

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000659-001 DT

03/13/2013

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
J. Eaton
Deputy

WOODBRIIDGE L L C

KEVIN W HOLLIDAY

v.

RONALD WAYNE DIERCKSEN (001)
LISA DIERCKSEN (001)

MICHAEL S DEFINE

ENCANTO JUSTICE COURT
REMAND DESK-LCA-CCC

HIGHER COURT RULING / REMAND

Lower Court Case No. CC2012-140094 EV.

Defendants-Appellants Ronald Wayne Diercksen and Lisa Diercksen appeal the Encanto Justice Court's determination that they were guilty of a special detainer. Defendants contend 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 July 19, 2012, Woodbridge LLC dba Woodbridge Apartments at 6635 N 19th Avenue, Phoenix Arizona, filed an eviction action against Defendants claiming past due rent of \$559.98. A copy of a Notice of Intent To Terminate Rental Agreement for Non-payment of rent dated July 11, 2012, accompanied the complaint. The Notice of Intent To Terminate Rental Agreement was filed in the name of Woodbridge Apt.

The matter was set for trial and Defendants appeared—pro se—at time of trial on July 26, 2012, where they stipulated to Judgment. The Judgment listed the Plaintiff as Woodbridge, LLC. dba Woodbridge Apartments. Thereafter, on August 7, 2012, Defendants appeared with counsel and attempted to set aside the Judgment. Defendants alleged that following judgment they discovered the entity claiming the right to a special detainer was legally non-existent in the State of Arizona and the owner of the property was a California based company—HK Realty with a mailing address of 2016 Riverside Drive, Los Angeles, Ca. 90039. Defendants further claimed HK Realty (1) had owned the premises since June, 2011; but (2) was not a registered business in Arizona and had failed to file any paperwork with the Arizona Corporation Commission at the time the Complaint was filed. Defendants asserted a foreign corporation is not able to transact business in Arizona unless and until the foreign corporation was given the authority to do so. Defendants also argued (1) Plaintiff lacked standing to bring the action; (2) Plaintiff's counsel was remiss in its due diligence; and (3) Plaintiff violated the mandate of RPEA, Rule 5(b) requiring the complaint be "brought in the legal name of the party claiming entitlement to possession of the property."

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000659-001 DT

03/13/2013

At the same time, Plaintiff moved to amend the caption and alleged (1) the correct Plaintiff was 6635 N. 19th Avenue LLC. dba Woodbridge Apartments;¹ (2) the Complaint was mistakenly filed in the name of Woodbridge LLC; (3) the mistake was the result of a “clerical error” because Plaintiff incorrectly informed its counsel that the owner was Woodbridge LLC; and (4) the error was a mistake as opposed to neglect. Plaintiff attached an exhibit to its motion indicating HK Realty, Inc. divested its interest in the premises to 6635 N. 19th Avenue Inc., an Arizona corporation, on July 5, 2011.

Defendants opposed Plaintiff’s motion to amend the caption and argued Plaintiff’s counsel was remiss in not filing suit on behalf of the correct entity. Defense counsel asserted he was able to ascertain the correct owner of the premises after approximately two hours of research and argued Plaintiff’s counsel failed to exercise due diligence in filing its pleadings. Defense counsel also maintained the judgment should be set aside because it was brought by a non-existent plaintiff and the true owner of the property—HK Realty—was not licensed to do business in Arizona.²

The trial court held a hearing on August 7, 2012.³ Defense counsel argued the legality—or illegality—of the named Plaintiff to the eviction action and asserted the correct Plaintiff lacked the ability to proceed with any action in Arizona.⁴ Defendants asserted the correct Plaintiff was a foreign company that was not registered with the Arizona Corporation Commission and was therefore doing business illegally.⁵ Defendants cited A.R.S. § 10–1502 as authority that the correct Plaintiff could not conduct proceedings in any Arizona court as a consequence of illegally conducting business in Arizona. In response, Plaintiff’s counsel asserted Defendants failed to cite to a RPEA rule allowing the court to set aside the judgment.

During the hearing, Plaintiff’s counsel agreed with the trial court that Woodbridge LLC was not a legal entity in Arizona⁶ but asserted they did not know this at the time they filed. Plaintiff’s counsel asked the court for leave to amend the caption because Woodbridge was the name of the apartment complex.⁷

....

¹ Although Defendants initially urged the party owning the property was an out-of state- corporation—HK Realty—Plaintiff submitted documentary proof indicating HK Realty sold the property to 6635 N. 19th Avenue LLC—an Arizona corporation—prior to the date when Defendants were sued for the non-payment of rent. This Court notes that Plaintiff refers to this entity as both 6635 N. 19th Avenue LLC and 6635 N. 35th Ave. Inc. in its Appellee’s Memorandum of Law. For ease, the entity will be referred to as 6635 N. 19th Avenue LLC throughout this opinion.

² Defendants’ Motion To Set Aside Judgment And Stay Issuance of Writ of Restitution at p. 2, ll. 17–25; p. 3, ll. 1–4.

³ Audio recording, August 7, 2012.

⁴ *Id.* at 2:30:46–2:31:09.

⁵ *Id.* at 2:31:00–34.

⁶ *Id.* at 2:34:11–22.

⁷ *Id.* at 2:34:24–56.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000659-001 DT

03/13/2013

Defense counsel argued the whole procedure was void as a matter of law and asserted an amendment to the caption would not correct the problem.⁸ Defense counsel also claimed RPEA, Rule 15(9) included the proviso the judgment was contrary to law and argued you cannot transact business if you are not licensed in Arizona.⁹

The trial court granted Plaintiff's motion to amend the caption, ruled the case was a non-payment of rent case, and denied Defendant's Motion To Set Aside the Judgment.¹⁰ Thereafter, Defendants filed a Motion to Reconsider on August 9, 2012, and a Notice of Appeal on August 12, 2012. The trial court determined it lost jurisdiction over the matter before it had the opportunity to rule on the Motion to Reconsider and deemed the Motion to Reconsider moot on August 14, 2012.

Defendants filed a timely appeal. Plaintiff filed a responsive memorandum. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12-124(A).

II. ISSUES:

A. *Did The Trial Court Err By (1) Granting Plaintiff The Opportunity To Amend Its Caption—Post-Trial—To Substitute A Different Entity and (2) Denying Defendant's Motion To Set Aside.*

Standard of Review

This case presents a mixed question of fact and law. Appellate courts normally review trial court determinations about granting or denying motions to amend for an abuse of discretion. As stated in *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 292, ¶ 25, 246 P.3d 938, 943, ¶ 25 (Ct. App. 2010):

Elm also argues the superior court erred when it denied its motion for leave to amend its complaint. "We review the denial of a motion to amend for an abuse of discretion." *Dube*, 216 Ariz. at 415, ¶ 24, 167 P.3d at 102. Leave to amend is discretionary but should be "freely given when justice requires." Ariz. R. Civ. P. 15(a).

In deciding if a trial court abused its discretion, the Arizona Supreme Court—in *Walter v. Kendig*, 107 Ariz. 510, 513, 489 P.2d 849, 852 (1971)—quoted with approval from an earlier Arizona case, *In re Welisch*, 18 Ariz. 517, 521-22, 163 P. 264, 265-66 (1917) a definition of judicial discretion.¹¹

....

⁸ *Id.* at 2:35:27-34.

⁹ *Id.* at 2:35:37-50.

¹⁰ *Id.* at 2:38:17-39.

¹¹ The Arizona Supreme Court in *In re Welisch* quoted from *Words and Phrases*, 2d, vo. 2. Page 4.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000659-001 DT

03/13/2013

“Discretion” of court is a liberty or privilege allowed to a judge, within the confines of right and justice, to decide an act in accordance with what is fair, equitable, and wholesome, as determined by the peculiar circumstances of the case, and as discerned by his personal wisdom and experience, guided by the spirit, principles, and analogies of the law, to be exercised in accordance with a wise, as distinguished from a mere arbitrary, use of power, and under the law.

The Supreme Court continued and stated:

Our courts exist for the purpose of providing an effective and fair tribunal in which parties to a dispute may resolve their grievances. An order which in effect grants judgment by default without regard to the merits of a case is a harsh order and justified only in circumstances where no reasonable excuse is present.

Walter v. Kendig, id., 107 Ariz. at 513, 489 P.2d at 852.

