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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

FRANCIS SHIVERS, Plaintiff and Appellant, v. LAURA PERRETT, Defendant and Respondent.	B197566 (Los Angeles County Super. Ct. No. BD417230)

APPEAL from an order of the Superior Court of Los Angeles County, Gretchen Taylor, Commissioner. Affirmed.

Francis Shivers, in pro. per., for Plaintiff and Appellant.

Ronald A. Litz and Alexandra R. Lavinsky for Defendant and Respondent.

Plaintiff and appellant Francis Shivers (Shivers), in propria persona, appeals a postjudgment order in favor of defendant and respondent Laura Pauline Perrett (Perrett), which order granted Perrett's motion to enforce the judgment in the underlying dissolution matter.

We perceive no error in the trial court's rulings and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND[1]

In December 2004, Shivers filed for dissolution. In February 2006, the parties reached a settlement of all issues. Shivers failed to sign the judgment papers, which caused Perrett to bring a motion for entry of judgment. (Code Civ. Proc., § 664.6.) On February 24, 2006, the trial court granted Perrett's motion for entry of judgment pursuant to the settlement agreement.

On April 12, 2006, Perrett filed a motion to enforce the judgment of dissolution by ordering Shivers to return personal items he had taken from her home, which items had an estimated value of $100,000. In the alternative, Perrett requested the $100,000 be credited against Shivers's receipt of a $195,000 equalizing payment he was owed under the judgment. Perrett also requested attorney fees, costs and sanctions against Shivers for his actions in violating the judgment, removing her personal belongings and damaging her house while he was in possession.

Perrett's supporting declaration set forth the extensive damage caused by Shivers to her home, including his carving the initial "C" into the walls, woodwork and appliances, and affixing stickers bearing his initial all over the house. The wood had to be sanded to eliminate the carved initials and in some cases, the wood had to be replaced. The entire interior had to be repainted and the carpets and appliances replaced.

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[1] The facts are gleaned from the record.

On February 7, 2007, the matter ultimately came on for hearing. The trial court noted the matter arose under Family Code section 721, [[2]] which requires that "pending the finality of division of community property, each party has a fiduciary duty to the other, and owes the other the highest duty of care, as a fiduciary, to preserve, protect, maintain any and all community property in its most pristine state. [¶] So the duty arose from their marriage relationship, and continued until such time as the property was divided and/or turned over." At the hearing, the trial court heard testimony by the parties. Thereafter, the trial court received written closing argument.

On March 9, 2007, the trial court issued an order granting Perrett's motion and setting forth the following findings:

"The Court finds by clear and convincing evidence, that [Shivers] committed intentional destruction and waste to the family residence during his period of exclusive possession. The Court finds that [Perrett] did not have an inspection of the condition of the property prior to the settlement on the record and that she relied on representations on the record at that time that it would be free of destruction when returned to her.

"The type of destruction was meant to harass and disturb [Perrett] as it consisted of many markings everywhere of [Shivers's] personal symbol, a star, as well as carved initial 'C' representing [Shivers] who goes by the nickname of 'Coyote.' Without enumerating all the types of damage, the Court finds that it included writing on the walls with permanent marker, glitter everywhere, leaving an animal locked in a room so that the entire room was destroyed by clawed doors and flooring, painting glow in the dark eyeballs on the master bedroom ceiling, destroying her personal property or removing her personal property.

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[2] All statutory references are to the Family Code, unless otherwise specified.

"The Court finds that [Shivers] violated his duty to [Perrett] and the community under . . . Section 721 and is liable for the diminution in value of the community to [Perrett] due to his intentional destruction of the residence and her personal property.

"The Court further finds that the reasonable value of repairs to the residence without considering the incalculable value of lost sentimental items is the sum of $30,800. The Court also finds that [Perrett] was constructively evicted from her residence after it was awarded to her due to the extensive nature of the repairs and that she expended the sum of $9,200.

"[P]erett is awarded the sum of $40,000 payable to her by [Shivers] forthwith, which sum can be offset to the extent possible by the remaining sums she owes him on account of the equalization payment.

"Additionally the Court finds that [Shivers] shall pay [Perrett's] attorney forthwith pursuant to [section] 271, the sum of $25,000 in attorney's fees."

On March 14, 2007, Shivers filed a timely notice of appeal from the order.[3]

CONTENTIONS

Shivers contends: the trial court denied his due process right to an impartial trier of fact; the trial court coerced him into the hearing by improperly predicating a continuance on the confiscation of his assets; the trial court ignored rules of evidence in favor of its predisposed finding based on inadmissible evidence; the trial court abused its discretion, making findings which were factually incorrect and factually inconsistent with its own prior rulings; and the trial court further exhibited its prejudice by hindering his ability to pursue this appeal.

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[3] On August 27, 2008, during the pendency of this appeal, the superior court entered an order deeming Shivers a vexatious litigant.

DISCUSSION

1. *Alleged bias by trial court*.

Shivers contends he was denied his right to an impartial trier of fact. According to Shivers, on November 13, 2006, the trial judge made statements on the record indicating it was biased against him and manifested its prejudging of disputed issues.[4] The contention fails.

A petition for writ of mandate pursuant to Code of Civil Procedure section 170.3, subd. (d), is the exclusive means by which a party may seek review of an unsuccessful peremptory challenge against a trial judge (Code Civ. Proc., § 170.6), or an unsuccessful challenge for cause (Code Civ. Proc., § 170.1). (*People v. Hull* (1991) 1 Cal.4th 266, 273-274; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 2:259.3, p. 2-121.)

Shivers acknowledges that a petition for writ of mandate is the exclusive method for obtaining review of judicial disqualification, but asserts, pursuant to *People v. Mayfield* (1997) 14 Cal.4th 668, that a party may nonetheless assert on appeal a claim of denial of the due process right to an impartial judge.

Mayfield enables a *criminal* defendant to assert on appeal a claim of denial of the due process right to an impartial judge. (*People v. Mayfield, supra*, 14 Cal.4th at p. 811.) Because this is a civil matter, *Mayfield* is inapposite. Therefore, Shivers's claim of judicial bias is not properly presented in this appeal.

2. *No merit to Shivers's contention he was "coerced" into a hearing*.

Shivers asserts that on November 7, 2006, his newly retained attorney requested a continuance to familiarize himself with the file. According to Shivers, the trial court "stated on the record that it would rule any continuance *be contingent on the confiscation*

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[4] On January 31, 2007, the trial court struck Shivers's statement of disqualification on the grounds it was untimely and disclosed no legal grounds for disqualification.

of [Shivers's] assets. (AA Exhibit. 4, pp. 33-48)" (Italics added.)[5] As a result, Shivers's attorney "was forced into trial unprepared, and [Shivers] was deprived of the ability to have a fair hearing."

In view of the fact the evidentiary hearing on the motion to enforce the judgment did not occur until February 7, 2007, it would appear Shivers's counsel had ample time to prepare for the hearing. We decline to speculate that the March 9, 2007 order would have been more favorable to Shivers if his counsel had additional time to familiarize himself with the case.

3. *No merit to Shivers's contention the trial court ignored rules of evidence*.

As indicated, the trial court found "by clear and convincing evidence" that Shivers committed intentional destruction and waste to the family residence during his period of exclusive possession.

However, Shivers contends the trial court ignored the rules of evidence and instead, made its predisposed findings based on inadmissible evidence. Shivers cites Evidence Code section 500, which states "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." Shivers asserts Perrett "failed to produce admissible evidence, *save her oral testimony*." (Italics added.)

With respect to the evidentiary showing made by Perrett, Shivers has not shown why Perrett's oral testimony was insufficient to meet her burden of proof at the hearing. Further, oral testimony was not even required. California Rules of Court, rule 3.1306(a), states: "Evidence received at a law and motion hearing must be by declaration or request for judicial notice without testimony or cross-examination, unless the court orders otherwise for good cause shown." Further, in addition to Perrett's oral testimony at the hearing, she filed three declarations, with supporting exhibits, including photographs and

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[5] Shivers's reference to 16 pages of the appellant's appendix is not a proper citation to the trial court's ruling in this regard.

damage estimates, as well as corroborating declarations by Stephen Jaffe, Michael Bosman, and Robert Price.

