FILED BY CLERK
SEP 25 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JEFFERY J. HARRIS, Plaintiff/Appellant, v. THE CITY OF BISBEE, ARIZONA, and BISBEE CITY CLERK, HELEN LEHR, Defendants/Appellees.	2 CA-CV 2009-0038 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause Nos. CV200600952 and CV200600953 (Consolidated)

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Jeffery J. Harris
Bisbee
In Propria Persona

John A. MacKinnon, Bisbee City Attorney
By John A. MacKinnon
Bisbee
Attorney for Defendants/Appellees

H O W A R D, Chief Judge.

¶1 In this appeal after remand in a referendum-petition special action, appellant Jeffery Harris argues the trial court abused its discretion in denying his motion for sanctions against appellee City of Bisbee (City) and erred in ruling on procedures for processing the petitions. Determining we have no jurisdiction over the appeal of the sanctions order and finding no error in the trial court's procedural ruling, we affirm.

Background

¶2 The procedural background and relevant facts are undisputed. In November 2006, Harris brought a statutory special action after the City refused to accept two sets of referendum petitions he had sought to file. The trial court ordered the City to process the petitions, pursuant to A.R.S. § 19-121.01. The City appealed to this court in September 2007. We agreed with the trial court that the individual invalid entries, which Harris had improperly altered, did not invalidate the remaining signatures and, in our disposition, directed the City "to process th[e] petitions pursuant to § 19-121.01."

¶3 Our mandate issued on September 19, 2008, and ordered the superior court to "conduct such proceedings as required to comply with the Opinion." Copies of the mandate and decision were sent to Harris and the City. The record, including the original referendum petitions that had been designated as part of the record, was returned to the trial court on September 19, 2008, and received there on September 22. With the exception of a motion by Harris "to preserve evidence," the record shows no action was taken to comply with our mandate until October 21, 2008, when the City requested "that the Clerk of the Court be

directed to deliver to the City Clerk the two sets of Referendum Petitions that were admitted into evidence in this case." On October 23, the trial court ordered the clerk to deliver the petitions to the City "as soon as they are available."

¶4 Thereafter, Harris moved for sanctions against the City "for a bad faith failure to timely comply with [this court's] Mandate."[1] After a hearing, the trial court denied Harris's motion for sanctions and granted a request the City had made for the court to set forth "procedures to be used to comply with the Mandate." The procedures outlined by the trial court did not include a time limit, stating only: "The City has discretion to set a special referendum election before the next ensuing primary or general election in 2010." The court also finally released the petitions to the City on December 29. Harris then filed the instant appeal.

Discussion

I. The trial court's decision to deny sanctions is not an appealable order

¶5 As a preliminary matter, the City challenges this court's jurisdiction of the appeal from the order denying sanctions, contending Harris's "motion for sanctions falls

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[1]Harris cited Rule 24(e), Ariz. R. Civ. App. P., and Rule 58(c), Ariz. R. Civ. P., as a basis for his request for sanctions. The first does not exist and the latter relates to the enforcement of a judgment, not sanctions. He later cited Rule 24(a)(5), Ariz. R. Civ. App. P., as a basis for sanctions. That rule directs appellate courts to return records to the lower court when a mandate is issued. But, in view of the nature of his request—that the court sanction the City for failing to comply with our mandate—we infer the sanctions were sought pursuant to A.R.S. § 12-864. *See Green v. Lisa Frank, Inc.*, ___ Ariz. ___, ¶ 11, 211 P.3d 16, 23 (App. 2009).

within the ambit of A.R.S. § 12-864" and the trial court's denial of that motion, therefore, is not an appealable order. *See Green v. Lisa Frank, Inc.*, ___ Ariz. ___, ¶ 11, 211 P.3d 16, 23 (App. 2009). Harris does not deny that the motion for sanctions falls within § 12-864 but maintains we have jurisdiction of this appeal "pursuant to A.R.S. §§ 12-2101(C) and (E)."

¶6 "Our supreme court has repeatedly ruled that contempt orders are not appealable." *Green*, ___ Ariz. ___, n.3, 211 P.3d at 24 n.3. But this court allowed an appeal from the sanction order based on contempt in *Green* because the order finally disposed of the matter as a whole: the court's sanctions against Green included dismissing his cross-claim, striking his reply to the counterclaim of Lisa Frank, Inc. (LFI), and granting LFI judgment on all but one issue, thereby finally disposing of the matter in favor of LFI. *Id.* ¶¶ 9, 17.

