/30/2010
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) 1 CA-CV 09-0318
)
RUTH BASSIGNAN,) DEPARTMENT A
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) Rule 28, Arizona Rules of
GARY BASSIGNAN,) Civil Appellate Procedure)
)
Respondent/Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. FN 2007-002909

The Honorable Hugh E. Hegyi, Judge

AFFIRMED

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W I N T H R O P, Judge

¶1 Gary Bassignan ("Husband") appeals from the superior court's post-decree order removing him from participating in the sale of certain real properties and awarding attorneys' fees to Ruth Bassignan ("Wife"). For the following reasons, we affirm the court's order.

FACTS AND PROCEDURAL BACKGROUND

¶2 Husband and Wife married in 1979. During dissolution proceedings, initiated in 2007, the parties agreed to sell their marital residence and four rental properties and to divide the proceeds. Pursuant to the parties' agreement, the court appointed two special commissioners, one to sell the marital residence and the other to sell the rental properties. The court outlined the responsibilities of the parties and the special commissioners as follows:

The parties shall consider all written offers for purchase of the subject real property. Approval of terms of offer shall not be unreasonably withheld; approval, rejection, or counter-offer shall be made timely and in the manner necessary to consummate an arms-length real property transaction.

Further, if any property remained unsold for ninety days, the special commissioner could recommend changes to the listing agreement. If either party refused to deliver written approval of any recommended changes, the special commissioner, or either party, could petition the court for a hearing. On May 25, 2008, the special commissioner received a purchase offer for the

marital residence. The offer lapsed, however, because the special commissioner was unable to contact Husband, who was out of the country. The court determined Husband violated the order, sanctioned Husband,¹ and further ordered:

In the event an offer is received, the Special Commissioner shall attempt to contact Husband at the contact number(s) provided at least 2 times. Husband shall have 24 hours from the Special Commissioner's second attempt to respond. If Husband has not responded within 24 hours of the deadline to respond to the offer, Wife is authorized to negotiate and conclude the transaction on behalf of both parties.²

¶13 Thereafter, the special commissioner for the marital residence moved for two emergency hearings based on Husband's opposition to lowering the listing price and for his "continued refusal to cooperate in the sale of the marital residence." Ultimately, after the court ordered both parties to cooperate and communicate politely with the special commissioner, she asked the court to remove her from her role as special commissioner due to Husband's harassing and intimidating

¹ The sanctions were to pay Wife's reasonable attorneys' fees and to compensate the special commissioner an additional one percent of the selling price from Husband's share of the sale proceeds. Both sanctions were expressly authorized in the court's order regarding the sale of the real properties.

² The same order was subsequently issued regarding the rental properties.

behavior. The court removed her and appointed a new special commissioner for the marital residence.³

¶4 In February 2009, Wife submitted a motion to remove Husband from participating in all real property transactions and allow Wife to act on behalf of both parties. Husband was defaulted for failing to appear as ordered at the April 3 hearing on the matter, and the hearing proceeded in his absence. Wife testified and submitted evidence concerning Husband's unusual behaviors,⁴ inconsistency in communication, and arguably inappropriate directions to the special commissioner attempting to market and sell the investment properties. The court granted Wife's request to remove Husband from the real estate transactions, explaining:

³ Shortly thereafter, the court also allowed the special commissioner for the rental properties to withdraw because he was unable to sell the properties.

⁴ Wife offered into evidence two postcards Husband had sent their son, which contained substantially similar statements. One of the cards read as follows:

Leaving Florida soon. Still looking for that perfect 4th mansion. One mansion I toured Son had three super models in swim suits on the property. All three young women with beautiful bodies were well educated sisters from Europe looking to marry a wealthy American. I was more impressed with the sisters then [sic] the mansion. Hope you are doing well Son. Pennyless & Homeless. Love you, Dad

Husband previously indicated to the trial court that "he's living in the woods" and living off "the largesse of others[.]"

The Court, based on the limited information it has, since [Husband] has chosen I guess to go to Florida instead of coming here for this trial is that he is not - simply does not appear to be mentally competent to appropriately engage in these types of negotiations. And the Court has a great concern that his property and [Wife's] property are simply going to be dissipated by virtue of their inability to sell the property for appropriate value.

The court awarded Wife attorneys' fees, but denied her request for a psychological evaluation of Husband. Husband timely appealed.⁵ We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(C) (2003).