In the case before this Court, the Plaintiff asked the trial court (1) to amend its caption after the judgment was entered; and (2) claimed any error in naming an incorrect party was a clerical error. A resolution of these claims involves the interpretation of the RPEA. Appellate courts review questions involving the interpretation of court rules *de novo*. As stated in *Haroutunian v. Valueoptions, Inc.*, 218 Ariz. 541, 544, ¶ 6, 189 P.3d 1114, 1117, ¶ 6 (Ct. App. 2008):

But we review *de novo* questions involving the interpretation of court rules and “evaluate procedural rules using principles of statutory construction.” *Fragoso v. Fell*, 210 Ariz. 427, ¶¶ 7, 13, 111 P.3d 1027, 1030, 1032 (App.2005); *see also State v. Hansen*, 215 Ariz. 287, ¶ 7, 160 P.3d 166, 168 (2007) (principles of statutory construction used to interpret court rules). In addition, we interpret court rules “in accordance with the intent of the drafters, and we look to the plain language of the ... rule as the best indicator of that intent.” *Fragoso*, 210 Ariz. 427, ¶ 7, 111 P.3d at 1030. If the language of a rule is ambiguous, however, we may consider “a variety of elements, including the rule's context, the language used, the subject matter, the historical background, the effects and consequences, and its spirit and purpose,” to determine the framers' intent. *State ex rel. Romley v. Superior Court*, 168 Ariz. 167, 169, 812 P.2d 985, 987 (1991); *see also Vega v. Sullivan*, 199 Ariz. 504, ¶ 8, 19 P.3d 645, 648 (App.2001).

Thus, this Court must review any interpretation of the RPEA *de novo* while determining if the trial court abused its discretion by granting Plaintiff's motion to amend its caption to reflect a different owner for the Woodbridge Apartments.

....

....

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000659-001 DT

03/13/2013

In the current case, the trial court agreed with the Plaintiff's position, determined Plaintiff committed a clerical error, and amended the case caption post judgment. By so doing, the trial court erred. The substitution of a party is not the same as a clerical error. In discussing if an error was a clerical error or a judgmental error, the Arizona Court of Appeals said:

Whether error is judgmental or clerical turns on the question whether the error occurred in rendering judgment or in recording the judgment rendered. 46 Am.Jur.2d, *Judgments* § 202 (1969). The power to correct clerical error does not extend to the changing of a judgment, order, or decree which was entered as the court intended. *See, e.g., Hiawassee Lumber Co. v. United States*, 64 F.2d 417 (4th Cir.1933); *Reed v. Howbert*, 77 F.2d 227 (10th Cir.1935); *Van Tiger v. Superior Court*, 7 Cal.2d 377, 60 P.2d 851 (1936); *Jones v. Bass*, 49 S.W.2d 723 (Tex.Com.App.1932); Annot., 126 A.L.R. 956, 980 (1940). In this case the trial court intended to enter judgment in the amount that the defendants now challenge. If there was error in the amount, the error was not clerical but judgmental, and defendants' failure to object at trial precludes correction on appeal.

Ace Auto. Products, Inc. v. Van Duyne, 156 Ariz. 140, 142-43, 750 P.2d 898, 900-01 (Ct. App. 1987). Similarly, in *Egan-Ryan Mech. Co. v. Cardon Meadows Dev. Corp.*, 169 Ariz. 161, 166, 818 P.2d 146, 151 (Ct. App. 1990) the Court of Appeals held:

Furthermore, we agree that once the time for filing a Rule 59(1) motion had expired, Rule 60(a), which provides for the correction of "clerical mistakes" in judgments at any time, was the only remaining authority for altering the judgment. That rule, however, only authorizes the correction of "clerical" errors-to show what the court actually decided but did not correctly represent in the written judgment; it may not be used to correct "judicial errors"-to supply something that the court could have decided, but did not. *See Hatch v. Hatch*, 23 Ariz. App. 487, 534 P.2d 295 (1975), *vacated on other grounds*, 113 Ariz. 130, 547 P.2d 1044 (1976); *Rae v. Brunswick Tire Corp.*, 45 Ariz. 135, 40 P.2d 976 (1935). We agree that the absence of language in the December 23, 1987, judgment relating to counts II and IV of the counterclaim cannot be considered a "clerical error."

