IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CALLIE LARSEN, *Plaintiff/Appellant*,

v.

SNOW PROPERTY SERVICES, et al., *Defendants/Appellees*.

No. 1 CA-CV 16-0205
FILED 3-7-2017

Appeal from the Superior Court in Maricopa County
No. CV2014-095235
The Honorable Robert H. Oberbillig, Judge

AFFIRMED

COUNSEL

Callie Larsen, Gilbert
Plaintiff/Appellant

Pywowarczuk Law, PLLC, Tempe
By Kristina L. Pywowarczuk, Katherine E. Hay
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge John C. Gemmill delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge Patricia A. Orozco joined.[1]

G E M M I L L, Judge:

¶1 Callie Larsen ("Larsen") appeals the superior court's grant of summary judgment in favor of Snow Property Services and Wind Drift Master Community Association (collectively "Defendants"). Finding no genuine dispute of material fact or legal error, we affirm.

BACKGROUND

¶2 Larsen lives in a property owned and occupied by P.J. Although Larsen and P.J. are "a couple," she considers herself a tenant and P.J. her landlord. Larsen does not have an ownership interest in the property or a written rental agreement for the property and provides what she describes as "business services" as rent. The property is located within the "Wind Drift" community, which is governed by the Wind Drift Master Community Association, a homeowners' association with governing covenants, conditions, and restrictions. Snow Property Services provides management services to the homeowners' association regarding the property.

¶3 In March 2012, P.J. complained to Defendants about physical damage to his property caused by the roots of a tree located on the community's adjoining property. Defendants removed the tree in May 2012, but Larsen claims that did not resolve the damage and an odor is still present in the guest bathroom. In March 2013, P.J. sued Wind Drift, and after a jury trial in June 2016, obtained a judgment for the damage to the property caused by the tree.

---

[1] The Honorable John C. Gemmill and Honorable Patricia A. Orozco, Retired Judges of the Court of Appeals, Division One, have been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

¶4 In November 2014, Larsen filed this case against Defendants alleging negligence, breach of contract, and trespass. Defendants moved for summary judgment, primarily arguing the absence of proof for the elements of "injury" or "damages" necessary to support Larsen's claims. The superior court granted Defendants' motion for summary judgment. Larsen then filed a motion for reconsideration that was denied. Larsen timely appeals, and this court has jurisdiction in accordance with Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2017) and -2101(A)(1) (West 2017).

ANALYSIS

¶5 Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a). We review a trial court's grant of summary judgment de novo, viewing the evidence and reasonable inferences in the light most favorable to the party opposing the motion. *Strojnik v. Gen. Ins. Co. of Am.*, 201 Ariz. 430, 433, ¶ 10 (App. 2001); *BAC Home Loans Servicing, LP v. Semper Inv. LLC*, 230 Ariz. 587, 589, ¶ 2 (App. 2012). A claim will not withstand a motion for summary judgment 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[.]" *Orme School v. Reeves*, 166 Ariz. 301, 309 (1990).

¶6 Larsen alleges the superior court erred in granting summary judgment because it incorrectly determined that, as a tenant, she was not entitled to recover damages for physical damage done to the property that is the subject of her tenancy. Larsen also claims the superior court erred by determining insufficient admissible evidence was presented to support her claim of damages caused by Defendants.

¶7 In its initial ruling granting summary judgment, the superior court stated that Larsen's

> claims for property damage allegedly caused by tree roots are not her claims to bring. These claims, if they exist, belong to the property owner, not the tenant. If the tenant has suffered damage to her tenancy, then her remedy is against her landlord per the terms of her agreement with the landlord[.]

The court supplemented its reasoning when it denied Larsen's motion for reconsideration, as follows:

> The Court did not find admissible evidence of damages to the tenancy caused by the alleged toxic tree, which had been removed. Consequently, as stated before, the Defendants' Motion was well taken. This Court's ruling was not based on a "lack of standing" but on a lack of admissible proof of recoverable damages for the tenancy.

