DIVISION ONE
FILED: 7/18/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| ROBERT J. STEPHAN, JR, an individual, Plaintiff/CounterDefendant/Appellant, v. MARK STEWART, an individual, Defendant/CounterClaimant/Appellee. | 1 CA-CV 12-0731<br>DEPARTMENT E<br>**MEMORANDUM DECISION**<br>(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure) |

Appeal from the Superior Court in Maricopa County

Cause No. CV 2010-053887

The Honorable Maria del Mar Verdin, Judge

**AFFIRMED IN PART, VACATED IN PART, REMANDED**

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Robert S. Porter, P.C. — Phoenix
By Robert S. Porter

and

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By David L. Abney
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By Jesse Cook
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**B R O W N**, Judge

**¶1** This appeal arises out of a lease of a condominium ("condo") and its furnishings between Robert Stephan, the landlord, and Mark Stewart, the tenant. On appeal, Stephan challenges the sufficiency of the evidence regarding his damages claim for lost furnishings and the superior court's "intent" instruction to the jury relating to Stewart's counterclaim for overpaid rent. For reasons that follow, we affirm the jury's verdict denying Stephan's claim but we vacate the jury's verdict awarding damages to Stewart. We also vacate the superior court's award of attorneys' fees and costs in favor of Stewart and remand for a determination of whether either party should be awarded fees or costs incurred in the superior court.

**BACKGROUND**

**¶2** In 2008, Stephan obtained a loan from M&I Bank to purchase the condo, which he then furnished. To secure the loan, Stephan gave the bank a deed of trust on the condo. Because of the decline in the housing market, the condo's value decreased and Stephan owed more on the loan than the condo was worth. Stephan attempted to negotiate a loan modification with the bank and in June 2009 stopped making his loan payments.

**¶3** On July 7, 2009, Stewart leased Stephan's furnished condo for one year, from July 11, 2009 through July 10, 2010.

Pursuant to the lease, Stewart paid Stephan $36,648 as prepaid rent for the year. The lease included a clause, handwritten by Stewart's realtor ("handwritten clause"), which provided:

> Tenant has been informed of Landlord's situation with the lender regarding loan modification, etc. If Tenant is required to vacate the premises prior to expiration of this lease, then Landlord shall reimburse Tenant for all rent plus tax pre-paid but not used through the expiration of the lease.

**¶4** Stephan was unsuccessful in renegotiating the loan with the bank. On February 18, 2010, the bank non-judicially foreclosed on the deed of trust and, making a credit bid, purchased the condo at the trustee's sale. Nonetheless, Stewart continued residing in the condo and, on June 7, 2010, he purchased the condo from the bank.

**¶5** Stephan sued Stewart for the return of his furnishings or their fair market value, and rent for their use after the lease had expired. Stewart counterclaimed for a refund of the prepaid rent from the date of the foreclosure through the end of the lease period. After a trial, the jury found against Stephan on his claim against Stewart and in favor of Stewart on his counterclaim against Stephan. The jury awarded Stewart $34,808.50. Upon Stewart's request for attorneys' fees and costs pursuant to the terms of the lease agreement and Arizona Revised Statutes ("A.R.S.") section 12-341.01, the superior

court awarded Stewart attorneys' fees in the amount of $37,277 and costs in the amount of $1,654. Stephan timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

**STEPHAN'S CLAIM AGAINST STEWART**

**¶6** We first address Stephan's claim against Stewart for the value of the furnishings within the condo. In finding in favor of Stewart and against Stephan, the jury rejected Stephan's claim. Stephan argues that the superior court erred in sending the issue to the jury because Stewart failed to present any evidence Stephan abandoned the furnishings. We disagree, however, because we conclude that Stewart presented evidence from which a jury could reasonably conclude Stephan abandoned the furnishings. *Strawberry Water Co. v. Paulsen,* 220 Ariz. 401, 408, ¶ 16, 207 P.3d 654, 661 (App. 2008) (abandonment as applied to personal property means the act of voluntarily and intentionally relinquishing a known right and must be proven by clear and convincing evidence).

**¶7** Stewart testified that Stephan did not mention the furnishings after the foreclosure. Instead, after the foreclosure, Stephan only asked to look "at the fixtures" to see if there was anything "he might want to take out." Stewart also contradicted Stephan's testimony that he had called Stewart in March and had read to Stewart a letter he had written to the

bank informing it "[he had] personal property in the unit which [he had] leased to [Stewart]." Finally, Stewart testified that it was not until after he had purchased the condo from the bank that Stephan had attempted to retrieve the furnishings, which was approximately four months after the foreclosure.