The error in this case was more than a simple clerical mistake. This is evident from Plaintiff's own pleadings where Plaintiff commented Defense counsel needed over 2 hours of research in order to ascertain the true owner of the premises. The rules mandate that an action be brought in the name of the party. No defendant should be forced to expend more than two hours in trying to find out who has sued him or her. Yet, that is exactly what Plaintiff forced Defendants to do.

....

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000659-001 DT

03/13/2013

An amendment of judgment can only go to change what the court actually decided but did not correctly represent. In the current case, however, there is little indication that (1) the trial court decided who was the proper party to the litigation; or (2) if the trial court considered if it had the ability to change the parties to the litigation post-judgment.

Eviction Complaints

Eviction actions are governed by the Rules of Procedure for Eviction Actions (RPEA). RPEA, rules 5(b)(1) and 5(b)(2) mandate the complaint be brought in the name of the party who claims entitlement to possession. The rule states:

Complaint. The complaint shall:

- (1) Be brought in the legal name of the party claiming entitlement to possession of the property,
- (2) Include the business name, if any, and address of the property.

A separate section of the rule—rule 5(b)(8)—requires that the attorney signing the complaint verify the attorney believes the assertions in the complaint to be true on the basis of a reasonably diligent inquiry.

In this case, the Complaint was brought in the name of Woodbridge LLC dba Woodbridge Apartments. As both parties—and the trial court—later agreed, Woodbridge LLC was not (1) the legal name for the party claiming entitlement to possession of the property or (2) the business name for the entity claiming the right to possess the property. Instead, as became apparent after the judgment was entered, the correct owner was 6635 N. 19th Avenue, LLC. While parties may be substituted during the pendency of litigation and, traditionally—and persuasively—amendments may be made to conform to the evidence, there is nothing in the precedent cited by either party that allows a trial court—other than for a clerical error—to amend a pleading and substitute a different party after judgment occurred. While Plaintiffs asserted the claim was brought in the name of Woodridge Apartments, the actual claim was brought in the name of Woodridge LLC dba Woodridge Apartments. The use of an incorrect party identifier is more than a simple clerical error—particularly when the error is not discovered during the pendency of the litigation. Plaintiffs seek to amend their judgment to reflect a different party. This Court has no knowledge if this change would—or would not—have affected Defendants’ decision to stipulate to judgment. However, as is more fully discussed below, this Court believes it would be inappropriate to change the caption and allow a different party to substitute into the action after judgment was given.

Time To Amend Pleadings

Plaintiff did not request leave to amend its Complaint until after the trial court entered judgment. Leave to amend is discretionary, although amendments to pleadings are usually liberally allowed. Indeed, in the civil context, amendments to pleadings are (1) allowed in order to conform to the evidence; and (2) generally granted; unless there has been undue delay, dilatory

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000659-001 DT

03/13/2013

action, or undue prejudice to the opposing party. A.R.C.P., Rule 15.¹² In the civil context, undue prejudice may be found when the amendment inserts new parties into the litigation. As stated in *Schoolhouse Educ. Aids, Inc. v. Haag*, 145 Ariz. 87, 91, 699 P.2d 1318, 1322 (Ct. App. 1985)

Although mere delay is not justification in and of itself for denial of leave to amend, substantial prejudice to the opposing party is a critical factor used in determining whether an amendment should be granted. Such prejudice is the “inconvenience and delay suffered when the amendment raises new issues or inserts new parties into the litigation.”

RPEA, Rule 9(c) states the court “may grant motions to amend pleadings for good cause shown” while RPEA Rule 13(a) specifies the items the trial court is required to review. RPEA Rule 13(a) states:

a. Items to Review. Except for stipulated judgments entered pursuant to Rule 13(b)(4), in each eviction action the court shall:

- (1) Determine whether the service of the summons and complaint was proper and timely, and whether the summons and complaint included all the information and notice(s) required under Rule 5.
- (2) Determine whether the tenant or occupant of the premises received proper termination notice if one was necessary, and was afforded any applicable opportunity to cure. If the notice does not comply with the statute or is not properly served, the court shall dismiss the action.
- (3) Determine whether the facts alleged, if proven, would be sufficient to determine that plaintiff has a right of superior possession due to a material breach of the lease agreement or for any other basis in law.
- (4) If it appears that a landlord has accepted a partial payment in a case claiming nonpayment of rent under the Arizona Residential Landlord and Tenant Act, the court shall inquire whether the landlord accepted the partial payment, and if so, can produce a partial payment agreement and waiver signed by the defendant as required by the statute. If the landlord is unable to prove that the waiver was signed, the court shall dismiss the action.

