IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

LARRY D. SPECTOR, AS TRUSTEE OF THE SPECTOR REVOCABLE TRUST, DATED MAY 25, 1978,
Plaintiff/Appellant,

v.

FITNESS & SPORTS CLUBS, LLC, A DELAWARE LIMITED LIABILITY COMPANY, FKA FITNESS INTERNATIONAL, LLC, A DELAWARE LIMITED LIABILITY COMPANY,
Defendant/Appellee.

No. 2 CA-CV 2022-0073
Filed May 8, 2023

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NOT FOR PUBLICATION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. C20183029
The Honorable Kellie Johnson, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Brearcliffe authored the decision of the Court, in which Judge Eckerstrom and Judge Kelly concurred.

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

¶1 This appeal follows from the judgment entered after a bench trial of a commercial lease dispute between a landlord, the Spector Revocable Trust—through its trustee Larry Spector ("the Spector Trust")—and its tenant, Fitness & Sports Clubs LLC (FSC), formerly known as Fitness International, LLC. The Spector Trust contends that FSC failed to plead an affirmative defense and that the trial court improperly placed the burden on the Spector Trust to disprove that defense. Because FSC provided sufficient notice of its defense, the Spector Trust bore the burden of proving its claim, and the record does not indicate that the court misallocated the burden of proof, we affirm.

Factual and Procedural Background

¶2 "Following a bench trial, we view the facts in the light most favorable to upholding the court's ruling." *Ariz. Biltmore Hotel Villas Condos. Ass'n v. Conlon Grp. Ariz., LLC*, 249 Ariz. 326, ¶ 3 (App. 2020). In December 2006, the Spector Trust leased a commercial building to Bally Total Fitness Corporation ("Bally") pursuant to a written lease agreement for an initial term of ten years. On November 28, 2011, FSC sent the Spector Trust a letter informing it of Bally's assignment to it of the commercial lease, and provided its new address for "all notices and correspondence to tenant under the Lease." In December 2011, Bally assigned the lease to FSC. Thereafter, in 2012, with the Spector Trust's knowledge and approval—and

as permitted by the lease—FSC ceased active operations on the premises, presumably leaving the building vacant. FSC continued to pay rent, which the Spector Trust accepted.

¶3 In March 2015, FSC notified the Spector Trust that the HVAC units on the roof of the building had been vandalized. FSC advised the Spector Trust that, given the danger of repeat vandalism, it would not repair or replace the HVAC units. Instead, noting it would file an insurance claim, FSC informed the Spector Trust that it would retain any insurance proceeds and give them to it when the lease expired. The Spector Trust agreed.

¶4 FSC surrendered the premises to the Spector Trust on December 27, 2016, and the lease expired four days later. When it surrendered the premises, FSC delivered $40,119.59 in insurance proceeds to the Spector Trust, which it accepted. FSC also sent the Spector Trust a letter confirming the surrender of the property and the expiration of the lease. In the letter, FSC stated that "turnover of the Premises to Landlord has been performed in compliance with all provisions as stated in the Lease" and that "Landlord hereby has agreed to release the tenant," asking that the Spector Trust countersign the letter indicating its agreement. The Spector Trust did not do so. Instead, Ronald Spector, a co-trustee of the Spector Trust, wrote at the bottom of the letter: "Landlord has received possession on 12/27/16. HVAC is missing. Parking lot lights are not working. Various windows are broken. Plumbing fixtures are missing." He then signed the letter and mailed it to FSC in January 2017.

¶5 The lease required the tenant, among other things, to pay "[a]ll costs, expenses and obligations" for the premises, unless otherwise stated; to maintain the premises "in good condition and repair"; and to "leave the Premises in broom-clean condition" when the lease ended. Section 9.2 of the lease states:

> If Tenant fails to perform any covenant or is otherwise in breach of any provision of this Lease (except for the defaults set forth in Sections 9.1 and 9.3), and such failure or breach continues for a period of thirty (30) days after Tenant receives written notice thereof from Landlord specifying the nature of such failure, then such failure shall be deemed a default under this Lease . . . .

Pursuant to § 16.1, all notices required to be sent under the lease must be sent "by a nationally recognized overnight courier delivery service for next

day delivery, properly addressed to the last address previously specified in writing by the party to whom the written notice is given."

¶6 The Spector Trust filed its complaint in June 2018, alleging that "[p]ursuant to Section 7.1 . . . of the Lease, [FSC] was obligated to maintain the Leased Premises . . . in good condition and repair. [FSC] failed to do so; thus, materially breaching the terms of the Lease." It also asserted that "[p]ursuant to Section 9.2 . . . of the Lease, [FSC had] failed to maintain the Lease[d] Premises in good condition and repair, a material breach of the Lease." It further alleged FSC "ha[d] materially breached the terms of the Lease by failing to adequately maintain and safeguard the Leased Premises, which resulted in extensive damages to the Leased Premises." Finally, the Spector Trust asserted that it had "fully performed under the terms of the Lease."

