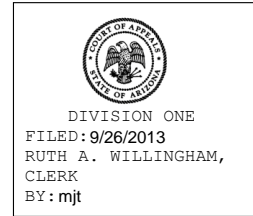


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GREEN CROSS MEDICAL, INC., an) 1 CA-CV 12-0610
Arizona non-profit corporation,)
) DEPARTMENT C
Plaintiff/Appellee,)
) **MEMORANDUM DECISION**
v.) (Not for Publication
) Rule 28, Arizona Rules
JOHN V. GALLY, Trustee of the) of Civil Appellate
John V. Gally Family Protective) Procedure)
Trust, dated January 11, 1993,)
)
Defendant/Appellant.)
)
)
_____)

Appeal from the Superior Court in Navajo County

Cause No. S0900CV201200208

The Honorable Ralph E. Hatch, Judge

AFFIRMED

Cunningham Mott, PC Flagstaff
By William Whitney Cunningham
Attorneys for Plaintiff/Appellee

KL Ward & Associates, LLC Chandler
By Kathrynne L. Ward
Attorneys for Defendant/Appellant

O R O Z C O, Judge

¶1 John V. Gally (Gally), as trustee of the John V. Gally
Family Protective Trust appeals the trial court's order granting

an application for a preliminary injunction filed by Green Cross Medical Center (GCM). For the following reasons, we affirm the trial court's decision.

FACTS AND PROCEDURAL HISTORY

¶12 In April 2012, Gally, in his capacity as Trustee, executed a commercial lease agreement with GCM, in which Gally agreed to rent to GCM a property located in Winslow, Arizona. At the time of the lease's execution, GCM was attempting to obtain a license to grow and dispense medical marijuana and intended to use the property for those purposes. The purpose of GCM's business was clearly set forth in the lease. Approximately two weeks later, Gally purported to revoke the lease.

¶13 GCM filed suit to enforce the lease, arguing that Gally was in breach of contract. Upon filing suit, GCM filed a motion for a temporary restraining order and a motion for a preliminary injunction. The trial court issued the temporary restraining order.

¶14 Gally filed a motion to vacate the temporary restraining order, arguing only that the previous tenant, Winslow Water Conditioning (WWC), had a superior interest in the property in the form of an option to purchase the property with Mantegic Technologies, Inc. (MTI), which manages WWC.

¶15 The trial court granted the preliminary injunction, finding that GCM "has a superior leasehold interest in the property to any interests of [MTI], managing member of [WWC], which purports to have exercised an option to purchase the property." Gally timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003) and -2101.A.5(b) (Supp. 2012).

DISCUSSION

Illegal Purpose

¶16 On appeal, Gally argues that, notwithstanding Arizona law regarding growing and dispensing medical marijuana, federal law prohibits such activities, and thus, the contract is void based on illegality of purpose. GCM argues that this issue was not decided by the trial court in ruling on the preliminary injunction. We agree.

¶17 So far as the record discloses, Gally did not raise any illegality of purpose argument during the preliminary injunction hearing. "Our review is limited to the record on appeal." *Nat'l Adver. Co. v. Ariz. Dep't of Transp.*, 126 Ariz. 542, 543, 617 P.2d 50, 52 (App. 1980). Moreover, "where an incomplete record is presented to an appellate court, the missing portions of that record are to be presumed to support the action of the trial court." *Cullison v. City of Peoria*, 120

Ariz. 165, 168 n.2, 584 P.2d 1156, 1159, n.2 (1978) (citation omitted).

¶18 On appeal, GCM provided only a partial transcript, which does not include any discussion of illegality of purpose. After the preliminary injunction was granted, and just days before filing the notice of appeal, Gally filed a motion to dismiss, arguing, inter alia, that he had a right to rescind the contract based on illegality of purpose. Because that issue was not raised until after the ruling on the preliminary injunction, we will not consider it on appeal.

Preliminary Injunction

¶19 The trial court has the discretion to issue a preliminary injunction when a party establishes 1) a strong likelihood of success on the merits; 2) the possibility of injury not remediable by damages; 3) a balance of hardships in the plaintiff's favor; and 4) public policy favors the injunction. *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990).

¶10 We review the trial court's issuance of a preliminary injunction for an abuse of discretion. *Valley Med. Specialists v. Farber*, 194 Ariz. 363, 366, ¶ 9, 982 P.2d 1277, 1280 (1999); see also *Fin. Assocs., Inc. v. Hub Props., Inc.*, 143 Ariz. 543, 545, 694 P.2d 831, 833 (App. 1984) ("The granting or withholding of a preliminary injunction rests in the sound discretion of the

trial court."). An abuse of discretion occurs if the trial court "1) applied the incorrect substantive law or preliminary injunction standard; 2) based its decision on a clearly erroneous finding of fact that is material to the decision to grant or deny the injunction; or 3) applied an acceptable preliminary injunction standard in a manner that results in an abuse of discretion." *McCarthy W. Constructors, Inc. v. Phx. Resort Corp.*, 169 Ariz. 520, 523, 821 P.2d 181, 184 (App. 1991).

¶11 The trial court found that the criteria required for the issuance of a preliminary injunction were met. First, the trial court determined that the plaintiff had a strong likelihood of success on the merits because it has a leasehold interest in the property superior to any interests of WWC. Specifically, the trial court found that WWC, which was Gally's previous tenant, abandoned its lease by operation of law because it did not pay rent for several months, there was no electricity or water at the property, WWC laid off or fired all of its employees, and Gally's efforts to contact WWC were unsuccessful. Moreover, the court determined that Gally was "intentionally very evasive" on cross examination and concluded he likely was evasive because he signed an Option Exercise Letter (Letter) with MMI. In the Letter, MMI, "purportedly acting as managing agent for WWC," indicated a willingness to purchase the property to open a medical marijuana dispensary. The trial court found

the Letter was too indefinite to create an option, thus rendering the Letter "invalid and unenforceable."

¶12 Second, the trial court determined that the harm GCM faces is incapable of being remedied by damages because an applicant for a dispensary permit "must submit documentation showing legal ownership of, or a legal leasehold interest in, the property at issue." Thus, without the issuance of a preliminary injunction, GCM's application would no longer be considered. Third, the trial court found that the injunction did not deprive Gally of any rights because he "could pursue damages, including . . . a forcible detainer action." Fourth, the trial court stated that "enforcement of legal and binding contracts is within the public policy of the State of Arizona."

¶13 The trial court applied the correct legal standard in reaching its decision. The trial court also clearly set forth its reasoning in the order granting the preliminary injunction, resting its decision on "the testimony given, the exhibits admitted into evidence, and the arguments of Counsel." Moreover, substantial evidence in the record supported the trial court's findings of fact. As such, no abuse of discretion occurred.

ATTORNEY FEES

¶14 Both parties request their attorney fees and costs on appeal pursuant to ARCAP 21(c) and A.R.S. §§ 12-341 (2003) and -

341.01 (Supp. 2012). Because Gally is not the prevailing party, he is not entitled to attorney fees and costs. Because GGM is the prevailing party, we award GCM costs and reasonable attorney fees on appeal, upon its compliance with ARCAP 21.

CONCLUSION

¶15 For the foregoing reasons, we affirm.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

SAMMUEL A. THUMMA, Presiding Judge

/S/

DIANE M. JOHNSEN, Chief Judge