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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2008-000127-001 DT

05/28/2008

JUDGE PRO TEM WILLIAM SCHAFER

CLERK OF THE COURT
S. Bindenagel
Deputy

KENT C HARDING

SCOTT M CLARK

v.

JOHN W STONE (001)
SHIRLEY STONE (001)

JOHN W STONE
20626 N 29TH DR
PHOENIX AZ 85027
SHIRLEY STONE
20626 N 29TH DR
PHOENIX AZ 85027

MANISTEE JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

Lower Court Case No. CC2007176431

The Superior Court has jurisdiction of this appeal pursuant to Article VI, Section 16 of the Arizona Constitution and A.R.S. § 12-124(A). The appeal is limited to the record of the proceedings below and the parties' memoranda.

This is an appeal from a justice court denial of the Stones' motion to vacate a writ of restitution issued by the justice court on September 7, 2005.

Curiously enough this case started in both the state and federal courts almost three years ago, July 5, 2005, when the Stones filed a petition in federal court for bankruptcy protection under Chapter 13 of the U.S. Code and with it was a notice that "The filing of a bankruptcy case automatically stays certain actions against the debtor and the debtor's property."

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Harding and the Stones were having a brouhaha at that time concerning rent money. Harding claimed the Stones owed to him. Being aware of the fact that the Stones had filed for bankruptcy, Harding filed a motion in federal court on July 11, 2005 for relief from the automatic stay, to allow him to file a petition in state court for a judgment for the money and a writ of restitution to collect the money.

On July 26, 2005 the district court granted Harding's request for relief from the automatic stay. And on the same day the district court dismissed Stones' Chapter 13 case because of procedural blunders.

So, on July 28, Harding filed his petition for judgment and a writ of restitution in the Peoria Justice Court and the Court set the matter for a hearing on August 4, 2005.

Two days later, August 2, 2005 the Stones filed another petition for bankruptcy in federal court, this one under Chapter 11.

On August 4, although the Stones knew that there was hearing that day on Harding's petition, they did not appear. The justice court, unaware that the Stones had filed for bankruptcy two days before, found them guilty of forcible detainer and entered judgment for Harding for \$8,276, "with a writ of Restitution to issue on: 8/10/2005."

On August 11, the Stones showed the justice court their filing of the Chapter 11 bankruptcy suit and the court immediately ordered that "the writ of restitution issued on 8-10-05 be vacated."

The next day, August 12, Harding filed a motion in federal court for emergency relief from the revived stay and the court set a hearing on the motion for August 31.

On the day before that hearing the Stones filed a motion in federal court to dismiss their petition for Chapter 11 bankruptcy relief and the court set that motion for a hearing on October 5, 2005.

The Stones did not appear at the August 31 hearing and on September 6, 2007 the federal court granted Harding's motion to lift the automatic stay in the Chapter 11 proceeding (which was still in existence because the federal court had not yet ruled on the Stones' motion to dismiss it – that was to be heard on October 5, 2005).

On September 7, 2005 the Peoria Justice Court issued a new writ of restitution to Harding. The writ was executed the next day and the Stones were evicted from their home. Later, in November, Harding filed a notice for a public sale of the home to take place in December.

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On August 29, 2005 the Stones filed a motion in the Justice Court to vacate the writ of restitution and the judgment of \$8,276 issued on September 7 because they had not been served with a summons, were not notified of the hearing on September 7, and because "the August 10, 2005 judgment that was used by the plaintiff to procure the September 7, 2005 writ of restitution was a void order that was vacated by Judge Anderson on August 11, 2005."

On September 11, 2005 the Justice Court denied the motion to vacate.

Two years later, September 25, 2007, the Stones filed this appeal from that September 11, 2005 ruling.

The Stones argue three things on appeal.

The first point they urge is that the money judgment rendered against them on August 4, 2005 was vacated on August 11 and any order based upon that judgment, for instance the order of September 7, is void.

It is interesting to note that the justice court on August 11 did not vacate the judgment entered on August 4; it vacated only the writ of restitution "issued on 8-10-05."

However, assuming the order encompassed the judgment and the writ of restitution, the judgment was not dismissed by the justice of the peace and when the stay order was lifted the proceedings on the judgment went forward. The Stones have not cited any law, statute or case, that requires such a judgment to be dismissed.

But more importantly, the Stones did not appeal the federal court's lifting of the stay on September 6 and they did not appeal the justice court order of September 7 issuing the writ. They did nothing for over two years and now their time to appeal has passed. A.R.S. § 12-1179 (A); A.R.S. § 22-261; Rule 4, Ariz. Superior Court Rules of Appellate Procedure; See *In re Schwartz*, 954 F.2d 569 (9th Cir. 1992); See *In re National Environmental Waste Corp.*, 129 P.3d 1052, 1054 (9th Cir. 1997). Because of that they cannot now attack the rulings.

Their second contention is that they had no notice of the hearing held on September 6 in federal court. First of all, the record doesn't show whether they had notice of the hearing, but also there is no requirement in federal court that the debtor be given notice of a hearing on a request for emergency relief. And again, the Stones did not appeal from the result of that hearing and cannot attack it at this late date.

Their last argument is rather opaque. They seem to be saying that the issues presented to the justice court at the August 4 hearing (or perhaps when the writ was issued on September 7)

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had already been decided by another court (presumably the federal district court) “thereby precluding this (sic) courts from reviewing the matter.” But there is nothing in the record to substantiate that. The federal courts ruled on motions properly before them, and the state courts did likewise. There was no federal preclusion.

This Court may not substitute its judgment for that of the trial court and if there is substantial evidence to support the trial court’s decision this Court will not reverse unless the trial court has abused its discretion.

We find that there is substantial evidence to support the lower court’s order and that the court did not abuse its discretion.

Therefore,

IT IS ORDERED AFFIRMING the judgment of the court below and it is ordered remanding this case to the Justice Court for any further proceedings consistent with this opinion.