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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

BUTTERFIELD PLAZA BENSON, L.L.C., an Arizona limited liability company, Plaintiff/Counterdefendant/Appellee, v. RAYMOND JOHNSON, II; 4-R ENTERPRISES dba RADIO SHACK K-484; STEVEN J. SACCO and SHARON L. SACCO dba POSTAL ANNEX, Defendants/Counterclaimants/Appellants.	2 CA-CV 2010-0042 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause Nos. CV200801064 and CV200801065 (Consolidated)

Honorable James L. Conlogue, Judge

AFFIRMED

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Attorney for Plaintiff/
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H O W A R D, Chief Judge.

¶1 Raymond Johnson, II and 4-R Enterprises ("Johnson"), and Steven J. and Sharon L. Sacco ("Sacco"), each of whom leased commercial space at Butterfield Plaza from its owner Butterfield Plaza Benson, L.L.C. ("Butterfield"), appeal from the trial court's order granting partial summary judgment in favor of Butterfield on its action against them for breach of their respective leases. Appellants contend the court's order was based, in part, on its erroneous conclusion that A.R.S. § 33-343 was not applicable. Appellants also contend the court erred in denying their cross-motion for partial summary judgment for breach of contract. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts and reasonable inferences from those facts in the light most favorable to the party against whom summary judgment was granted. *See Andrews v. Blake*, 205 Ariz. 236, ¶ 12, 69 P.3d 7, 11 (2003). Appellants were commercial lessees of Butterfield. On May 21, 2008, the City of Benson sent appellants copies of a letter identifying various structural problems with the building. The letter required that the problems be repaired, rehabilitated, or removed within 30 days. It further provided that it was a condemnation notice and that the buildings were to be vacated in 30 days. Finally, it provided notice of an available appeal of the requirements to the Board of Appeals.

¶3 On May 30, the city issued a 120-day extension to the notice, stating that "no tenants [were] expected to leave the building." Although these letters were addressed to the tenants of Butterfield Plaza, there was no evidence that appellants received them.

On June 2, Sacco signed a new lease for a different premises, and on June 4, Johnson also signed a new lease for a different premises. On June 5, the city notified Butterfield that it had rescinded the notice to vacate based on Butterfield's remediation efforts. On June 10 and 11, appellants notified Butterfield that they intended to terminate their leases and cease paying rent.

¶4 Butterfield sued appellants for breaching their leases by not paying rent. The trial court consolidated the cases against appellants. Butterfield filed a motion for summary judgment, and appellants filed a cross-motion for summary judgment. After a hearing on these motions, the court granted partial summary judgment in favor of Butterfield, finding that appellants had breached the leases, and denied appellants' cross-motion for summary judgment and ordered that separate proceedings be conducted to determine Butterfield's damages as to each tenant. This appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(G).

Summary Judgment

¶5 Appellants first argue the trial court erred in granting summary judgment for Butterfield because A.R.S. § 33-343 allowed them to terminate their tenancies. Appellants assert that the city's condemnation notice established the building was "untenantable or unfit for occupancy," as provided in § 33-343, and that the leases terminated automatically because they did not contain the language required by the statute to avoid its application. We review a grant of summary judgment de novo. *Valder Law Offices v. Keenan Law Firm*, 212 Ariz. 244, ¶ 14, 129 P.3d 966, 971 (App. 2006). Summary judgment is required where there is "no genuine issue as to any

material fact." Ariz. R. Civ. P. 56(c)(1). Our supreme court has interpreted this rule to mean that, "if the facts produced in support of the 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," summary judgment should be granted. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¶6 Section 33-343 provides as follows:

> The lessee of a building which, without fault or neglect on the part of the lessee, is destroyed or so injured by the elements or any other cause as to be untenantable or unfit for occupancy, is not liable thereafter to pay rent to the lessor or owner unless expressly provided by written agreement, and the lessee may thereupon quit and surrender possession of the premises.

"Express" means "[c]learly and unmistakably communicated; directly stated." *Black's Law Dictionary* 620 (8th ed. 2004). In *Leonardi v. Furman*, 83 Ariz. 61, 63-64, 316 P.2d 487, 489 (1957), the lease specified that if the building were to be destroyed or damaged in certain ways and could not be repaired within 150 days, either party had the option of terminating the lease. The lease did not use the express language, "untenantable or unfit for occupancy." *Id.* When the building was completely destroyed by fire, the tenants notified the lessors in writing that the lease had terminated automatically based on the former version of § 33-343; lessors sought and obtained a declaratory judgment that the lease continued to exist and had not terminated. *Id*. at 63, 316 P.2d at 488-89. The supreme court found, inter alia, that the lessee had violated the terms of the lease by declaring the lease over and surrendering the property and the violation was not excused

by the provisions of the previous version of A.R.S. § 33-343. *Id.* at 63, 65-66, 316 P.2d at 489, 490-91.