ANALYSIS

¶15 Husband argues the court erred by granting Wife's motion to remove him from participating in the real estate transactions. We review a superior court's order granting or denying post-decree or post-judgment relief for an abuse of

⁵ Although Husband's notice of appeal was premature, it was followed by entry of an appealable order. *Barassi v. Matison*, 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981); *Schwab v. Ames Constr.*, 207 Ariz. 56, 58, ¶ 9, 83 P.3d 56, 58 (App. 2004). Accordingly, this appeal became effective on April 28, 2009, the date the appealable order was entered.

discretion.⁶ *City of Phoenix v. Geyler*, 144 Ariz. 323, 328, 697 P.2d 1073, 1078 (1985). A court abuses its discretion when "the record fails to provide substantial support for its decision or the court commits an error of law in reaching the decision." *Files v. Bernal*, 200 Ariz. 64, 65, ¶ 2, 22 P.3d 57, 58 (App. 2001).

1. *Entry of Default*

¶6 First, Husband's failure to appear at trial justified the court's entry of default as it relates to the merits of Wife's motion. If a party fails to appear at a properly noticed post-decree evidentiary hearing, the court, upon motion or its own initiative, shall make such orders that are just, including imposing sanctions pursuant to Arizona Rule of Family Law Procedure ("Rule") 76(D). Ariz. R. Fam. L.P. 91(Q). The

⁶ Although Wife did not cite a basis for her motion to remove, the motion was made pursuant to Arizona Rule of Family Law Procedure 91(H), as it sought post-decree relief from an order regarding the sale of the parties' real properties. See Ariz. R. Fam. L.P. 91(H) (any party seeking post-decree or post-judgment relief not specifically addressed in Rule 91 shall file a petition in compliance with paragraph A of Rule 91). We treat the motion to remove as we would a motion for post-judgment relief pursuant to Arizona Rule of Civil Procedure 60(c), which permits a party to petition a court for relief from final judgment for the following reasons: (1) mistake, (2) newly discovered evidence, (3) fraud or misrepresentation, (4) void judgment, (5) satisfied, released or discharged judgment, or (6) any other reason justifying relief from the operation of the judgment. See Ariz. R. Fam. L.P. 1 cmt. ("Wherever the language in these rules is substantially the same as the language in other statewide rules, the case law interpreting that language will apply to these rules.").

nonexclusive list of sanctions in Rule 76(D) includes: "(1) an order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting that party from introducing designated matters in evidence; [and] (2) an order striking out pleadings . . . or rendering a judgment or temporary order." Ariz. R. Fam. L.P. 76(D) (emphasis added).

¶17 Here, the parties were notified that failing to appear at the hearing would result in imposition of all available sanctions pursuant to Rule 76(D), "including proceeding to hear this matter by default based upon the evidence presented by the appearing party." Husband failed to appear at the hearing. Accordingly, the court acted within its discretion by proceeding with the hearing on Wife's motion and entering a judgment against Husband based upon the evidence presented at the hearing.⁷ Thus, the pertinent issue on appeal is whether there is substantial evidence supporting the court's decision to remove Husband from participating in the real estate transactions.

¶18 Husband argues there is insufficient evidence he refused to comply with the terms of the court's order regarding

⁷ The court could have simply entered judgment in Wife's favor. Ariz. R. Fam. L.P. 76(D).

the sale of the properties. For this argument, Husband relies on Rule 89(A).⁸

¶9 Husband previously violated two provisions of the court's order regarding the sale of the marital residence thereby triggering Rule 89(A). First, Husband failed to timely respond to the only offer on the marital residence. Additionally, Husband did not sign the listing agreement within three days of presentation by the special commissioner. More important, and as discussed further below, problems with Husband's ability to timely respond to offers and to execute sales contracts on any of these properties more than justified the court's order. Accordingly, there was no error removing Husband from participating in transactions concerning the marital residence and directing Wife to be the sole negotiator for the marital residence.

¶10 Regarding the rental properties, as of the hearing date there had been no offers. While it is unclear whether Husband directly violated any provisions of the order concerning

⁸ Rule 89(A) provides, in pertinent part:

If a judgment directs a party to execute a conveyance of land . . . or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court, and the act when so done has like effect as if done by the party.

the rental properties, there is evidence Husband harassed the special commissioner and caused a delay in getting the listing agreement for the rental properties approved. Specifically, the special commissioner for the rental properties testified that Husband unreasonably and repeatedly requested copies of leases, which the special commissioner did not possess, with the stated intent of raising rents on the properties. Further, she informed Husband that raising the current rents, which were within the market rates, might negatively affect the marketing and sale of the properties, due to potential vacancies. Despite her explanations, Husband continued requesting the leases.

¶11 Moreover, the court inquired as to whether the property values would continue to diminish so long as the properties remained unsold. Wife testified she was concerned Husband's behaviors, inaccessibility, and lack of responsiveness would delay the process and the parties would continue to lose equity in the properties. Further, the special commissioner testified there already had been delay getting the listing approved because of Husband's failure to maintain access to a fax machine. She explained, "[I]n today's market, you really don't want to waste any time."

