

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000697-001 DT

03/13/2012

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
K. Waldner
Deputy

ANDREW ASH

RAYA TAHAN

v.

EDWARD BALL (001)
J D BALL (001)
LISA BALL (001)

EDWARD BALL
23623 N SCOTTSDALE RD #D3-168
SCOTTSDALE AZ 85255
J D BALL
23623 N SCOTTSDALE RD #D3-168
SCOTTSDALE AZ 85255
LISA BALL
23623 N SCOTTSDALE RD #D3-168
SCOTTSDALE AZ 85255

DESERT RIDGE JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2011114228EA.

Defendant Appellant Edward Ball, (Defendant)¹ appeals the Desert Ridge Justice Court's determination that he was guilty of a forcible/special detainer. Defendant contends the trial court erred. For the reasons stated below, the court affirms in part and reverses in part the trial court's judgment.

I. FACTUAL BACKGROUND.

On May 16, 2011, Plaintiff sent Defendants Edward Ball and J.D. Ball a 5-day notice because Defendants allegedly failed to pay the total amount of rent. The 5-day notice requested

¹ Three defendants, Edward Ball, Lisa Ball, and J.D. Ball, were named in the amended complaint. Only one defendant, Edward Ball, appealed the trial court's judgment. Although Edward Ball listed the appellants as Edward Ball et al in the caption to the appeal, Mr. Edward Ball is not an attorney and cannot represent other appellants. Neither Lisa Ball nor J.D. Ball signed the appellate memorandum. Because Mr. Edward Ball is the only appellant, he will be referred to—in the singular form—as Defendant throughout this Minute Entry.

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payment of \$8,200.00. On June 10, 2010, Plaintiff filed a forcible detainer action claiming Defendants owed past due rent for five months, plus late fees, pool maintenance fees, court costs and attorney fees. Plaintiff requested judgment of \$9,999.99—an amount within the jurisdictional limits of the trial court but less than the total past due rent. The Complaint listed Edward Ball and J.D. Ball and “any/all occupants” as Defendants in the action. The Summons and Complaint was served on June 13, 2011, and listed—as the persons served—Edward Ball, JD Ball, and “any/all Occupants.” They were served by posting a copy on the front door of the residence on June 13, 2011, and by mailing a certified copy to them on June 14, 2011.

The trial court held a hearing on June 16, 2011, and a trial on June 21, 2011. On June 16, 2011, Plaintiff filed an amended complaint adding Lisa Ball as a co-defendant.² All parties were represented by counsel. Defense counsel did not object to the amendment to the pleadings. At the June 16, 2011, hearing, counsel for Defendants stated Defendants had a history of irregular payments³ but asserted Defendants made payments for the months of March, April, and May.⁴ The trial court set the matter for trial on June 21, 2011.

Plaintiff testified at the June 21, 2011, trial,⁵ He identified the amended complaint⁶ and stated the agreed to rental amount was \$2,200.00.⁷ He said the parties entered into the lease on August 20, 2008,⁸ but the tenants were not timely on the payment of rent and missed their first payment in September.⁹ Plaintiff stated Defendants missed 13 payments during their three year occupancy.¹⁰ Plaintiff identified his ledger and said it reflected all of the deposits made.¹¹ Defendant did not object to the admission of the ledger as evidence.¹² Plaintiff also stated he provided Defendant with letters from the HOA about multiple fines totaling at least \$750.00.¹³ Plaintiff submitted a ledger—Exhibit 3—as evidence and Defendant raised no objection to this exhibit.¹⁴

Plaintiff testified about the termination procedure according to the lease and stated that after the initial 12-month period, the tenancy became a month-to-month tenancy with a termination

² There is no showing that Lisa Ball was properly served with a Summons and Complaint. However the record reflects Defendant’s counsel of record, Mr. Snow, also represented Ms. Ball. The trial court commented—Audio Transcript of June 16, 2011 at 2:03:36–56—Mr. Snow was “representing the Balls.”

³ Audio transcript, June 16, 2011, at 2:05:03–12.

⁴ *Id.* at 2:05:25–30.

⁵ Audio transcript, June 21, 2011, bench trial.

⁶ *Id.* at 2:32:07.

⁷ *Id.* at 2:32:13.

⁸ *Id.* at 2:32:33–38.

⁹ *Id.* at 2:32:48–57.

¹⁰ *Id.* at 2:33:21.

¹¹ *Id.* at 2:33:47.

¹² *Id.* at 2:34:48–58.

