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

CHARLES FENIMORE, Plaintiff/Appellant, v. MCCOY'S M.H.P., L.L.C., an Arizona limited liability company dba MCCOY RANCH MOBILE HOME PARK; DAN MILLER and JANE DOE MILLER, husband and wife, Defendants/Appellees.	1 CA-CV 11-0427 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-008291

The Honorable George H. Foster, Jr., Judge

AFFIRMED IN PART, REVERSED IN PART

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G E M M I L L, Judge

¶1 Charles Fenimore appeals the trial court's grant of summary judgment dismissing his claims against McCoy's M.H.P., L.L.C. d/b/a McCoy Ranch Mobile Home Park and its manager, Dan

Miller, and his wife (collectively, “Defendants”) for conversion of awnings, steps, and a carport that were previously attached to a trailer home he purchased. Fenimore also appeals the court’s grant of attorneys’ fees to Defendants. For the following reasons, we affirm the summary judgment in favor of Defendants but reverse the award of attorneys’ fees.

FACTS AND PROCEDURAL HISTORY

¶2 In August 2009, Fenimore arranged to purchase a mobile home owned by Green Tree Financial (“Green Tree”). Green Tree is not a party in this litigation. Fenimore expected to then sell the mobile home to Heather Burdett for a considerable profit. The mobile home was located at McCoy Ranch Mobile Home Park (“Mobile Park”). When Fenimore first viewed the mobile home in June 2009, it had attached awnings, a porch and steps (“the accessories”). Two months later, when Fenimore inspected it before placing his bid with Green Tree, he noticed the accessories had been removed. The manager of the Mobile Park allegedly told Fenimore that he removed the accessories and would replace them after the sale if Fenimore found a suitable purchaser to live at the Mobile Park

¶3 Fenimore purchased the mobile home from Green Tree for $12,000. A week later, Defendants denied Heather Burdett’s application to become a tenant of the Mobile Park because she had bad credit and previous evictions, and her co-applicant had

a criminal record. Consequently, Burdett did not purchase the mobile home.

¶4 Fenimore filed this lawsuit alleging that Defendants' conversion of the accessories prevented him from selling the mobile home because the Mobile Park's rules required all mobile homes to have "steps, carport and a patio." Fenimore sought damages for lost profit from the expected sale to Heather Burdett, additional damages of no less than $220,000 for park rental fees, utilities, and taxes, plus punitive damages and attorneys' fees.[1]

¶5 Defendants filed a motion for summary judgment arguing that Fenimore never owned the accessories because the previous owner had conveyed the accessories to them as settlement of unpaid rent. Defendants further argued that Green Tree never intended to transfer the accessories to Fenimore because the mobile home was sold in "as is" condition. They further argued

[1] Fenimore purchased the trailer for $12,000 intending to sell it to Heather Burdett for $28,000, to be paid in monthly installments over a period of twenty years at eighteen-percent interest. Fenimore alleged that Defendants interfered with that sale by refusing to approve Heather Burdett as a tenant for "no reason," even though it had represented to him that Heather Burdett would qualify. Fenimore also argued the conversion of the accessories prevented him from selling the mobile home to anyone, thereby rendering the mobile home "valueless." Fenimore's complaint claimed $103,710 as loss profit of the sale, and $220,000 for rents, utilities and taxes incurred for maintaining the trailer at the Mobile Park. In addition, Fenimore sought no less than $50,000 in punitive damages and $12,000 in attorneys' fees for filing the complaint.

that Fenimore inspected the home before placing his bid and saw that the accessories had been removed, so he had purchased the mobile home without the accessories.

¶6 Fenimore opposed the motion for summary judgment and filed a separate statement of facts. At his deposition, Fenimore testified that he believed the accessories were included in the purchase of the mobile home. He further stated that he contacted Ben Gubac, the manager of foreclosure properties at Green Tree at the time of sale. Because Gubac was no longer employed by Green Tree, Tim Barboza, the current manager who was the field representative that inspected the mobile home, responded to the inquiry. By letter dated and signed July 21, 2010, Barboza stated:

> The home at the time came with steps, a carport and patio cover. These items were included in the purchase of the home at that time. The home at initial inspection in June 2009 showed these items were attached to the home but in August 2009, pictures show that they were removed. These items were part of the agreement made with you at the time.

¶7 At his deposition, Barboza stated that the letter was incorrect and the accessories were not part of the agreement. Barboza testified that he received Fenimore's inquiry about the accessories "almost a year" after the sale, so he prepared his response by comparing inspection reports and pictures from June 2009, when the bank took possession of the mobile home, with

those from August 2009, when Fenimore placed his bid. Because he only looked at those reports and pictures, Barboza stated that he incorrectly believed the accessories were part of the sale.