¶7 Section 25 of both leases between appellants and Butterfield first states that if the premises are damaged by fire or other perils covered by insurance, Butterfield will repair them and the leases will remain in full force and effect. The leases further provide that if the premises are damaged "by any cause," other than perils covered by insurance, in an amount less than ten percent of the replacement cost, Butterfield is required to repair it. If the damage is greater than ten percent, Butterfield has the option of repairing the premises, with the leases "continuing in full force and effect."

¶8 The leases thus expressly provide under what circumstances they will continue in effect and under what circumstances they may be terminated by the lessor, but their terms describe no situations in which the tenant may terminate the lease. These leases do not give the tenants the right to terminate their leases if the premises are damaged "as to be untenantable or unfit for occupancy." *See* § 33-343. Although the leases include more situations than contemplated by § 33-343, that does not render their mandates less than "express" or otherwise inapplicable. *See Leonardi*, 83 Ariz. at 64-66, 316 P.2d at 489-91.

¶9 Appellants claim, however, the trial court could not rely on *Leonardi* because it cited to the prior version of § 33-343. The Arizona legislature adopted the Arizona Revised Statutes in 1956, 1956 Ariz. Sess. Laws 3d Spec. Sess., ch. 3, § 1, but the legislature instructed the commission charged with codifying the statutes that it should not "undertake to make any change of existing laws," 1955 Ariz. Sess. Laws, ch.

1, § 1. And in fact the statutory language remained substantially the same. Thus, *Leonardi*'s interpretation of the statute controls in determining that a lease need not use the precise wording of the statute to expressly provide for an alternate result.

¶10 Appellants also attempt to distinguish *Leonardi* because, there, the premises were destroyed by fire, as provided for in the lease, whereas the premises here were condemned. *See* 83 Ariz. at 63-64, 316 P.2d at 489. But § 33-343 does not include condemnation as one of the grounds permitting a tenant to terminate the lease. *See* § 33-343. Rather, the statute requires that the premises be "untenantable or unfit for occupancy" before the tenant can terminate, unless prevented from doing so by the lease. *Id.* The condemnation here is merely evidence of the condition of the premises. Furthermore, although appellants belatedly suggested at oral argument that condemnation was a species of untenantability, the statute refers to the physical condition of the premises not an outside legal cause. *See Gen. Accident Fire & Life Assurance Corp. v. Traders Furniture Co.*, 1 Ariz. App. 203, 204, 401 P.2d 157, 158 (1965) (§ 33-343 intended to ameliorate common law rule that tenant not relieved of covenant to pay rent even when premises destroyed). Moreover, because the condemnation was due to the alleged untenantability, the lease still covered the underlying cause and *Leonardi* still applies.

¶11 At oral argument, appellants claimed the leases contemplated sudden events rather than gradual deterioration. Although insurance coverage may be limited to sudden events, the second provision of paragraph 25 covers damage by "any other cause." This language covers gradual deterioration. And, as Butterfield points out, appellants did not

give it notice of any claimed failure on its part to maintain the premises as required under Section 24 of the lease.

¶12 Appellants also argue that the city's police power supersedes the leases. But they do not dispute that the condemnation notice contained a right to appeal or that the city did not exercise its police power to bar entry to the premises. However, even if the city had barred the tenants from entering the premises, the leases do not require that the tenants occupy the building in order for the leases to remain in effect. Instead, the leases specifically address what is to occur if the buildings have been "damaged by fire or other perils," or damage to the building interferes with the tenants' businesses, or the destruction is greater than ten percent of the full replacement cost of the building. None of these situations allows either tenant to terminate its lease, although some of them may entitle the tenants to an abatement of rent. Accordingly, even structural damage to the building causing the city to bar entry to the premises would simply fall within damage to the building and may, at most, entitle the tenants to a rent abatement. Continuing to pay some amount of rent as provided by the leases would not interfere with the city's exercise of its police power over occupancy of a building.

Cross-Motion for Partial Summary Judgment

¶13 Appellants next contend the trial court erred in denying their cross-motions for partial summary judgment for breach of contract on the basis of the covenant of tenantable premises and constructive eviction. "[A]lthough the denial of a motion for summary judgment is generally a nonappealable interlocutory order, we may consider such denials when we otherwise have jurisdiction over the appeal . . . ." *Ballesteros v.*

Am. Standard Ins. Co. of Wis., 223 Ariz. 269, ¶ 6, 222 P.3d 292, 295 (App. 2009). "We review a denial of a motion for summary judgment for an abuse of discretion and view the facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." *Sonoran Desert Investigators, Inc. v. Miller*, 213 Ariz. 274, ¶ 5, 141 P.3d 754, 756 (App. 2006).