¶7 FSC's answer denied the allegations in the complaint, including that the Spector Trust had fully performed under the lease, and asserted, under the heading "Affirmative Defenses," that the Spector Trust's "claims are barred by the non-occurrence of conditions precedent." In a later disclosure statement, FSC claimed that the Spector Trust had never provided it "with written notice of any non-monetary default and an opportunity to cure," stating that such was "a prerequisite of any claim for damages" under the lease. In the parties' joint pretrial statement, FSC stated, as a contested issue of material fact, that the Spector Trust had failed to provide it the prerequisite notice of breach and opportunity to cure the breach ("notice and cure") "in accordance with § 9.2 of the Lease." The Spector Trust included, as a contested issue of law, "[w]hether compliance with" the opportunity to cure provisions (§ 9.2 of the lease) was a prerequisite to its claim for damages for breach of lease.[1]

¶8 A bench trial was held in February 2022.[2] During the trial, Ronald Spector testified that he did not know whether or not he had sent any default notice to FSC as required under § 16.1 of the lease; that is, notice

[1]Although not addressed at trial, the Spector Trust asserts on appeal that the notice and cure provision of the lease was not a prerequisite to its claim in any event. On review of our earlier opinion in this case, our supreme court held that this argument had been waived. *See Spector v. Fitness & Sports Clubs, LLC*, No. CV-23-0145-PR (Ariz. Dec. 8, 2023) (decision order).

[2]Before trial, the trial court ruled that the Spector Trust's breach of contract claim was waived in the amount of the $40,119.59 in proceeds received for the HVAC insurance claim. This ruling was not appealed.

of default by overnight courier with next day delivery. He testified, however, that he had likely mailed, e-mailed, and texted notice of damage to the property to FSC's corporate representative.

¶9 At the close of the Spector Trust's evidence, FSC requested a directed verdict, arguing that the Spector Trust had failed to prove that it provided FSC notice and opportunity to cure as required under § 9.2, and that "[t]here can be no cause of action until [the Spector Trust] actually puts the tenant on notice of a default" under the contract. The Spector Trust argued that FSC had actual notice of the claimed damages, and that the parties had routinely sent notices by email. The trial court denied the motion for directed verdict because there was no jury to which it would charge the case. FSC did not put on any evidence in its case in chief.

¶10 The trial court ultimately issued its verdict in favor of FSC, finding, among other things, that FSC had sent the Spector Trust "a release which [the Spector Trust] never signed" and

> [a]t the bottom of the unsigned release, [the Spector Trust] wrote a list of items, presumably noting deficiencies in the property [it] felt needed to be addressed. . . . The handwriting does not include a request to cure the noted deficiencies.

It also found that the Spector Trust had

> admitted no other exhibit demonstrating written notice of the potential breach into evidence. [Ronald Spector] testified he believed he provided the handwritten list to [FSC] but was uncertain about how he sent the list to [FSC]. He also testified he had several conversations with [FSC's] representatives about curing the issues noted on the handwritten list.

Ultimately, the court concluded, "[T]he evidence presented at trial fails to prove by a preponderance of the evidence that [FSC] breached the Lease because the evidence fails to demonstrate that [the Spector Trust] provided [FSC] with written notice of his complaints and a cure period required under the Lease."

¶11 The Spector Trust moved for reconsideration, arguing that FSC had not pleaded its notice and cure argument as an affirmative defense

under Rule 8(d), Ariz. R. Civ. P., or with sufficient specificity as a condition precedent under Rule 9(c), Ariz. R. Civ. P. The Spector Trust also argued that, even if the defense had been properly pleaded, FSC had waived the defense by its conduct in the litigation, and that the trial court had improperly placed the burden on the Spector Trust to disprove FSC's notice and cure argument. The court denied the motion for reconsideration, awarded FSC attorney fees and costs and entered a final judgment in favor of FSC under Rule 54(c), Ariz. R. Civ. P. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 12-2101(A)(1).

Discussion

¶12 On appeal, the Spector Trust asserts, as it did on reconsideration below, that any lack of notice and cure period was an "affirmative defense" that FSC failed to plead, and even if it had been properly pleaded, FSC waived the argument in its course of conduct during the litigation. But, if not waived, the Spector Trust argues it should not have borne the burden at trial of proving that notice and cure had been provided. We review the trial court's denial of a motion for reconsideration for abuse of discretion. *Tilley v. Delci*, 220 Ariz. 233, ¶ 16 (App. 2009). And we review both the interpretation and application of procedural rules and allocation of any burden of proof de novo. *Stafford v. Burns*, 241 Ariz. 474, ¶ 35 (App. 2017); *Parker v. City of Tucson*, 233 Ariz. 422, ¶ 11 (App. 2013).

