IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

COLD FUSION LIGHTING, LLC, *Plaintiff/Appellee*,

v.

VERDE WELLNESS CENTER, INC., et al., *Defendants/Appellants*.

COLD FUSION LIGHTING, LLC, *Plaintiff/Appellant*,

v.

VERDE WELLNESS CENTER, INC., et al., *Defendants/Appellees*.

No. 1 CA-CV 17-0510
No. 1 CA-CV 17-0593
(Consolidated)
FILED 10-23-2018

Appeal from the Superior Court in Maricopa County
No. CV2017-007233
No. CV2017-003584
The Honorable Steven K. Holding, Commissioner
The Honorable Margaret Benny, Commissioner

CV 17-0593: JURISDICTION ACCEPTED, RELIEF GRANTED
CV 17-0510: JUDGMENT VACATED, REMANDED

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MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Jennifer M. Perkins and Judge Lawrence F. Winthrop joined.

T H O M P S O N, Judge:

¶1 These consolidated appeals arise from two forcible detainer actions brought by Cold Fusion Lighting, LLC (Cold Fusion) against Verde Wellness Center, Inc. (Verde Wellness) and 46 Long, LLC (46 Long) (collectively, defendants). In 1 CA-CV 17-0593, Cold Fusion appeals from the attorneys' fees award to defendants after the first action was dismissed without prejudice. We lack appellate jurisdiction, but, in our discretion, we accept special action jurisdiction. For the following reasons, we grant relief. In 1 CA-CV 17-0510, defendants appeal the judgment entered against them in the second action. For the following reasons, we vacate the judgment and remand with directions to dismiss the complaint.

FACTS AND PROCEDURAL HISTORY

¶2 In April 2017, Cold Fusion filed a complaint for forcible detainer alleging that (1) the parties had an oral lease allowing defendants to possess real property owned by Cold Fusion (the Property) in exchange for rent of $19,000 per month and (2) defendants failed to pay the past two

months' rent.[1] *See* Ariz. Rev. Stat. (A.R.S.) § 12-1178. Defendants answered. As relevant on appeal, Verde Wellness denied possessing the Property and 46 Long alleged it was a mortgagee-in-possession of the Property, having acquired the promissory note (the Note) that Cold Fusion executed to finance its purchase of the Property. Defendants also sought recovery of their attorneys' fees. *See* A.R.S. §§ 12-349, -1178(B).

¶3 The next month, the superior court dismissed the forcible detainer complaint without prejudice,[2] concluding the question of title between 46 Long and Cold Fusion—which was at issue in a then-pending foreclosure action—needed to be resolved "before you proceed with an eviction action."[3]

¶4 Shortly thereafter, defendants requested an award of attorneys' fees under A.R.S. § 12-1178(B), which provides that fees and costs "shall be given" to a defendant who is found "not guilty" of forcible detainer. Cold Fusion objected, asserting that defendants had not been found "not guilty" of forcible detainer. After full briefing, the superior court

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[1] The complaint stated in bold print at the top center of the first page: YOUR LANDLORD IS SUING TO HAVE YOU EVICTED. PLEASE READ CAREFULLY. *See* Ariz. R.P. Eviction Actions 5(b)(6). A month prior, Cold Fusion had given Defendants a five-day notice demanding payment of $38,000 in past due rent or "your rental of the premises will terminate and a forcible detainer action will be filed against you."

[2] Although the minute entry does not indicate the dismissal was without prejudice, the transcript reflects the court's order "dismissing the eviction without prejudice." We consider the "rendition of judgment" to be the oral pronouncement by the court. *See Fridena v. Maricopa Cty.,* 18 Ariz. App. 527, 531 (1972) (explaining the "rendition of judgment" is an act of the court and the "entry of judgment" is an act of the clerk) (citing *Am. Sur. Co. v. Mosher,* 48 Ariz. 552, 561 (1936)); *cf. State v. James*, 239 Ariz. 367, 368, ¶ 7 (App. 2016) ("When there is a discrepancy between the trial court's oral statements at a sentencing hearing and its written minute entry, the oral statements control.").

[3] *See 46 Long, LLC v. Cold Fusion Lighting, LLC,* Maricopa Cty. Super. Ct. Cause No. CV 2017-005306.

entered a "final" judgment, *see* Ariz. R. Civ. P. (Civil Rule) 54(c), awarding defendants $19,622.11 in fees and costs. Cold Fusion timely appealed.

¶5 In the meantime, Cold Fusion paid off the Note and obtained a release of the deed of trust encumbering the Property. Subsequently, in June 2017, Cold Fusion filed a second forcible detainer complaint, again alleging an oral lease and unpaid rent.[4] Again, defendants answered. This time, though, Verde Wellness (not 46 Long) admitted possessing the Property and denied the existence of an oral lease, obliquely suggesting it was allowed to be on the Property to cultivate medical marijuana pursuant to a Grower Services Agreement (GSA), which admittedly had expired in December 2016.