¶12 Given all of this evidence, we find substantial support for granting Wife's motion to remove Husband from

participating in the real estate transactions.⁹ Accordingly, we find no error in the court's removing Husband from the transactions.

2. *Mental Competency*

¶13 Further, we disagree with Husband's contention that the trial court's brief discussion of his bizarre behaviors and/or mental competency at the hearing constituted a "finding." In fact, in its minute entry order, the court made no findings in that regard and actually denied Wife's motion for the court to order a psychological examination of Husband. Although the court was concerned about Husband's behaviors, accessibility, and mental competency, it ultimately granted Wife's motion because doing so was in the best interests of the marital community. Husband's history of harassing the court-appointed special commissioners charged with selling the various properties, combined with his demonstrated inability to timely respond to offers made it imperative that Wife be granted the authority to consider and execute reasonable sales contracts for these properties.

⁹ Moreover, Wife testified her intention is to sell the properties for the highest price possible and she will not take merely any offer for the properties if the offer is too low. Accordingly, the court concluded Wife has the same incentive as Husband - to maximize the profits on the properties.

3. Attorneys' Fees

¶14 Finally, Husband argues the court erred in awarding attorneys' fees to Wife pursuant to A.R.S. § 25-324 (Supp. 2009)¹⁰ because it did not properly consider the financial resources of each party. We review an award of attorneys' fees for an abuse of discretion. *Breitbart-Napp v. Napp*, 216 Ariz. 74, 83, ¶ 35, 163 P.3d 1024, 1033 (App. 2007).

¶15 Under A.R.S. § 25-324(A), a court may award reasonable attorneys' fees after considering both parties' financial resources and the reasonableness of their respective positions. Although a court is required to consider both financial circumstances and reasonableness before deciding to grant attorneys' fees, it may do so based on evidence supporting either circumstance. *See Magee v. Magee*, 206 Ariz. 589, 591 n.1, ¶ 8, 81 P.3d 1048, 1050 n.1 (App. 2004).

¶16 Here, the court granted Wife attorneys' fees "[a]fter considering . . . what little the Court can discern of [Husband's] financial circumstances, [Wife's] financial circumstances, and the reasonableness of the positions the parties have taken." Husband does not challenge the court's assessment of his reasonableness and the record supports a finding he was unreasonable: Husband caused one special

¹⁰ We cite the current version of the applicable statutes because no revisions material to our analysis have since occurred.

commissioner to resign, caused delays with the listing agreements, and failed to appear at the hearing despite being ordered to appear.

¶17 Regarding the parties' financial resources, Husband relies on *Breitbart-Napp*, which we find distinguishable.¹¹ Here, the parties' affidavits of financial information were filed in September and October 2007, approximately a year and a half before the hearing.¹² At the hearing, Wife testified Husband was likely living off money he had hidden over the years. Although there was little evidence regarding Husband's financial resources, the court considered the information available. Had Husband chosen to attend the hearing, he could have submitted controverting evidence.

¶18 Because the court specifically stated it considered both parties' financial resources and the record shows Husband

¹¹ There, the superior court abused its discretion by awarding attorneys' fees pursuant to A.R.S. § 25-324 because the record was inadequate to determine the parties' financial status and because the court imposed a prevailing party standard. *Breitbart-Napp*, 216 Ariz. at 84, ¶ 39, 163 P.3d at 1034. The financial information in that record was limited to the parties' affidavits of financial information; one filed three years earlier and the other filed eight months earlier. *Id.*

¹² In the affidavits, Husband stated he had income of \$4000 per month and Wife stated she had income of \$5922 per month. Later, in his response to Wife's application for attorneys' fees, Husband submitted unsigned copies of his 2007 and 2008 tax returns which showed yearly incomes of \$16,929 and \$2610 respectively.

took unreasonable positions, we find no abuse of discretion awarding Wife attorneys' fees under A.R.S. § 25-324.

¶19 Husband requests an award of attorneys' fees on appeal pursuant to the parties' property settlement agreement. The property settlement agreement provides the prevailing party in a legal proceeding commenced "for purposes of construing or enforcing" the agreement shall recover attorneys' fees from the opposing party. Husband is not the prevailing party, nor is the settlement agreement at issue on appeal. Accordingly, we deny Husband's request for fees.

¶20 Wife also requests attorneys' fees on appeal pursuant to A.R.S. § 25-324. In the exercise of our discretion, we deny her request for fees.

CONCLUSION

¶21 For the foregoing reasons, we affirm the superior court's order.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
MAURICE PORTLEY, Presiding Judge

_____/S/_____
MARGARET H. DOWNIE, Judge