IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

DAWN HOGAN, an individual, *Plaintiff/Appellant*,

v.

TW2 PROPERTIES LLC, an Arizona limited liability company,
Defendant/Appellee.

No. 1 CA-CV 15-0738
FILED 2-16-2017

Appeal from the Superior Court in Maricopa County
No. CV2012-093131
The Honorable David M. Talamante, Judge

AFFIRMED

COUNSEL

Sternfels & White PLLC, Fountain Hills
By Frederick C. Horn, Shawn C. White
Counsel for Plaintiff/Appellant

Grant & Vaughn PC, Phoenix
By Kenneth B. Vaughn, Sharon R. Sprague
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Kent E. Cattani delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge Maurice Portley[1] joined.

C A T T A N I, Judge:

¶1 Dawn Hogan appeals from a bench trial on her conversion claim against TW2 Properties, LLC ("TW2"). The superior court granted judgment as a matter of law at the close of Hogan's case-in-chief, finding that Hogan did not present sufficient evidence and argument to support her claim. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 TW2 obtained title to Hogan's former residence in a trustee's sale in November 2011, then obtained an eviction judgment approximately one month later. Hogan vacated the residence, and she asserts that she was forced to leave behind a substantial amount of personal property. TW2 apparently gave Hogan some opportunity to recover her personal property, but she did not do so, and a portion of the property was sold at an estate sale. The items that were not sold were returned to Hogan, although she claims some of the items had been damaged.

¶3 Hogan sued TW2 a few months later alleging violations of the Arizona Residential Landlord and Tenant Act ("ARLTA"), conversion, abuse of process, and intentional infliction of emotional distress. The superior court granted summary judgment to TW2 on all of Hogan's claims except conversion, and the court certified the judgment as final under Rule 54(b) of the Arizona Rules of Civil Procedure. Hogan did not appeal from that judgment.

¶4 The superior court sent the conversion claim to compulsory arbitration, and an arbitrator awarded Hogan $35,000. TW2 appealed, and the parties proceeded to a bench trial on that claim. Hogan testified on her own behalf but did not explain a basis for the $35,000 award and did not

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[1] The Honorable Maurice Portley, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

move for the admission of items in evidence. TW2 requested judgment as a matter of law at the close of Hogan's case-in-chief, and the superior court granted TW2's request, finding that Hogan did not offer sufficient evidence to support her conversion claim. The court entered final judgment on the conversion claim, and Hogan timely appealed. We have jurisdiction under Arizona Revised Statutes ("A.R.S.") § 12-2101(A)(1).[2]

DISCUSSION

¶5 Under Rule 52(c) of the Arizona Rules of Civil Procedure, the court in a bench trial may weigh the evidence at the close of the plaintiff's case and rule on the merits. *Johnson v. Pankratz*, 196 Ariz. 621, 625, ¶ 15 (App. 2000).[3] In such circumstances, the superior court "may rule as a matter of law or consider the sufficiency of the evidence," and on review, we consider the evidence presented in the light most favorable to sustaining the court's ruling. *Id.* at 626, ¶¶ 19–20.

¶6 Here, the superior court found that Hogan failed to present sufficient evidence to support her conversion claim. Conversion is "an act of wrongful dominion or control over personal property in denial of or inconsistent with the rights of another." *Case Corp. v. Gehrke*, 208 Ariz. 140, 143, ¶ 11 (App. 2004) (citation omitted). To prevail, Hogan had to specifically identify what property TW2 allegedly converted and show she was entitled to immediate possession of it when it was converted. *Id.*; *Cassell v. Gen. Motors Corp.*, 154 Ariz. 75, 77 (App. 1987).

¶7 Hogan did not establish these facts; she testified only that her "whole entire household was sold" without specifying the objects that belonged to her. And there is no indication in the record that TW2 received more from the estate sale than what was owed to it. Although Hogan now contends that a "memorandum"—which she physically provided to the court at a pretrial hearing but did not formally file—"provide[d] the prima facie elements" of her claim, she did not move for that document's admission and it was never admitted in evidence. And even though she

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[2] Absent material revisions after the relevant date, we cite a statute's current version.

[3] Although TW2 cited Rule 50(a)(1), which applies to jury (not bench) trials, as the basis for its motion for judgment as a matter of law, we construe the motion as one for judgment on partial findings under Rule 52(c). *Johnson*, 196 Ariz. at 626, ¶ 19.

was self-represented, she was required to comply with the procedural requirements for admitting evidence in the record. *See Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, 287, ¶ 16 (App. 2000) (stating that self-represented parties are held to the same standard as parties represented by counsel).

¶8 The court indicated that it "looked at Ms. Hogan's memorandum" and "considered . . . [Hogan's] memoranda as by way of argument." The court further noted that it would "look at it [to] see whether it has any evidentiary value, but I didn't get that impression from looking at it the first time. But let her have an additional opportunity and then you [TW2's counsel] can at that point then either renew your Rule 50 or respond to whatever else she tells me . . . ." Hogan did not ask that the memorandum be admitted in evidence, and there is no indication that the superior court considered it any way other than as argument. The memorandum was not part of the trial record, and we previously rejected Hogan's request to expand the record on appeal to include the memorandum. Accordingly, the unfiled memorandum does not form a basis for relief.

¶9 Hogan next argues that we should consider certain allegations that TW2 made in a different case against its former counsel as judicial admissions relating to her ARLTA claims. *See, e.g.*, *Fox v. Weissbach*, 76 Ariz. 91, 95 (1953) (stating that allegations in pleadings in prior cases may be treated as admissions). But the superior court had previously resolved Hogan's ARLTA claims in its earlier Rule 54(b) judgment, which Hogan did not appeal, and we thus lack jurisdiction to address those claims. *Dowling v. Stapley*, 221 Ariz. 251, 264 n.13, ¶ 38 (App. 2009). Moreover, Hogan does not explain how allegations regarding TW2's former counsel related specifically to the conversion claim. Accordingly, her claim on appeal is unavailing.

¶10 TW2 requests sanctions under ARCAP 25, which authorizes the court to impose sanctions on parties or counsel for bringing frivolous appeals. *See Johnson v. Brimlow*, 164 Ariz. 218, 221–22 (App. 1990). An appeal is frivolous "when any reasonable attorney would agree that the appeal is totally and completely without merit." *Price v. Price*, 134 Ariz. 112, 114 (App. 1982) (citation omitted). But "[g]ranting sanctions pursuant to Rule 25 is something that must be done with great caution," and we use our authority under Rule 25 only "with great reservation" and only in cases involving "wholly frivolous and meritless claims." *Id.*

¶11 Here, Hogan's assertion that her memorandum should have been included in the record was not frivolous. The superior court's explanation that it would consider the memorandum "as by way of argument" and would "look at it [to] see whether it has any evidentiary value" established a basis for Hogan's argument that the memorandum should be included in the record. Although we have concluded that Hogan was required to do more to have the memorandum introduced in evidence as an exhibit (particularly given the superior court's indication that its initial impression was that the memorandum did not have "evidentiary value"), the issue was not "totally and completely without merit." *Id.* Accordingly, we decline to award TW2 sanctions.

CONCLUSION

¶12 The judgment is affirmed.

AMY M. WOOD • Clerk of the Court
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