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See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 06/07/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

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

MARGARET RUIZ,) 1 CA-CV 11-0370
)
Plaintiff/Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
VICKIE LUCIA,) Rule 28, Arizona Rules
) of Civil Appellate
Defendant/Appellant.) Procedure)
)

Appeal from the Superior Court in Mohave County

Cause No. B8015CV201004145

The Honorable Charles W. Gurtler, Judge

AFFIRMED

Margaret Ruiz
In Propria Persona

Beaumont, CA

Charlotte A. Wells
Attorney for Defendant/Appellant

Kingman

T H O M P S O N, Judge

¶1 Defendant/appellant Vickie Lucia (Tenant) appeals from the superior court's denial of her motion to set aside a summary judgment entered against her on plaintiff/appellee Margaret Ruiz's (Landlord's) claim for back rent and property damage, and

from the court's decision dismissing her counterclaim for work she performed and expenses she incurred in repairs to and maintenance of the property she leased from Landlord. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In December 2005, Tenant entered into a residential lease agreement with Landlord for a dwelling unit in Kingman, Arizona. The lease provided for rent at \$975.00. In August 2007, the parties agreed to lower the monthly rent to \$950.00. Landlord sometimes accepted partial payments from Tenant.

¶3 In August 2010, Landlord gave Tenant a notice titled "5-DAY NOTICE PAY OR QUIT," dated August 9. The notice stated that Tenant had five days to pay unpaid rent in the amount of \$9,134 pursuant to Arizona Revised Statutes (A.R.S.) section 33-1368(B) (2007). The notice advised Tenant that if full payment was not made within five calendar days, an eviction action would be filed to recover possession of the premises, rent, late fees, and court costs. The notice also stated that Tenant could vacate the premises, but that doing so would not relieve Tenant of liability for the outstanding balance owed. Attached to the notice was a list of the amounts owed by month for 2009 and 2010 at the rate of \$975.00 per month with a statement that no late fee was applied for the months that payment was late. The list

showed a partial payment of \$450 for July¹ and no payment for August. Tenant vacated the premises.

¶4 On September 16, 2010, Landlord filed a complaint for breach of contract against Tenant claiming that Tenant owed her \$13,687.71 in unpaid rents and late fees. She further sought to retain Tenant's security deposit and to obtain a judgment for an additional \$405.00 for property damage.

¶5 On October 28, 2010, Tenant answered and filed a counterclaim for \$13,687.71, claiming that she had put labor and money into the house in the form of repairs and maintenance that were Landlord's responsibility, acknowledging that some repairs, specifically installation of wood flooring, went unfinished. Tenant claimed that the house had numerous plumbing and electrical problems, that it flooded when it rained because of poor landscaping, and that it had a mold problem. Although she asserted she was entitled to compensation for the work she performed on the property, Tenant did not dispute Landlord's claim for rent. She also contended that she had previously talked to Landlord about moving out because of "money being so tight," but that Landlord persuaded her to stay, saying that she would rather accept what Tenant could pay than leave the house empty.

¹ Landlord later claimed this was an error and that Tenant had paid nothing for July.

¶6 On December 6, 2010, Landlord filed a motion for summary judgment pursuant to Rule 56, Arizona Rules of Civil Procedure, on her complaint and a motion to dismiss Tenant's counterclaim. Landlord noted that Tenant did not dispute owing the rent and that Tenant acknowledged not completing the installation of hardwood flooring and leaving the premises in an unclean state, for both of which Landlord sought payment. Landlord also argued that, although Tenant seemed to complain that the premises were barely habitable, she had lived there for five years. Landlord supplied an affidavit as her statement of facts, stating that Tenant began to be habitually late with rental payments beginning in December 2007, sometimes making only partial payments and sometimes making no payment. She asserted that, at Tenant's request, she had agreed to let Tenant install wood flooring in the house, that she had purchased the flooring, that she had waived Tenant's rent for two months in exchange for Tenant's labor installing the flooring, and that Tenant had done a poor and incomplete job, requiring additional expense for repair and completion of the work. She attached a rental log, two leases dated December 2005 and August 2007, an inspection check list from August 2007, and photographs of the property. Tenant did not respond to the motion.