I. Waiver of Claim of Lack of Notice

¶13 As stated above, under § 9.2 of the lease, a non-monetary default occurs "[i]f Tenant fails to perform any covenant or is otherwise in breach of any provision of this Lease . . . and such failure or breach continues for a period of thirty (30) days after Tenant receives written notice thereof from Landlord specifying the nature of such failure." The Spector Trust claims that FSC waived any claim of failure of notice and cure by not expressly raising the claim as an "affirmative defense" in its answer pursuant to the general pleading standards of Rule 8(d), or with sufficient particularity as a condition precedent under Rule 9(c).

¶14 In either case, we see no error. First, pleading an affirmative defense in an answer requires no more than an affirmative statement—the rule does not require specificity or particularity. *Compare* Ariz. R. Civ. P. 8(d) (party must affirmatively state any avoidance or affirmative defense), *with* Ariz. R. Civ. P. 9(c) (when denying condition precedent has occurred party must do so with particularity). And, if FSC's notice and cure defense constituted an affirmative defense, it was well-pleaded in FSC's answer when FSC asserted that the Spector Trust's "claims are barred by the non-occurrence of conditions precedent," and in its general denial that the

Spector Trust had fully performed. But if the notice and cure argument were asserted on the ground that a condition precedent did not occur—an allegation that requires particularity under Rule 9(c)—then, as the Spector Trust claims, it was not sufficiently particular in FSC's answer.

¶15 However, FSC ultimately provided timely and particularized notice of this allegation in both its disclosure statement and the parties' joint pretrial statement. Even if FSC's answer were insufficient under either Rule 8 or 9, "[a] joint pre-trial statement controls the subsequent course of litigation and may amend the pleadings." *Murcott v. Best W. Int'l, Inc.*, 198 Ariz. 349, ¶ 47 (App. 2000). As discussed above, in an exchanged disclosure statement, FSC asserted that the Spector Trust had never provided it "with written notice of any non-monetary default and an opportunity to cure in accordance with § 9.2, a prerequisite of any claim for damages under this section of the Lease." And in the parties' joint pretrial statement, FSC asserted, as a contested issue of material fact, that the Spector Trust had failed to provide it with the prerequisite notice and cure period "in accordance with § 9.2 of the Lease."

¶16 FSC's submission to the parties' joint pretrial statement was sufficient to provide particularized notice to the Spector Trust that FSC would be asserting lack of notice and opportunity to cure at trial. That claim was then tried without the Spector Trust's objection. *See* Ariz. R. Civ. P. 15(b)(2) (even an issue not raised in pleadings is treated as if it had been if tried with express or implied consent of the parties, and failure to amend the pleadings "does not affect the result of the trial of that issue"). If the Spector Trust thought that arguments pertaining to notice and cure were outside the scope of the pleadings, it could have so objected before or at trial; it did not. *See* Ariz. R. Civ. P. 15(b)(1). The trial court did not abuse its discretion in denying the motion for reconsideration.

II. Burden to Prove Lack of Notice and Cure Period as Affirmative Defense or Condition Precedent

¶17 The Spector Trust also argues that, even if the claim were well-pleaded, FSC had the burden at trial to prove the "affirmative defense of nonoccurrence of a condition precedent," and the trial court erred by "placing the burden on [the Spector Trust] of disproving such affirmative defense in order to meet its burden of proving a breach of contract." The Spector Trust contends that the misallocation became apparent for the first time in the court's under advisement ruling, in which the court found that there was insufficient evidence that the Spector Trust had provided notice and opportunity to cure. We see no error.

¶18 The Spector Trust conflates the different burdens of proof applicable to Rules 8(d) and 9(c). Indeed, as the Spector Trust notes, a party asserting an affirmative defense under Rule 8(d) bears the burden of proving it. *See Grubb & Ellis Mgmt. Servs., Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, ¶ 21 (App. 2006). However, when a defendant denies "with particularity" that a condition precedent occurred under Rule 9(c)—as we conclude FSC ultimately did here—it remains the plaintiff's burden to prove that the condition precedent to bringing suit has been fulfilled. *See* Ariz. R. Civ. P. 9(c), *see also* Fed. R. Civ. P. 9(c); *see also Flynn v. Campbell*, 243 Ariz. 76, ¶ 9 (2017) (where Arizona rule is modeled after federal counterpart, federal interpretation of the rule is persuasive); *cf., e.g.*, *Mason v. Connecticut*, 583 F. Supp. 729, 733 (D. Conn. 1984) ("Where defendant alleges specifically and with particularity, as here, that any of the conditions precedent to suit have not been fulfilled, the plaintiff is required under Fed. R. Civ. P. 9(c), to prove they were satisfied."); *Jackson v. Seaboard Coast Line R.R. Co.*, 678 F.2d 992, 1010 (11th Cir. 1982) ("[T]he defendant may deny 'specifically and with particularity' that the preconditions have . . . been fulfilled," and "[t]he plaintiff then bears the burden of proving that the conditions precedent, which the defendant has specifically joined in issue, have been satisfied." (quoting former version of Fed. R. Civ. P. 9(c))); *Holley Coal Co. v. Globe Indem. Co.*, 186 F.2d 291, 294 (4th Cir. 1950) (Pursuant to Rule 9(c), Fed. R. Civ. P., where bond "expressly provide[d]" that plaintiff company "must show as a condition precedent to recovery that the loss was not attributable to those persons excepted in the bond," "[s]uch a showing would thus become a part of [plaintiff]'s case (not an affirmative defense), to be pleaded and proved by it."); *see also Henschel v. Hawkeye-Sec. Ins. Co.*, 178 N.W.2d 409, 417-19 (Iowa 1970) (in accord regarding Iowa rule "based primarily on federal rule 9(c)," citing sources across jurisdictions and secondary sources).[3]

¶19 The Spector Trust asserted in its complaint that it had complied with all terms of the lease. FSC denied this in its answer, and then stated with particularity in the pretrial statement that notice and opportunity to cure had not occurred as required under § 9.2. It further stated that these conditions were prerequisites to the Spector Trust's claim. The burden therefore remained with the Spector Trust to show that these conditions had occurred. *See Henschel*, 178 N.W.2d at 418-19. The trial court concluded that it had not carried that burden, the record supports that

[3]We are persuaded that these federal and sister-state authorities are correct and consistent with Arizona law.

conclusion, and we will not reweigh evidence. *See Shooter v. Farmer*, 235 Ariz. 199, ¶ 4 (2014).

¶20 This allocation of the burden to the Spector Trust is not an undue burden given its principal burden to prove breach of contract. *See Henschel*, 178 N.W.2d at 418-19; *Graham v. Asbury*, 112 Ariz. 184, 185 (1975). As part of its breach of contract claim, the Spector Trust bore "the burden of proving the existence of the contract, its breach and the resulting damages." *Graham*, 112 Ariz. at 185; *see Jahnke v. Palomar Fin. Corp.*, 22 Ariz. App. 369, 373 (1974) ("A cause of action must exist and be complete prior to the commencement of the lawsuit and if it is not it is defective as premature."). As a general matter, a cause of action for breach of contract accrues when the event of breach occurs. *See Beaudry Motor Co. v. New Pueblo Constructors, Inc.*, 128 Ariz. 481, 482-83 (App. 1981); *Enyart v. Transamerica Ins. Co.*, 195 Ariz. 71, ¶ 13 (App. 1998). But the parties may contract expressly for notice and cure periods in the event of a breach, and such cure periods delay or toll the accrual of the cause of action for breach of contract. *Cf. Mill Alley Partners v. Wallace*, 236 Ariz. 420, ¶¶ 12-13 (App. 2014) (breach of contract for guaranty generally accrues on breach of underlying obligation unless parties contract for a cure period).

¶21 "[T]he existence of a cause of action is a fundamental prerequisite to litigation." *Jahnke*, 22 Ariz. App. at 373. Because the Spector Trust failed to provide the notice and cure opportunity required under the contract, any claim of breach requiring such notice remained tolled and the Spector Trust's claim simply failed to accrue. The trial court correctly found that the Spector Trust failed to carry its burden and show actionable breach of the lease.

III. Attorney Fees

¶22 On appeal, both the Spector Trust and FSC request attorney fees and costs pursuant to Ariz. R. Civ. App. P. 13(a)(8) and 21(a), A.R.S. § 12-341.01(A), and § 16.6 of the lease. Section 16.6 of the lease provides that the prevailing party shall receive reasonable attorney fees and court costs from the losing party. The Spector Trust is not the prevailing party on appeal and is therefore not entitled to an award of fees under § 12-341.01(A) or § 16.6 of the lease. Because FSC is the prevailing party, we award it costs and reasonable attorney fees on appeal upon compliance with Rule 21, pursuant to § 16.6 of the lease. *See Bennett v. Appaloosa Horse Club*, 201 Ariz. 372, ¶ 26 (App. 2001); *see also Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, ¶ 33 (App. 2007) (costs on appeal to prevailing party).

Disposition

¶23 We affirm the trial court's judgment in full.