IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

RICHARD A. JORDAN AND EILEEN M. MCCORMICK,
HUSBAND AND WIFE,
Plaintiffs/Counter Defendants/Appellants/Cross-Appellees,

v.

SAGUARO CLIFFS HOMEOWNERS ASSOCIATION, INC.,
AN ARIZONA NON-PROFIT CORPORATION
Defendant/Counter Plaintiff/Appellee/Cross-Appellant.

No. 2 CA-CV 2021-0070
Filed February 1, 2022

Appeal from the Superior Court in Pima County
No. C20193230
The Honorable Jeffrey T. Bergin, Judge

VACATED AND REMANDED

COUNSEL

Eric L. Hager, Vail
Counsel for Plaintiffs/Counter Defendants/Appellants/Cross-Appellees

Smith and Wamsley PLLC, Tucson
By Jason E. Smith and Sean K. Moynihan
Counsel for Defendant/Counter Plaintiff/Appellee/Cross-Appellant

---

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Eppich and Vice Chief Judge Staring concurred.

B R E A R C L I F F E, Judge:

¶1 Richard Jordan and Eileen McCormick appeal from the trial court's award of partial attorney fees in their favor. Saguaro Cliffs Homeowners Association, Inc. ("Saguaro Cliffs") cross-appeals from the court's grant of summary judgment in favor of Jordan and McCormick. We vacate the grant of summary judgment and the award of attorney fees and remand for proceedings consistent with his decision.

Factual and Procedural Background

¶2 "On appeal from a summary judgment, we view the facts in the light most favorable to the party against whom judgment was entered and draw all inferences in its favor." *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 2 (App. 2009). Jordan and McCormick were homeowners in Saguaro Cliffs, a residential subdivision. As homeowners, they were members of the homeowners association and thus subject to the recorded Covenants, Conditions, and Restrictions ("CC&Rs") that govern the use of property in the subdivision. In June 2019, Saguaro Cliffs began fining Jordan and McCormick $50 per day, and then $150 per day, on an almost daily basis for violating the CC&Rs. Article 3, Section 3.24, of the CC&Rs states, in pertinent part, that "[a]n entire Residential Unit may be leased to a Lessee from time to time by an Owner." Saguaro Cliffs asserted that Jordan and McCormick had leased only part of their home in violation of this provision.

¶3 Jordan and McCormick designed their home to include an "in-law suite," with its own kitchen, bathroom, and great room, as well as a separate entrance and garage. It is separated from the rest of the home by a laundry room, which has doors that close each side of the home off from the other. The in-law suite was designed for McCormick's parents to live in. However, after it was determined that McCormick's parents would not live there, Jordan and McCormick rented the space to a couple for $800 per month, and then later to another couple for $1,000 per month.

¶4 In 2017, Michael Deehan and Michael Rojas began living in the in-law suite. Deehan and Rojas were first paying Jordan and McCormick $1,900 per month, and later $2,000 per month. Jordan and McCormick discussed formalizing their agreement with Deehan, but no written agreement was ever made. On numerous occasions, Deehan and Rojas referred to their monthly payments as "rent." McCormick also referred to the payment as a "rent payment."[1] On occasion, Deehan and Rojas would make plans to "come over" to Jordan and McCormick's side of the house, and both sets of parties would refer to each other as "neighbors." On one occasion, Jordan and McCormick apologized for disturbing Deehan and Rojas's "space" after doing work on the master bathroom in the in-law suite. McCormick also suggested on one occasion that the four of them combine the two "houses" to host a party.

¶5 In January 2019, Saguaro Cliffs gave notice to Jordan and McCormick of what it perceived to be a violation of the CC&Rs and invited them to respond to the claim of violation. Then, when the situation was not resolved, it began assessing the daily fines.[2] Jordan and McCormick then filed this lawsuit seeking: (1) an injunction compelling Saguaro Cliffs to "rescind" all fines; (2) a declaratory judgment that they may "co-reside" in their home with whomever they choose; (3) an injunction preventing Saguaro Cliffs from taking further enforcement action against them; and (4) an award of attorney fees and costs. Saguaro Cliffs filed a counterclaim seeking a permanent injunction against Jordan and McCormick to terminate the alleged lease and for damages for breach of contract.

¶6 The parties each moved for summary judgment. Jordan and McCormick claimed that they did not violate the CC&Rs because there was no lease and, even if there were, the CC&Rs do not prohibit leasing a portion of their house. Jordan and McCormick supported their motion with

---

[1]In May 2019, after Saguaro Hills first raised the issue of the alleged tenancy, McCormick requested that Deehan and Rojas label the payments as "household expense contributions" rather than "rent" in the memo line of the account transfers.