¶8 Citing *Thompson v. Harris*, 9 Ariz. App. 341 (1969), Larsen contends there is a "universal rule that tenants may recover for damage to rental property." *Thompson* held that the landlord had no duty to prevent the improper use of a shared wall by another tenant and noted the tenant "has a cause of action" against the co-tenant. 9 Ariz. App. at 345. Even assuming a tenant *may* have a cause of action against a third-party, the tenant must, in opposing a motion for summary judgment, produce evidence from which a reasonable jury could find in favor of the claims presented. *See Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 115, ¶ 12 (App. 2008) (holding that party resisting summary judgment must "come forward with evidence establishing the existence of a genuine issue of material fact that must be resolved at trial"). "When a motion for summary judgment is made and supported as provided in this rule, an opposing party may not rely merely on allegations or denials of its own pleading." Ariz. R. Civ. P. 56(e). Further, "[t]he opposing party must, by affidavits or as otherwise provided in this rule, set forth specific facts showing a genuine issue for trial." *Id.*

¶9 Larsen alleged three claims within her complaint — negligence, breach of contract, and trespass — each requiring proof of damage or injury. A negligence claim required Larsen to prove, among other things, "actual loss or damage." *Ontiveros v. Borak*, 136 Ariz. 500, 504 (1983) (*citing* W. Prosser, *Handbook on the Law of Torts* § 30, at 143 (4th ed. 1971)); *Glaze v. Larsen*, 207 Ariz. 26, 29, ¶ 13 (2004) ("Because an essential element of the claim is that the plaintiff was injured . . . negligence alone is not actionable; actual injury or damages must be sustained before a cause of action in negligence is generated.") (internal quotation and citation omitted). Similarly, to prevail on a breach of contract claim, Larsen must show, as an essential element of her claim, "resulting damages." *Chartone, Inc. v. Bernini*, 207 Ariz. 162, 170, ¶ 30 (App. 2004); *see also Gilmore v. Cohen*, 95 Ariz. 34, 36 (1963) (stating burden is on plaintiff in action for breach of contract to prove damages "with reasonable certainty"). Likewise, regarding the trespass claim, Larsen was required to prove a resulting injury yielding damages. *See Cannon v. Dunn*, 145 Ariz. 115, 117 (App. 1985) (noting that, although "landowner upon whom a *sensible injury* has been inflicted by the protrusion of the roots of a noxious tree or plant ha[s] the

right to an action at law in trespass," where there is no injury or damages "no action may be had" (emphasis added).[2]

¶10 Contrary to Larsen's argument, the superior court did not base its ruling "on a 'lack of standing' but on a lack of admissible proof of recoverable damages for the tenancy." Larsen's "tenancy" consists of the "use and occupancy" of P.J.'s property as a tenant pursuant to the terms of their oral rental agreement. *See* A.R.S. § 33-1314(B) (West 2017). Arizona law defines a tenant as "a person entitled under a rental agreement to occupy a dwelling unit to the exclusion of others." A.R.S. § 33–1310(16) (West 2017). Thus, in order to support her claims against Defendants, Larsen was required to present admissible evidence supporting her claim of injury to herself or her tenancy, not damage to property she did not own. *See Weinman v. De Palma*, 232 U.S. 571, 575 (1914) (stating "where a trespass results in the destruction of a building, with consequent interruption of a going business, the loss of future profits (these being reasonably certain and proved with reasonable exactitude) forms a proper element for consideration in awarding compensatory damages" to tenant by landlord and third party trespasser) (citations omitted). We therefore examine the record to determine if Larsen presented evidence creating any triable issue of fact regarding damage to her possessory interest as a tenant or personal injury to her.[3] *See* Ariz. R. Civ. P. 56(e).

¶11 A party's assertions based only on hearsay or speculation will generally not constitute "competent evidence" sufficient to overcome a motion for summary judgment. *Cullison v. City of Peoria*, 120 Ariz. 165, 168 (1978). Damages that are speculative or uncertain cannot support a judgment; the plaintiff must prove the fact of damage with reasonable

---

[2] We disagree with Defendants' assertion that *Cannon* and its use of "landowner" necessarily mean that tenants have no right to an action at law in trespass. *See Rogers v. Bd. of Regents of Univ. of Ariz.*, 233 Ariz. 262, 268-69, ¶ 22 (App. 2013) ("In order to establish a claim of trespass against another, the claimant must possess a legal interest in the land against which the trespass is alleged.").

[3] To the extent Larsen has argued that the damage or injury supporting her claims is physical damage sustained by P.J.'s property, the superior court correctly concluded that she cannot recover such damages. Indeed, Larsen acknowledges in her reply brief on appeal that she "lacks the requisite ownership interest to recover damages to real property."

certainty. *Coury Bros. Ranches, Inc. v. Ellsworth*, 103 Ariz. 515, 521 (1968). Such proof "must be of a higher order than proof of the amount of damages." *Id*. In the context of a motion for summary judgment,

> [i]f the burden of proof . . . rests on the non-moving party, then, to meet its burden of production, the moving party does not need to present evidence disproving the non-moving party's claim or defense. . . . Instead, the moving party need only "point out by specific reference to the relevant discovery that no evidence exist[s] to support an essential element of the [non-moving party's] claim" or defense.