¶7 We concluded that "contempt orders are unappealable unless the substance or effect of the order in question—beyond including a 'finding[] of contempt'—qualifies the order as one of those made appealable pursuant to § 12-2101." *Id.* ¶ 21, *quoting State v. Mulligan*, 126 Ariz. 210, 216, 613 P.2d 1266, 1272 (1980) (alteration in *Green*). Thus, because the sanction order in *Green* created a final judgment, we concluded we had jurisdiction to hear the appeal. *Id*. ¶¶ 22, 23. Unlike the situation in *Green*, however, the trial court's denial of the sanction here did not dispose of the litigation in full and thereby create a final, appealable judgment, nor was the order otherwise appealable under § 12-2101. Thus, the denial of the motion for sanctions falls into the long-standing, general rule that contempt orders are unappealable. *See Hurd v. Hurd*, ___ Ariz. ___, n.2, 213 P.3d 683, 685

(App. 2009) (order denying contempt sanctions unappealable); *Danielson v. Evans*, 201 Ariz. 401, ¶ 35, 36 P.3d 749, 759 (App. 2001) ("[T]his court lacks . . . jurisdiction over an appeal from a civil contempt adjudication."); *see also Mulligan*, 126 Ariz. at 216-17, 613 P.2d at 1272-73. As a result, we cannot address Harris's arguments related to the denial of sanctions.

II. Ruling on procedures

¶8 Although the City has not argued that this court lacks jurisdiction to hear Harris's arguments concerning the trial court's specification of the procedures for the processing of the petitions and the City's failure to comply with the mandate, we must examine our own jurisdiction. *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304, 812 P.2d 1119, 1122 (App. 1991). A trial court's entry of judgment based on a "specific mandate" is not appealable. *Scates v. Ariz. Corp. Comm'n*, 124 Ariz. 73, 75, 601 P.2d 1357, 1359 (App. 1979). Giving Harris the benefit of any doubt, some of his arguments do not fall within this prohibition because they involve areas in which the mandate was not specific or because they concern the City's actions, rather than the trial court's. Accordingly, we will address those arguments.

¶9 Harris argues the City circumvented the mandate and has not been held to the same standard as he has and that the trial court erred by "emasculating the mandate by removing the time sense." Relying on *Borrow v. El Dorado Lodge, Inc.*, 75 Ariz. 218, 254 P.2d 1027 (1953), and § 19-121.01, he maintains the City was required to forward the

petition for verification to the recorder's office within fifteen days of our mandate. Because Harris presents a legal question involving statutory construction, we review this issue de novo. *Forszt v. Rodriguez*, 212 Ariz. 263, ¶ 9, 130 P.3d 538, 540 (App. 2006).

¶10 As Harris correctly points out, a trial court is "bound by the decision and mandate of an appellate court." *Tovrea v. Superior Court*, 101 Ariz. 295, 297, 419 P.2d 79, 81 (1966). And,

> an appeal suspends from the time of its perfection the time allowed by the judgment or order appealed from for the performance of a condition affecting a substantive right or obligation of a party, so that the time for the performance of such condition commences to run from the time the appellate court's judgment or order becomes effective, . . . under our practice, the date of issuance of the mandate.

Borrow, 75 Ariz. at 220, 254 P.2d at 1028-29. But Harris's conclusions are incorrect for several reasons.

¶11 First, the mandate orders the *superior court*, not the City, to conduct further proceedings to comply with our decision. Therefore, the City did not "circumvent" the mandate by not immediately taking action. Second, *Borrow* involved a specific time for remittitur set by the superior court. 75 Ariz. at 220, 254 P.2d at 1029. Neither the trial court's judgment nor our decision affirming the judgment on appeal specified a "time for the performance of [a] condition." *Id.* at 220, 254 P.2d at 1028. Rather, we stated only that the City should "process th[e] petitions pursuant to § 19-121.01."

¶12 Harris argues, however, that by directing the City to process the petitions pursuant to § 19-121.01, our opinion required the City to "transmit the appropriate petition sheet facsimiles to the county recorder within 15 business days following the issuance of the appellate mandate." When Harris instituted this action, that section required the City to process a referendum petition "[w]ithin fifteen days . . . of the *date of filing* . . . and issuance of the receipt." 1999 Ariz. Sess. Laws, ch. 353, § 5 (emphasis added); *see also* A.R.S. § 19-141(A) ("The provisions of [§ 19-121.01] shall apply to the legislation of cities . . . . The duties required of the secretary of state as to state legislation shall be performed in connection with such legislation by the city . . . clerk, . . . or person performing the duties as such."). Thus, the statute addresses the time limits imposed after the filing of a petition and not the procedure to be employed after remand following a challenge to the City's initial processing or rejection of a petition. And this court did not impose a fifteen-day requirement on the City but rather directed that the City follow the procedures in § 19-121.01. The fifteen-day requirement, therefore, does not apply here. And the superior court did not modify or ignore this court's mandate or apply a different standard to Harris.

¶13 Finally, Harris has not shown that the City failed to act promptly upon receipt of the petitions from the court or that the court allowed the City to delay processing the petitions in such a way as to prejudice him. In the absence of such prejudice, we will not reverse. *See* Ariz. R. Civ. P. 61 (court will not reverse for harmless error). And because we

have found that the City did not violate our mandate, we need not address Harris's argument that the City forfeited its authority to proceed with the election.

Disposition

¶14 The judgment of the trial court is affirmed. In our discretion, we deny the City's request for attorney fees, made pursuant to Rule 25, Ariz. R. Civ. App. P.

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JOSEPH W. HOWARD, Chief Judge

CONCURRING:

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PHILIP G. ESPINOSA, Presiding Judge

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PETER J. ECKERSTROM, Judge