

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 06/21/2011
RUTH A. WILLINGHAM,
CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

VALERIE DONALDSON,) 1 CA-CV 09-0689
)
Plaintiff/Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
BARRY MCNEW,) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
Defendant/Appellee.)
_____)

Appeal from the Superior Court in Yavapai County

Cause No. P1300CV20090871

The Honorable David L. Mackey, Judge

AFFIRMED

Grant & Vaughn, P.C.
by Kenneth B. Vaughn
Attorneys for Plaintiff/Appellant

Phoenix

Barry McNew, Defendant/Appellee
In Propria Persona

Westminster, CO

P O R T L E Y, Judge

¶1 Valerie Donaldson appeals the order dismissing her complaint against Barry McNew for failure to state a claim upon which relief may be granted. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Donaldson owns a ranch in Yavapai County. Prior to May 2007, she and McNew had a relationship, and he brought horses and cattle to the ranch. After the relationship soured, McNew moved to Hawaii in June 2007, but left the livestock on Donaldson's ranch. Donaldson continued to feed, pasture, and perform other services for the livestock. McNew did not make arrangements to move the livestock or pay Donaldson for taking care of the animals.

¶3 Donaldson filed a lawsuit on June 8, 2009, to perfect a lien on McNew's livestock pursuant to Arizona Revised Statutes ("A.R.S.") section 3-1295 (2002) for expenses she incurred between June 2007 and June 2009 and for attorneys' fees. Before answering, McNew moved to dismiss the complaint for failure to state a claim because: (1) the claim was time-barred, (2) he never agreed to pay Donaldson for pasturage services, and (3) the claim was barred by the doctrine of laches. After Donaldson's response, the trial court granted the motion, dismissed the complaint, and awarded McNew attorneys' fees and costs.

¶4 Donaldson appealed, and we have jurisdiction pursuant A.R.S § 12-2101(B) (2003).

DISCUSSION

¶15 Arizona Rule of Civil Procedure ("Rule") 12(b)(6) provides that a party may move to dismiss a suit for "[f]ailure to state a claim upon which relief can be granted." We analyze the sufficiency of the complaint in light of Rule 8, which only requires sufficient factual allegations to "give the opponent fair notice of the nature and basis for the claim" and must do more than include "mere conclusory statements." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶¶ 6-7, 189 P.3d 344, 346 (2008) (quoting *Mackey v. Spangler*, 81 Ariz. 113, 115, 301 P.2d 1026, 1027-28 (1956)).

¶16 "When reviewing a trial court's decision to grant a motion to dismiss, 'we assume the truth of the allegations set forth in the complaint and uphold dismissal only if the plaintiffs would not be entitled to relief under any facts susceptible of proof in the statement of the claim.'" *Redhair v. Kinerk, Beal, Schmidt, Dyer & Sethi, P.C.*, 218 Ariz. 293, 294, ¶ 2, 183 P.3d 544, 545 (App. 2008) (quoting *Mohave Disposal, Inc. v. City of Kingman*, 186 Ariz. 343, 346, 922 P.2d 308, 311 (1996)). We review the order for an abuse of discretion, but issues of law are reviewed de novo. *Dressler v. Morrison*, 212 Ariz. 279, 281, ¶ 11, 130 P.3d 978, 980 (2006).

¶17 The livestock lien statute, section 3-1295, provides in entirety:

A. A person who furnishes pasture, feed or other services for livestock¹ on the premises of that person has a lien on the stock for the amount of the charges that are due and unpaid. A person having such lien may retain the stock until the charges are paid. If possession continues for twenty days after the charges accrue, and the charges have not been paid, the person retaining possession of the stock may perfect the amount of the lien by filing an action in either superior court or justice court, according to the amount in controversy, in the jurisdiction of the holder of the stock. The hearing shall be held not less than ten and not more than twenty days after the date the action is filed in court. If the prevailing party does not receive payment due within ten days after the final judgment of the court, the prevailing party becomes the owner of the stock. The court shall award the prevailing party court costs and reasonable attorney's fees.

B. On presenting a judgment of the court in the appropriate jurisdiction awarding ownership to the holder of the stock in satisfaction of the lien, the department shall issue to the holder of the stock such ownership and hauling certificates, certificates of inspection or other papers ordinarily required on the transfer of ownership of livestock.

¶18 In its order, the trial court concluded that § 3-1295 required either an actual or implied agreement to pay charges for the boarding of livestock and that the one-year statute of limitations applied to § 3-1295 claims. The court then found that Donaldson pled that she began boarding the animals in June

¹ Livestock are defined as "cattle, equine, sheep, goats and swine, except feral pigs." A.R.S. § 3-1201(5) (Supp. 2010).

2007 and did not allege any facts to establish an express or implied agreement. As a result, the court held that the claim was untimely and § 3-1295 could not be used to establish title.