**¶8** Although we recognize Stephan disputed Stewart's testimony, it was for the jury to evaluate the parties' credibility and determine whether Stewart had presented clear and convincing evidence Stephan had abandoned the furnishings. *Thompson v. Better-Bilt Aluminum Products Co.,* 171 Ariz. 550, 558, 832 P.2d 203, 211 (1992).[1] For these reasons, we affirm that portion of the judgment in favor of Stewart on Stephan's claim for the cost of the furnishings.

**STEWART'S COUNTERCLAIM FOR REFUND OF RENT**

**¶9** On appeal, as in the superior court, Stephan argues the phrase "required to vacate" in the handwritten clause was unambiguous and thus the superior court abused its discretion in instructing the jury to "determine what the parties intended at the time that the [lease] was formed."[2] Although we review the

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[1] Because Stewart presented sufficient evidence Stephan abandoned the furnishings, we need not address Stephan's other argument on appeal, namely, the bank could not have sold the furnishings to Stewart.

[2] The court gave the jury the standard instruction on intent:

superior court's decision to give or withhold a jury instruction for an abuse of discretion, *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cnty.,* 222 Ariz. 515, 533, ¶ 50, 217 P.3d 1220, 1238 (App. 2009), we review de novo the superior court's determination whether a contract term is ambiguous. *Burke v. Voicestream Wireless Corp. II,* 207 Ariz. 393, 395, ¶ 11, 87 P.3d 81, 83 (App. 2004); *see also Taylor v. State Farm Mut. Auto Ins. Co*., 175 Ariz. 148, 158-59, 854 P.2d 1134, 1144-45 (1993) ("Whether contract language is reasonably susceptible to more than one interpretation . . . is a question of law[.]").

**¶10** "When the terms of an agreement are clear and unambiguous, we give effect to the agreement as written."

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> In deciding what a contract provision means, you should attempt to determine what the parties intended at the time that the contract was formed. You may consider the surrounding facts and circumstances as you find them to have been at the time that the contract was formed. It is for you to determine what those surroundings facts and circumstances were.
>
> To determine what the parties intended the terms of a contract to mean, you may consider the language of the written agreement; the acts and statements of the parties themselves before any dispute arose; the parties' negotiations; any prior dealings between the parties; any reasonable expectations the parties may have had as the result of the promises or conduct of the other party; and any other evidence that sheds light on the parties' intent.

*Marana v. Pima Cnty*, 230 Ariz. 142, 147, ¶ 21, 281 P.3d 1010, 1015 (App. 2012) (citation omitted). If, however, the terms of the agreement are ambiguous, that is, reasonably susceptible to more than one interpretation, parol evidence "may be used to explain [the ambiguity], but in the absence of fraud or mistake, it may not be used to change, alter or vary the express terms in a written agreement." *Id*. (internal quotations omitted). When parties submit competing interpretations of a contract's meaning, the court should consider the offered evidence to determine whether the contract language is reasonably susceptible to the interpretation asserted by its proponent. *Taylor*, 175 Ariz. at 154, 854 P.2d at 1140. If "parties use language that is mutually intended to have a special meaning, and that meaning is proved by credible evidence, a court is obligated to enforce the agreement according to the parties' intent, even if the language ordinarily might mean something different." *Id*. 153, 854 P.2d at 1139. Nonetheless, the more "unusual an asserted interpretation is, the more convincing must be the testimony that supports it" and a court need not consider parol evidence when the "asserted meaning of the contract is so unreasonable . . . that it is improbable that the parties actually subscribed" to the asserted interpretation. *Id*.[3]

[3] Based on our review of the record, it does not appear that

**¶11** At trial, Stephan testified that "required to vacate" meant surrendering occupancy or physical possession. Stephan explained the handwritten clause was added

> at [his] suggestion to protect both [Stewart] and [him]self. . . . [I]f [Stewart] was required to vacate, he would get a refund, but if he wasn't required to vacate he wouldn't, and the reason for that was that under the Federal Landlord Tenant Act [the bank] had to honor this lease.

