DIVISION ONE
FILED: 02/17/11
RUTH WILLINGHAM, ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

RICHARD RICCARDO, Plaintiff/Appellee, v. ROBIN FARNES and BARBARA FARNES, husband and wife and as trustees of the ROBIN ALBERT FARNES AND BARBARA ANN KACZMAREK FARNES REVOCABLE LIVING TRUST DATED MARCH 30, 2006, Defendants/Appellants.	No. 1 CA-CV 10-0227 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-070545

The Honorable Harriett Chavez, Judge

AFFIRMED

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By David J. Sandoval
Attorneys for Defendants/Appellants

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By Gregory T. Torok
Attorneys for Plaintiff/Appellee.

H A L L, Judge

¶1 Appellants Robin Farnes and Barbara Farnes, husband and wife, (collectively, the Farneses) appeal the trial court's grant of summary judgment in favor of Appellee Richard Riccardo. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 On February 22, 2002, Riccardo entered into a Residential Rental Agreement[1] (rental agreement) and Residential Resale Real Estate Purchase Contract (the 2002 contract) with the Farneses for the sale of a home in Phoenix (the property). The rental agreement stated that only Riccardo and his daughter and son may occupy the premises, and specifically prohibited subletting. The rental agreement also stated that as the landlord, the Farneses were obligated to pay the Homeowners' Association (HOA) Fees. The 2002 contract stated that HOA fees "shall be prorated as of Close of Escrow" and "[a]ny current homeowners' association assessment which is a lien as of Close of Escrow to be paid in full by Seller." The parties agreed to close escrow on March 1, 2007; the rental agreement ran through February 28, 2007.

[1] Although both parties and the trial court refer to the Residential Rental Agreement, and the Farneses included a copy of it in their appendix on appeal, the rental agreement is not part of the record on appeal. However, the rental agreement was presented to the trial court and considered by it in ruling on Riccardo's summary judgment motion.

¶3 From February 2002 until February 2007, Riccardo made monthly payments of $2444.84 to the Farneses, and each payment was credited towards the overall purchase price of the house of $216,600.00. Riccardo also paid $2280.00 in earnest money and made a down payment of $21,320.00. Pursuant to the contract, Riccardo had the option to purchase the property in February 2007, by making a balloon payment of $117,776.00. In January 2007, Riccardo and the Farneses entered into a contract (the 2007 contract)[2], which stated in relevant part: "Balance of $117,776 @ 8% [interest rate] = $1,428.94 per month[] [f]or a 10 year note to be fully satisfied[.] Start date of February [1, 2007] through February [1, 2017.] This note carries no pre-payment penalties and/or no restrictions whatsoever!" The parties did not enter a new rental agreement. On June 8, 2007, the Farneses encumbered the property by a deed of trust securing a line of credit "not exceed[ing] . . . $166,000.00" from JPMorgan Chase Bank.

¶4 On September 9, 2008, Barbara Farnes sent a letter to Riccardo regarding a payment of $372.00 for 2008 HOA dues. She

[2] The Farneses state that it is "questionable whether [the 2007 contract] is supported by sufficient consideration and is specific enough in its terms to be enforced as a stand-alone contract." However, the parties did not argue this matter in the trial court or on appeal and the trial court did not discuss such an issue in its judgment. We will therefore not address this issue in our decision.

wrote, “Please accept my apologies if I have not sent these [dues] to you before today!”

¶5 On September 10, 2008, Riccardo sent an email attachment to the Farneses regarding “paperwork for [Riccardo’s] mortgage pay off.” Barbara Farnes responded that she received “the [pay off] schedule. I just wanted to let you know that our pay off numbers are just slightly different as you paid $1450.00 (a $21.05 extra Payment) on your 1/1/08 payment . . . so your pay off amount is just a bit lower. I want to make sure that our records are the same so I have attached our [pay off] schedule.” On September 11, 2008, Riccardo replied, “Robin [Farnes] you said you would talk to your bank and see if you could borrow the differen[ce] in between what I owe you on the pay off of my mortgage of $104,759.85 and what you owe on your loan on my house. . . . I want to know by today if I will be able to initiate pay off on house or if you are going to lend the $20,000 from you and then I could wait until October 31 to finish this pay off.” Robin Farnes responded, “We have come up with $10,000 in cash so far . . . We still are checking and digging at this time and are [a]waiting responses from family.”

¶6 On September 17, 2008, the Farneses contacted their attorney and requested that he draft a letter to Riccardo stating that Riccardo had ten days to “cure any and all violations.” The Farneses allege these violations included

subleasing the property, failing to pay the September 2008 mortgage payment, and failing to pay HOA fees. Riccardo made the mortgage payment within the ten days, but did not remove the tenant or pay the HOA dues.

¶7 On September 29, 2008, the Farneses filed a forcible/special detainer action against Riccardo, alleging breach of contract because Riccardo violated the 2002 contract, the rental agreement, and the 2007 contract by subletting the property and tendering only a partial monthly payment on September 24, 2008.

¶8 On October 23, 2008, Riccardo filed an action for quiet title against the Farneses. The court granted a stay in the Farneses' forcible detainer suit pending the outcome of the quiet title action. Riccardo subsequently moved for summary judgment in the quiet title action claiming that the Farneses breached the 2007 contract and requested specific performance; the Farneses cross-moved for summary judgment. In Riccardo's Statement of Facts in Support of Plaintiff's Motion for Summary Judgment, he offered to pay off the balance on Farneses' deed of trust in exchange for delivery of clean title and the Farneses' agreement to pay Riccardo the difference between the amount owed under the deed of trust and the outstanding balance owed by Riccardo on the 2007 contract. Riccardo attached a mortgage

loan commitment in the amount of $200,000.00 as an exhibit to his Statement of Facts.

¶9 The court granted summary judgment in favor of Riccardo and denied the Farneses' cross motion for summary judgment, finding

> there is no material question of fact regarding the parties having entered into a residential real estate purchase contract on February 22, [2002], and residential rental agreement. The rental agreement expired as of February 2007, although, prior to expiration[,] on January 22, 2007, the parties renegotiated a new agreement. Whether the new agreement is considered a modification of the original residential real estate purchase contract of February 22, [2002], or a new contract regarding payment of [the] original balloon payment of $117,776.00, the payment due date was extended to February 1, 2017, without restriction or prepayment penalty.
>
> The dispute arose between the parties in September 2008, when [Riccardo] sought the payoff amount and [the Farneses] failed to present it. [The Farneses] were attempting to resolve issues related to the underlying debt on the property which was encumbered June 2008. [The Farneses] failed to identify and accept the payoff amount, thereby resulting in the breach of the purchase agreement.

The court also ordered Riccardo to put $104,759.85, the pay off amount, in escrow and the Farneses to convey title of the property without encumberances thereafter.

¶10 The Farneses timely appealed and presented the sole issue on appeal of whether there were genuine issues of material fact to preclude summary judgment. We have jurisdiction

pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(B) (2003).

DISCUSSION

¶11 We review de novo the grant of a motion for summary judgment. *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 199, ¶ 15, 165 P.3d 173, 177 (App. 2007). The moving party has the burden of proving no genuine issue of material fact as to each element of its claim, and all defenses, and that it is entitled to judgment as a matter of law. *Orme Sch. v. Reeves,* 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990). If the moving party meets its burden, the burden shifts to the opposing party to produce sufficient evidence indicating that an issue of material fact exists as to one or more elements of the claim or defense. *Doe v. Roe,* 191 Ariz. 313, 323, ¶ 33, 955 P.2d 951, 961 (1998); Ariz. R. Civ. P. 56(c). Summary judgment is warranted when the facts produced to support a 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 of the claim or defense." *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008. "Motions for summary judgment should not be denied 'simply on the speculation that some slight doubt . . ., some scintilla of evidence, or some dispute over irrelevant or immaterial facts might blossom into a real controversy in the midst of trial.'" *Shaw v.*

Peterson, 169 Ariz. 559, 560-61, 821 P.2d 220, 221-22 (App. 1991) (citation omitted). Our task is to determine whether any genuine issues of material disputed fact exist and, if not, whether the trial court correctly applied the substantive law. *In re Estate of Johnson*, 168 Ariz. 108, 109, 811 P.2d 360, 361 (App. 1991).

¶12 The Farneses maintain that Riccardo never tendered or offered to tender the purchase price of the property and that they produced sufficient, admissible evidence to create a genuine issue of material fact. However, the evidence points to the contrary. The only evidence the Farneses refer to in their brief is a September 2009 affidavit submitted by Robin Farnes in which he states "[t]o date, [Riccardo] has never tendered nor offered to tender the requisite balloon payment."

¶13 Riccardo, however, was not obligated to demonstrate that he was "ready, willing and able" to tender money to the Farneses once the Farneses repudiated the contract. *Nelson v. Cannon*, 126 Ariz. 381, 385, 616 P.2d 56, 60 (App. 1980) (upon seller's breach, buyer is only required to tender money to seller "before the court rules on the merits of the case"). Riccardo nonetheless sent two emails to the Farneses inquiring into paying off the house in September 2008, and obtained a mortgage loan commitment for $200,000.00 for the property and offered to tender the pay off amount as part of his motion for

summary judgment. Thus, the Farneses did not produce sufficient evidence to create a genuine issue of material fact as to whether Riccardo tendered or offered to tender the purchase price of the property.

¶14 The Farneses additionally assert that genuine issues of material fact remain as to whether Riccardo breached the 2002 contract and whether the Farneses were justified in terminating the 2007 contract in September 2008. The Farneses specifically argue that Riccardo violated the lease portion of the 2002 contract and subleased the property to a tenant. The Farneses contend that this violation as well as Riccardo's failure to pay the mortgage and HOA fees constituted a breach of contract. We disagree. The 2007 contract contained no prohibitions against Riccardo subleasing the property; indeed it explicitly states, "no restrictions whatsoever!" Further, the 2002 contract states that HOA fees "shall be prorated as of Close of Escrow" and "[a]ny current homeowners' association assessment which is a lien as of Close of Escrow to be paid in full by Seller" and the 2007 contract does not contain any language requiring Riccardo to make HOA payments. Based on the contractual documents before us, Riccardo was not obligated to make HOA payments. Finally, the Farneses admitted they allowed Riccardo ten days to make his mortgage payment and he made the payment within that time period. The Farneses could not therefore repudiate the 2007

contract based on Riccardo subletting the property to a tenant, failure to timely pay HOA fees, and paying his mortgage within the time frame the Farneses allotted.

CONCLUSION

¶15 For the foregoing reasons, we affirm the trial court's grant of summary judgment in favor of Riccardo. We also grant Riccardo's request for an award of attorneys' fees pursuant to A.R.S. § 12-341.01 (2003), contingent on his compliance with Arizona Rule of Civil Appellate Procedure 21(a).

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PHILIP HALL, Presiding Judge

CONCURRING:

_____
JON W. THOMPSON, Judge

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LAWRENCE F. WINTHROP, Judge