IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

CATHERINE POLLAKOV,
Plaintiff/Appellant,

v.

GMH CAPITAL PARTNERS ASSET SERVICES, L.P., A FOREIGN LIMITED PARTNERSHIP OPERATING UNDER THE REGISTERED TRADE NAME OF THE GMH UNIVERSITY HOUSING DBA LUNA APARTMENTS; AND GMH UNIVERSITY HOUSING, AN ARIZONA REGISTERED TRADE NAME,
Defendants/Appellees.

No. 2 CA-CV 2021-0133
Filed July 26, 2022

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20212109
The Honorable D. Douglas Metcalf, Judge

AFFIRMED

COUNSEL

Watters Law, PLLC, Tucson
By Andrea E. Watters
Counsel for Plaintiff/Appellant

Sanders & Parks P.C., Phoenix
By J. Steven Sparks and Vincent R. Miner
Counsel for Defendants/Appellees

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 Catherine Pollakov appeals from the trial court's grant of appellee GMH Capital Partners Asset Services, L.P.'s ("GMH") motion to dismiss. Pollakov claims that the court erred in ruling that her claim was barred by a one-year statute of limitations under The Arizona Residential Landlord and Tenant Act ("ARLTA"), A.R.S. §§ 33-1301 to 33-1381. We affirm.

Factual and Procedural Background

¶2 On review from an order granting a motion to dismiss, "we accept as true all facts asserted in the complaint." *Harris v. Cochise Health Sys.*, 215 Ariz. 344, ¶ 2 (App. 2007). GMH rented an apartment to Pollakov on approximately March 7, 2018. The parties entered into a lease agreement providing the terms of the rental.

¶3 In early 2019, Pollakov "began noticing strong odors and dampness in the apartment." On February 5, 2019, GMH received reports of visible mold growth in the apartment and it assured Pollakov that it would come to the unit to look at the problem. On February 17, GMH agreed that the apartment had "significant repair issues" and agreed to put Pollakov in a hotel while GMH made the necessary repairs.

¶4 After about a week at the hotel, Pollakov returned to her apartment and found the kitchen cabinets were not installed, the sink not replaced, and the garbage disposal was not installed. GMH assured her that all repairs would be completed but it did not return to remedy the problems. Pollakov "had pre-existent health problems and feared that remaining in the apartment put her health at risk, given the poor state of repair and seemingly unaddressed health issues." She vacated the apartment on May 15, 2019, "due to the failure of [GMH] to ensure that it was a safe and habitable place for her to live."

¶5 In May 2021, Pollakov sued GMH for breach of contract claiming that GMH breached the lease when it failed to provide a safe and habitable residence. Pollakov claimed that the ARLTA was incorporated by a provision in the lease that provided:

> This Lease is governed by the Arizona Residential Landlord and Tenant Act (Arizona Code Title 33, Chapter 10) (the "Act") and any other applicable federal, state or local laws. You are advised to read the Act before si[gn]ing this Lease. In the case of any conflict between the terms of this Lease and the Act, the terms of the Act will control.

¶6 She thus asserted in her complaint that the statute applicable to her claim was § 33-1324, which provides that a landlord shall "keep the premises in a fit and habitable condition." The lease itself does not provide such a requirement. GMH moved to dismiss pursuant to Rule 12(b)(6), Ariz. R. Civ. P., claiming that Pollakov's complaint was barred by a one-year statute of limitations applicable to ARLTA. GMH claimed that Pollakov's cause of action accrued by at least May 2019, when she vacated her apartment, and she filed her complaint in May 2021.

¶7 The trial court agreed and granted GMH's motion to dismiss. Pollakov appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Analysis

¶8 "We review de novo the dismissal of an action under Rule 12(b)(6) based on a statute of limitations." *Standard Constr. Co. v. State*, 249 Ariz. 559, ¶ 5 (App. 2020). "We review questions of statutory application and contract interpretation de novo." *Id.* We construe contracts to give effect to the parties' intent and apply the plain contractual language when it is unambiguous. *Id.*

¶9 On appeal, as she did below, Pollakov argues that the applicable statute of limitations here is six years because her claim is based on a written contract—the lease agreement.[1] She argues that her breach of

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[1]A.R.S. § 12-548 provides that the statute of limitations for a contract in writing executed within Arizona is six years after the cause of action accrues.

contract claim arises from the lease because it incorporates ARLTA, and thus does not arise from ARLTA itself.[2]

¶10 GMH argues on appeal, as it did below, that Pollakov's complaint is based entirely on her claim that GMH violated ARLTA, and the only section of the lease she claims that GMH breached is the section stating that ARLTA governs the lease. GMH asserts that the provision of the lease in question does not incorporate ARLTA, but merely states the law—that ARLTA applied to the lease agreement. And thus, it claims, Pollakov is asserting a statutory ARLTA claim, not a breach of contract claim, and the one-year statute of limitations in A.R.S. § 12-541(5) applies.

