IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

ROBERT A. IVERSON,
Plaintiff/Appellant/Cross-Appellee,

v.

CARLOS NAVA, et al.,
Defendants/Appellees/Cross-Appellants.

No. 1 CA-CV 18-0628
FILED 2-27-2020

Appeal from the Superior Court in Maricopa County
No. CV2016-016923
The Honorable Kerstin G. LeMaire, Judge

AFFIRMED IN PART, VACATED IN PART AND REMANDED

COUNSEL

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OPINION

Presiding Judge Samuel A. Thumma delivered the opinion of the Court, in which Judge Jennifer M. Perkins and Judge Paul J. McMurdie joined.

T H U M M A, Judge:

¶1 Resolution of this appeal turns on the statutory jurisdictional limits for counterclaims a tenant may assert in a special detainer action. Because some of the counterclaims filed by Carlos and Tina Nava exceeded the jurisdiction granted to the superior court, that portion of the final judgment resolving those counterclaims after a bench trial is vacated. As discussed more fully below, the judgment is affirmed in part and reversed in part and this matter is remanded for entry of a judgment reflecting the relief set forth below and any other proceedings deemed necessary.

FACTS AND PROCEDURAL HISTORY

¶2 In January 2009, Robert Iverson and the Navas entered an oral month-to-month lease, in which the Navas agreed to pay $1,400 per month for a residential property. They discussed, but never signed, a purchase option agreement. After the first three months, the Navas paid $1,700 per month ($300 more per month than oral lease required) until February 2014. From March 2014 until September 2016, the Navas again paid $1,400 per month.

¶3 At the end of September 2016, Iverson tried to increase the rent to $1,800 per month as of November 2016. The Navas did not agree to that increase, asking instead that Iverson apply the $17,400 they had paid above the $1,400 monthly rent to rent that would become due over the coming months. Iverson did not agree to that proposal.

¶4 When the Navas failed to pay rent for October 2016, Iverson's attorney sent them a letter on October 9, 2016, demanding payment within five days, terminating their tenancy and directing them to vacate or a special detainer action would be filed. *See* Ariz. Rev. Stat. (A.R.S.) section 33-1377 (2020).[1] The Navas did not comply with these demands.

[1]Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

¶5 In early November 2016, Iverson filed a complaint in justice court, alleging a failure to pay rent and that the Navas "held over their tenancy." By statute, trial was to be held no later than mid-November 2016. *See* A.R.S. § 12-1176(A) (stating trial should be held "no more than five days" after the complaint is filed); *see also* A.R.S. § 12-1177(C) (allowing postponement of trial for no more than ten calendar days).

¶6 The Navas, through counsel, filed an answer and asserted counterclaims for: (1) breach of contract (the alleged purchase option); (2) breach of the covenant of good faith and fair dealing under A.R.S. § 33-1311; (3) breach of A.R.S. § 33-1321 ("Security Deposits") (an alternative to the contract claim); (4) breach of A.R.S. § 33-1324 (landlord's duty to perform repairs and provide fit and habitable premises); and (5) unjust enrichment (an alternative to the contract claim). As amended, the Navas' counterclaims sought $17,400, or in the alternative, possession of the property for 12 months, punitive damages and attorneys' fees and costs.

¶7 Because the Navas' counterclaims exceeded the justice court's jurisdiction, that court transferred the case to superior court. Iverson then moved to dismiss the counterclaims for various reasons, including that they exceeded the court's jurisdiction. Iverson also filed a motion seeking an order compelling the Navas to pay accruing rent. After briefing and an evidentiary hearing, the superior court denied Iverson's motion to dismiss the counterclaims and granted, in part, Iverson's motion for accruing rent.

¶8 In March 2017, after a December 2016 evidentiary hearing, the court issued an order making various findings of fact and conclusions of law. On March 30, 2017, the Navas vacated the property. Motion practice then followed for months. After various hearings (including another evidentiary hearing), the court first vacated the March 2017 ruling and then, in May 2018, issued new findings of fact and conclusions of law. This May 2018 order found, among other things, that Iverson did not receive notice of all the repairs the Navas undertook during their tenancy. As remedies, this May 2018 order:

- Found the Navas owe Iverson "unpaid rent from October 2016 through the month that they vacated the premises. The amount of rent [the Navas] owe [Iverson] totals $10,694.90."
- Found Iverson's failure to repair the pool reduced the fair market rental value by $250 a month for 16 months, totaling $4,000.

- Found Iverson's failure to repair the interior water leaks reduced the fair market value by $150 a month for 19 months, totaling $2850.
- Ordered Iverson to pay the Navas $17,600 (approximating the $300 difference between the $1,400 monthly rent in the lease and the $1,700 the Navas had paid for 58 months).
- Dismissed the Navas' unjust enrichment claim (counterclaim count five).
- Found Iverson was the prevailing party and entitled to an award of attorneys' fees and costs.

¶9 After further motion practice, the court entered a final judgment in November 2018, a bit more than two years after Iverson filed his complaint. Along with the remedies in the May 2018 order, the judgment: (1) awarded Iverson $20,000 in attorneys' fees and non-taxable costs and $2,840.48 in taxable costs; (2) noted "$5,165.00 due to [the Navas] for pool service charges" and "$7,565.00 due to [the Navas] for yard service charges" and (3) dismissed Craig Iverson as a party at the same time entering judgment against him for $4,639.62 plus interest.[2] The net of these various awards would appear to result in Iverson owing the Navas $3,639.62. The judgment, however, awarded the Navas $7,496.77, representing "all sums being held by the Clerk of the Court" as well as $4,639.62 plus interest. This court has jurisdiction over Iverson's timely appeal and the Navas' timely cross-appeal under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶10 The two primary issues on appeal are: (1) what counterclaims could the Navas properly assert and (2) who is entitled to attorneys' fees. This court reviews the interpretation of statutes and rules de novo. *Pima Cty. v. Pima Cty. Law Enf't Merit Sys. Council*, 211 Ariz. 224, 227 ¶ 13 (2005).

I. The Navas Asserted Counterclaims Both Within and Outside of the Superior Court's Jurisdiction.

¶11 The purpose of a forcible entry and detainer (FED) action is to "afford a summary, speedy and adequate remedy for obtaining possession

[2] The reason for the dismissal of Craig Iverson is unclear from the record, although the record suggests that he "had nothing to do with the oral option agreement and was not even a trustee" at the time Robert Iverson and the Navas entered into the lease in January 2009.

of the premises withheld by a tenant." *Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 204 (1946). The *only* issue to be decided in an FED action is the right of possession. *Id.* "Because an FED action does not bar subsequent proceedings between the parties to determine issues other than the immediate right to possession, those issues are better resolved in proceedings designed to allow full exploration of the issues involved." *Curtis v. Morris*, 184 Ariz. 393, 398 (App. 1995) (citing *Rushing*, 64 Ariz. at 205), *approved on other grounds*, 186 Ariz. 534 (1996). This is so because the accelerated nature of FED actions does not include disclosure or discovery available in general civil litigation. *Id.*[3]

¶12 The Arizona Rules of Procedure for Eviction Actions (RPEA) govern FED actions. RPEA 1. "Unless specifically provided for by statute, *no counterclaims*, cross claims, or third party claims may be filed in eviction actions. *Any counterclaim filed without a statutory basis shall be stricken and dismissed without prejudice*." RPEA 8(a) (emphasis added). In an action based on the nonpayment of rent, like this case, a tenant may counterclaim for any amount recoverable under the rental agreement if the landlord did not comply with its obligations. A.R.S. § 33-1365(A); *accord Mead, Samuel & Co., Inc. v. Dyar*, 127 Ariz. 565, 569 (App. 1980) (requiring counterclaim to be authorized by statute or based on the rental agreement). Significantly, no other counterclaims are allowed.

A. The Court Lacked Jurisdiction Over Counterclaim Counts One (Breach of Contract) and Five (Unjust Enrichment).

¶13 The Navas' contract counterclaim alleged Iverson breached the alleged purchase option and the Navas sought the same relief in their alternative unjust enrichment counterclaim. Neither counterclaim is based on a statute or term of the lease. The Navas have shown no jurisdictional basis for these counterclaims and the superior court lacked jurisdiction to consider them. *See* RPEA 8(A). Thus, that portion of the judgment addressing the merits of counterclaim counts one and five and awarding the Navas $17,600 is vacated without prejudice to the Navas asserting such claims in a separate civil action.

[3] Although this case was filed as a special detainer action under A.R.S. § 33-1377(A), that statute incorporates "the procedure and appeal rights prescribed in title 12, chapter 8, article 4," meaning the analysis under the FED and special detainer statutes is the same.

B. The Judgment Denying Relief for Counterclaim Count Two (Breach of the Covenant of Good Faith and Fair Dealing Under A.R.S. § 33-1311) Stands.

¶14 As pled, it is unclear whether this counterclaim was based on the purported purchase option (meaning jurisdiction was lacking) or the lease agreement (meaning jurisdiction was proper). The judgment, however, did not award the Navas any damages for this counterclaim and the Navas have not appealed from that denial. Thus, to the extent this counterclaim was based on the lease agreement, meaning jurisdiction was proper, the judgment denying the Navas any relief stands.

C. The Court Had Jurisdiction Over Counterclaim Count Three (Security Deposits) and the Judgment for Iverson on that Count Stands.

¶15 Pleading in the alternative, the Navas alleged in counterclaim count three that their additional payment of $300 per month for 58 months was for prepaid rent (if it was not attributed to the claimed purchase option). In an FED action, a counterclaim for prepaid rent is authorized by statute. *See* A.R.S. § 33-1321. Thus, the superior court had jurisdiction over this counterclaim. *See* RPEA 8(A). On the merits, however, the court rejected this counterclaim, finding the additional $300 per month was not intended to be rent, but "intended to be credited toward the purchase of the home." The Navas have not appealed from that denial. Thus, the judgment for Iverson on counterclaim count three stands.

D. The Court Had Jurisdiction Over Counterclaim Count Four (Failure to Maintain Fit and Habitable Premises).

¶16 Counterclaim count four alleged Iverson failed to "[m]ake all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition," as required by A.R.S. § 33-1324(A)(2). This statute required Iverson to "[m]aintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning and other facilities and appliances . . . supplied or required to be supplied by him." A.R.S. § 33-1324(A)(4). This counterclaim alleged violations of A.R.S. § 33-1324, meaning the superior court had jurisdiction to consider it. *See* RPEA 8(A).

¶17 In this counterclaim, the Navas alleged Iverson breached these obligations by (1) failing to repair the roof and pool leaks and (2) failing to provide yard and pool maintenance. The court addresses the merits of these two types of claims in turn.

¶18 The court found Iverson received notice of the roof and pool leaks but did not repair them. After an evidentiary hearing, the court found Iverson's failure to repair these items reduced the fair market rental value of the house of $250 per month for 16 months (for the pool leaks) and $150 per month for 19 months (for the roof leaks). As a result, the court awarded the Navas $6,850, representing this reduced rental value.

¶19 If a landlord fails to provide "essential services" contrary to the rental agreement or A.R.S. § 33-1324, after giving "reasonable notice to the landlord specifying the breach," the tenant may do one of three things: (1) procure reasonable essential services and deduct the actual reasonable cost from the rent; (2) "[r]ecover damages based upon the diminution in the fair rental value" or (3) obtain reasonable substitute housing, which excuses the payment of rent. A.R.S. §§ 33-1364(A)(1)-(3). The superior court applied the second alternative, awarding the Navas diminution of the fair rental value. Iverson does not challenge this award on appeal and, given that waiver, it is affirmed. *MacMillan v. Schwartz*, 226 Ariz. 584, 591 ¶ 33 (App. 2011).[4]

¶20 The claims for yard and pool maintenance costs involve a different analysis. Iverson correctly notes that, on the record presented, the Navas failed to show these were "essential services." As a result, Section 33-1364(A) remedies are inapplicable. The Navas rely on the superior court's findings that these were services Iverson, as the landlord, had to provide under Section 33-1324(A) (requiring compliance with "applicable building codes materially affecting health and safety"). Given those findings, however, the Navas needed to "[p]romptly notify the landlord in writing of any situation or occurrence that requires the landlord to provide maintenance or make repairs or otherwise requires the landlord to take action as prescribed in § 33-1324." A.R.S. § 33-1341(8). The Navas failed to provide that notice. Thus, that portion of the counterclaim fails and, as a result, that portion of the judgment awarding the Navas damages for the yard and pool maintenance is vacated.

II. Judgment Should Not Have Been Entered Against Craig Iverson, Who Was Dismissed as a Party.

¶21 Iverson challenges the portion of the judgment awarding the Navas $4,639.62 plus interest against Craig Iverson because that same

[4] Given waiver, this court is not asked to address, and expressly does not address, whether the repairs were for "essential services" under A.R.S. § 33-1364(A).

judgment dismissed him as a party. The Navas did not address this issue in their answering brief. *See Hodai v. City of Tucson*, 239 Ariz. 34, 45 ¶36 (App. 2016) ("Failure to respond may be considered a confession of error."). Thus, that portion of the judgment awarding the Navas $4,639.62 plus interest against Craig Iverson is vacated.