I. Contract Requirement

¶19 Donaldson first contends that § 3-1295 does not require a written contract. Specifically, she contends that an individual is only required to provide pasturage services in order to seek a lien pursuant § 3-1295, regardless of the existence of an agreement.

¶10 Donaldson raises an issue of statutory interpretation, which we review de novo. *City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, 547, ¶ 8, 105 P.3d 1163, 1166 (2005). Our principal goal when interpreting a statute is to give effect to the legislature's intent. *Blum v. State*, 171 Ariz. 201, 205, 829 P.2d 1247, 1251 (App. 1992). We primarily rely on the language of the statute and interpret the terms according to their common meaning. *Mercy Healthcare Ariz., Inc. v. Ariz. Health Care Cost Containment Sys.*, 181 Ariz. 95, 98, 887 P.2d 625, 628 (App. 1994). "When the language of a statute is clear and unambiguous, a court should not look beyond the language but rather 'simply apply it without using other means of construction, assuming that the legislature has said what it means.'" *Cundiff v. State Farm Mut. Auto Ins. Co.*, 217 Ariz. 358, 360, ¶ 8, 174 P.3d 270, 272 (2008) (quoting *Hughes v.*

Jorgenson, 203 Ariz. 71, 73, ¶ 11, 50 P.3d 821, 823 (2002)) (internal quotation marks omitted). But when the language is ambiguous, we may also look to the historical background, the consequences, and the purpose of the statute. *Phx. Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 244, 934 P.2d 801, 808 (App. 1997).

¶11 In *Shartzler v. Ulmer*, our supreme court explained that § 3-1295(A) creates an "agistor's lien." 85 Ariz. 179, 182, 33 P.2d 1084, 1087 (1959) (interpreting a prior version of section 3-1295(A)). An agistor is typically defined as a person that provides pasturage for a fee - "a type of bailee for hire." Black's Law Dictionary 73 (8th ed. 2004). Similarly, agistment is considered "[a] type of bailment in which a person, for a fee, allows animals to graze on his or her pasture; the taking in of cattle or other livestock to feed at a per-animal rate." *Id.* The agistor's lien did not exist at common law because courts held that a person who cared for and fed animals did not impart any value to them. See, e.g., *Ahlswede v. Schonevled*, 488 P.2d 908, 909 (Nev. 1971); *Lewis v. Tyler*, 23 Cal. 364, 364 (1863); *Wills v. Barrister*, 36 Vt. 220, 220 (1863). As a result, the lien is "therefore statutory, unless created by contract." *Shartzler*, 85 Ariz. at 181, 333 P.3d at 1087.

¶12 Consistent with the definitions, a typical agistment agreement requires at least an agreement between the parties to

furnish pasture and other services for livestock in exchange for some consideration. *In re Bolinger*, 971 P.2d 767, 775 (Mont. 1998) (stating that "agister's lien can be founded on an express or implied contract" but finding that an agreement to "pay your share" was not specific enough to justify an agistment); *Cornia v. Wilcox*, 898 P.2d 1379, 1383 (Utah 1995) ("To establish an agistment contract, the bailor must show that (1) some duty of care was bargained for and accepted by the landowner, and (2) the animals were delivered in good condition."); *Ahlswede*, 488 P.2d at 909 n.2 ("An agister is a particular kind of bailment under which a person takes in animals for care and pasturing, for a consideration."); 4 Am.Jur.2d *Animals* § 58 (2011); 3B C.J.S. *Animals* § 111 (2011). For example, the consideration for pasturage services need not be monetary and may provide for in-kind services. *See Eddy v. Watson*, 450 A.2d 1140, 1140-41 (Vt. 1982) (finding a quasi-contract where the plaintiff provided pasturage services and trained horses in exchange for use of the horses).

¶13 We believe the existence of either an express or implied contract is necessary to establish a lien pursuant to § 3-1295. The plain language of § 3-1295(A) establishes a method to perfect a statutory lien in order to protect an underlying obligation. *Matlow v. Matlow*, 89 Ariz. 293, 297-98, 361 P.2d 648, 651 (1961) ("The term 'lien', as generally used, is a

charge or encumbrance upon property to secure the payment or performance of a debt, duty, or other obligation."). Moreover, § 3-1295(A) specifically requires that charges become due and remain unpaid. In other words, the parties agreed that there would be a payment. Cf. Ariz. Code of Judicial Admin. § 3-401 ("'Past due' means a payment that has not been received on or before the due date."). Finally, § 3-1295(A) requires that charges go unpaid for at least twenty days before bringing an action. Again, this necessarily implies an agreement that charges would accrue.

¶14 Moreover, our interpretation is consistent with the overall statutory scheme regulating livestock. Livestock are heavily regulated in Arizona. A party cannot transfer ownership of livestock without a bill of sale. A.R.S. § 3-1291 (2002). A person who is not the owner of a particular animal cannot "gather, drive, or otherwise handle" the animal without "authority in writing." A.R.S. § 3-1293 (2002). If the ownership of livestock is in question, the Arizona Department of Agriculture ("Department") is required to seize the livestock pending the determination of ownership. A.R.S. § 3-1371(2) (2002). All stray livestock must be forfeited to the Department or returned to the owner. A.R.S. § 3-1402 (Supp. 2010).

¶15 Donaldson, however, argues that § 3-1295 does not require an express agreement. In support, she cites A.R.S. § 33-1022(A) (2007), which provides:

Proprietors of garages and repair and service stations shall have a lien upon motor vehicles of every kind and aircraft, and the parts and accessories placed thereon, for labor, materials, supplies and storage for the amount of the charges, when the amount of the charges is agreed to by the proprietor and the owner.

In *Fields v. Steyaert*, we interpreted the provision to require that the parties have an express or an implied contract as to the amount of charges before a lien is available. 21 Ariz. App. 30, 31, 515 P.2d 57, 58 (1973). Donaldson contends that because § 3-1295 does not include the phrase "when the amount of charges is agreed to," it does not require any agreement. There is a difference, however, between requiring an agreement as to charges and requiring an agreement for services in general. The fact that § 3-1295 does not specifically require an agreement for the amount for charges does not vitiate the need for an agreement.

¶16 Here, Donaldson did not plead any facts that would even imply the existence of an agreement with McNew. Instead, her complaint states that after their breakup McNew "effectively abandoned the . . . [l]ivestock on Donaldson's Ranch" and that "[he] has made no arrangements to remove the . . . [l]ivestock

from Donaldson's Ranch." She, however, asserts that McNew knew she could seek a lien pursuant to § 3-1295 because McNew had "at least, an implied obligation to pay"; her unjust enrichment claim.

¶17 A quasi-contract (unjust enrichment) is not, however, the same as an implied in fact contract for purposes of § 3-1295. "Implied contracts are different from quasi-contracts" Restatement (Second) of Contracts § 4 cmt. b. (1981). A quasi-contract is an obligation implied in law to achieve an equitable remedy where no other remedy exists. *Id.* An implied in fact contract requires the same elements as an express contract, only the parties' manifestation of assent is implied. 17 C.J.S. *Contracts* § 6 (2010). The existence of an offer, acceptance, and consideration are still required to form an implied in fact contract. *Id.*; see *Pyeatte v. Pyeatte*, 135 Ariz. 346, 353, 661 P.2d 196, 203 (App. 1983); *Bailey v. West*, 249 A.2d 414, 416-17 (R.I. 1969) (distinguishing quasi-contracts and implied-in-fact contracts).

¶18 Nor do we find the cases cited by Donaldson allowing quasi-contracts analogous to this situation. In each of those cases, a preexisting agreement for pasturage services existed. For example, in *Christensen v. Abbott*, after the parties settled their dispute over an agistment agreement, the livestock owner failed to remove the animals from the plaintiff's property for

one month. 671 P.2d 121, 122 (Utah 1983). The plaintiff refused to release the animals and sued on an unjust enrichment theory. *Id.* The court held that the suit was permissible because the lien statute authorized the agistor to retain the cattle until paid. *Id.* Similarly, in *Ozment v. Eatmon*, the trial court upheld an unjust enrichment for agistment services. 521 So. 2d 48, 49 (Ala. Civ. App. 1988). There, the defendant loaned money to his nephew, who used the proceeds to purchase livestock and place them on plaintiff's ranch. *Id.* The nephew declared bankruptcy, failed to pay for the pasturage services, and the defendant removed the cattle and sold them. *Id.* at 50. The court found that the defendant benefited from the pasturage because he sold the cattle. *Id.*

¶19 Here, however, Donaldson did not plead an agreement to provide pasturage services. Unlike *Christensen*, she was not authorized to retain possession of the cattle pursuant to § 3-1295. And unlike *Ozment*, she still has possession of the cattle. McNew has not collected the cattle or profited from her pasturage services at this point. As a result, the trial court did not err in dismissing her unjust enrichment claim.

¶20 Because a quasi-contract is insufficient to establish a lien pursuant to § 3-1295, and Donaldson has not pled any facts to establish an agreement for agistment, either express or

implied, the trial court did not err by dismissing her claim pursuant to § 3-1295.

ATTORNEYS' FEES ON APPEAL

¶21 Donaldson requests fees on appeal pursuant to § 3-1295(A). Because she is not the successful party, she is not entitled to an award of fees.

¶22 McNew requests attorneys' fees for charges incurred prior to the entry of the final judgment. He has not filed a cross-appeal challenging the trial court's award of fees and, therefore, cannot challenge the trial court's award in his answering brief. See ARCAP 13(b)(3). McNew did not request fees or costs on appeal.

CONCLUSION

¶23 Based on the foregoing, we affirm the trial court's order dismissing Donaldson's complaint.

/s/

MAURICE PORTLEY, Judge

CONCURRING:

/s/

PETER B. SWANN, Presiding Judge

/s/

PATRICK IRVINE, Judge