IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

LAWRENCE MONTANO, A MARRIED MAN
AS HIS SOLE AND SEPARATE PROPERTY,
Plaintiff/Appellee,

v.

RICHARD LUFF AND PHOEBE LUFF, HUSBAND AND WIFE;
IAN LUFF, AN UNMARRIED MAN; ANDREW DIODATI, AN UNMARRIED MAN,
PARTIES IN POSSESSION,
Defendants/Appellants.

No. 2 CA-CV 2020-0025
Filed December 21, 2020

Appeal from the Superior Court in Pinal County
No. CV201901680
The Honorable Stephen F. McCarville, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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Counsel for Plaintiff/Appellee

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By Richard R. Luff
In Propria Persona and Counsel for Defendants/Appellants

OPINION

Judge Espinosa authored the opinion of the Court, in which Judge Eckerstrom and Judge Staring concurred.

E S P I N O S A, Judge:

¶1 In this forcible entry and detainer (FED) action, appellants Richard Luff, Phoebe Luff, Ian Luff, and Andrew Diodati challenge the trial court's entry of judgment in favor of Lawrence Montano. For the following reasons, we affirm in part and vacate in part.

Procedural Background

¶2 On November 5, 2019, Montano filed a FED action against Ada, Richard, Phoebe, and Ian Luff, alleging he was "entitled to immediate possession" of the premises he had purchased at a trustee's sale and the defendants had wrongfully withheld possession of the premises after twice being notified to vacate. The Luffs did not appear at the November 18 eviction hearing, which was reset to December 2, 2019. And because it appeared the defendants were avoiding service of process, the trial court granted Montano's request for alternative means of service.

¶3 On December 2, Richard, Phoebe, and Ian Luff, represented by Richard, and Andrew Diodati, in propria persona,[1] filed an answer to the complaint, denying Montano's right to possession of the premises, asserting Ada Luff was deceased, and demanding a jury trial. At the hearing the same day, none of the Luff defendants appeared in person, but Diodati did. Montano objected to the demand for a jury trial, arguing "there is no factual basis to deny [him] the ability to have his judgment today," noting a jury trial is only appropriate when there is a factual

[1]Andrew Diodati had not been named as a defendant by Montano, but signed the answer as a defendant, claiming to be a "part time occupant of the premises."

dispute. The trial court agreed the case was "not subject to a jury trial" and proceeded with the eviction action.

¶4 Montano testified that he had purchased the subject property at an auction and the deed had been recorded on October 9, 2019. Montano stated he had hired a certified process server to notify the Luffs to vacate the premises, and he later sent a certified letter informing them of the same. Diodati testified that although he had no ownership claim to the property, he had "current possession of the premises" because he would sometimes sleep in one of the bedrooms and operated an office out of the premises. He further stated he had never received either of the two notices to vacate and argued that because there was no evidence any defendant had received a written demand to vacate, eviction was improper.

¶5 At the conclusion of the hearing, the trial court found that the defendants had been properly served after Richard Luff evaded service; that Montano needed only demonstrate the notices had been mailed, not that they were received; that the Luffs had not filed a motion to continue and had failed to appear; and that the defendants were not entitled to a jury trial. The court then entered a guilty verdict against the Luff defendants.

¶6 The Luffs and Diodati thereafter filed a motion to set aside the judgment and a motion to quash the writ of restitution to be issued December 9, 2019. After hearing oral argument, the trial court denied both motions, noting that although the defendants contended ownership of the property was a "disputed fact" requiring a jury trial, they also "acknowledged that they are not the owners of the subject property and can make no legitimate claim to occupy the same." The court also noted that Richard Luff had failed to appear and any challenges to the proceedings were legal ones, not factual. As to the defendants' argument that notice to vacate the premises had not been received, the court disagreed that Montano had the burden to prove a written demand "was actually received," reasoning "[i]f that were true, no plaintiff could ever prevail on an eviction action" because the "defendant could always claim they never received notice." The Luffs and Diodati filed a joint notice of appeal from the trial court's December 2 order and its subsequent denial of their motion to set aside the judgment. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-1182.[2]

[2]Montano challenges Diodati's appearance in this appeal. Citing Rule 4(c), Ariz. R. Civ. App. P., Montano argues that because Diodati did not personally sign the opening brief and Richard Luff has not filed a notice

Written Demand of Possession

¶7 The Luffs and Diodati first contend Montano did not provide written demand of possession as required by A.R.S. § 12-1173.01(A) (permitting FED action against person "who retains possession of . . . real property after he receives written demand of possession"). *See Alton v. Tower Cap. Co.*, 123 Ariz. 602, 604 (1979) ("written demand to surrender" is prerequisite to filing FED action). The trial court determined Montano needed only show that he had sent written demand, not that the defendants actually received it. We have found no pertinent authority or published cases explicitly supporting this proposition.[3] But we need not resolve that question here because the record nevertheless contains sufficient evidence to support a finding that the defendants received a written demand of possession. *See State v. Childress,* 222 Ariz. 334, ¶ 9 (App. 2009) ("We will uphold the [trial] court's ruling if legally correct for any reason supported by record."); *see also Castro v. Ballesteros–Suarez*, 222 Ariz. 48, ¶ 11 (App. 2009) (we will not set aside trial court's findings if "substantial evidence supports" them).

¶8 The record reflects that Montano provided written demand of possession by letter dated October 4, 2019, left at the door of the property, in which he asserted he had "knocked on [the] door and no one answered." Montano also testified at trial that he had "hired a certified process server to take a copy of" the October 4 letter to the property. On October 23, 2019, Montano mailed another written demand letter by certified mail, which

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of appearance on his behalf, he is not a party to the appeal. But Rule 4 does not require an attorney to file a notice of appearance to represent a party on appeal, and Diodati signed the notice of appeal, complying with Rule 8(c)(5), Ariz. R. Civ. App. P.

[3]Multiple unpublished memorandum decisions of this court support the trial court's reasoning that requiring a plaintiff to prove a written demand "was actually received" would make it near impossible for a plaintiff to prevail in an eviction action. *See Ally Bank v. Thomas*, No. 1 CA-CV 16-0551, ¶ 10 (Ariz. App. Dec. 14, 2017) (mem. decision); *BMO Harris Bank, N.A. v. Thruston*, No. 1 CA-CV 15-0279, ¶¶ 6-9 (Ariz. App. Sept. 22, 2016) (mem. decision); *Deutsche Bank Nat. Tr. Co. v. Clinksale*, No. 1 CA-CV 09-0019, ¶¶ 6, 12-14 (Ariz. App. Feb. 4, 2010) (mem. decision).

was also sent to Richard Luff via email. In addition, Montano attached a copy of both letters to his complaint, which was validly served on the Luff defendants on November 11 and November 21, 2019, by alternate service, having been "posted on [the] front door" of the property and sent by certified mail. *See* Arizona Rules of Procedure for Eviction Actions (RPEA) 5(e) (complaint may be served as provided by Rule 4.1 of the Arizona Rules of Civil Procedure); Ariz. R. Civ. P. 4.1(k)(1) (permitting alternate means of service). The defendants thereafter filed an answer to the complaint, demonstrating they had received the notice to vacate. Accordingly, the trial court had sufficient evidence upon which to find the defendants had received written demand of possession.

Judgment for Rent

¶9 Montano's complaint requested damages in the form of per diem fair market value rent of $100 for each day after October 9, 2019, the defendants remained on the premises, which the trial court awarded when it found the defendants guilty of forcible detainer. The Luffs and Diodati contend there was no landlord-tenant relationship, so no rent was due. This argument, however, misunderstands the court's judgment. Rent was not owed to Montano because of any rental agreement, but as damages because their refusal to vacate the property denied Montano the use of his property, either for his own enjoyment or to rent to a tenant. Section 12-1178(A), A.R.S., provides that when a defendant is found guilty of forcible detainer, the trial court "shall give judgment for the plaintiff for restitution of the premises . . . and for damages, attorney fees, court and other costs." The court did not err in awarding Montano the fair market rental value of the property under the "damages" provision of § 12-1178(A).

¶10 The Luffs and Diodati also argue the award for rent was improper because Montano's complaint did not comply with RPEA 5(c) or 13(c). The former provision lists the information that must be in the complaint when monetary damages are sought, including the frequency of rent to be paid, the due date for each payment, and the amount due on each date. RPEA 13(c)(2) states that the court may not award damages or relief not specifically stated in the complaint, save for exceptions not applicable here.

¶11 The requirements of RPEA 5(c) and 13(c) are inapplicable to the situation at hand because rent was owed as damages, not under a rental agreement. Montano was not required to include any particular information in the complaint to establish his claim for money damages other than the rental value of the property. *See* A.R.S. § 12-1175(D) (court

may not enforce rule or policy that "requires a mandatory or technical form" for pleadings); *see also Drew v. United Producer & Consumers*, 161 Ariz. 331, 333 (1989) (Arizona is notice pleading jurisdiction which "does not require the use of 'magic words'" in complaint). Moreover, even were those rules applicable, although it did not use the term "damages," Montano's complaint substantially complied with their requirements, requesting "$100.00 per day commencing on October 9, 2019 until the Defendants vacate the Premises." Because Montano identified the frequency of payment (daily), the due date (each day), and the amount due ($100), the complaint was sufficient even under the rule's requirements. It follows that the court did not violate RPEA 13(c)(2) because the award was for damages specifically stated in the complaint.[4]

Possession by Ian Luff

¶12 The Luffs and Diodati next argue the judgment must be vacated as it relates to Ian Luff because the verdict against him was "unsupported by any evidence." In a FED action, the only issue to be determined is the right of actual possession. A.R.S. § 12-1177(A). And the plaintiff has the burden of proof to support his claim. *See Harvey v. Aubrey*, 53 Ariz. 210, 213 (1939).

¶13 We agree that judgment against Ian Luff must be vacated. Although Ian stated in his answer that he "retain[s] possession of the premises," he simultaneously asserted he is not a resident of Pinal County (where the premises is located) and "no longer resides at the premises," thus, the allegation was not unequivocally admitted.[5] *See Bank of Yuma v.*

[4] Citing RPEA 13(c)(2)(A), the Luffs and Diodati also claim the damages award must be amended because it awarded rent incurred after the judgment had been entered, "commencing on October 9, 2019 until the Defendants vacate the Premises." But they have cited no authority, nor are we aware of any, that limits the rental damages award to the date of the judgment. By its own terms, RPEA 13(c)(2)(A) does not prohibit damages after the judgment; rather it simply permits—but does not require—a plaintiff to seek rent incurred after judgment in a civil action. RPEA 13(c)(2)(A) ("If the plaintiff is entitled to rent incurred after the judgment has been entered, then the plaintiff *may* seek that amount in a separate civil action." (emphasis added)).

[5] The remaining defendants admitted they retained possession of the premises without contradiction. And at trial, Diodati testified that only he, Richard Luff, and Phoebe Luff retained possession.

Arrow Constr. Co., 106 Ariz. 582, 585 (1971) ("Allegations in pleadings are not evidence; they are statements of facts which the pleader must prove unless admitted by the opposing party."). At trial, Montano presented no evidence that Ian Luff retained possession of the premises. Diodati testified, and his testimony was uncontroverted, that Ian Luff "is not a resident of the residence in question." Because there was no substantial evidence supporting the trial court's implicit factual finding that Ian Luff possessed the property, the guilty verdict against him must be vacated.[6] *See In re Estate of Pouser*, 193 Ariz. 574, ¶ 13 (1999) ("In reviewing a trial court's findings of fact, we do not reweigh conflicting evidence or redetermine the preponderance of the evidence, but examine the record only to determine whether substantial evidence exists to support the trial court's action.").

Denial of Jury Trial

¶14 The Luffs and Diodati additionally maintain the trial court erred by refusing their request for a jury trial. We first address their assertion that the court "didn't 'determine whether there is a basis for a legal defense' under RPEA, Rule 11(b), or 'inquire and determine the factual issues to be determined by the jury,' under RPEA, Rule 11(d)." Rule 11(b)(1) states in relevant part,

> If the defendant appears and contests any of the factual or legal allegations in the complaint or desires to offer an explanation, the judge should determine whether there is a basis for a legal defense to the complaint either by reviewing a written answer filed pursuant to Rule 7 or by questioning the defendant in open court.

Contrary to appellants' contention, the record reflects that the court, after initially questioning Diodati—the only defendant to appear—and reviewing the answer, found "this is not subject to a jury trial," thus

[6] Montano contends that judgment against Ian Luff was proper because he had not and has not abandoned his claim to possession, but the record reflects otherwise. Abandonment occurs when the occupant vacates the premises "with intent to relinquish all rights therein," and such intent "can be shown by words or conduct." *Gangadean v. Erickson*, 17 Ariz. App. 131, 133 (1972). Here, Ian Luff's intent to relinquish his previous possession was demonstrated by his answer in which he stated he no longer lived at the premises and his subsequent arguments both below and on appeal that he claims no possession to the premises.

implicitly determining there was no basis for a factual defense to the complaint. *See City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 65 (App. 2008) ("We defer to the trial court with respect to any factual findings explicitly or implicitly made, affirming them so long as they are not clearly erroneous." (quoting *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, ¶ 10 (App. 2004))).

¶15 Appellants also argue there is "an inherent conflict" between A.R.S. § 12-1176(B), which states that when a FED defendant requests a jury trial, "the request shall be granted," and RPEA 11(d), which provides, if a jury trial has been demanded but "no factual issues exist for the jury to determine, the matter shall proceed to a trial by the judge alone." Appellants assert that the trial court's ruling "on the fly at an initial appearance" "eviscerate[s] the statutorily created right to a jury trial, violates the separation of powers and diminishes the due process rights of litigants."

¶16 Although the statute's mandatory language may be at odds with the discretionary language of RPEA 11(d) permitting a bench trial and summary disposition, the two provisions are readily harmonized if there are no factual issues for a jury to decide. *See Rosner v. Denim & Diamonds, Inc.*, 188 Ariz. 431, 433 (App. 1996) ("If a rule and a statute appear to conflict, the rule is construed in harmony with the statute."). The approach authorized by RPEA 11(d) is analogous to the summary disposition of civil cases authorized under Rule 56, Ariz. R. Civ. P., notwithstanding a party's demand for a jury trial. Just as "the granting of summary judgment does not deprive a plaintiff of his constitutional rights to a jury trial," in relation to that rule, the right to trial in this context is not violated when "there are simply no genuine issues of fact for a jury to consider." *Cagle v. Carlson*, 146 Ariz. 292, 298 (App. 1985). We therefore reject the Luffs' and Diodati's argument that the trial court erred because it had "no power to deny a timely demanded jury trial in a forcible detainer case."

¶17 The Luffs and Diodati lastly contend that even if a trial court can refuse a jury trial, the court erred because "fact questions were manifest," including whether Ian Luff was in possession of the property and whether the defendants received a written demand to surrender possession. As noted above, because there was no conflicting evidence on the issue of Ian Luff's possession, it was not a factual question to be resolved by a jury. *See* RPEA 11(d) (if "no factual issues exist for the jury to determine, the matter shall proceed to a trial by the judge alone"). And while the issue of whether a defendant received written demand is a mixed question of fact and law, we conclude it is not a question for a jury to resolve

for two reasons. First, a defendant's receipt of written demand for possession is a predicate to bringing a FED action, and thus should be resolved before the matter would be submitted to a jury. *See* § 12-1173.01(A) (forcible detainer may only be brought against "a person . . . who retains possession . . . after he receives written demand of possession"). And second, it is well established the only issue to be tried in a FED action is "the right of actual possession"; a defendant's receipt of written demand is not contemplated by that issue. § 12-1177(A); *Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 204 (1946); *see AU Enters. Inc. v. Edwards*, 248 Ariz. 109, n.4 (App. 2020) (Arizona's statutory scheme focuses on right of possession "without any procedural delay arising from the litigation of peripheral issues"). Accordingly, the court did not err in proceeding without a jury.

Attorney Fees and Costs on Appeal

¶18 Montano requests an award of attorney fees and costs on appeal pursuant to A.R.S. §§ 12-341, 12-349, and 12-1178(A). Section 12-1178(A) addresses the components of a trial court's judgment and neither expressly authorizes nor compels attorney fees on appeal. *See Bank of N.Y. Mellon v. Dodev*, 246 Ariz. 1, ¶ 40 (App. 2018). Because the Luffs have prevailed on one issue in this appeal, we decline to award Montano attorney fees as a sanction pursuant to § 12-349. However, because Montano has substantially prevailed on appeal, we award him his appellate costs upon his compliance with Rule 21, Ariz. R. Civ. App. P.[7] *See* § 12-341.

Disposition

¶19 For the foregoing reasons, the trial court's judgment is affirmed in part and vacated in part.

[7] The Luffs and Diodati also request attorney fees on appeal "pursuant with Rule 21(a)." Providing no basis or authority for an award, we deny their request. *See* Ariz. R. Civ. App. P. 21(a)(2) ("A claim for fees . . . must specifically state the statute, rule, decision law, contract, or other authority for an award of attorney[] fees."); *see also Bed Mart, Inc. v. Kelley*, 202 Ariz. 370, ¶ 24 (App. 2002) (declining party's request for attorney fees on appeal citing only Rule 21 as basis).