¶14 Because we have determined as a matter of law that appellants were not entitled under the leases to terminate them, we necessarily conclude that the trial court properly denied appellants' cross-motion for summary judgment. We nevertheless review appellants' arguments on this issue, because they are different than those raised in opposition to Butterfield's motion.

¶15 Appellants argue that Butterfield breached the covenant of tenantable premises and, in doing so, breached the leases. However, appellants do not cite to the tenantable premises provision in the leases or to any authority regarding the covenant of tenantable premises. The argument accordingly is waived on appeal. *See* Ariz. R. Civ. App. P. 13(a)(6) ("An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393-94 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal).

¶16 Constructive eviction, on which appellants also rely, requires "intentional conduct by the landlord which renders the lease unavailing to the tenant or deprives him of the beneficial enjoyment of the leased property, causing him to vacate the premises."

Stewart Title & Trust of Tucson v. Pribbeno, 129 Ariz. 15, 16, 628 P.2d 52, 53 (App. 1981). No evidence here points to intentional conduct by Butterfield. To the contrary, the subsequent letter from the city extended the time period for condemnation from thirty days to 120 days due to the "undaunted efforts of the building owner . . . to remediate the structural issues." Moreover, appellants cite to no Arizona cases in which a landlord's inaction constituted constructive eviction. Finally, appellants were not forced to vacate the premises because first the requirement to vacate, and then the condemnation notice, were rescinded. The trial court did not abuse its discretion in denying appellants' cross-motion for summary judgment on the basis of breach of contract.

Contract Doctrines

¶17 Finally, appellants direct their argument again to the trial court's grant of summary judgment to Butterfield. They argue the court erred because the contract doctrines of impracticability of performance and frustration of purpose precluded entry of summary judgment in favor of Butterfield. We review a grant of summary judgment de novo. *Valder Law Offices*, 212 Ariz. 244, ¶ 14, 129 P.3d at 971.

¶18 Arizona has defined impracticability of performance according to the Restatement (Second) of Contracts § 261 (1981). *See 7200 Scottsdale Rd. Gen. Partners v. Kuhn Farm Machinery, Inc.*, 184 Ariz. 341, 345, 909 P.2d 408, 412 (App. 1995). Under the Restatement, "a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made," and "his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary." Restatement (Second) of

Contracts § 261 (1981).[1] As previously discussed, the leases provide specific results under different scenarios of damage to the buildings. Because the leases assumed that damage to the building might occur or interfere with tenants' businesses, the doctrine of impracticability of performance does not apply. Furthermore, the leases explicitly provide that they may not be terminated by the tenant regardless of the damage to the building.

¶19 Appellants further assert that the city's issuance of the condemnation notice frustrated the purpose of operating their businesses in the building. The doctrine of frustration of purpose requires the frustration to be so severe that it could not be regarded as a risk assumed under the contract. *7200 Scottsdale Rd. Gen. Partners*, 184 Ariz. at 348, 909 P.2d at 415. Here, the leases specifically allocate the risk of damage to the premises. Moreover, the condition of the premises had not been such that the tenants felt the need to move out of the premises before receiving the condemnation notice. And the notice specifically provided for the repair or rehabilitation of the building, which occurred. Appellants were never forced to move out. Frustration of purpose does not apply.

[1]At oral argument, appellants relied on the Restatement (Second) of Contracts § 264 (1981), which states that "[i]f the performance of a duty is made impracticable by having to comply with a . . . government regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made." However, the comments state that this section does not apply if the contract language provides otherwise, as it does here. *See* Restatement § 264 cmt. a ("The rule stated in this Section does not apply if the language or the circumstances indicate the contrary."). Furthermore, appellants were never unqualifiedly ordered to leave the premises.

Attorney Fees

¶20 Both parties request attorney fees on appeal. Because the leases provide that the prevailing party is entitled to attorney fees, and because Butterfield is the prevailing party, we grant Butterfield's reasonable attorney fees upon compliance with Rule 21, Ariz. R. Civ. App. P. Conversely, appellants' request is denied.

Conclusion

¶21 In light of the foregoing, we affirm the trial court's grant of partial summary judgment in favor of Butterfield. We also affirm the trial court's denial of appellants' motion for partial summary judgment.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge