

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 07/03/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LONDON BRIDGE RESORT, LLC,) 1 CA-CV 11-0208
)
Plaintiff/Appellant,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ADVENTURE CENTER, INC., an Arizona) Rule 28, Arizona Rules
corporation; CHRIS HANSEN; STEVEN) of Civil Appellate
CHICHINSKY,) Procedure)
)
Defendants/Appellees.)
)

Appeal from the Superior Court in Mohave County

Cause No. CV2010-07120

The Honorable Michael J. Burke, Judge

REVERSED AND REMANDED

Beus Gilbert PLLC
by Franklyn D. Jeans
Cassandra H. Ayres
Attorneys for Plaintiff/Appellant

Scottsdale

Law Offices of John C. Churchill
by John C. Churchill
John A. Shannon, Jr.
Julie A. LaBenz

Parker

and
Toby Zimbalist
Attorneys for Defendants/Appellees Adventure Center and Hansen

Phoenix

and
James E. Chavez
Attorney for Defendant/Appellee Chichinsky

Kingman

S W A N N, Judge

¶1 London Bridge Resort, LLC ("London") appeals from the dismissal of its forcible entry and detainer ("FED") action against Adventure Center, Inc., Chris Hansen and Steve Chichinsky (collectively, "Adventure"). London also appeals from the superior court's award of attorney's fees in favor of Adventure. For the following reasons, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

¶2 London owns approximately ninety-six feet of land ("seawall") bordering a channel of water in Lake Havasu.¹ Adventure operates a business that rents recreational watercraft from its floating docks, which run adjacent to London's seawall. Two ramps connect London's seawall to Adventure's docks, allowing for ingress and egress of Adventure's customers and employees.

¶3 In February 2009, Adventure entered into a "Lease and Concession Agreement" with London. The agreement provides that Adventure will pay London fifteen percent of its gross sales every month to "use and occupy" the ninety-six feet of London's seawall. The agreement further provides that its term is "month-to-month" and that London may, in its sole discretion, terminate the lease by providing a thirty-day written notice.

¹ It is unclear from the record how far London's property boundaries extend outward from the water's edge.

¶4 In April 2010, London served Adventure with a written notice stating that it was seeking to terminate the lease. Adventure continued to operate its business. In June 2010, London filed a FED complaint against Adventure under A.R.S. § 33-361. The complaint alleged that London had a superior right of possession to the seawall and that Adventure was in breach of the lease. In response, Adventure moved to dismiss the complaint pursuant to Rule 9(e) of the Rules of Procedure for Eviction Actions.²

¶5 At the hearing that ensued, London responded that the purpose of the lease agreement was to allow Adventure's customers and employees to cross over its land to access the docks. London also argued that it has a right to remove Adventure's docks and install its own docks because it owns the adjacent land. London's complaint, however, sought possession only of the seawall. Adventure admitted London owned the property adjacent to its docks, but argued that London did not have a possessory interest in the land beneath the docks.

¶6 The superior court granted Adventure's motion to dismiss, finding that it lacked jurisdiction because there was a genuine dispute over whether there was a valid lease agreement

² Rule 9(e) provides, "In response to either a complaint or a counterclaim, a party may make a motion to dismiss some or all of the claims."

between the parties. The superior court granted Adventure's request for \$15,547.50 in attorney's fees and costs.

¶7 London timely appeals.

DISCUSSION

¶8 London argues that the superior court erroneously found there was a genuine dispute over whether a valid lease agreement existed between the parties concerning use of London's seawall.

¶9 When a tenant violates a provision of a lease, the person to whom rent is due may commence a FED action for recovery of possession of the premises. A.R.S. § 33-361(A). Section 12-1171 provides that a person is guilty of forcible entry and detainer if he or she

[w]illfully and without force holds over any lands, tenements or other real property after termination of the time for which such lands, tenements or other real property were let to him or to the person under whom he claims, after demand made in writing for the possession thereof by the person entitled to such possession.

¶10 The purpose of a FED action is to provide a summary, speedy, and adequate means for obtaining possession of premises by one entitled to actual possession. *Colonial Tri-City Ltd. P'ship v. Ben Franklin Stores, Inc.*, 179 Ariz. 428, 433, 880 P.2d 648, 653 (App. 1993). Whether plaintiff and defendant have a valid lease is a prerequisite to determining which party is

entitled to possession. *Id.* If the parties dispute the existence of a lease agreement, that dispute must be resolved in a general civil action because the FED statutes do not furnish all of the procedural safeguards provided in a general civil action. *Id.*

¶11 At the hearing, Adventure focused its argument on which party owned the land underneath the docks, claiming that it had acquired title to the land by adverse possession. Citing general principles of wharfing law, London responded that because it owns the land abutting the seawall, it owns the land underneath Adventure's docks. London also informed the court that it seeks to install its own docks in place of Adventure's docks. It appears the court reasoned that the dispute over the seawall and the ownership of the land underneath the docks were so intertwined that it was necessary for the parties to file a general civil action to resolve both disputes together.³ We disagree.

¶12 The record does not support the superior court's conclusion that there was a genuine dispute as to whether a valid lease agreement existed between London and Adventure concerning use of London's seawall.

³ On appeal, Adventure abandons its argument that the superior court had jurisdiction to determine which party owns the land underneath the docks.

¶13 The agreement permits Adventure's employees and customers to cross over London's property to access its docks in exchange for a percentage of its monthly gross sales. We conclude that there was no genuine dispute as to whether a valid lease existed between the parties concerning use of the seawall. And because the seawall was the only property mentioned in the complaint, the court had jurisdiction to address London's FED claim with respect to possession of the leased premises. We therefore reverse and remand.

¶14 Though London stated at the hearing that it seeks ultimately to remove Adventure's docks and replace them with its own, our decision does not address property that was not the subject of the complaint. Therefore, if London seeks to install its own docks in place of Adventure's docks, London may have to prove that it owns the land underneath Adventure's docks in a general civil action.

CONCLUSION

¶15 The judgment dismissing the FED action is reversed. We remand the case for further proceedings on the merits. Because we reverse the superior court's decision, we grant London's request to vacate the award of attorney's fees in favor of Adventure. In our discretion, we award London its request for attorney's fees on appeal, subject to compliance with Rule 21 of the Arizona Rules of Civil Appellate Procedure.

/s/

PETER B. SWANN, Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Presiding Judge

/s/

PATRICIA K. NORRIS, Judge