IN THE
# ARIZONA COURT OF APPEALS
**DIVISION ONE**

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TIMOTHY MILLWEE, *Plaintiff/Appellant*,

*v.*

NEW TIANPING INVESTMENTS, L.L.C., et al., *Defendants/Appellees*.

No. 1 CA-CV 19-0681
FILED 6-2-2020

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Appeal from the Superior Court in Maricopa County
No. CV2019-090734
The Honorable Tracey Westerhausen, Judge

**AFFIRMED**

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COUNSEL

Timothy Millwee, Mesa
*Plaintiff/Appellant*

Jones, Skelton & Hochuli, Phoenix
By Michael E. Hensley, David C. Potts, Jonathan P. Barnes
*Counsel for Defendants/Appellees*

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**MEMORANDUM DECISION**

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Paul J. McMurdie and Judge Jennifer B. Campbell joined.

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**C A T T A N I**, Judge:

**¶1** Timothy Millwee appeals from the entry of summary judgment in favor of New Tianping Investments, LLC ("NTI") and Jim Hilleary (collectively, "Appellees") on Millwee's claims alleging housing discrimination. For reasons that follow, we affirm.

**FACTS AND PROCEDURAL BACKGROUND**

**¶2** Millwee lived in a mobile home park owned by NTI and managed by Hilleary. When Hilleary learned that Millwee owned two pit bulls, he informed Millwee that pit bulls were prohibited at the park. After Millwee explained that the dogs were service animals, Hilleary provided Millwee with a verification form for Millwee's doctor to fill out to confirm that the dogs were in fact service animals. Millwee took the form to his Veterans Affairs ("VA") healthcare provider who declined to complete it because to do so was not authorized by VA policy. When Millwee informed Hilleary that he was unable to get a VA provider to fill out the form, Hilleary suggested that he ask a non-VA provider.

**¶3** After Millwee stated that he would not contact a non-VA provider, Hilleary gave Millwee notice that his rental agreement would be terminated unless the pit bulls were removed from the premises. The notice instructed Millwee to either "remove [the] unauthorized dogs from the park" or "vacate [the] space within thirty (30) days after [the] receipt of this notice."

**¶4** Millwee then filed a complaint in superior court, alleging that Hilleary violated his rights under the Americans with Disabilities Act ("ADA") and Fair Housing Act ("FHA") and that he disrupted Millwee's mental health treatment for PTSD and anxiety, while also alleging that NTI was subject to vicarious liability.

**¶5** After the 30-day cure period had expired on the termination notice, Millwee provided a physician's note stating that the pit bulls were emotional support animals. A March 22, 2019 letter from Dr. Lin at the VA

hospital stated, "Mr. Millwee have [sic] two service dogs . . . , who provided companionship, emotional stability and mental support."[1] After receiving this letter, Hilleary withdrew the January 24, 2019 notice and informed Millwee he could keep the dogs as service animals at the mobile home park.

**¶6** The parties filed cross-motions for summary judgment, with Millwee contending that he was entitled to judgment because Appellees failed to address the complaint and Appellees asserting that there was no violation of the law because they were permitted to request verification from Millwee's medical provider. After Millwee failed to respond to Appellees' motion, Appellees moved for summary disposition.

**¶7** The superior court granted summary judgment in favor of Appellees, reasoning that Millwee did not file a separate statement of facts as required by Arizona Rule of Civil Procedure 56(c)(3)(B), he did not respond to Appellees' motion for summary judgment, and Appellees' motion was legally sound. Millwee timely appealed, and we have jurisdiction under A.R.S. § 12-2101(A)(1).

## DISCUSSION

**¶8** Millwee argues the superior court erred by entering summary judgment in favor of Appellees. Specifically, he argues that the verification form and demands by Hilleary were discriminatory and prohibited by the FHA and ADA.

**¶9** Summary judgment is appropriate when there are no genuine issues of material fact and undisputed facts establish that the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a). We review the superior court's grant of summary judgment de novo, considering the facts and all reasonable inferences in the light most favorable to the party against whom judgment was entered. *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 193, 195 (App. 1990).

