

IN THE UTAH COURT OF APPEALS

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David Truong,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff, Counter-)	
defendant, and Appellant,)	Case No. 20080385-CA
)	
v.)	F I L E D
)	(July 30, 2009)
<u>Bruce E. Holmes, Joan W.</u>)	
<u>Holmes, and John Does 1-5,</u>)	2009 UT App 212
)	
Defendants, Counter-)	
plaintiffs, and <u>Appellees.</u>)	

Third District, Salt Lake Department, 040920717
The Honorable Denise P. Lindberg

Attorneys: Shawn D. Turner, South Jordan, for Appellant
Brent D. Wride and Steven W. Call, Salt Lake City,
for Appellees

Before Judges Greenwood, Orme, and McHugh.

GREENWOOD, Presiding Judge:

David Truong appeals, arguing that the trial court erred in (1) dismissing his Amended Complaint for failing to state a claim upon which relief could be granted, (2) granting Bruce E. and Joan W. Holmes's motion for summary judgment, and (3) awarding damages, prejudgment interest, and attorney fees to the Holmeses. Because we see no error in the trial court's various rulings, we affirm.

Jurisdiction

As an initial matter, the Holmeses assert that we lack jurisdiction to hear this appeal because the notice of appeal was untimely filed. More specifically, the Holmeses argue that because the trial court certified its prior rulings as final pursuant to rule 54(b) of the Utah Rules of Civil Procedure, Truong's notice of appeal was untimely filed. However, we conclude that the previous rulings were not properly certified because the trial court did nothing more than recite the words of certification, without making required findings. See Bennion v.

Pennzoil Co., 826 P.2d 137, 139 (Utah 1992). In addition, neither the briefing nor the record convince us that the issues allegedly certified were appropriate for certification. See id. at 138 (stating "that certification [i]s generally precluded where there [i]s significant 'factual overlap' between the operative facts of the certified and unlitigated claims and where the outcome of the appeal of the certified claims theoretically would have a res judicata effect on the unlitigated claims remaining before the trial court" (citing Kennecott Corp. v. Utah State Tax Comm'n, 814 P.2d 1099, 1104 (Utah 1991))). Thus, we disagree with the Holmeses' assertion that we lack jurisdiction on the basis that the trial court's earlier rulings were properly certified as final and appealable.

In the alternative, the Holmeses characterize this as an unlawful detainer action and argue that Truong's notice of appeal was therefore due no later than ten days after entry of the Final Order. See Utah R. App. P. 4(a). However, this action was commenced by Truong's original Complaint, which did not assert a claim for unlawful detainer. Although the Holmeses subsequently asserted a counterclaim for unlawful detainer, this lawsuit included other claims only tangentially related to unlawful detainer. Because of the "hybrid nature" of this action, Truong was not required to file his notice of appeal within ten days from entry of the Final Order. See Fashions Four Corp. v. Fashion Place Assocs., 681 P.2d 830, 831 (Utah 1984) (characterizing as "hybrid" an action involving claims for unlawful detainer and "containing additional declaratory and equitable causes" such as damages for breach of a lease).

Rule 12(b)(6) Dismissal

Truong first argues that the trial court erred in dismissing his Amended Complaint pursuant to rule 12(b)(6) of the Utah Rules of Civil Procedure. "The propriety of a 12(b)(6) dismissal is a question of law"; therefore, 'we give the trial court's ruling no deference and review it under a correctness standard.'" Sony Elecs., Inc. v. Reber, 2004 UT App 420, ¶ 8, 103 P.3d 186 (quoting St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 196 (Utah 1991)). The trial court dismissed Truong's original Complaint for failing to state a claim upon which relief could be granted, but allowed Truong "to amend his Complaint in order to provide additional detail on . . . his unjust enrichment claim [pertaining to the renovations and improvements made to the property] or to add any new claim which may provide the basis for

reimbursing [Truong] for his expenditures" in renovating or improving the property.¹

The trial court reviewed Truong's Amended Complaint and concluded it was improper because it included claims for fraud in the inducement and specific performance, which claims "exceed[ed] the bounds granted by the Court . . . limit[ing] the scope of Truong's amendment." The trial court thus dismissed these claims. Although Truong attempts to argue the merits of these claims on appeal, the record clearly evidences that the trial court dismissed them as outside the bounds of the amendment allowed by the court's first order of dismissal. Because Truong never sought nor was granted leave to amend his Complaint to include these two claims, the trial court did not err in dismissing Truong's claims for fraud in the inducement and specific performance.² See Utah R. Civ. P. 15(a) (stating that other than amending his complaint "once as a matter of course [A] party may amend his pleading only by leave of court").

¹Truong's Complaint asserted claims for promissory estoppel, specific performance, and unjust enrichment. In his Amended Complaint, Truong again asserts claims for specific performance and unjust enrichment, including for the first time a claim for fraud in the inducement. To clarify, Truong does not appeal from the dismissal of his original Complaint, and our analysis is limited to the dismissal of his Amended Complaint.

²Though not addressed in either party's briefing, a plaintiff is allowed to "amend his pleading once as a matter of course at any time before a responsive pleading is served." See Utah R. Civ. P. 15(a). And, "[a] motion to dismiss . . . is not a responsive pleading which would preclude an opponent from amending a complaint under Utah R. Civ. P. 15(a) once as a matter of course." Heritage Bank & Trust v. Landon, 770 P.2d 1009, 1010 (Utah Ct. App. 1989) (internal quotation marks omitted). However, Truong waived this argument because he failed to object to the trial court's determination that these two claims exceeded the allowable amendment. See, e.g., State v. Holgate, 2000 UT 74, ¶ 11, 10 P.3d 346. Moreover, recent Utah case law clarifies "that the right to amend as a matter of course . . . terminates with a nonfinal order of dismissal and, thus, a plaintiff must thereafter move for leave to amend." Turville v. J & J Props., LC, 2006 UT App 305, ¶ 30, 145 P.3d 1146 (interpreting Barton v. Utah Transit Auth., 872 P.2d 1036 (Utah 1994)). Because the trial court entered a nonfinal order of dismissal prior to Truong's amendment, Truong's right to amend his original Complaint once without leave of court had terminated.

The trial court also dismissed Truong's amended unjust enrichment claim because it determined such equitable relief was not available to Truong. Unjust enrichment is not available where the subject matter of the claim is covered by an express contract. See Mann v. American W. Life Ins. Co., 586 P.2d 461, 465 (Utah 1978). Pertinent to this discussion, the Agreement states: "All improvements made by [Truong] to the Premises which are so attached to the Premises that they cannot be removed without material injury to the Premises, shall become the property of the [Holmeses] upon installation." Because the Agreement addressed renovations and improvements to the property in the event Truong failed to exercise the option, the trial court did not err in dismissing Truong's unjust enrichment claim as legally unavailable. See id.

Counterclaim

Truong also argues that the trial court erred in granting the Holmeses' motion for summary judgment on their counterclaim for unlawful detainer. We "review[] a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness, and view[] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Orvis v. Johnson, 2008 UT 2, ¶ 6, 177 P.3d 600 (citation and internal quotation marks omitted). And, under the version of the Utah Code applicable to this action,

A tenant of real property, for a term less than life, is guilty of an unlawful detainer . . . when he continues in possession . . . of the property or any part of it, after the expiration of the specified term or period for which it is let to him, which specified term or period, . . . shall be terminated without notice at the expiration of the specified term or period.

Utah Code Ann. § 78-36-3(1), (1)(a) (2002).

In granting the Holmeses' motion for summary judgment, the trial court determined that the lease expired on its own terms no later than October 1, 2005. Because Truong remained in possession of the property after that time, the trial court concluded that he was liable for unlawful detainer. Truong presents us with no material factual disputes precluding summary judgment, and his legal attack on this ruling consists of reiterations of his several equitable arguments included in his Complaint and Amended Complaint. More specifically, Truong's arguments stem entirely from his overarching claim that he was entitled to purchase the property and attempted to do so

according to the Agreement. As these arguments have proven unsuccessful below and on appeal, we conclude that the undisputed material facts together with the prior rulings by the trial court entitled the Holmeses to judgment for unlawful detainer as a matter of law.

Relief Granted

Truong also asserts that the trial court erred in awarding treble damages, prejudgment interest, and attorney fees to the Holmeses.³ More specifically, Truong argues that (1) treble damages were not appropriate because the Holmeses suffered no injury other than lost rents, (2) prejudgment interest was not properly awarded because the amount of damages was uncertain until ruled upon, and (3) the Holmeses provided insufficient evidence to support the award of attorney fees.

Under the Utah Code applicable at the time of this action, a party successfully asserting a claim for unlawful detainer shall be awarded past due rent and treble damages resulting from unlawful detainer. See Utah Code Ann. § 78-36-10(2), (3).

"Rents which may not be trebled, are such as accrue before termination of the tenancy. After the tenancy has been terminated . . . the person in unlawful possession is not owing rent under the contract, but must respond in damages pursuant to the law. Rental value or reasonable value of the use and occupation of the premises becomes an element of damages for retaining possession. This is not rent, it is damages."

Monroc, Inc. v. Sidwell, 770 P.2d 1022, 1025 (Utah Ct. App. 1989) (quoting Forrester v. Cook, 77 Utah 137, 292 P. 206, 214 (1930)).

On appeal, as before the trial court, Truong characterizes himself as a holdover tenant and, accordingly, contends that the Holmeses suffered only lost rents, which are not subject to trebling. We disagree because the trial court correctly ruled that he was not a holdover tenant but was liable for unlawful detainer upon termination of the lease. Furthermore, as stated above, one of the elements of damages is "[r]ental value or

³In addition, Truong argues that the judgment entered against him should have been decreased by the amount of his security deposit. However, we decline to address this issue as it is an inadequately briefed legal challenge. See Valcarce v. Fitzgerald, 961 P.2d 305, 313 (Utah 1998).

reasonable value of the use and occupation of the premises." Id. The trial court concluded that the Holmeses' damages were best represented by the amount of rent called for in the lease--which may, of course, be an accurate measure of "rental value" in the absence of a compelling argument to the contrary.

Truong further argues, without legal support, that prejudgment interest was not appropriate because "[b]y its nature, a claim for treble damages is incomplete until the issue has been ruled on." We review a trial court's award of prejudgment interest for correctness. See Trail Mt. Coal Co. v. Utah Div. of State Lands & Forestry, 884 P.2d 1265, 1271-72 (Utah Ct. App. 1994), aff'd in part and rev'd in part, 921 P.2d 1365 (Utah 1996). Utah law is clear that an award of prejudgment interest is appropriate "where the damage is complete and the amount of the loss is fixed as of a particular time, and that loss can be measured by facts and figures." First Sec. Bank, N.A. v. J.B.J. Feedyards, Inc., 653 P.2d 591, 600 (Utah 1982) (internal quotation marks omitted). Because Truong has failed to support his argument with legal authority, we find it to be inadequately briefed and affirm the trial court's determination that prejudgment interest was proper as a matter of law. See Valcarce v. Fitzgerald, 961 P.2d 305, 313 (Utah 1998).

Finally, Truong contests the trial court's award of attorney fees to the Holmeses.

Attorney fees are awarded only when authorized by statute or contract. The award of attorney fees is a matter of law, which we review for correctness. However, a trial court has broad discretion in determining what constitutes a reasonable fee, and we will consider that determination against an abuse-of-discretion standard.

EDSA/Cloward, LLC v. Klibanoff, 2008 UT App 284, ¶ 8, 192 P.3d 296 (citations and internal quotation marks omitted).

On appeal, Truong reiterates his argument made before the trial court, contending that the award was improper because the Holmeses failed to separate fees incurred defending against Truong's claims from fees incurred asserting the counterclaim for unlawful detainer. The trial court rejected this argument, stating that the entire litigation, including Truong's original Complaint, involved allegations of breach of the Agreement, which Agreement specifically allowed for recovery of attorney fees. The trial court further ruled that the Holmeses need not separate out their compensable and non-compensable claims because they sufficiently overlap, involving the same nucleus of facts. See

Dejavue, Inc. v. U.S. Energy Corp., 1999 UT App 355, ¶ 20, 993 P.2d 222 (stating that where litigation involves a contractual prevailing party attorney fee provision and includes "multiple claims involving a common core of facts and related legal theories, . . . [the party] prevail[ing] on at least some of its claims . . . is entitled to compensation for all attorney fees reasonably incurred in the litigation"). As for the amount of the fees, the trial court analyzed the requested fees and supporting invoices carefully, finding that some of the requested fees and costs were unnecessary, unreasonable, or insufficiently supported, and thus, disallowed those fees and costs. Truong has failed to convince us that the trial court erred as a matter of law in determining that the Holmeses were entitled to attorney fees or abused its discretion in determining the amount to which they were entitled.

Accordingly, we affirm.

Pamela T. Greenwood,
Presiding Judge

WE CONCUR:

Gregory K. Orme, Judge

Carolyn B. McHugh, Judge