Stephan's real estate agent corroborated his testimony. His agent explained the handwritten clause was added because Stephan

> was in the process of . . . applying for a loan modification . . . and [Stephan's real estate agent] believe[d] [Stephan] had perhaps not made one [mortgage] payment[.] [Stephan] wanted to disclose that to [Stewart] . . . [a]nd if for some reason [Stewart] was forced to leave . . . Stephan would reimburse [Stewart] for any time that he was not there during the term of the lease.

**¶12** Stewart, on the other hand, disputed Stephan's interpretation of the handwritten clause. He testified the handwritten clause meant "if [Stephan] lost the [condo] to foreclosure [he] would get [his] prepaid rent back." He also explained "required to vacate" meant "if [the condo] went into foreclosure[,] that would expire the lease at that point and that [he] would get [his] remaining prepaid rent back." Stewart also testified he, not Stephan, insisted on the handwritten clause.

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the parties cited *Taylor* to the trial court.

**¶13** When Stewart's real estate agent was asked to explain the parties' intent in including the handwritten clause, he testified:

> [T]he intent was that if the landlord was not successful in modifying the loan, that in a traditional situation the tenant would be required to vacate. And since he paid the full amount, the full year of the rent, the landlord would reimburse him for whatever he didn't use. That was the intent.

Stewart's attorney then asked the real estate agent to clarify whether the parties intended the provision to require a refund of all unused prepaid rent monies in the event of a foreclosure, and he responded:

> Yeah, I guess, yes. I would just add to that that the option that the tenant didn't vacate the premises because he would end up purchasing it wasn't even on the table.

**¶14** The ordinary meaning of the term vacate is "cease to occupy," Webster's II New College Dictionary 1246 (3rd ed. 2005), or "surrender occupancy or possession; to move out or leave," Black's Law Dictionary 1584 (8th ed. 2004). *See W. Corrs. Group, Inc. v. Tierney*, 208 Ariz. 583, 587, ¶ 17, 96 P.3d 1070, 1074 (App. 2004) (explaining we refer to established and widely used dictionaries to determine the plain and ordinary meaning of a word). These definitions are consistent with the use of the phrase "vacate the premises" in other provisions of

the parties' lease agreement. *See Nichols v. State Farm Fire & Cas. Co.*, 175 Ariz. 354, 356, 857 P.2d 406, 408 (App. 1993) (explaining that a contract must be "read as a whole in order to give a reasonable and harmonious meaning and effect to all of its provisions" and "each part must be read and interpreted in connection with all other parts").

**¶15** For example, the provision beginning at Line 26 of the lease agreement provides that "[i]f the tenant willfully fails to vacate the premises as provided for in this agreement," the landlord shall be entitled to specified damages. Additionally, the provision commencing at Line 202 sets forth the tenant's obligations "upon vacating premises" and explains the tenant promises to "surrender the premises" in the same condition as when the lease began. The use of the word "vacate" in these contractual provisions is not reasonably susceptible to the special meaning offered in Stewart's testimony, namely, that the parties intended the word "vacate" to mean "in the event of a foreclosure."

**¶16** Moreover, when Stewart was asked whether he discussed the handwritten clause with Stephan or Stephan's realtor, he admitted he only discussed the clause with his own realtor and further stated that he and his realtor "didn't discuss what it meant." And, to the extent Stewart's realtor believed that

"required to vacate" meant foreclosure of the condo, there is no evidence in the record that he discussed his interpretation with Stephan or Stephan's realtor at any point in the lease negotiations. As explained in *Taylor*, parties may give a special meaning to an ordinary word, but only by mutual agreement.[4] 175 Ariz. at 153, 854 P.2d at 1139; *see also Tabler v. Indus. Comm'n*, 202 Ariz. 518, 521, ¶ 13, 47 P.3d 1156, 1159 (App. 2002) ("The determination of the parties' intent must be based on objective evidence, not the hidden intent of the parties."). Therefore, the phrase "required to vacate the premises" as used in the handwritten clause was not ambiguous and, under *Taylor*, not "reasonably susceptible" to Stewart's proffered interpretation.