¶8 Barboza explained that he changed his mind because a foreclosed home is typically sold in "as is" condition, so the buyer has a chance to inspect the home before making a bid. Therefore, if the accessories are not attached to the mobile home at the time the buyer inspects it, they are usually not included in the purchase. Barboza also stated that when a sales agreement does not list the accessories, they are not "part of the deal."

¶9 At his deposition, McCoy's owner, Geoffrey Gunsalus, testified that management removed the accessories because the prior owner conveyed them to him in exchange for unpaid rent. He explained that McCoy's policy was to remove awnings and patio covers when a trailer is abandoned, but to give them to the new owners as incentive to keep the mobile home in the Mobile Park. Gunsalus testified that he offered to give Fenimore accessories if Fenimore found a qualified tenant to purchase the home. The manager of the Mobile Park, Dan Miller, similarly testified that the prior owner sold the accessories to Defendants.

¶10 Based on this evidence and the sales contract, the trial court granted McCoy's motion for summary judgment. With

regard to the potential factual dispute about whether the accessories were included in Fenimore's purchase of the mobile home, the trial court stated as follows:

> Defendants have come forward with evidence to show that the Plaintiff did not have any right to own or possess the property in question. The purchase agreement indicates that the Plaintiff acquired only the trailer and nothing else. The purchase price for the trailer was only $12,000. In the complaint, Plaintiff alleges that it would cost far in excess of $12,000 to purchase the mobile home and the accessories. The Plaintiff's testimony indicates that when he inspected the mobile home in connection with the sale it did not have the awning, patio cover and stairs that are the subject of the dispute. He claims they were part of the contract, but the written agreement indicates otherwise.
>
> In addition, the seller did not have any interest in the accessories in question to be able to confer upon the Plaintiff any rights of ownership or use. In the absence of any evidence tending to prove the right of possession or ownership, the Plaintiff's claim for conversion must fail. Although the Plaintiff alleges material facts regarding the right to possession are in dispute, he has failed to come forward with any admissible evidence contradicting the record that indicates he was never conferred any right to possess the accessories at issue.

¶11 Fenimore timely appeals the adverse judgment entered against him.

DISCUSSION

¶12 Fenimore argues the trial court erred in granting

summary judgment on his conversion claim. He argues he had a superior right of possession to the accessories because they were "part of the purchase," and Defendants removed them without permission. He contends this evidence raises a genuine dispute of material fact. We disagree.

¶13 Summary judgment is warranted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). We review the grant of summary judgment de novo. *Hohokam Irr. & Drainage Dist. v. Ariz. Pub. Serv. Co.*, 204 Ariz. 394, 396, ¶ 5, 64 P.3d 836, 838 (2003). This court views the evidence and all reasonable inferences from the evidence in the light most favorable to the party opposing the motion. *Id*. at 396-97, ¶ 5, 64 P.3d at 838-39. In deciding a motion for summary judgment, we "apply the same standards as used for a directed verdict." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). Accordingly, summary judgment is appropriate "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim." *Id.*

¶14 Conversion is an act of dominion or control exerted over another's personal property that seriously interferes with the other's right to control the property. *Universal Mktg. &*

Entm't, Inc. v. Bank. One of Ariz., 203 Ariz. 266, 268, ¶ 6, 53 P.3d 191, 193 (App. 2002) (citation omitted). One must have the right to immediate possession of property for it to be converted. *Case Corp. v. Gehrke*, 208 Ariz. 140, 143, ¶ 11, 91 P.3d 362, 365 (App. 2004).

¶15 Fenimore's conversion claim against Defendants fails because he cannot show that he ever became the owner of the accessories or otherwise acquired a right to possess them. There is no dispute that Defendants removed the accessories sometime between Green Tree's foreclosure against the prior owner and Fenimore's subsequent purchase of the mobile home. The trial court found no admissible evidence that showed Fenimore gained possession or ownership of the accessories through the purchase of the mobile home. Nothing in the written contract shows that the accessories were included in the sale of the mobile home, and nothing is listed on the contract in the space provided for accessories.

¶16 In addition, the accessories had already been removed when Fenimore inspected the mobile home before making his bid, and Barboza testified that the mobile home was sold in "as is" condition. Barboza's testimony is supported by the fact that Fenimore paid only $12,000 for the mobile home, yet claims the value of the accessories alone was $27,000.