¹³ *Id.* at 2:35:00–36:00.

¹⁴ *Id.* at 2:36:42.

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provision allowing for termination with a 30-day notice.¹⁵ He said he attempted to notify the tenant about the potential for termination by filing three, 5—day eviction notices but did not follow through with the first two notices.¹⁶

Plaintiff also spoke about air conditioning and bathtub issues and said Defendant did not want the problems repaired when the problems arose.¹⁷ Plaintiff then read a portion of (1) a May 6, 2011, e-mail¹⁸ and (2) a reply to the e-mail. Thereafter, Plaintiff read a portion of a June 14, 2011, e-mail and a response to it.¹⁹ Defendant did not object to the admission of the e-mail and its reply as evidence.²⁰ Plaintiff also spoke about an agreement with Defendant about no need to repair the air conditioner until Defendant’s rent was “paid current.”²¹ Plaintiff also testified about the rental payments and said the parties had discussions “almost weekly or bi-monthly” about whether Defendants could catch up on their payments.²²

On cross-examination, Plaintiff said his last notice to terminate was: “I believe was 31 days ago.”²³ Defense counsel suggested a May 15 date, and Plaintiff confirmed the date as correct.²⁴ Plaintiff stated he accepted payments in the month of May and the payments were (1) \$2200.00 on May 13, 2011, and (2) \$2250.00 on May 20.²⁵ Defense counsel argued that according to A.R.S. § 33–1371, if a landlord accepts partial payment during the term of the lease, the landlord is unable to terminate for that term.²⁶ Counsel also argued no termination notice was sent for the month of June and therefore Plaintiff failed to use the proper procedure for an action for possession.²⁷ Plaintiff’s counsel challenged this assertion and argued Defendant—in his e-mails—agreed to relinquish his possession of the property.²⁸ Plaintiff’s counsel further maintained the 30-day notice provision allowed this matter to continue as an action for possession.²⁹ The trial court admonished Defense counsel that he was straying into presenting his case rather than cross-examining the witness.³⁰

¹⁵ *Id.* at 2:37:34–2:37:48.

¹⁶ *Id.* at 2:37:51–2:38:03.

¹⁷ *Id.* at 2:38:40–2:39:16.

¹⁸ The landlord requested an inspection on Sunday, Mother’s Day.

¹⁹ Audio Recording, *id.* at 2:40:44–2:42:27.

²⁰ *Id.* at 2:39:16–2:20:34; 2:42:27.

²¹ *Id.* at 2:42:58–2:43:18.

²² *Id.* at 2:43:54–2:44:14.

²³ *Id.* at 2:45:00.

²⁴ *Id.* at 2:45:13.

²⁵ *Id.* at 2:45:29–45.

²⁶ *Id.* at 2:46:17–26.

²⁷ *Id.* at 2:46:26–2:47:00.

²⁸ *Id.* at 2:47:03–48.

²⁹ *Id.* at 2:47:48–2:48:22.

³⁰ *Id.* at 2:49:12–2:50:10.

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Defense counsel asked Plaintiff to read the remainder of the May 6 e-mail and Plaintiff read that he (the landlord) could come on either Saturday or Monday.³¹ Plaintiff stated he tried—in the past—to contact Defendant and—despite giving a 48-hour notice and ringing the doorbell—did not receive any response.³²

By May 6, Defendant notified Plaintiff, the air conditioner was not working.³³ Plaintiff explained he wanted to fix the air conditioning but the agreement was that Plaintiff would not fix this until the rent was “paid current.”³⁴ During the course of the tenancy, Plaintiff had the air conditioning repaired once, within “a couple of days” of receiving notice of a problem with the unit.³⁵ Plaintiff admitted he became aware of the more recent problem with the air conditioning in January, but testified the parties agreed the air conditioning would not be repaired until the rent was “paid current.”³⁶

