

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MICHAEL GOLDEN and CAROL GOLDEN, husband and wife,
Plaintiffs/Appellees,

v.

NEIL BREAKSTONE and PETRA BREAKSTONE, husband and wife,
Defendants/Appellants.

No. 1 CA-CV 17-0270
FILED 2-27-2018

Appeal from the Superior Court in Coconino County
No. S0300CV201500554
The Honorable Dan R. Slayton, Judge

AFFIRMED IN PART, VACATED AND REMANDED IN PART

COUNSEL

Linda Wallace, PLLC, Sedona
By Linda Wallace
Counsel for Defendants/Appellants

Michael Golden, Carol Golden, Chandler
Plaintiffs/Appellees

MEMORANDUM DECISION

Judge James B. Morse Jr. delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Kenton D. Jones joined.

M O R S E, Judge:

¶1 Neil and Petra Breakstone ("Tenants") appeal from the trial court's entry of summary judgment holding them responsible to Michael and Carol Golden ("Homeowners") for damages to custom window coverings arising out of Tenants' residential lease of Homeowners' property. For the following reasons, we affirm in part and vacate and remand in part.

FACTS AND PROCEDURAL HISTORY

¶2 Homeowners and Tenants were parties to a residential lease agreement which provided for Tenants' surrender of the premises "in as good a state and condition" as existed when the lease term commenced, "reasonable use and wear and tear thereof and damages by the elements excepted."

¶3 In their move-in inspection report, Tenants described the condition of the window coverings as "[e]xcellent." Upon Tenants' departure, some custom window coverings were damaged beyond repair. The parties agreed the window coverings were 14 years old.

¶4 Homeowners provided Tenants with replacement cost quotes for the window coverings in the amounts of \$18,529.70 and \$18,486.20. Tenants tendered \$7,500 to Homeowners in addition to their previously forfeited security deposit of \$1,550, but failed to further compensate Homeowners and litigation ensued.

¶5 In the superior court, Homeowners moved for summary judgment and requested the full replacement cost of the damaged window coverings. In response to the motion for summary judgment, Tenants conceded responsibility, but argued that the undisputed age of the window coverings made damages a contested factual issue that was inappropriate for summary judgment. The superior court granted summary judgment in favor of Homeowners and awarded damages in the amount of \$18,712.70 for replacement of the damaged window coverings, less 25% depreciation

for age, and the \$9,050 sum already paid or forfeited by Tenants. Additionally, the superior court awarded attorneys' fees and costs, plus interest, to Homeowners in the amount of \$14,299.57. The \$14,299.57 included fees and costs of \$1,939.82 related to an earlier motion to dismiss that had been filed by Tenants.

¶6 Tenants timely appealed.¹

DISCUSSION

I. Standard for Review

¶7 We review de novo a grant of summary judgment and view the facts in the light most favorable to the party against whom summary judgment was entered. *United Dairymen of Ariz. v. Schugg*, 212 Ariz. 133, 140, ¶ 26 (App. 2006).

¶8 Summary judgment is appropriate when the moving party "shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). In a contract case, the plaintiff bears the burden of proof to demonstrate that a contract exists, its breach, and resulting damages. *Thunderbird Metallurgical, Inc. v. Ariz. Testing Labs.*, 5 Ariz. App. 48, 50 (1967). "If the evidence would allow a jury to resolve a material issue in favor of either party, summary judgment is improper." *Comerica Bank v. Mahmoodi*, 224 Ariz. 289, 291, ¶ 12 (App. 2010). "Put differently, the mere absence of a genuine dispute of material fact does not automatically entitle a plaintiff to judgment—the plaintiff must also demonstrate that the evidence entitles it to judgment as a matter of law." *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213, ¶ 16 (App. 2012). Thus, a motion for summary judgment "does not shift [the burden] to the non-moving party," and even when a defendant fails to offer opposing evidence, a court should not grant summary judgment if plaintiff's evidence "is susceptible to different assessments by a reasonable finder of fact." *Comerica Bank*, 224 Ariz. at 292-93, ¶ 20.

¹ Homeowners did not file an answering brief, but Lynn A. Keeling, Keeling Law Offices PC, Homeowners' attorney in the proceedings before the superior court, submitted a letter inviting this court to decide the appeal based on the opening brief and the record.

II. The Damages Award

¶9 Tenants do not challenge or dispute summary judgment as to responsibility, but argue that summary judgment was improper as to damages because the value of the aged window coverings, factoring in depreciation, was in dispute. Homeowners argued that summary judgment was appropriate on the issue of damages because Tenants never presented controverting evidence on the price of replacement blinds and depreciation "doesn't apply as a matter of law" because the blinds were custom.