¶7 The court granted Landlord's motion for summary judgment and motion to dismiss. It noted that the failure to

object to a "properly supported" motion was deemed consent to the motion, but also explained that it independently reviewed the file to determine if summary judgment was appropriate. The court adopted Landlord's statement of facts "as supported by Affidavit and Exhibit," and found that Landlord had established past-due rent, late fees, and the cost of clean-up and general repairs. The court credited Tenant with the security deposit, and entered judgment on Landlord's complaint in the amount of \$13,687.71 for rent and late fees, and for damages in the amount of \$405.00. The court found that Tenant had failed to establish that she complied with the rental agreement or that she availed herself of the remedies for tenants under the Arizona Residential Landlord and Tenant Act (ARLTA), Arizona Revised Statutes (A.R.S.) sections 33-1301 to 33-1381 (2007); the court granted Landlord's motion to dismiss Tenant's counterclaim. On February 17, 2011, the court entered judgment, denying an award of fees and costs to Landlord, stating that the court had no record of taxable costs and that "paralegal costs"² were not recoverable.

¶8 On March 18, 2011, Tenant filed a Motion for Relief from Judgment and/or Motion for Reconsideration. Tenant filed the motion pursuant to Rule 15, Arizona Rules of Procedure for

² Landlord was assisted by a certified legal document preparer.

Eviction Actions (RPEA) on the grounds that Tenant did not receive proper notice, that the judgment was contrary to law, that the judgment was entered as a result of mistake, inadvertence, surprise or excusable neglect and/or the judgment was procured through the fraud, misrepresentation and/or other misconduct of Landlord. Alternatively, Tenant moved for reconsideration pursuant to Rule 9(f), RPEA, asserting that, had the court made proper findings under Rule 13(a), RPEA, it would have dismissed Landlord's case.

¶9 Tenant argued that Landlord was required to proceed in the form of a special detainer action for rent under the summary process mandated by ARLTA and pursuant to RPEA, which she argued was the exclusive remedy for Landlord. She contended that none of the findings required by RPEA Rule 13(a) were supported and therefore Landlord's case should have been dismissed. She also argued that Landlord had allowed Tenant to make partial and late payments for several years and, therefore, under A.R.S. § 33-1371,³ Landlord could not strictly enforce timely payments. She further argued that, because Landlord had accepted partial payments, the court was required to dismiss her complaint under RPEA Rule 13(a)(4). Tenant argued Landlord acted in bad faith,

³ The statute provides in part: "acceptance of rent, or any portion thereof, with knowledge of a default by tenant . . . constitutes a waiver of the right to terminate the rental agreement for that breach." A.R.S. § 33-1371(B).

based in part on a calculation of rent owed at \$975.00 per month instead of \$950.00 per month, that the procedure followed by Landlord was not in compliance with the RPEA, and that the RPEA did not provide for a motion for summary judgment. Tenant also argued that, assuming the Arizona Rules of Civil Procedure applied, Landlord failed to respond to Tenant's counterclaim and Tenant was unaware she was expected to respond to the motion. Tenant included affidavits from herself and her roommate. She avowed that she assumed when she filed her counterclaim that Landlord would have to respond, that Landlord's motion was such a response, and that she would be notified of a court date.

¶10 Landlord argued that Tenant received adequate notice, and that upon Tenant's voluntary surrender of the keys, the rental agreement was terminated and Landlord had a claim for damages. Landlord asserted that, although she could not terminate the lease based on an accepted partial payment, Landlord served the 5-Day Notice based on Tenant's failure to pay any rent for July or August 2010. Landlord admitted miscalculating the rent owed in the 5-Day Notice but noted that she had corrected the error in her motion for summary judgment.

¶11 In reply, Tenant argued that ARLTA and the RPEA presented the exclusive remedy for Landlord, that possession was irrelevant, and that regardless of Tenant having voluntarily surrendered the premises, Landlord was required by A.R.S. § 33-

1368(B) to terminate the rental agreement by filing a special detainer action.

¶12 In denying Tenant's motion, the court noted:

Nowhere within the Motion does it specify why the Defendant failed to timely file a Response. There is no analysis whatsoever as to why the Defendant would be entitled to Rule 60(c), A.R.C.P. relief in this case.

Defendant's Motion further misses the point. At no time was tenancy ever at issue in this case. As the Plaintiff points out, she brought a breach of contract action in light of the fact that the Defendant moved out of the property. What remained was a claim for damages. Therefore, the summary eviction proceedings and Landlord and Tenant Act are inapplicable. Even if such act was applicable (if tenancy had been in issue), Plaintiff's claims for lost rent [sic] and/or damage to property would still be applicable.

Additionally, Defendant's Answer did not place these issues into controversy. Defendant did not assert she was a tenant. Rather, she averred the claim was meritless.

Tenant timely appealed from the denial of her motion for relief from judgment. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(2) (Supp. 2011).

DISCUSSION

¶13 Underlying Tenant's arguments on appeal is her contention that Landlord was required to proceed by a special detainer action pursuant to A.R.S. § 33-1377 and the Rules of

Procedure for Eviction Actions (RPEA), rather than by a civil complaint for breach of contract.

¶14 A special detainer action is employed where “a landlord files an action to terminate a tenant’s lease for breach of a current, valid lease.” *Keenan v. Biles*, 199 Ariz. 266, 267 n.1, ¶ 1, 17 P.3d 111, 112 (App. 2001). A landlord may bring such an action where a tenant fails to pay the rent agreed. A.R.S. § 33-1368(B) (2007); *Keenan*, 199 Ariz. at 267, ¶ 5, 17 P.3d at 112. A special detainer action is a summary proceeding. RPEA 2. The summons is issued on the day the complaint is filed, and the defendant is required to appear and answer the complaint not more than six days from the date of the summons. A.R.S. § 33-1377(B) (2007). The trial can be postponed for not more than five days in superior court. A.R.S. § 33-1377(C). Although other matters may be addressed in a special detainer action, the issue before the court is actual possession of the premises. See A.R.S. § 33-1377(D) (“*In addition to determining the right to actual possession, the court may assess damages, attorney fees, and costs.*”) (emphasis added); A.R.S. § 33-1377(F) (“If the defendant is found guilty, the court shall give judgment for the plaintiff for restitution of the premises”). The RPEA, which govern the procedure in superior court for special detainer actions as well as forcible detainer actions, also reflect that possession is the

principal issue. The rules refer to a special detainer action as an eviction proceeding. RPEA 1. They require that the complaint be brought in the name of the party "claiming entitlement to possession of the property," that it state in "bold print, capitalized, and underlined at the top center of the first page, below the case caption, '**YOUR LANDLORD IS SUING TO HAVE YOU EVICTED,**'" and that it state the "specific reason for the eviction." RPEA 5(b)(1), (6)-(7). The rules also state that if the complaint seeks a money judgment for rent and other charges or fees, it "shall also" provide information as to the rental amount, frequency of payments, and how much is owed. RPEA 5(c). The primary objective of such a proceeding, however, is for the landlord to recover possession.

¶15 Moreover, ARLTA recognizes that actions could be brought for reasons other than determining possession. A.R.S. § 33-1365 notes that "In an action for rent where the tenant is not in possession," the tenant can counterclaim without depositing rent into the court, which a tenant in possession must do. A.R.S. § 33-1365(B) (2007). "Action" is defined in ARLTA as including "recoupment, counterclaim, setoff, suit in equity and any other proceeding in which rights are determined, including an action for possession." A.R.S. § 33-1310(1) (2007). That "action" includes an action for possession necessarily implies that actions for possession are not the only

actions contemplated by ARLTA. Further, any right or obligation in ARLTA is enforceable by "action" unless otherwise stated. A.R.S. § 33-1305(B) (2007). ARLTA clearly encompasses more than eviction actions. See, e.g., *Thomas v. Goudreault*, 163 Ariz. 159, 786 P.2d 1010 (App. 1989) (tenant action against landlord under ARLTA for tort damages for noncompliance with act). The RPEA, however, apply only to actions for possession--forcible and special detainer actions. RPEA 1-2.

¶16 Tenant relies on *Keenan* as support for her position that a claim for rent and damages must be brought as a special detainer action even where possession is not at issue. *Keenan* found that a special detainer action could continue even after the tenant had vacated the premises to allow a judgment to be entered for costs, rent, and attorney fees. 199 Ariz. at 268, ¶¶ 8-9, 17 P.3d at 113. In *Keenan*, however, the tenant vacated the premises after the action for possession had commenced. *Id.* at 267, ¶ 3, 17 P.3d at 112.

¶17 Possession of the property was not an issue when Landlord filed her complaint. Tenant had vacated the property and provided the keys to Landlord thereby delivering possession to the Landlord. A.R.S. § 33-1310(3). Where a lessor accepts the surrender of a lease, the lease is terminated, and the lessor may recover past due rent but not future rent for the remainder of the term. *Roosen v. Schaffer*, 127 Ariz. 346, 349,

621 P.2d 33, 36 (App. 1980). Landlord acknowledged that the lease was terminated. Because the lease was already terminated and possession was not at issue, Landlord had no basis for bringing a special detainer action to terminate the lease and recover possession. The RPEA, which governs eviction actions, therefore did not apply.

¶18 Tenant contends that the court erred in denying her motion to set aside the judgment. Tenant brought her motion pursuant to RPEA 15. Having determined that the Rules of Procedure for Eviction Actions do not apply, we will treat the motion, as did the trial court, as a motion to vacate the judgment pursuant to Rule 60(c), Arizona Rules of Civil Procedure.

¶19 We review a trial court's order granting or denying relief under Rule 60(c) for abuse of discretion. *City of Phoenix v. Geyler*, 144 Ariz. 323, 328, 697 P.2d 1073, 1078 (1985). "Abuse of discretion" is discretion exercised in a manner that is manifestly unreasonable or based on untenable grounds or untenable reasons. *Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, 42, ¶ 11, 178 P.3d 511, 514 (App. 2008). Our review is restricted to the matters raised in the motion to set aside and does not extend to a review of whether the court was substantively correct in entering the underlying judgment.

Hirsch v. Nat'l Van Lines, Inc., 136 Ariz. 304, 311, 666 P.2d 49, 56 (1983).

¶20 Tenant contends that the trial court lacked subject matter jurisdiction. A judgment entered by a court lacking subject matter jurisdiction is void, and a court has no discretion, but must vacate that judgment. *Martin v. Martin*, 182 Ariz. 11, 14-15, 893 P.2d 11, 14-15 (App. 1994). Whether a court has subject matter jurisdiction is a question of law we review de novo. *In re Marriage of Crawford*, 180 Ariz. 324, 326, 884 P.2d 210, 212 (App. 1994).

¶21 The question of a court's subject matter jurisdiction concerns whether the court has "the power to hear and determine cases of the general class to which the particular proceedings belong." *In re Marriage of Dorman*, 198 Ariz. 298, 301, ¶ 7, 9 P.3d 329, 332 (App. 2000) (quoting *Estes v. Superior Court*, 137 Ariz. 515, 517, 672 P.2d 180, 182 (1983)). The test of jurisdiction is whether the court has the "power to enter upon the inquiry." *Greater Ariz. Sav. & Loan Ass'n v. Tang*, 97 Ariz. 325, 327, 400 P.2d 121, 123 (1965). The superior court's jurisdiction is determined by the Arizona Constitution and by statute. *State v. Payne*, 223 Ariz. 555, 559, ¶ 6, 225 P.3d 1131, 1135 (App. 2009). It is a single unified court having original jurisdiction of "[c]ases and proceedings in which exclusive jurisdiction is not vested by law in another court" as