¶17 Although Fenimore denies that the property was sold in

"as is" condition, he provided no admissible evidence to support his claim. Instead, Fenimore relies on the letter from Barboza stating that the accessories were included in the purchase of the mobile home. This letter at first blush lends support to Fenimore's testimony that he believed the purchase of the mobile home included the accessories. Barboza testified, however, that he was mistaken in the letter and that he reached his erroneous opinion almost a year after the sale by simply comparing inspection reports and pictures of the mobile home from before and after the sale. We therefore find no support in the record that the mobile home was not sold in "as is" condition.

¶18 We also find no merit to Fenimore's claim that Defendants had no right to possession of the accessories. Both Gunsalus and Miller testified that the prior owner conveyed the accessories to the Mobile Park in satisfaction of unpaid rent. Fenimore provides no reliable evidence to dispute this testimony. Although Fenimore cites to a signed statement from the prior owner that no such transfer occurred, the writing is unverified and fails to satisfy the requirements of an affidavit or sworn declaration. *See* Ariz. R. Civ. P. 56(c)(1) (stating summary judgment shall be based on "the pleadings, deposition, answers to interrogatories, and admissions on file, together with the *affidavits*, if any" (emphasis added)).

¶19 Furthermore, regardless of whether Defendants had any

possessory rights to the accessories or who between Green Tree and Defendants had a superior right to possession, the accessories were not attached to the mobile home when Fenimore purchased it in "as is" condition. Because Fenimore never obtained possessory rights to the accessories through his purchase from Green Tree, we conclude that the trial court correctly granted Defendants summary judgment on Fenimore's conversion claim.

¶20 Next, Fenimore challenges the trial court's award of attorneys' fees in favor of Defendants in the amount of $9600. Defendants requested fees pursuant to A.R.S. § 12-341.01(A) (2003) and A.R.S. § 33-1408(C) (2007).

¶21 Fenimore argues Defendants are not entitled to the award under § 12-341.01(A) because conversion is a tort claim that does not "arise out of contract." We agree. In *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 543, 647 P.2d 1127, 1141 (1982), our supreme court held that fees may be awarded under A.R.S. § 12-341.01, "as long as the cause of action in tort could not exist but *for* the breach of contract." *Id.* at 543, 647 P.2d at 1141. In determining whether a contract arises out of contract,

> the court should look to the fundamental nature of the action rather than the mere form of the pleadings. The existence of a contract that merely puts the parties within tortious striking range of each other does

> not convert ensuing torts into contract claims. Rather, a tort claim will "arise out of a contract" only when the tort could not exist "but for" the breach or avoidance of contract. When the duty breached is one implied by law based on the relationship of the parties, that claim sounds fundamentally in tort, not contract. In such cases, it cannot be said that the plaintiff's claim would not exist "but for" the contract. The test is whether the defendant would have a duty of care under the circumstances even in the absence of a contract.

Ramsey Air Meds., L.L.C. v. Cutter Aviation, Inc., 198 Ariz. 10, ¶ 27, 15-16, 6 P.3d 315, 320-21 (App. 2000).

¶22 Here, the underlying purchase agreement with Green Tree merely places Fenimore and Defendants within "tortious striking range" or each other. *Id.* Fenimore alleges that Defendants violated their duty not to interfere with the possessory rights that Fenimore obtained through that agreement. Because the "duty not to interfere with the contract of another arises out of law, not contract," the fundamental nature of Fenimore's complaint sounds in tort. *See Bar J Bar Cattle Co., Inc., v. Pace*, 158 Ariz. 481, 486, 763 P.2d 545, 550 (App. 1988). We conclude, therefore, that attorneys' fees should not have been awarded under A.R.S. § 12-341.01(A).

¶23 Defendants also sought fees on the basis of A.R.S. § 33-1408(C), a statute within the Arizona Mobile Home Parks Residential Landlord and Tenant Act ("Act"). This statute applies to actions arising out of an agreement entered into

pursuant to the Act or a violation of the Act. Here, neither the claim nor defense arose under the rental agreement with Defendants. *See* A.R.S. § 33-1406 (2007) (stating this chapter applies to the "obligations and remedies under a rental agreement").

¶24 For these reasons, we reverse the trial court's award of attorneys' fees to Defendants.

CONCLUSION

¶25 We affirm the grant of summary judgment in favor of Defendants and the trial court's award of taxable costs to Defendants. We reverse the trial court's award of attorneys' fees to Defendants. We deny Defendants' request for an award of attorneys' fees on appeal. In accordance with A.R.S. § 12-342 (2003), Fenimore is entitled to an award of his taxable costs on appeal, upon compliance with Arizona Rule of Civil Appellate Procedure 21.

____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

____/s/_____
PATRICIA A. OROZCO, Presiding Judge

____/s/_____
JON W. THOMPSON, Judge