[2]Following the notice of violation, McCormick submitted a request to the Board for a variance based on the contention that Deehan and Rojas were in-home caregivers assisting Jordan. Ultimately, however, McCormick and Jordan refused to sign the variance agreement, and McCormick later argued that she did not believe their living arrangement violated the CC&Rs.

their own affidavits and those of Deehan and Rojas. Jordan and McCormick claimed that the "fact" Deehan and Rojas could come and go from any part of the home, that they had a "familial relationship," and that the payments were "contributions for expenses" supported a finding that there was no lease.[3] Saguaro Cliffs claimed the contrary—that the evidence supported the existence of a lease because Jordan and McCormick referred to Deehan and Rojas as their neighbors, and vice versa, and Deehan and Rojas had exclusive possession of the in-law suite, did not have right to possession of the Jordan and McCormick side of the house, and paid monthly rent.

¶7 After a hearing on the motions, the trial court granted Jordan and McCormick's motion and denied Saguaro Cliffs's motion. Jordan and McCormick thereafter filed their application seeking $53,305 in attorney fees. The court awarded Jordan and McCormick $37,000 in attorney fees and entered a final judgment. Jordan and McCormick appealed, and Saguaro Cliffs cross-appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Analysis

Summary Judgment

¶8 On cross-appeal, Saguaro Cliffs argues that the trial court erroneously granted summary judgment because there was a genuine issue of material fact as to whether Jordan and McCormick were leasing a part of their residence. "We review a superior court's 'grant of summary judgment on the basis of the record made in [that] court, but we determine *de novo* whether the entry of [summary] judgment was proper.'" *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, n.3 (App. 2008) (alterations in *Nat'l Bank*) (quoting *Schwab v. Ames Constr.*, 207 Ariz. 56, ¶ 17 (App. 2004)). In determining whether the trial court properly granted summary judgment, we apply the same standard the court uses in ruling on a summary judgment motion. *Id.*

¶9 "The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). We will reverse an order granting summary judgment when the order necessarily required the trial court to assess "the credibility of witnesses with differing versions of materials facts, . . . to weigh the quality

[3]Despite the claim of a "familial relationship," no evidence of kinship among Jordan and McCormick and Deehan and Rojas appears in the record.

of documentary or other evidence, . . . [or] to choose among competing or conflicting inferences." *Orme Sch. v. Reeves*, 166 Ariz. 301, 311 (1990) (weighing evidence, assessing credibility, and resolving fact issues are questions for the jury at trial, not for the court on summary judgment).

¶10 In granting Jordan and McCormick summary judgment, the trial court agreed with Saguaro Cliffs that the CC&Rs allowed Jordan and McCormick to lease their entire home but not a portion of the home. It found, however, that there was no lease between Jordan and McCormick and Deehan and Rojas, and thus no violation of the CC&Rs. The court found that "Deehan and Rojas were not . . . given the right to the exclusive use, possession, or occupancy of any part of Plaintiffs' home, including the [in-law suite]." It also noted that there was no agreement as to how long Deehan and Rojas would reside in the home.

¶11 To affirm summary judgment for Jordan and McCormick, we must find undisputed evidence that they were not leasing a portion of their residence to Deehan and Rojas. We do not find such undisputed evidence.[4]

Existence of an Oral Lease

¶12 Although a written lease was never produced, as with any contract, a writing is not required. *See Healey v. Coury*, 162 Ariz. 349, 353 (App. 1989). Under Arizona law, an oral lease for a term of less than a year—for example at-will, week-to-week, or month-to-month—is fully enforceable. *See* A.R.S. §§ 44-101(6) (lease agreement can be oral if term of lease is for less than a year under statute of frauds), 33-1310(13) (Arizona Residential Landlord and Tenant Act defining rental agreement as meaning all oral or written agreements concerning the occupancy of a dwelling unit or premises); *see also* 49 Am. Jur. 2d Landlord and Tenant § 118 (2021) (at will tenancy may be created by oral lease); Restatement (Second) of Property, Landlord and Tenant § 2.1 (1977) (lease may be created orally if duration does not exceed period in controlling statute of frauds). Indeed, the CC&Rs contemplate oral leases by defining a "lessee" as a "lessee or tenant under a lease, oral or written, of any Lot including an assignee of a lease." As such, the lack of a written lease is immaterial.

---

[4]Specifically, the trial court found in its ruling that "[t]he parties agree there [was] no specific written or oral agreement to lease the property." We cannot find any evidence in the record, however, that Saguaro Cliffs made such a concession.

¶13 Nonetheless, proving the existence and terms of an oral lease can be difficult. Under Arizona's Landlord Tenant Act, an oral lease may be proved by evidence of an agreement to the terms and conditions concerning the use and occupancy of the dwelling unit or premises. *See* § 33-1310(13). The terms and conditions must have the effect of entitling the tenant to occupy the dwelling unit or premises to the exclusion of others. *See* § 33-1310(17) (definition of tenant). But, a lease or rental agreement is still valid even if the duration of the lease is not included in the agreement. *See* A.R.S. § 33-1314(D) (statutorily provided terms and conditions of the agreement). And, rather than being properly found on summary judgment, the existence and extent of an oral contract is a question of fact, typically left for a jury. *See Tabler v. Indus. Comm'n*, 202 Ariz. 518, ¶¶ 8, 12 (App. 2002) (determination of intent to contract generally a fact question); *Johnson Int'l, Inc. v. City of Phoenix*, 192 Ariz. 466, ¶ 20 (App. 1998) (trial court should not decide contract formation question when conduct sufficient to create question of fact for trier).