¶6 Both parties moved for judgment on the pleadings. As relevant on appeal, defendants contended that the parties' dispute about the existence of an oral lease required dismissal of the complaint. After a hearing, however, the superior court ordered that Cold Fusion was entitled to immediate possession of the Property. Defendants moved for relief from the judgment, *see* Ariz. R.P. Eviction Actions (Eviction Rule) 15(a)(9), but the court summarily denied the motion. Following entry of a final judgment, *see* Ariz. R. Civ. P. 54(c), defendants timely appealed.

DISCUSSION

I. 1 CA-CV 17-0593: Cold Fusion's Appeal

A. Jurisdiction

¶7 We have reviewed the record pursuant to our duty to determine whether we have jurisdiction over the appeal. *Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 465 (App. 1997).

¶8 Generally, an appeal may arise only from a final judgment. A.R.S. § 12-2101(A)(1); *McMurray v. Dream Catcher USA, Inc.*, 220 Ariz. 71, 74, ¶ 4 (App. 2009). In this appeal, Cold Fusion challenges an attorneys' fees award entered after the superior court dismissed the complaint without prejudice. We generally do not have appellate jurisdiction to review a dismissal without prejudice, *Kool Radiators, Inc. v. Evans*, 229 Ariz. 532, 534, ¶ 8 (App. 2012); *McMurray,* 220 Ariz. at 74, ¶ 4 (noting a dismissal without

[4] Cold Fusion did not serve a new notice to vacate; instead, it relied on the prior five-day notice, which demanded payment of past due rent or "your rental of the premises will terminate and a forcible detainer action will be filed against you." *See infra* n.1.

prejudice that does not preclude further litigation is not a final, appealable order), nor do we have appellate jurisdiction to review a fee award entered after a dismissal without prejudice. *Kool Radiators,* 229 Ariz. at 535, ¶ 10. Although the court certified the judgment as "final" in accordance with Civil Rule 54(c), the inclusion of finality language under these circumstances does not transmute an otherwise non-appealable judgment into an appealable one. *See Brumett v. MGA Home Healthcare, L.L.C.*, 240 Ariz. 420, 426, ¶ 6 (App. 2016) (citing *Madrid v. Avalon Care Ctr.-Chandler, L.L.C.*, 236 Ariz. 221, 224, ¶ 6 (App. 2014)).

¶9 That said, because Cold Fusion has no plain, speedy, or adequate remedy by appeal, we consider the matter as a petition for special action. In the exercise of our discretion, we accept jurisdiction. *See* Ariz. R.P. Spec. Actions 1(a); *Kool Radiators,* 229 Ariz. at 535, ¶ 11; *see also* A.R.S. § 12-120.21(A)(4) (granting court of appeals jurisdiction to hear special actions "without regard to its appellate jurisdiction").

B. Attorneys' Fees Award

¶10 Cold Fusion argues—as it did below—that attorneys' fees were not authorized by A.R.S. § 12-1178(B) because defendants were not found "not guilty" of forcible detainer.

¶11 Generally, the superior court may not award attorneys' fees unless a statutory (or contractual) basis exists for the award. *State Farm Mut. Auto. Ins. Co. v. O'Brien*, 24 Ariz. App. 18, 21-22 (1975). We review de novo the application of a fee statute to a fee award. *Burke v. Ariz. State Ret. Sys.*, 206 Ariz. 269, 272, ¶ 6 (App. 2003); *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 13, ¶ 12 (App. 2000). In construing a statute, our task is to give effect to the legislature's intent. *Stambaugh v. Killian,* 242 Ariz. 508, 509, ¶ 7 (2017). The most reliable indicator of a statute's meaning is its language. *Sempre Ltd. P'ship v. Maricopa Cty.,* 225 Ariz. 106, 108, ¶ 5 (App. 2010). We give effect to each word or phrase by applying the "usual and commonly understood meaning" unless the legislature clearly intended otherwise. *Indus. Comm'n of Ariz. v. Old Republic Ins. Co.,* 223 Ariz. 75, 77, ¶ 7 (App. 2009) (quoting *State v. Korzep,* 165 Ariz. 490, 493 (1990)). When the plain text of a statute is clear and unambiguous, we do not resort to other means of statutory interpretation. *State v. Christian,* 205 Ariz. 64, 66, ¶ 6 (2003).

¶12 In a forcible detainer action, § 12-1178(B) authorizes fees to a defendant who is found "not guilty." Although defendants undoubtedly "prevailed" in obtaining an interim dismissal, the superior court did not decide the issue of guilt. *See Union Interchange, Inc. v. Van Aalsburg*, 102 Ariz.

461, 464 (1967) (explaining that a dismissal without prejudice is not an adjudication on the merits). Thus, under the plain language of the statute, Defendants were not entitled to fees.

¶13 Additionally, we must construe § 12-1178(B) in the context of the entire statutory scheme so it is "harmonious and consistent." *See Cypress on Sunland Homeowners Ass'n v. Orlandini,* 227 Ariz. 288, 297, ¶ 30 (App. 2011) (citing *State v. Flynt,* 199 Ariz. 92, 94, ¶ 5 (App. 2000)); *Stambaugh,* 242 Ariz. at 509, ¶ 7). Looking to the preceding statute governing a forcible detainer trial, the legislature has specified: "If a jury is demanded, it shall return a verdict of guilty or not guilty of the charge as stated in the complaint. If a jury is not demanded the action shall be tried by the court." A.R.S. § 12-1177(B). Viewed thusly, § 12-1178(B) clearly contemplates a decision on the merits as a condition precedent to the award of fees. In this case, though, the superior court dismissed the action because the question of title needed to be resolved before Cold Fusion could proceed by way of forcible detainer. The only issue decided in a forcible detainer action is the right to possession, not ownership. *United Effort Plan Tr. v. Holm*, 209 Ariz. 347, 350–51, ¶ 21 (App. 2004). A dismissal without prejudice does not adjudicate the merits of that issue. *See Union Interchange,* 102 Ariz. at 464.

¶14 In the answering brief, defendants suggest the superior court—having found the action to be "groundless and not brought in good faith"—properly awarded fees as a sanction under Eviction Rule 4(c). As Cold Fusion points out, though, the record does not support the facts underlying this suggestion. And to the extent that defendants suggest we may affirm the award as a sanction, *see Pettit v. Pettit*, 218 Ariz. 529, 531, ¶ 4 (App. 2008) (appellate court may affirm on any theory supported by the record), we find no basis in the record to do so.

II. 1 CA-CV 17-0510: Defendants' Appeal

¶15 In this appeal, defendants challenge the subsequent entry of a forcible detainer judgment. We have jurisdiction over this appeal pursuant to A.R.S. §§ 12-2101(A)(1) and -1182(A). *See Morgan v. Cont'l Mortg. Inv'rs*, 16 Ariz. App. 86, 91 (1971).

¶16 Defendants argue the superior court erred by entering a judgment on the pleadings in favor of Cold Fusion. A judgment on the pleadings in favor of the plaintiff is proper when the complaint sets forth a claim for relief and the answer fails to assert a legally-sufficient defense. *Pac. Fire Rating Bureau v. Ins. Co. of N. Am.*, 83 Ariz. 369, 376 (1958). According to defendants, the court should have entered a judgment on the

pleadings in their favor and dismissed the complaint because the dispute between Cold Fusion and Verde Wellness regarding the existence of a landlord-tenant relationship could not be litigated in a forcible detainer action. We agree.

¶17 A forcible detainer action is created by statute to provide a summary and speedy remedy to gain possession of a premise. *Mason v. Cansino*, 195 Ariz. 465, 466, ¶ 5 (App. 1999) (citing *Old Bros. Lumber Co. v. Rushing,* 64 Ariz. 199, 204 (1946)). But such action is limited in scope: "Whether plaintiff and defendant had a valid lease is not a question incident to the right of possession, but rather an issue whose resolution is a *prerequisite* to determining which party is entitled to possession." *Colonial Tri-City Ltd. P'ship v. Ben Franklin Stores, Inc*., 179 Ariz. 428, 433 (App. 1993) (emphasis in original); *see also United Effort Plan,* 209 Ariz. at 350–51, ¶ 21. A forcible detainer action "is not a vehicle to decide whether the parties have a landlord-tenant relationship or were under a lease agreement." *United Effort Plan,* 209 Ariz. at 350–51, ¶ 21 (citing *RREEF Mgmt. Co. v. Camex Prods., Inc.,* 190 Ariz. 75, 78-79 (App. 1997) and *Colonial Tri-City,* 179 Ariz. at 434)). Hence, a genuine dispute between the parties regarding the existence of a lease must be addressed in an ordinary civil action. *Colonial Tri-City,* 179 Ariz. at 433; *RREEF Mgmt.,* 190 Ariz. at 79.

¶18 After defendants raised this issue in their motion for judgment on the pleadings, Cold Fusion proposed that possession could be determined in a forcible detainer action because Verde Wellness was a tenant at sufferance (presumably by holding over after the GSA expired). *See* A.R.S. §§ 12-1171(3), -1173(1). But a plaintiff in a forcible detainer proceeding is permitted to advance only those allegations "properly stated in the complaint." Ariz. R.P. Eviction Actions 11(e). Relying on the same five-day notice "to pay or terminate" that was provided in the first action, Cold Fusion brought the second action premised on an oral lease and unpaid rent. Conversely, a tenancy at sufferance exists "when a party who had a lawful possessory interest in property wrongfully continues in possession of the property after its interest terminated." *Grady v. Barth ex rel. Cty. of Maricopa*, 233 Ariz. 318, 321, ¶ 12 (App. 2013) (noting "a tenancy at sufferance is not a true landlord-tenant relationship"). Clearly this allegation was not "properly stated" in the second complaint.

CONCLUSION

¶19 In 1 CA-CV 17-0593, we accept special action jurisdiction and, for the foregoing reasons, grant relief. We award costs to Cold Fusion upon compliance with Arizona Rule of Civil Appellate Procedure (ARCAP) 21.

¶20 In 1 CA-CV 17-0510, for the foregoing reasons, we vacate the judgment and remand to the superior court with directions to dismiss the complaint. We deny Defendants' request for attorneys' fees on appeal, *see infra* ¶¶ 10-13, but award defendants their costs upon compliance with ARCAP 21.

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