**¶10** Millwee's complaint alleged that Hilleary and thus NTI violated the ADA by refusing to allow Millwee to have a service dog. Title III of the ADA prohibits discrimination based on disability in any place of public accommodation. *See* 42 U.S.C. § 12182(a); *see also Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 730 (9th Cir. 2007). While the term "public

[1] This explanation differed from the one previously asserted in Millwee's complaint, in which he alleged that his service dogs remind him to take his daily medications and alert him when his Ketone levels are at an unhealthy level by licking his face.

accommodation" includes transient lodging like an "inn, hotel, motel, or other place of lodging," 42 U.S.C. § 12181(7)(A), "other place of lodging" does not include purely residential housing. *See Regents of Mercersburg Coll. v. Rep. Franklin Ins. Co.*, 458 F.3d 159, 165 n.8 (3d Cir. 2006) ("[R]esidential facilities such as apartments and condominiums are not transient lodging and, therefore, not subject to ADA compliance."); *see also* H.R. Rep. No. 101-485(II), at 100 (1990) (noting that residential housing would be covered by the FHA rather than ADA Title III). Millwee's ADA claim related solely to his residence at the mobile home park, which is not a public accommodation. Accordingly, he was not entitled to relief under the ADA.[2]

**¶11** Millwee's complaint also alleged that Hilleary violated the FHA by placing undocumented restrictions on the use, size, and breed of service dogs and denying him the use of his existing dogs. The FHA prohibits housing discrimination against a person because of a handicap. 42 U.S.C. § 3604(f)(2). Discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). Guidance issued by the Department of Housing and Urban Development ("HUD") confirms, however, that housing providers may verify the need for a service animal by requiring a resident "to provide documentation of the disability and the need for the animal from an appropriate third party, such as a medical provider, mental health provider, or other professional in a position to provide this verification." U.S. Dep't of Hous. & Urban Dev., HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs, at 3-77 (2013) (§ 3-29 Verification of the Need for an Assistance Animal).

**¶12** Here, Hilleary's conduct did not violate the FHA. When he discovered that Millwee had two service dogs, he gave Millwee a verification form to be completed by a medical provider. That form did not require the disclosure of any confidential information and was requested to verify that the dogs were service animals. Millwee was also permitted to provide an alternative statement of disability and need for accommodation but failed to provide one until after eviction proceedings commenced and after he filed his complaint. Thus, because Millwee failed to provide the

[2] Millwee's argument that Appellees deliberately misstated the law regarding the applicability of the ADA to this situation is similarly unavailing.

requested documentation, there was no failure to accommodate under the FHA.

**¶13** Next, Millwee's complaint asserted that Hilleary willingly and knowingly created an environment that disrupted his mental health treatment, creating complications with Millwee's PTSD and anxiety treatment plan. But because Hilleary's request for documentation was not unreasonable, Millwee's claim fails.

**¶14** Millwee further contends that Appellees filed eviction proceedings against him in retaliation for his civil lawsuit in violation of A.R.S. § 33-1491(A)(4). But Millwee failed to allege such retaliatory conduct in his complaint, asserting it for the first time in his purported statement of facts in support of his motion for summary judgment.

**¶15** In any event, Millwee was not entitled to relief under A.R.S. § 33-1491. That section prohibits a landlord from retaliating by threatening to bring an action for eviction against a tenant who has filed an action against the landlord. A.R.S. § 33-1491(A)(4). But here, because Appellees provided notice of termination before Millwee filed his complaint in superior court, Appellees did not retaliate against Millwee.

**¶16** Finally, Millwee contends that the superior court ruled without providing "legal reasoning or statutory evidence" to support its decision. But the superior court determined that summary judgment was appropriate because Millwee did not submit a separate statement of facts in compliance with Rule 56 or respond to the motion for summary judgment, and because Appellees' motion was "legally sound." We discern no error.

## CONCLUSION

**¶17** For the foregoing reasons, we affirm. As the prevailing parties on appeal, Hilleary and NTI are entitled to an award of costs upon compliance with ARCAP 21.


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