¶11 In its ruling, the trial court found that:

> In this case, the lease is merely stating the obvious, that the Landlord Tenant Act applies to the lease. Doing so does not convert the Act into [a] lease term such that the six-year statute of limitations for written contracts applies instead of the one-year statute of limitations for a violation of a statute. If that were the case, all cases alleging a violation of the Act would be subject to the six-year statute of limitations, which cannot be what the legislature intended when it enacted that one-year statute of limitations for claims alleging of a violation of a statute.

It thus held that the one-year statute of limitation under § 12-541(5) applies and dismissed Pollakov's complaint. We cannot say that the trial court erred in dismissing Pollakov's claim.

¶12 "When determining what statute of limitations to apply, 'we look to the nature of the cause of action or of the right sued upon and not the form.'" *Redhair v. Kinerk, Beal, Schmidt, Dyer & Sethi, P.C.*, 218 Ariz. 293, ¶ 21 (App. 2008) (quoting *Atlee Credit Corp. v. Quetulio*, 22 Ariz. App. 116, 117 (1974)); *see also La Canada Hills Ltd. P'ship v. Kite*, 217 Ariz. 126, ¶ 6 (App. 2007) (determining characterization of a claim and resulting applicable statute of limitations). Thus, here, we must determine whether Pollakov's claim is properly characterized as a breach of contract claim because the

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[2]Pollakov does not dispute that if the one-year statute of limitations applies her cause of action is time-barred.

lease, as she alleges, incorporates ARLTA, or, if the lease does not incorporate ARLTA, if her claim is a statutory claim arising from ARLTA itself.

¶13 To incorporate a document by reference, the reference must be "clear and unequivocal." *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 268 (App. 1983). Typically, a contract will characterize another document as being "incorporated herein by this reference" or employ some other such clear and unequivocal language. *See, e.g., Weatherguard Roofing Co. v. D.R. Ward Constr., Co.*, 214 Ariz. 344, ¶¶ 8-9 (App. 2007) (while not necessary that contract uses exact terms "incorporated by this reference herein" it must use terms to incorporate documents that are clear and unequivocal). "Mere reference to a document for descriptive purposes does not operate as an incorporation of the document into a contract." *United Cal. Bank*, 140 Ariz. at 268. Here, no such clear and unambiguous language appears. Instead, the contract merely states that the document is "governed" by ARLTA. "Govern" is defined as "to control a point in issue." *Govern*, Black's Law Dictionary 839 (11th ed. 2019). This is similar to stating that any dispute under a contract is "governed" by Arizona law (or the law of some other named jurisdiction). *See, e.g., Ciena Cap. Funding, LLC v. Krieg's, Inc.*, 242 Ariz. 212, ¶ 10 (App. 2017). Such a description does not incorporate the entirety of a jurisdiction's law into the contract documents; it merely means that relevant provisions of state law will be used to interpret the existing contractual provisions. *See, e.g., id.* ¶¶ 8-15; *Cf. Qwest Corp. v. City of Chandler*, 222 Ariz. 474, ¶ 37 (App. 2009) (valid statutes become part of any contract and contract must be interpreted in light of existing laws). At most, a jurisdictional statement or choice of law provision may mean that implied-in-law provisions, such as Arizona's implied covenant of good faith and fair dealing, may bind the parties. *See, e.g., Griffin Found. v. Ariz. State Ret. Sys.*, 244 Ariz. 508, ¶ 29 (App. 2018).

¶14 Thus, merely stating that ARLTA "governs" the lease agreement here similarly does not incorporate ARLTA as express contractual terms. By its terms, ARLTA applies "to the rental of dwelling units" in Arizona. § 33-1304. If this dwelling unit lease were silent on ARLTA, it would no less be governed by ARLTA. If there were no written lease between the parties at all, ARLTA would still govern their relationship with regard to this dwelling unit rental.

¶15 Pollakov's claim as made in her complaint therefore exists irrespective of any written contract between the parties and arises independently under ARLTA. Because her claim arises under ARLTA, her

claim is for a liability created by statute, *see* § 33-1305(B), with an applicable statute of limitations of one year, § 12-541(5). It is undisputed, and indeed conceded, that Pollakov filed suit later than a year after her claim accrued. The trial court therefore properly dismissed Pollakov's complaint pursuant to Rule 12(b)(6), Ariz. R. Civ. P.

Disposition

¶16 For the foregoing reasons, we affirm the trial court's dismissal of Pollakov's complaint.