¶10 The superior court's grant of summary judgment, less a 25% depreciation factor, explicitly rejects Homeowner's argument that depreciation was inappropriate as a matter of law, and is consistent with *Devine v. Buckler*, 124 Ariz. 286, 287 (App. 1979). There, the parties sued over damages to 3.5 year-old carpet in excellent condition. *Id.* This court affirmed that the trier of fact has wide latitude in determining actual value of used goods for which there is no active market and may consider factors including the cost of the property when new, the length of time it was used, its condition when the loss or injury occurred, its replacement cost with another item of like kind and similar condition, and any other factors to assist in assessing the value to the owner at the time of loss or injury. *Id.* The court also found that the trial court, as the trier of fact, had not abused its discretion in discounting the price of replacement carpet from \$13 to \$10 (approximately 27%) per yard to account for depreciation based upon the age of the carpet. *Id.*

¶11 Concluding that depreciation is an appropriate consideration as a matter of law, however, does not mean that it was proper for the superior court to make that determination via summary judgment in this case. See *Orme School v. Reeves*, 166 Ariz. 301, 311 (1990) (explaining summary judgment is inappropriate where a trial court is required to weigh the quality of the evidence or choose among competing or conflicting inferences). As noted in *Devine*, the superior court was the trier of fact and was entitled to weigh competing testimony and evidence regarding value. 124 Ariz. at 287. Here, the superior court was presented with nothing more than estimates for replacement costs of 14 year-old custom window blinds, and the Tenant's assertion that some reduction from those prices for depreciation was appropriate. On this record, damages are a fact "susceptible to different assessments by a reasonable finder of fact," *Comerica Bank*, 224 Ariz. at 292-93, ¶ 20, and it is up to the factfinder to decide whether, and by how much, the replacement costs of the blinds should be discounted by the factors identified in *Devine*. Because there is a

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genuine issue as to the amount of damages, we vacate the superior court's award of damages and remand for further proceedings.

III. Attorneys' Fees and Costs

¶12 Pursuant to Arizona Revised Statutes ("A.R.S.") section 12-341.01, Homeowners requested, and the superior court awarded, their attorneys' fees and costs, plus interest, in the amount of \$14,299.57, including fees and costs in the amount of \$1,939.82, plus interest, arising out of Homeowners' early defeat of Tenants' motion to dismiss before the superior court's entry of summary judgment in favor of Homeowners on all claims. Tenants request on appeal that the award of attorneys' fees and costs be vacated and remanded pending a determination of the successful party after a damages hearing.

¶13 We review an award of attorneys' fees and costs for an abuse of discretion. *Cohen v. Frey*, 215 Ariz. 62, 68, ¶ 18 (App. 2007). A court may award the successful party reasonable attorneys' fees in an action arising out of contract. A.R.S. § 12-341.01. "The decision as to who is the successful party for purposes of awarding attorneys' fees is within the sole discretion of the trial court, and will not be disturbed on appeal if any reasonable basis exists for it." *Sanborn v. Brooker & Wake Prop. Mgmt., Inc.*, 178 Ariz. 425, 430 (App. 1994). Although an award of money is "an important item to consider," the fact that a party does not recover the full measure of relief it requests does not mean that it may not be considered the successful party. *Ocean W. Contractors, Inc. v. Halec Constr. Co.*, 123 Ariz. 470, 473 (1979). Moreover, a court "must assess the overall outcome of the case to determine if that party 'prevailed' in the lawsuit." *Murphy Farrell Dev., LLLP v. Sourant*, 229 Ariz. 124, 134, ¶ 35 (App. 2012).

¶14 Based upon the foregoing, we decline to reverse the award of \$1,939.82, plus interest, related to Homeowners' defeat of Tenants motion to dismiss, but we vacate the superior court's remaining award of attorneys' fees and costs and remand the issue for consideration upon the ultimate disposition of the case.

¶15 Pursuant to A.R.S. §§ 12-341, 12-341.01, and 12-342, Tenants also request their attorneys' fees and costs on appeal. ARCAP 21. In our discretion, we decline to award Tenants attorneys' fees and costs on appeal but, in accordance with § 12-342(A), direct the trial court to determine whether Tenants are entitled to costs on this appeal when the trial court's judgment is ultimately entered on remand.

CONCLUSION

¶16 For the reasons set forth above, we affirm the superior court's grant of summary judgment in favor of Homeowners on the issue of liability and vacate the damages award and remand to the superior court for further proceedings. We, similarly, partially affirm and partially vacate the award of attorneys' fees pending disposition of the case and leave a redetermination as to the awarding of Tenants' costs incurred through this appeal to the trial court's determination at the culmination of proceedings herein.



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