III. The Court Properly Awarded Iverson Attorneys' Fees.

¶22 Both Iverson and the Navas challenge the award of attorneys' fees to Iverson. The Navas argue they were the prevailing party entitled to an award of fees. Iverson argues he should have been awarded the full amount of fees he requested. In a special detainer action, "the court may assess damages, attorney[s'] fees and costs as prescribed by law." A.R.S. § 33-1377(D). If a defendant is found guilty, like the Navas were here, "the court shall give judgment for the plaintiff for . . . attorney[s'] fees, court and other costs . . . ." A.R.S. § 12-1178(A).

A. The Navas Were Not the Prevailing Parties, Meaning They Are Not Eligible for an Award of Attorneys' Fees.

¶23 The Navas argue they are the prevailing party entitled to fees under the net judgment rule and A.R.S. § 33-1365. This argument fails for three reasons.

¶24 First, the Navas cite no case applying the net judgment rule in an FED case. Given the statutory provisions, the summary nature of such cases and that the classic FED remedy is eviction (not an award of damages), it is unsurprising that the net judgment rule would have no application to such cases.

¶25 Second, after vacating the amounts awarded to the Navas, on remand, the judgment will have the Navas paying money to Iverson, not the other way around. Thus, even if the net judgment rule applied, the Navas would not be the prevailing parties for fee-shifting.

¶26 Third, Section 33-1365 has no provision authorizing an award of attorneys' fees. Thus, that statute provides no basis for an award of fees to the Navas.

B. Iverson Has Not Shown the Court Abused Its Discretion in Awarding Him a Portion of His Requested Fees.

¶27 Although Iverson sought an award of $118,235 in attorneys' fees, the court awarded him $20,000. On appeal, Iverson claims an

entitlement to the entire amount of fees requested. An award of attorneys' fees is reviewed for abuse of discretion. *Rudinsky v. Harris*, 231 Ariz. 95, 101 ¶ 27 (App. 2012). Iverson has not shown that either Sections 33-1377 or 12-1178, or any other potentially applicable statute, required the court to award all his requested fees. Iverson sued under Section 33-1368, which gives the court discretion in determining whether to award the successful landlord reasonable fees and, if awarded, discretion in determining the amount of fees awarded. A.R.S. § 33-1368(C) ("The landlord may recover . . . reasonable attorney fees . . . ."). Iverson has shown no abuse of discretion in the court's fee award.

IV. The Court Did Not Err in Declining to Sanction the Navas.

¶28 Iverson argues the court erred by failing to impose sanctions against the Navas and their attorney for asserting their counterclaims. Iverson bases this argument on RPEA 4(A), which requires "due diligence" by parties and attorneys and that "[a]ttorneys must exercise reasonable care to ensure that their pleadings are accurate and well-grounded in fact and law." RPEA 4(A). Sanctions may be imposed for violations of these obligations. RPEA 4(C).

¶29 In declining to award sanctions, the court stated that it considered "the tone and tenor of the litigation as a whole and the reasonableness of the parties in asserting their claims." The court found no lack of reasonable care by the Navas and made no finding that their claims were not well-grounded in fact and law. Moreover, although they exceeded the jurisdiction in this FED case, the Navas' counterclaims properly could be asserted in a civil action. On this record, Iverson has not shown the court abused its discretion in denying the requested sanctions against the Navas.

V. Iverson is Entitled to Attorneys' Fees on Appeal.

¶30 Iverson requests an award of attorneys' fees and costs on appeal pursuant to A.R.S. §§ 12-341, -341.01, -349, -350 and -1178(A). The Navas seek an award of fees on appeal pursuant to A.R.S. § 12-341.01. Because the Navas are not the successful parties on appeal, their request is denied. As the successful party on appeal, Iverson is awarded his reasonable attorneys' fees and costs incurred on appeal pursuant to A.R.S. §§ 12-341 and -341.01, contingent upon his compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶31 Those portions of the judgment addressing the merits of counterclaim counts one and five and awarding the Navas $17,600 paid toward the purchase of the property are vacated without prejudice to the Navas asserting such claims in a separate civil action. The portion of the judgment awarding $4,639.62 against Craig Iverson is vacated. The portions of the judgment awarding the Navas $5,165 for pool service and $7,560 for yard service are vacated. The portions of the judgment addressing counterclaim counts two and three stand. The portions of the judgment addressing the merits of the roof and pool leak portions of counterclaim count four and Iverson's claims are affirmed. This matter is remanded to the superior court for entry of a judgment reflecting this relief and any other proceedings deemed necessary.

AMY M. WOOD • Clerk of the Court
FILED: AA