Plaintiff’s counsel called Defendant as a witness³⁷ and asked about the air conditioning pursuant to A.R.S. § 33–1324(C). Defendant replied that if you rent a place in Scottsdale, you will need air conditioning and said that when he rented the home, it had air conditioning³⁸ but it broke down almost a week after he moved in.³⁹ Defendant stated he asked Plaintiff to fix the air conditioning and referred to e-mails with Plaintiff. Defendant stated he moved in during August, 2008, and September 30, 2008, was the first time he asked Plaintiff to fix the air conditioner.⁴⁰ Defendant stated Plaintiff fixed the air conditioner and read an e-mail indicating the landlord paid time and a half to get the air conditioner fixed as it was over a holiday weekend.⁴¹ Defendant then added the air conditioner was not fixed,⁴² and Defendant showed an e-mail from July 20, 2009 indicating continued problems with the air conditioning.⁴³ The e-mail stated: “The air guy did not show up. Should we call somebody?”⁴⁴ Defendant also referred to a July 23, 2009, e-mail indicating he was on the phone with an air conditioning person and another indicating the air was blowing cold.⁴⁵ In December, 2010, the parties again exchanged e-mails about the air conditioning.⁴⁶ Defendant testified the problem was with the Freon in a broken unit

³¹ *Id.* at 2:51:00.

³² *Id.* at 2:51:05–29.

³³ *Id.* at 2:52:47.

³⁴ *Id.* at 2:52:48–2:53:20.

³⁵ *Id.* at 2:53:20–42.

³⁶ *Id.* at 2:53:42–2:54:05.

³⁷ *Id.* at 2:55:24.

³⁸ *Id.* at 2:56:46–2:57:03.

³⁹ *Id.* at 2:57:10.

⁴⁰ *Id.* at 2:58:26.

⁴¹ *Id.* at 2:59:28.

⁴² *Id.* at 2:59:32.

⁴³ *Id.* at 3:00:08.

⁴⁴ *Id.* at 3:00:19.

⁴⁵ *Id.* at 3:00:36–56.

⁴⁶ *Id.* at 3:01:06–3:01:58.

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and “the repair people did not know this.”⁴⁷ Defendant also testified the air conditioning was broken at least once a year.⁴⁸ Defendant investigated the cost for repairing the entire unit,⁴⁹ but (1) did not send for his own repairman and (2) did not get an estimate for the cost of replacing the entire unit.⁵⁰ Defendant also stated he did not opt to terminate his agreement because the landlord “would constantly tell me it was being fixed.”⁵¹

Defendant testified he first saw the ledger about 5 minutes prior to the trial⁵² and did not agree with the amount indicated on the ledger.⁵³ He admitted he did not pay rent every month for the past three years. Defendant said he asked Landlord for an itemized accounting.⁵⁴ Plaintiff’s counsel interrupted and said she e-mailed the accounting to Defendant but Defendant denied receiving the e-mail.⁵⁵

Defendant denied promising to pay the missing rent but, instead, reiterated he asked for an accounting.⁵⁶ He admitted to sending an e-mail on May 9, stating—in response to a query as to when he would be moving out—that he would be looking for a new residence and would “get on a payment plan for the back rent.”⁵⁷ Defendant also identified an e-mail dated May 16, but said the amounts indicated payments that were made and not payments that were owed. Defendant admitted the landlord sent him an e-mail stating the total remaining payments totaled \$8,200.00.⁵⁸ Defendant then identified the e-mail saying “Got it” as a response to the 5-day notice and not to an accounting.⁵⁹ Defendant also reiterated, he asked Plaintiff’s counsel for an itemized accounting.⁶⁰ Defendant said he sent payments that were not credited and referred to an e-mail dated April 25, 2011.⁶¹

Defendant was then asked about the possession of the home and stated he was presently in possession of the home.⁶² Defendant stated he believed he had a legal right to maintain

⁴⁷ *Id.* at 3:03:30.

⁴⁸ *Id.* at 3:05:15–21.

⁴⁹ *Id.* at 3:06:47–3:06:59.

⁵⁰ *Id.* at 3:07:30.

⁵¹ *Id.* at 3:07:32–50.

⁵² *Id.* at 3:08:14–19.

⁵³ *Id.* at 3:08:24.

⁵⁴ *Id.* at 3:08:30–48.

⁵⁵ *Id.* at 3:08:47–3:09:06.

⁵⁶ *Id.* at 3:10:43.

⁵⁷ *Id.* at 3:11:02–19.

⁵⁸ *Id.* at 3:12:42.

⁵⁹ *Id.* at 3:12:56.

⁶⁰ *Id.* at 3:12:58.

⁶¹ *Id.* at 3:14:37–49.

⁶² *Id.* at 3:30:43.

