SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

10/18/2002

CLERK OF THE COURT
FORM V000A

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

CV 2002-012350

FILED: _____

TIM A KING

DAVID T MADDOX

v.

MORTGAGE POWER INC, et al.

LOUIS B SCHAEFFER

PHX JUSTICE CT-NE
REMAND DESK CV-CCC

MINUTE ENTRY

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This Court has taken this matter under advisement, considered the record from the Phoenix Justice Court-NE and reviewed the memoranda of the parties.

The case was tried in the Phoenix Justice Court-NE April 24, 2002.[1] Mr. King was the Plaintiff (Appellant here); Mortgage Power, Inc. (Mortgage Power) was the Defendant (now Appellee). Previously, Mr. King had named Randy Howell, President of Mortgage Power as a co-defendant; however, the Phoenix Justice Court-NE, on Defendant's motion, dismissed the complaint against him April 19, 2001.[2] Mr. Howell's role in the case was that of the President of Mortgage Power; he had no personal role. Defendant claimed attorney's fees of $4,780.

[1] Appellant's memorandum, p. 2.
[2] Appellee's memorandum, p. 2.

At trial April 24, 2002, the court ruled for Defendant, determining that Plaintiff should take nothing. The court ordered Plaintiff to pay court costs of $24 and Defendant's reasonable attorney's fees, which it reduced, presumably in the interests of equity since no rationale is available, from $4,780 to $3,000.[3] The court did not indicate whether the attorney's fees would accrue any interest or at what rate.[4]

An appellate court does not conduct trials. It may consider only those matters in the record before it. Appellant ordered no transcripts or tapes of the trial court's proceedings, so none are available to explain the trial court's ruling. For this appeal, the trial court furnished its judgment and exhibits of record. Appellant and Appellee provided their memoranda in which each cites authority for his respective position. This court, therefore, is limited in the scope of its review and must presume that matters not contained in the record would support the trial court's ruling.[5]

Appellant raises four issues on appeal in this case:[6]

1. Failure to disclose prohibits introduction of tape records.

2. The tape recordings were introduced over appellant's objection without proper authentication.

3. Denial of production of loan files prejudiced plaintiff's ability to prove conversion or to impeach appellee; and

[3] Judgment, Phoenix Justice Court-NE, April 24, 2002, Case No. CV2002-009666, p. 1.
[4] *Id.*
[5] *Lewis v. Oliver*, 178 Ariz. 330, 873 P.2d 668 (App. 1994); *National Advertising Co. v. Arizona Department of Transportation*, 126 Ariz. 542, 617 P.2d 50 (App. 1980).
[6] Appellant's reply memorandum, pp. 2-3.

4. The amount of attorneys fees awarded to defendant was not too small.

Appellee cross-appeals for an additional $1,780.00, the amount by which the trial court reduced its attorney's fees.

This court will deal with each issue in turn.

First, this court understands that failure to disclose might – under certain circumstances – prohibit the introduction of Appellee's tape recordings in accordance with the Arizona Rules of Civil Procedure 26.1(8). That provision in the rule indicates that each party must disclose "[t]he existence, location, custodian, and general description of any tangible evidence or relevant documents that the disclosing party plans to use at trial . . . ."[7] Mortgage Power, however, indicates that it did deliver the pertinent taped telephone conversations to Appellant's counsel April 10, 2002.[8] Nonetheless, even if it had not done so, failure to disclose might be justifiable under certain conditions, as when the material was commingled with privileged or confidential information to which the Appellant was not entitled, "such failure [was] harmless," or later admissibility was conditioned ". . . by leave of court for good cause shown . . . ."[9] As Appellee indicates, Mortgage Power provided hundreds of pages of documentation to satisfy disclosure and discovery[10] and answered numerous interrogatories on short notice.[11] Defendant objected to various requests for production that would have involved thousands of pages of documents concerning the confidential credit and financial records of hundreds of borrowers.[12] All told, Appellee claims to have delivered the tapes, a total of 616 pages of documents, and

[7] Ariz. R. Civ. P. 26.1(8).
[8] Appellee's memorandum, p. 3.
[9] Ariz. R. Civ. P. 37(c)(1).
[10] Appellee's memorandum, pp. 2, 3.
[11] *Id*. p. 4.
[12] *Id*.

answers to Appellant's interrogatories.[13] Since the record provide insufficient basis to support the Appellant's contentions, this court will not disturb the trial court's ruling.

Second, Appellant claims the tape recordings were introduced over appellant's objection without proper authentication. No foundation exists in the record for this assertion. Sufficient authentication generally is ". . . evidence sufficient to support a finding that the matter in question is what its proponent claims."[14] Such authentication may include, "but [is] not limited to . . . [v]oice identification" . . . and "[t]elephone conversations with confirming fact patterns and circumstances . . . ."[15] Moreover, because of its relevancy, such evidence is generally ". . . admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of Arizona or by applicable statutes or rules . . . .[16] Here, the record does not support Appellant's contention that the trial court improperly disregarded any right due him.

Third, Appellant claims that denial of production of loan files prejudiced plaintiff's ability to prove conversion or to impeach appellee. As indicated, Appellee Mortgage Power

> ". . . objected to [the relevant request for production], which [would have] required the production of all of its loan files on loans closed (and those loan files opened but not closed) between October 2000 to October 2001. This request for production would have involved the production of thousands of pages of documents, including credit

[13] Appellee's memorandum, p. 3.
[14] 17A A.R.S. R. Evid. 901 (2002).
[15] 17A A.R.S. R. Evid. 901(b)(5)-(6) (2002).
[16] 17A A. R. S. R. Evid., Rule 402.

> reports and financial records of hundreds of borrowers."[17]

Nothing in the record indicates that the trial court disagreed with the Appellee's claim as it did not compel production. This court finds no reason to disturb that implied finding.

Lastly, this court consolidates Appellant's final issue with that of Appellee's cross-appeal. Appellant claims that the amount of attorney's fees awarded to defendant was not too small, whereas Appellee claims that it was. Because the record does not provide the trial court's rationale for the reduction in fees, this court must conclude that the trial court had justification for its reduction in the fees. Since this court has found no merit to any of Appellant's claims, it finds no need to argue with the prior handling of attorney's fees and will not disturb ruling of the trial court. In like fashion, Appellee's cross-appeal for additional attorney's fees is without merit.

Finding no error,

IT IS THEREFORE ORDERED affirming the judgment of the Phoenix Justice Court-NE.

IT IS FURTHER ORDERED remanding this case back to the Phoenix Justice Court-NE for all future proceedings.

/S/ HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT

[17] Appellee's memorandum, p. 4.