Nat'l Bank of Ariz., 218 Ariz. at 117, ¶ 22 (quoting *Orme School*, 166 Ariz. at 310).

¶12 Defendants' motion for summary judgment pointed out that no evidence exists to support the essential element of recoverable injury or damage to Larsen caused by Defendants. On this record, Defendants' motion was adequately supported by reference to the relevant discovery. *See* Ariz. R. Civ. P. 56; *Nat'l Bank of Ariz.*, 218 Ariz. at 117, ¶ 22. As a result, Larsen had the burden to show that there was a genuine issue of disputed material fact.

¶13 Regarding Larsen's claim of damage to her tenancy interest, she asserts "loss of quiet enjoyment of property she rented." The record reveals, however, that at all relevant times Larsen was able to occupy, use, and exclude others from the property, presumably in a manner consistent with the terms of her oral rental agreement. During her deposition, she testified to an embarrassing odor in her guest bathroom but when asked whether the bathroom was still functional, she responded that the bathroom was functional and she continued to use it. She speculated that the odor resulted from one or more pipes cracked by the tree roots, but did not submit admissible evidence linking the tree roots to the odor. Larsen also claims there were times she could not park in the driveway due to the root protrusion, but she did not establish any exclusion from use, damage to her vehicle, or costs incurred for alternate parking.

¶14 Further, Larsen argues, as a "theory of damages," that a proper "proxy" for damages suffered by the tenancy is the difference between the reasonable rental value of the property without the tree root damage and the current rental value with the root damage. In her motion for reconsideration, she submitted to the trial court a report prepared by a real estate associate broker that concluded the rental value of the property

was diminished approximately $800 per month as a result of the damage attributed to the intruding tree roots. Even assuming this report could constitute competent evidence of damage to the tenancy, for several reasons the conclusions contained in the report were not properly presented to the superior court. First, the real estate associate broker is not demonstrated to be an expert, and the report itself contains the disclaimer that it "is not an appraisal" and "[i]f an appraisal is desired, the services of a licensed appraiser should be obtained"; second, the report assumes that the "smells" in the home are caused by the offending tree roots, a causal connection that has not been established by Larsen in this proceeding; and third, the report has not been submitted in verified form, such as by affidavit or declaration. *See* Ariz. R. Civ. P. 56(c), (e). Consequently, the report did not constitute admissible evidence defeating the summary judgment showing made by Defendants. On this record, Larsen did not demonstrate any triable issue of harm to her tenancy recoverable against Defendants.

¶15 Turning from potential damage to her tenancy to personal injury to Larsen herself, she asserts generally that she has been harmed by the odor in her guest bathroom. Larsen's deposition testimony, however, is the only evidence in proper form presented to support such a claim, and her deposition testimony falls short of proving the fact of damage with requisite certainty. During her deposition, the following exchange took place:

> Q. Have you had any personal issues as a result of the funky smell in the bathroom?
>
> A. It's embarrassing, sometimes, when company comes over.
>
> Q. Had you had any illnesses related to it?
>
> A. I don't know.
>
> . . . .
>
> Q. And do you believe that the odor is harming you in any way, like it's unhealthy, causing damage to your health?
>
> A. Well, I would have to get a test and everything. You don't really know if there is a mold problem that's causing health [sic] until you get it tested.
>
> Q. Well, as you sit here today, are you saying that you've had any sort of reactions concerning your health or possible damage to your health as a result of this cracked pipe?
>
> A. Not that I know of.

Larsen also acknowledged that she had not observed a crack in the bathroom piping, she was not certain that there is a crack in the bathroom piping, and she never requested repair of the bathroom piping. She asserts the smell is embarrassing but does not claim specifically that it has harmed her physically or emotionally. More significantly, she has not presented admissible evidence establishing the source of the odor or that the cause of that source of odor is attributable to Defendants. Stated simply, the evidence offered by Larsen does not rise above allegation and speculation.

¶16 On this record, Larsen presented insufficient evidence of damages sustained by her or her tenancy, and a reasonable jury could not properly find liability for the claims presented. Therefore, even viewing the evidence in the light most favorable to Larsen, this court concludes that summary judgment was properly granted in favor of Defendants.

CONCLUSION

¶17 We affirm the summary judgment.

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