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possession of the home⁶³ because—although he received a 5-day notice on May 16,—he paid rent on May 16.⁶⁴

Defendant later amended his answer to say he paid rent for May but did not know exactly which day.⁶⁵ Defendant also testified he only owed June rent and said June rent was the only thing that was confirmed.⁶⁶ Defendant stated the ledger was wrong⁶⁷ and said he made additional payments after the e-mails in February through April.⁶⁸ Defendant then tried to give an example of a payment but was interrupted by Plaintiff's counsel submitting papers and avowing they showed copies of her client's bank statements and that payments were missing for certain months.⁶⁹

Plaintiff's counsel then read a series of e-mails where Defendant said he was trying to leave the premises. Counsel asked Defendant why he was leaving if he believed he was current on the rent. Defendant replied he was leaving because the landlord (Plaintiff) would not fix the air conditioning.⁷⁰ Defendant said the air conditioning never worked properly and that it was always at an 85–90 degree level.⁷¹ Defendant referred to an e-mail he sent to the landlord stating it was costing him \$500.00 per month to keep the air conditioning running at the 85–90 degree level.⁷²

Defendant admitted he paid rent late⁷³ but said he never received an accounting he could confirm as accurate.⁷⁴ Defendant stated he never received “a writing” from the landlord indicating (1) a time when the landlord failed to accept a late payment; or (2) put a condition on a late payment.⁷⁵ Defendant then said he requested an accounting but also stated he had a casual relationship with the landlord.⁷⁶ Defendant asserted he provided a rent payment in March, April, and May, but not in June.⁷⁷ He also testified he was not given a copy of the CC&Rs.⁷⁸

The trial court (1) admitted the bank statements under seal; (2) stated it believed the 5-day notice was properly served; and (3) said it would enter a judgment but take the matter under

⁶³ *Id.* at 3:30:47.

⁶⁴ *Id.* at 3:31:09–22.

⁶⁵ *Id.* at 3:31:30–34.

⁶⁶ *Id.* at 3:31:58–3:32:15.

⁶⁷ *Id.* at 3:33:42.

⁶⁸ *Id.* at 3:33:26–28.

⁶⁹ *Id.* at 3:33:53–3:34:15.

⁷⁰ *Id.* at 3:35:10–21.

⁷¹ *Id.* at 3:35:52–3:36:07.

⁷² *Id.* at 2:36:07–15.

⁷³ *Id.* at 3:38:18.

⁷⁴ *Id.* at 3:38:12–15.

⁷⁵ *Id.* at 3:38:30.

⁷⁶ *Id.* at 3:38:37.

⁷⁷ *Id.* at 3:39:10–19.

⁷⁸ *Id.* at 3:39:25.

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advisement before he established an amount. Following trial, the trial court signed an order granting Plaintiff's forcible detainer and entering judgment for \$9,800.

Defendant appealed alleging a myriad of errors. For his first error, Defendant contended the 5-day notice was defective because the landlord received payment of \$2,200.00 rent on May 13, 2011, and \$2,250.00 on May 20, 2011. He asserted the trial court erred by not granting 30 days in which to correct the partial rental payment problem pursuant to A.R.S. § 33-1371. Defendant also claimed the trial court erred by stating the 5-day notice was properly served on May 5, 2011, when it was served on May 16, 2011. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12-124(A).

II. ISSUES:

A. Did The Parties Properly Present Their Issues On Appeal.

Plaintiff Appellee failed to properly present his issues on appeal. These proceedings are governed by the Superior Court Rules of Appellate Procedure—Civil (SCRAP—Civ.). SCRAP—Civ. rule 8 (a) (3) states:

Memoranda shall include a short statement of the facts with reference to the record, a concise argument setting forth the legal issues presented with citation of authority, and a conclusion stating the precise remedy sought on appeal.

Plaintiff failed to include any citation to the record or any citation to authority. Because SCRAP—Civ. Rule 8(a)(5) provides the Superior Court may “modify or waive the requirements of this rule to insure a fair and just determination of the appeal,” this Court waives Plaintiff's obligation to strictly comply with this rule.

B. Did Defendants' Payment of Part Of The Rental Obligation Prohibit Defendant From Proceeding With A Forcible Detainer.

On May 16, 2011, Plaintiff filed a 5-day notice asserting Defendants owed base monthly rent in the amount of \$8,200.00 plus late fees of \$25.00 per day. The 5-day notice included language warning Defendants that if they failed to pay the full sum due within five (5) days, the landlord would (1) terminate the rental agreement and (2) file an eviction action without providing any further notice. The notice also demanded that Defendants leave the premises. Defendants did not leave the premises and, although they paid \$4,450.00 in rent, they did not pay the entire \$8,200.00 Plaintiff demanded. On June 10, 2010, Plaintiff filed a complaint alleging Defendants failed to (1) pay all of the rent due for February; and rent for March, April, May, and June. Plaintiff claimed Defendants owed \$10,200.00 in past due rent plus other fees. At the time of trial, Defendant admitted owing rent for June as well as other past due rent. On appeal, Defendant asserts Plaintiff accepted payment for rent for the months of May and June⁷⁹ and

⁷⁹ Appellant Memoranda [sic] at p. 2, ll. 26-27.