well as of “[a]ctions of forcible entry and detainer.” Ariz. Const. art. 6, §§ 13, 14(1), (5). Where the legislature intends to divest the superior court of jurisdiction, it must state so explicitly and clearly. *Fry v. Garcia*, 213 Ariz. 70, 72-73, ¶ 9, 138 P.3d 1197, 1199-1200 (App. 2006); see also *Advanced Prop. Tax Liens, Inc. v. Sherman*, 227 Ariz. 528, 530 n.2, ¶ 9, 532, ¶ 21, 260 P.3d 1093, 1095 n.2, 1097 (App. 2011) (finding no jurisdiction for lack of notice where statute provided, “A court shall not enter any action to foreclose . . . until the purchaser sends the notice required by this section.”).

¶22 Tenant appears to argue that the court lacked subject matter jurisdiction because Landlord did not bring the action as a special detainer action, which Tenant argues is the exclusive remedy for a landlord to terminate a rental agreement. Tenant’s argument is unclear as to how the court would be deprived of the power to “enter and determine the case” brought before it. ARLTA provides: “The appropriate court of this state may exercise jurisdiction over any landlord with respect to any conduct in this state governed by this chapter or with respect to any claim arising from a transaction subject to this chapter.” A.R.S. § 33-1309 (2007). The superior court’s jurisdiction in matters between a landlord and tenant is not limited to a case brought as an eviction action.

¶23 Tenant asserts that Landlord did not comply with the notice requirements of RPEA, and that under RPEA 13(a), that failure would have required dismissal. To the extent that Tenant is arguing that the Landlord's failure to comply with the rules deprived the court of jurisdiction over the defendant, we reject the argument. We have already concluded that Landlord was not required to bring her claim as a special detainer action and that therefore the RPEA did not apply. To the extent Tenant may be arguing that failure to comply with the notice requirements deprives the court of subject matter jurisdiction, we likewise reject the argument. Rule 13(a) does not preclude the court from "entering the action" absent proper notice. Rather, it requires the court in a detainer action to make certain determinations and upon making certain findings, it requires the court to dismiss the action. Rule 13(a) does not apply to this contract action. Even if it did, a purported failure to meet its procedural requirements would not have deprived the court of jurisdiction. We conclude that the judgment entered by the court was not void for lack of subject matter or personal jurisdiction.

¶24 Tenant also argues that the court abused its discretion in denying her motion to vacate the summary judgment. Much of her argument pertains to the propriety of the summary judgment, arguing that the judgment was not properly supported

by admissible evidence. Tenant brought her motion in the trial court pursuant to Rule 15, RPEA, which allows for relief from a judgment on the grounds that the judgment is contrary to law. RPEA 15(a)(9). Rule 60(c), Arizona Rules of Civil Procedure, does not provide for relief on those grounds. Such an argument would have been more properly raised in a motion for new trial, under Rule 59(a)(8), Arizona Rules of Civil Procedure, or on direct appeal. See *Anderson v. Hawkins*, 129 Ariz. 83, 84-85, 628 P.2d 966, 967-68 (App. 1981). Our review of a decision pursuant to Rule 60(c) is limited and does not extend to review whether the court was substantively correct in entering the underlying judgment. *Hirsch*, 136 Ariz. at 311, 666 P.2d at 56. We therefore do not address the merits of the entry of summary judgment or the dismissal of Tenant's counterclaim.

¶25 Tenant also contends that the court should have granted her motion to set aside the judgment on the grounds of mistake, inadvertence and excusable neglect. She argues that her inadvertence in failing to respond to Landlord's motion for summary judgment and motion to dismiss the counterclaim was well-established by affidavit and memorandum.

¶26 "[M]istake or inadvertence is rarely completely explainable." *Martin v. Rossi*, 18 Ariz. App. 212, 215, 501 P.2d 53, 56 (1972). In reviewing whether the trial court abused its discretion in granting or denying a motion to set aside for

mistake or inadvertence, we consider all the circumstances presented to the trial court. *Id.* Whether the conduct is excusable under Rule 60(c) depends on whether the conduct is the act of a reasonably prudent person under the same circumstances. *Geyler*, 144 Ariz. at 331-32, 697 P.2d at 1081-82. Whether the party acted diligently is critical to the determination. *Id.* at 332, 697 P.2d at 1082.

¶27 Tenant's motion for relief from the judgment stated as one of its grounds that the judgment "was entered as a result of mistake, inadvertence, surprise or excusable neglect." Tenant, however, presented no argument on this point. The only passage in the motion arguably related to such an argument was the following:

45 days after Defendant filed her answer and paid the answer fee, Defendant received Plaintiff's "Motion for Summary Judgment and Motion to Dismiss." Having had no experience with lawsuits, Defendant thought Plaintiff's "Motion" was a response to the "countersuit." Lucia Affidavit, para. 11. She did not know she was expected to respond to the "motion" until she spoke with a Court employee **after receiving** the Court's February 17, 2011 judgment. Lucia Affidavit, para. 13.

In Tenant's accompanying affidavit, she avowed that when she received the summons and complaint she asked someone at the courthouse how to proceed. She was given a form to use to respond and told she could include a counterclaim in the

response. A deputy clerk told her to mail the answer and counterclaim. She further stated that she "assumed" that Landlord would have to file a response, that the motion for summary judgment and motion to dismiss were that response, and that she would receive notice of a court date. She stated that when she received the judgment, she called the clerk's office and was told to call the court. She was then told she lost the case because she failed to respond to the motion and was advised to hire a lawyer.

¶28 On appeal, Tenant argues that she did not ignore the lawsuit and that she is guilty only of not knowing that she needed to respond to the motion for summary judgment.

¶29 We cannot find that the trial court abused its discretion in concluding that relief from judgment was not warranted for inadvertence or excusable neglect. Tenant had previously taken steps to determine what was required when she was served with the summons and complaint, but apparently failed to take any steps to determine what was required when served with Landlord's motion. Her actions were not the diligent conduct of a reasonably prudent person in similar circumstances. Moreover, a civil litigant who represents herself is held to the same standards as one represented by counsel and is charged with the same familiarity with procedures, and the same notice of rules, statutes, and legal principles as a lawyer. *Higgins v.*

Higgins, 194 Ariz. 266, 270, ¶ 12, 981 P.2d 134, 138 (App. 1999). The fact that she did not know how to proceed, without more, does not compel a finding of excusable neglect or inadvertence in her failure to respond to the motion for summary judgment, justifying relief from that judgment. The trial court did not abuse its discretion.

¶30 Landlord seeks an award of fees for document preparation in the trial court and on appeal. A.R.S. § 12-341.02 (Supp. 2011) authorizes the court, in its discretion, to award to the prevailing party the cost of document preparation by a certified legal document preparer. We deny Landlord's request for an award of document preparation fees incurred in the trial court. As acknowledged by Landlord, she did not seek fees under this statute in the superior court. Arguments not made in the trial court are waived on appeal. *Scottsdale Princess P'ship v. Maricopa County*, 185 Ariz. 368, 378, 916 P.2d 1084, 1094 (App. 1995) (this court will not consider on appeal arguments not first presented to the trial court). In addition, an order awarding document preparation fees incurred in the superior court would expand the rights of Landlord, which this court cannot do absent the filing of a cross-appeal. ARCAP 13(b)(3).

¶31 We grant Landlord's request for an award of document preparation fees incurred in this appeal.

CONCLUSION

¶32 The superior court's decision denying Tenant's motion for relief from judgment is affirmed.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

MARGARET H. DOWNIE, Judge