¶14 The question here is not whether any existing lease could have been enforceable under the statute of frauds or estoppel principles, but rather whether a landlord-tenant relationship was established at the most basic level. There is no evidence that the term "lease" or the concept of a lease as used in the CC&Rs is anything other than a lease as commonly understood. According to Black's Law Dictionary, a lease is "[a] contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration." *Lease*, Black's Law Dictionary 1066 (11th ed. 2019). It is also defined as "a contract by which one conveys lands, tenements, or hereditaments for life, for a term of years, or at will or for any less interest than that of the lessor, usu[ally] for a specified rent or compensation." *Lease*, Webster's Third New Int'l Dictionary 1286 (1971).

¶15 Here, the premises were identified—the in-law suite—and the rental rate was established—$2,000 per month. Although there was no evidence of the expected duration of the relationship, as stated above, a lease may be at will, meaning the tenancy need not have a fixed term and may terminate "upon fair notice." *See Tenancy at will*, Black's Law Dictionary 1768 (11th ed. 2019). While other common terms, such as insurance requirements, maintenance, and even pet ownership, may have not been contemplated, discussed, or agreed upon, what was agreed upon was sufficient to establish a genuine issue of fact as to the tenancy and the leasehold interest to a portion of the Jordan and McCormick home. The fact that Deehan and Rojas resided there without dispute (in the record anyway)

of any terms of the tenancy may reflect that there were no unagreed upon necessary terms.

¶16 Whether a leasing relationship was created here is not an issue that can be determined as a matter of law under Arizona's Landlord Tenant Act or merely by virtue of the lack of a writing or any express memorandum of terms. A landlord-tenant relationship, as commonly understood, could have been created here irrespective of the enforceability of any particular term as between Jordan and McCormick and Deehan and Rojas. The facts and circumstances of the creation of the relationship between Jordan and McCormick and Deehan and Rojas and the circumstances of their living arrangement could, to a reasonable jury, prove the existence of a lease as contemplated by and prohibited under the CC&Rs.

Exclusive Use

¶17 As to the trial court's finding that Deehan and Rojas were not given exclusive use of any portion of the premises, that finding is belied by the evidence. Saguaro Cliffs presented evidence that Deehan and Rojas made monthly payments—that they, for years, referred to as "rent"—to Jordan and McCormick for their use of a certain portion of the residence but not for the remainder. Saguaro Cliffs presented evidence that Deehan, Rojas, Jordan, and McCormick would refer to each other as neighbors and refer to Deehan and Rojas's portion of the residence as their "home," on one occasion Deehan specifically gave McCormick permission to "go next door" into the in-law suite, and they would text each other in advance before meeting up or inviting each other to "come over" to their side of the home. This evidence is sufficient to create a genuine issue of fact as to whether Deehan and Rojas had exclusive possession of a portion of the home.

¶18 Ultimately, it was not for the trial court to weigh the evidence and choose among competing inferences, *Orme Sch.*, 166 Ariz. at 311, but instead the court must view the facts and evidence in the light most favorable to the non-moving party and give that party the benefit of all reasonable inferences drawn from the evidence, *Sanchez v. City of Tucson*, 191 Ariz. 128, ¶ 7 (1998) (quoting *Orme Sch.*, 166 Ariz. at 309-10). A reasonable jury could find that Jordan and McCormick leased Deehan and Rojas the in-law suite of their home, and summary judgment was thus improper. We therefore vacate the trial court's grant of summary judgment in favor of Jordan and McCormick and remand for further proceedings.

Attorney Fees Below

¶19 In their appeal, Jordan and McCormick claim that the trial court applied the incorrect legal standard and method in determining the amount of attorney fees to award. Because we reverse the grant of summary judgment in favor of Jordan and McCormick, we also vacate the court's award of attorney fees and costs to them as prevailing parties. Accordingly, their appeal of the reduced attorney fee award is moot. *See Wang Elec., Inc. v. Smoke Tree Resort, LLC*, 230 Ariz. 314, ¶ 45 (App. 2012).

Attorney Fees on Appeal

¶20 Both parties request attorney fees on appeal pursuant to Section 9.1 of the CC&Rs and Rule 21, Ariz. R. Civ. App. P., and Saguaro Cliffs also requests costs pursuant to Rule 21. Given the issues remaining on remand, we deny both parties requests for fees without prejudice. On remand, the trial court may award attorney fees after the case has been resolved on the merits. However, as Saguaro Cliffs prevailed on appeal, we award them costs upon compliance with Rule 21.

Disposition

¶21 For the foregoing reasons, we vacate the trial court's grant of summary judgment and award of attorney fees, and we remand for further proceedings.