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A.R.S. 33-1371 precludes Plaintiff from continuing with the eviction action. A.R.S. 33-1371 deals with the acceptance of partial payments of rent.

A. Landlord is not required to accept a partial payment of rent or other charges. A landlord accepting a partial payment of rent or other charges retains the right to proceed against a tenant only if the tenant agrees in a contemporaneous writing to the terms and conditions of the partial payment with regard to continuation of the tenancy. The written agreement shall contain a date on which the balance of the rent is due. The landlord may proceed as provided in article 4 of this chapter and in title 12, chapter 8 against a tenant in breach of this agreement or any other breach of the original rental agreement. If the landlord has provided the tenant with a notice of failure to pay rent as specified in section 33-1368, subsection B prior to the completion of the agreement for partial payment, no additional notice under section 33-1368, subsection B is required in case of a breach of the partial payment agreement.

B. Except as specified in subsection A of this section, acceptance of rent, or any portion thereof, with knowledge of a default by tenant or acceptance of performance by the tenant that varied from the terms of the rental agreement or rules or regulations subsequently adopted by the landlord constitutes a waiver of the right to terminate the rental agreement for that breach.

Defendant asserts there is no contemporaneous writing between the parties and therefore Plaintiff was precluded from proceeding against him on the forcible detainer as he accepted a partial payment of rent. Plaintiff asserted he had the right to continue the eviction and suggested the e-mails Defendant forwarded indicating Defendants' intention to relocate provided the necessary writing.

The trial court had the ability to determine fact questions and the trial court's ruling will only be overturned for an abuse of discretion. In reviewing a case for an abuse of discretion, this Court must determine if there was sufficient evidence for the trial court's determination. The appellate court must not re-weigh the evidence to see if it would reach the same conclusion as the original trier-of-fact. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2 1185, 1189 (1989). Instead, the appellate court must find if the trial court could find sufficient evidence to support its decision. Where this Court reviews the trial court's actions based on an abuse of discretion standard, this Court will not change or revise the trial court's determination if there is a reasonable basis for the order. A court abuses its discretion when there is no evidence supporting the court's conclusion or the court's reasons are untenable, legally incorrect, or amount to a denial of justice. *Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, 141 P.3d 824 ¶ 17 (Ct. App. 2006). In discussing discretion, the Arizona Supreme Court, in *State v. Chapple*, held:

Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and

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which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers, and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to “look over the shoulder” of the trial judge and, if appropriate, substitute our judgment for his or hers.

State v. Chapple, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n. 18 (1983) (citation omitted). In this case, the “factual and equitable considerations which vary from case to case” are in dispute as the parties essentially contest (1) the amount of rent owing at the time of the 5-day notice; and (2) if the May payments were for current and future rent (May and June) or if the May payments covered past due obligations; and (3) if the e-mails provided the necessary contemporaneous writing to allow an eviction following Defendants’ partial rent payment.

A trial court judgment will not be disturbed if there is any substantial legal evidence to support it, *Corn v. Branche*, 74 Ariz. 356, 357, 249 P.2d 537, 538 (1952). In *T.H. Properties v. Sunshine Auto Rental, Inc.*, 151 Ariz. 444, 446, 728 P.2d 663 (Ct. Appeals 1986), the Court of Appeals held that acceptance of rent which accrued before the time the grounds for forfeiture arose (1) did not affect the liability of such rent; and (2) did not operate as a waiver of the landlord’s right to forfeit the lease. Defendants admitted (1) they were often behind on the rent; and (2) they owed Plaintiff money. Because the trial court could find the May payments referred to past due payments for prior months, late fees, and HOA fees,⁸⁰ all of which accrued before the grounds for forfeiture occurred; and (2) because the, the trial court could also determine the two May payments were subject to a contemporaneous writing agreed to by Defendants in the form of their e-mail correspondence, this Court finds there is evidence to support the trial court’s determination. Accordingly, and because the trial court’s actions are subject to review on an abuse of discretion standard, this Court finds the trial court’s determination must be sustained.