Given this record, we reject Shivers's contention the trial court lacked admissible evidence on which to base its award of damages to Perrett.

4. *Shivers's contention the March 9, 2007 order contradicted the trial court's earlier rulings is unavailing.*

Shivers contends the trial court's March 9, 2007 order contained factually erroneous findings which contradicted the court's previous rulings. We address his arguments seriatim.

a. *Perrett's reentry into the residence while Shivers was in possession*.

The first paragraph of the March 9, 2007 ruling states that from at least July 12, 2004, when Perrett left the family residence, until March 10, 2006, when Perrett returned pursuant to the judgment, there was only a single entry by Perrett, in April 2005, to remove some clothing.

Shivers contends said ruling is inconsistent with the trial court's finding on January 31, 2005, that during the previous six months Perrett had crawled through a window to enter the house. Shivers further contends that at the time of the April 2005 entry by Perrett, she took more than "some clothing." Shivers cites to an April 8, 2005 order which authorized Perrett to remove various items of personal property from the residence.

Shivers's arguments in this regard are unavailing. The March 9, 2007 order awarded Perrett $30,800 for "the reasonable value of repair to the residence" as well as $9,200 for Perrett's loss of use due to constructive eviction. The issue of Perrett's entry while Shivers was in possession has no bearing on this award of damages to Perrett.

b. *Alleged stalking by Shivers*.

The March 9, 2007 order states that at the January 31, 2005 hearing, the trial court found "at that time that [Shivers] engaged in behavior that was a form of stalking and harassing to [Perrett]."

Shivers contends the March 9, 2007 characterization of the January 31, 2005 order is erroneous because the reporter's transcript of the January 31, 2005 contains a statement by the trial court that "I see no . . . behavior that says that Mr. Shivers has engaged in an assault, threat of an assault, or behavior that rises to the level of such severe emotional harm that he needs to be excluded from his home."

The contention likewise is an irrelevancy because it has no bearing on the March 9, 2007 order awarding $40,000 to Perrett for repairs and loss of use of the residence.

c. *Other alleged bizarre behavior by Shivers*.

The March 9, 2007 order stated that at the January 31, 2005 hearing, the trial court found Shivers "had papered over the windows of the family residence and had engaged in *other bizarre behavior* relative to the family residence." (Italics added.)

Shivers contends the transcripts of the January 31, 2005 hearing reflects that apart from the aforementioned windows, there is no mention of any *other* "bizarre behavior relative to the family residence." However, Shivers has only furnished a *partial* transcript of the January 31, 2005 hearing, consisting of pages 11, 12, 16 and 17. Therefore, Shivers's contention the January 31, 2005 transcript fails to support the trial court's finding merits no discussion.

5. *Shivers's contention regarding denial of his request for appellate attorney fees is not properly presented in this appeal*.

On January 14, 2008, the trial court tentatively awarded Shivers $5,000 for attorney fees to pursue the instant appeal. On February 28, 2008, the trial court reversed itself, stating that although Shivers lacked the means to pay his attorney fees, his appeal was "baseless and not in good faith." On March 20, 2008, the trial court ruled its February 28, 2008 ruling "stands as previously ordered."

Shivers now contends the trial court exhibited its prejudice after the hearing by hindering his ability to pursue this appeal, citing the rulings made January 14, February 28 and March 20, 2008.

Said contention is not properly before this court. The instant notice of appeal, filed March 14, 2007, relates to the March 9, 2007 order granting Perrett's motion to enforce the judgment. The trial court's subsequent rulings, made on January 14, 2008 and thereafter, are beyond the scope of the instant appeal.

DISPOSITION

The March 9, 2007 order is affirmed. Perrett's request for attorney fees on appeal is denied. Perrett shall recover costs on appeal.

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KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.