**¶17** In sum, because "required to vacate" retained its ordinary meaning—having to surrender or leave the premises—and both parties agree that Stewart was in fact not required to vacate the premises during the one-year term of the lease, the trial court erred in submitting the interpretation of the

[4] We also note that the parties' lease agreement contains an "integration clause" commencing at Line 227, which expressly states that the written contract "shall constitute the entire agreement" between the parties and "supersede[s] any other written or oral agreement" between the parties.

pertinent contract language to the jury.[5] *See Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593, ¶ 9, 218 P.3d 1045, 1050 (App. 2009) ("Where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto.") (internal quotations omitted); *In re Estate of Lamparella*, 210 Ariz. 246, 250, ¶ 21, 109 P.3d 959, 963 (App. 2005) ("A contract is not ambiguous just because the parties to it [] disagree about its meaning."); *Long v. Glendale*, 208 Ariz. 319, 329, ¶ 34, 93 P.3d 519, 529 (App. 2004) (recognizing that under *Taylor*, a party cannot claim he is interpreting a written clause with extrinsic evidence if such interpretation "unavoidably changes the meaning of the writing"). Accordingly, we vacate the jury verdict in favor of Stewart on his

[5] At trial, Stephan was impeached with his replevin hearing testimony in which he stated that he informed Stewart he was attempting a loan modification and "if that failed, then it would be foreclosed on, in which event, [Stewart's] prepaid rent would be refunded to him." When questioned about this testimony at trial, Stephan explained that it was "incomplete" and he had meant to say "if [Stephan] had to vacate as a result of foreclosure." Although Stephan's replevin hearing testimony can be construed as supporting Stewart's proffered definition of "vacate," in light of Stephan's clarifying trial testimony and, more importantly, Stewart's admission that he never disclosed his special meaning of the word "vacate" to Stephan, we conclude the term "vacate" as used in the parties' lease agreement is not ambiguous. The determination of the parties' intent must be based on objective evidence, not the hidden intent of the parties.

counterclaim against Stephan for a refund or return of "unused" rent.[6]

**ATTORNEYS' FEES AND COSTS**

**¶18** Based on our decision to vacate the jury's verdict on Stewart's counterclaim, we also vacate the superior court's award of attorneys' fees and costs in favor of Stewart. On remand, the court should (1) determine whether either party qualifies as "prevailing" or "successful" under the terms of the lease or A.R.S. § 12-341.01; and (2) if one party has prevailed, determine an appropriate award of attorneys' fees and costs to such party. *See* Arizona Attorneys' Fees Manual § 2.6.1, at 2-17 (Bruce E. Meyerson & Patricia K. Norris, eds. 5th ed. 2010) ("In multiple-claim cases, when there has been no recovery on any of the claims – no recovery on either the complaint or counterclaim – there may be no successful party under A.R.S. § 12-341.01(A).").

**¶19** Each party requests an award of attorneys' fees incurred on appeal pursuant to A.R.S. §§ 12-341.01 and -349(A).

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[6] Stephan testified that he believed the Protecting Tenants at Foreclosure Act of 2009 ("PTFA"), Pub. L. No. 111-22, §§ 701-04, 123 Stat. 1632 (2009), would have protected Stewart from eviction following foreclosure. Given our conclusion that the handwritten language of the lease is not reasonably susceptible to Stewart's interpretation, application of the PTFA to the lease is irrelevant and we therefore need not reach Stephan's additional argument that the superior court should have instructed the jury on the PTFA.

In our discretion, we deny both attorneys' fees requests. In addition, both parties request an award of costs incurred on appeal pursuant to A.R.S. § 12-341, which provides that the successful party in a civil action is entitled to recovery of costs. Although Stephan made a successful argument on Stewart's counterclaim, Stephan did not prevail on his argument regarding abandonment of the furnishings. Thus, as noted, we are remanding for further proceedings to permit the superior court to determine whether there should be a successful party in this litigation. We therefore decline to award costs on appeal to either party. *See Concannon v. Yewell*, 16 Ariz. App. 320, 322, 493 P.2d 122, 124 (1972) ("As a general rule, where both parties prevail on a material question on appeal, each must bear his own costs."). Our decision to deny fees and costs on appeal should not be construed as expressing an opinion as to whether either party should be awarded fees or costs on remand.

**CONCLUSION**

**¶20** For the foregoing reasons, we affirm the jury's verdict in favor of Stewart on Stephan's furnishings claim. We vacate, however, the $34,808.50 judgment in favor of Stewart on

his counterclaim for prepaid rent. We also vacate the superior court's award of attorneys' fees and costs and remand for further proceedings consistent with this decision.

_____/s/_____
MICHAEL J. BROWN, Judge

CONCURRING:

_____/s/_____
PATRICIA K. NORRIS, Presiding Judge

_____/s/_____
JOHN C. GEMMILL, Judge