In addition, Plaintiff’s complaint dealt with Defendants’ failure to pay rent. Ariz. Rules Proc. Evic. Act., (RPEA) Rule 5(d) provides a tenant may cause the action to be dismissed if all rent, reasonable late fees, court costs, and attorney fees are paid.

(1) If the action is based solely on non-payment of rent, contains a request for monetary damages and involves a residential property or mobile home space, the

⁸⁰ Although Defendant asserted he did not receive notice of the HOA requirements in Exhibit M—which begins with “This is my sworn testimony. . .”—the Lease Agreement—lines 152–58—states he has received a copy of any “rules, regulations, covenants, conditions and restrictions, homeowners’ association rules, ordinances, and laws (“Rules and Law”) concerning the premises. . . .” Defendant initialed and signed this lease.

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complaint must also state that the defendant may contact the plaintiff or plaintiff's attorney and may reinstate the lease agreement and cause the eviction action to be dismissed if, prior to the entry of judgment, the defendant pays all rents due, any reasonable late fees due that are provided for under a written lease agreement, and any court costs and attorney fees the plaintiff has incurred as of the date the payment is made

By his own admission, Defendant did not pay all of these fees. Therefore under the RPEA, defendant was not entitled to have the action dismissed.

C. May a Plaintiff Amend A Forcible Detainer Complaint On The Day Of The Hearing.

Defendant claims Plaintiff inappropriately amended the complaint to add the name of co-defendant Lisa Ball on the day of the hearing. In addition, Defendant claims he paid the disputed rent. Defendants cite to ARCP rule 15(a) re amendments. These rules do not apply to a forcible detainer action.

RPEA, Rule 9, allows motions to amend pleadings. In this case, the amendment added the name of "Lisa Ball" and language referring to the community interest of JD and Lisa Ball.⁸¹ Trial courts have discretion to determine whether to allow amended pleadings. *ELM Retirement Center, LP v. Callaway*, 226 Ariz. 287, 246 P.3d 938 ¶¶ 25–26 (Ct. App. 2010) discussed the standard for reviewing a motion to amend. Although the *ELM Retirement Center LP, id.*, case involved an amendment according to ARCP, rule 15(a), the rationale for the decision is persuasive. The Court of Appeals quoted from *Dube v. Likins*, 216 Ariz. 406, 167 P.3d 93 ¶ 24 (Ct. App. 2007) the standard that (1) appellate courts review these rulings for a abuse of discretion and (2) leave to amend should be freely given when justice requires. Defendant has not demonstrated how or why the trial court abused its discretion in allowing the amended complaint. Defense counsel did not object to any amendment to the pleadings and entered his appearance on behalf of all of the defendants. Because (1) Defendant failed to adequately demonstrate why the amended complaint is not appropriate; (2) determining whether to allow an amendment may only be reviewed for an abuse of discretion; and (3) Defendant failed to demonstrate the trial court abused its discretion in allowing the amendment, this Court finds the trial court did not err in allowing Plaintiff to amend his complaint.

D. Did the Trial Court Abuse Its Discretion When It Failed to Consider Plaintiff's Obligation To Provide Heat, Air Conditioning, Water, Hot Water, and Essential Services.

Defendant next argues about the landlord's obligation to keep the premises in good repair and asserts the landlord failed to meet this obligation. However true this assertion may be, it is

⁸¹ Exhibit R.

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not part of a forcible detainer action.⁸² Forcible detainers are limited proceedings and are restricted to questions of possession. As stated in *Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 204, 167 P.2d 394, 397 (1946):

Such actions are statutory proceedings, the only means of trying the right to the possession of property at common law being the common law action of ejectment. The common law action of ejectment is now codified in this and most states of this county [sic] and in such an action the Court may determine the question of which party has the paramount legal title to the premises for the purpose of determining who has the right to possession.

This Court understands Defendant may have complaints about the way the rental property was maintained. However, while the parties may have related issues arising from the landlord-tenant relationship, these issues are not to be resolved in the limited proceeding of a forcible detainer action. *Old Bros, Lumber Co. v. Rushing, id.*, 64 Ariz. at 204–05, 167 P.2d at 399 (1946); *accord, Gangadean v. Erickson*, 17 Ariz. App. 131, 134, 495 P.2d 1338, 1341 (Ct. App. 1972); RPEA, Rule 8. In *Old Bros. Lumber Co., id.*, the Arizona Supreme Court explained that if other defenses were permitted—and the court heard testimony about these issues—the action would “not afford a summary, speedy and adequate remedy for obtaining possession of the premises.” *Old Bros, Lumber Co. v. Rushing, id.*, 64 Ariz. at 205.

Issues about air conditioning and heating are beyond the scope of a forcible detainer action.⁸³ As the Court of Appeals in *Gangadean, id.*, stated:

The reason for denying counterclaims and the like and limiting judgment only to possession, costs, and recovery for unpaid rent is to preserve the proceeding as a summary remedy. Allowing other claims would increase the issues and protract the action.

17 Ariz. App. at 134. Similarly, In *United Effort Plan Trust v. Holm*, 209 Ariz. 347, 101 P.3d 641 ¶ 21 (Ct. App. 2004), the Court of Appeals held:

The only issue to be decided in the action is the right of actual possession. Thus the only appropriate judgment is the dismissal of the complaint or the grant of possession to the plaintiff. A real dispute regarding a landlord-tenant relationship must be tried in an “ordinary civil action, in which time periods are not accelerated, counter- and cross-claims are allowed, and there is an opportunity for discovery.”

⁸² This Court recognizes that a significant amount of trial time was devoted to a discussion about the air conditioning. This was inappropriate on a forcible detainer action.

⁸³ Nothing in this opinion restricts Defendant’s right to pursue any of Defendant’s claims through an appropriate proceeding.

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(Citations omitted). A forcible detainer is separate from a general contract action. Consequently Defendants misconstrue the law when they assert the trial court erred when it failed to rule about damages for alleged landlord neglect.

E. Did The Trial Court Err In Admitting Plaintiff's Ledger Sheet.

Defendant next asserts the trial court erred by admitting the Plaintiff's ledger sheet. Defendant did not timely object to the admission of this document. Arizona Rules of Evidence, Rule 103(a)(1) requires a timely objection for an alleged erroneous evidentiary ruling to be appealed.

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and

1. *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context;

In *Rogers v. House*, 6 Ariz. App. 582, 583, 435 P.2d 492, 493 (Ct. App. 1967) the Court of Appeals ruled that appellants are "foreclosed from raising on appeal questions relating to admission of evidence not objected to. . . ." In *State v. Hamilton*, 177 Ariz. 403, 408, 868 P.2d 986, 901 (Ct. App. 1993) the Court of Appeals stated:

A party must make a specific and timely objection at trial to the admission of certain evidence in order to preserve that issue for appeal.

Defendants did not object to the admission of the ledger sheet. Therefore, they are foreclosed from raising this issue on appeal.

F. Did The Trial Court Err By Admitting E-Mail Evidence.

Defendants also claim the trial court erred by admitting the e-mail correspondence despite the e-mails containing "confidential notices." Although the e-mails from Defendants do carry this notice, there is no showing Plaintiff ever acceded to keeping the e-mail confidential. All relevant evidence is admissible. Rule 402, Arizona Rule of Evidence. Furthermore, Defendants failed to properly object to the use of the e-mails. Arizona Rules of Evidence, Rule 103 (a) (1).

Defendants also contend the trial court erred because:

LANDLORD [sic] was allowed to manipulate APPELLANT e-mail by using parts of the e-mail to lie to the Court. For example the court allowed LANDLORD's attorney to have LANDLORD read only small parts of emails to create a false interpretations and lies.⁸⁴

⁸⁴ Appellant Memoranda, p. 14, ll. 5-7.

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Defendant objected—on appeal—to the incomplete reading of the e-mails. However, (1) Defendants did not object at trial; and (2) Defendants had the opportunity to cross-examine Plaintiff and ask Plaintiff to read the entire e-mail. It is not error on the part of the trial court if Defendants failed to take advantage of their opportunity to cross-examine Plaintiff. The trial court did not err here.

G. Did the Trial Court Abuse Its Discretion By Allowing Plaintiff To Present Evidence Beyond The Scope Of Its Complaint.

Defendant also alleged the trial court erred by allowing Plaintiff to present evidence beyond the scope of the complaint. To the extent the evidence was relevant, the trial court did not err. While Defendant asserts the evidence—Exhibits I and J—showed payment of rent for several months,⁸⁵ the same exhibit also indicated several of the payments—December, 2010, and February, 2011,—were returned. Defendant effectively asserted the payments made in March, April, and May, 2011, covered the rent due for those months. However, nothing precluded Plaintiff from attributing the rent received to prior months. The initial lease Agreement—lines 88–90—specifies that acceptance of a late or partial payment does not change the due date or amount of any required payment and does not relieve Tenant of any obligation to pay the balance of any rent, late fees or costs.

H. Did The Trial Court Err By Admitting Plaintiff's Bank Statements

Defendant also asserted the trial court should not have admitted Plaintiff's bank statements. This Court concurs. While the bank statements may be relevant, the trial court committed error in admitting them because (1) only Plaintiff's counsel identified these statements; and (2) neither Defendant nor his counsel were shown the bank statements. This Court has carefully reviewed the trial recording. When bringing the bank statement to the Court's attention, Plaintiff's counsel failed to question Plaintiff or to lay any foundation for the statements. Instead, she averred the statements would support her position. Because Plaintiff was not recalled to testify about these bank statements and because no foundation was laid, Defendant was not given the opportunity to question Plaintiff about the bank statements.⁸⁶ In addition, neither Defendant nor defense counsel had an opportunity to review these statements because neither was shown the bank statements. Defendant had a due process right to see the evidence that was offered against him and to cross-examine any witness offering the bank statements as evidence.

In addition, while the bank statements fall within an exception to the hearsay rule as a regularly conducted activity—Rule 803 (6), Arizona Rules of Evidence—this exception requires a proper foundation.

⁸⁵ *Id.* at p. 8, ll. 26–28.

⁸⁶ For example, Defendant lacked the opportunity to discover if Plaintiff had more than one account where he deposited rent checks.

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However, such evidence shall not be admissible if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness or to the extent that portions thereof lack an appropriate foundation.

Plaintiff laid no foundation and the trial court erred in admitting and considering this evidence because (1) foundation was lacking; (2) Defendants were not given an opportunity to see the evidence; and (3) Defendants had no opportunity to cross-examine any witness about these exhibits.

While Defendants did not object during trial, this error is a fundamental one.⁸⁷ The Court of Appeals in *Blakeway v. Texas Business Investments Co.*, 12 Ariz. App. 390, 392, 470 P.2d 710, 712, (Ct. App. 1970) held the “opportunity to be heard in defense against an adverse claim is (t)he fundamental requisite of due process.” In *Monica C. v. Arizona Dept. of Economic Sec.*, 211 Ariz. 89, 118 P.3d 37 (Ct. App. 2005) the Arizona Court of Appeals discussed the implications of fundamental error in a civil case. The Court of Appeals reaffirmed the holding that fundamental error is error which goes to the very foundation of a case. *Monica C., id.*, at ¶ 24. To establish fundamental error, a litigant must show an error that (1) goes to the foundation of the case; (2) takes away a right essential to his defense; and (3) is of such magnitude that he could not have received a fair trial. In the current case, admission of the bank statements went to the heart of how much Defendants may or may not have paid toward rent. When Plaintiff failed to (1) lay a proper foundation; (2) show the statements to Defendants; and (3) provide any witness to testify about the bank statements, Defendants were foreclosed from presenting a viable defense to these bank statements. Because the trial court announced it would be taking the matter under advisement to consider these bank statements before determining the appropriate amount of money owed, this Court finds the bank statements supported the trial court’s ultimate determination of the amount of past rent due and owing. This determination is at the heart of the trial court’s decision and prejudiced Defendants. While Defendants failed to properly object to the admission of the bank statements, and while the burden of establishing prejudice rests on Defendants, this Court finds—after reviewing the total record—that Defendants were deprived of the right to cross-examine Plaintiff about the records when the trial court admitted the records under seal and without providing Defendants an opportunity to review the records and determine if they wished to cross-examine anyone about them.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Desert Ridge Justice Court erred in admitting the bank statements without first receiving proper foundation and without providing Defendants an opportunity to see these statements. Therefore, this Court affirms the trial court’s

⁸⁷ Although the doctrine of “fundamental error” is sparingly applied in civil cases—*Maxwell v. Aetna Life Ins. Co.*, 143, Ariz. 205, 212, 693 P.2d 348, 355 (Ct. App. 1984)—courts are not foreclosed from considering fundamental error where the alleged error deprives a party of the right to a fair trial.

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finding that Defendants were guilty of a forcible detainer but reverses the trial court's judgment as to the amount of rent owed by Defendant Edward Ball.

IT IS THEREFORE ORDERED affirming in part and reversing in part the judgment of the Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Desert Ridge Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris

THE HON. MYRA HARRIS
Judicial Officer of the Superior Court

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