¹² Although the Arizona Rules of Civil Procedure only apply when specifically incorporated by reference, this Court may consider civil court decisions as persuasive when there is no binding case law interpreting the relevant RPEA provisions. Similarly, when Arizona first adopted the Arizona Rules of Civil Procedure, our Court of Appeals in *Bayham v. Funk*, 3 Ariz. App. 220, 413 P.2d 279 (Ct. App. 1966) held the interpretation of the federal rules were persuasive and provided a body of case law to reference when searching for rule interpretation. In *Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 469–70, ¶¶ 18–22, 224 P.3d 960, 966–67, ¶¶ 18–22 (Ct. App. 2010), the Arizona Court of Appeals referred to cases from other jurisdictions in ruling on an issue of first impression. Accord, *Branch v. State*, 15 Ariz. 99, 104, 136 P. 628, 630–31 (1913).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000659-001 DT

03/13/2013

In this case, Defendant asserted—on appeal—the trial court was unable to make the necessary findings at the time it entered judgment because (1) the Complaint did not include all of the information required by Rule 5, RPEA; and (2) the tenant was not given a proper termination notice as the notice was issued in the name of a party—Woodbridge Apartments—that was not entitled to possession. Plaintiff failed to provide any authority indicating the trial court could amend the pleadings and substitute another litigant for an incorrectly named party after the litigation ended. Because the trial court had no authority to amend the caption or pleadings following a final judgment, the trial court erred by granting Plaintiff’s motion to amend the caption.

Stipulation

Plaintiff argued Defendants waived any right to reconsideration by (1) originally entering a stipulation for judgment; and (2) signing, they waived any rights to reconsideration or appeal. Plaintiff asserted a consent judgment is conclusive as to the stipulating parties. In support of this contention, Plaintiff relied on *Cochise Hotels v. Douglas Hotel Operating Co.*, 83 Ariz. 40, 316 P.2d 290 (1957) and *Wall v. Superior Court*, 53 Ariz. 344, 89 P.2d 624 (1939) While *Cochise Hotels v. Douglas Hotel Operating Co.*, *id.*, 83 Ariz. at 47, 316 P.2d at 295, did assert a judgment entered by stipulation is as valid as a judgment resulting from a trial on the merits, the case does not preclude an appeal as trial judgments are subject to appeal. The stipulation which the court enforced in *Wall v. Superior Court of Yavapai County* was “prepared by able counsel” *Wall v. Superior Court*, *id.*, 53 Ariz. at 351, 89 P.2d at 627.

In the case before this Court, Defendants signed the stipulation after consulting with Plaintiff’s counsel. This Court lacks knowledge about what occurred during the consultation in the hallway. Consequently this Court cannot determine if anything Plaintiff’s counsel said contributed to Defendants’ stipulation/agreement to forego any reconsideration or appeal. However, and on the other hand, Defendants have not demonstrated—or even asserted—their will was overborne. In *Higgins v. Guerin*, 74 Ariz. 187, 245 P.2d 956 (1952) the Arizona Supreme Court held:

The great weight of authority is to the effect that a stipulation such as was entered into in this case is conclusive throughout the litigation unless the parties, for good cause shown, are relieved by the court of its binding effect. In *LeBarron v. City of Harvard*, 129 Neb. 460, 262 N.W. 26, 32, 100 A.L.R. 767, a similar question was involved on the retrial of a case. The trial court ignored the stipulation and upon appeal the Nebraska Supreme Court reversed, stating:

‘A stipulation by the parties as to the facts, so long as it stands, is conclusive between them, and cannot be contradicted by evidence tending to show the facts otherwise.’ (Citing cases.)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000659-001 DT

03/13/2013

‘Parties will not be relieved from stipulations in the absence of a clear showing that the matter stipulated is untrue, and then only if the application for such relief is seasonably made, and good cause is shown for granting it.’ (Citing cases.)

Higgins v. Guerin, id., 74 Ariz. at 190, 245 P.2d at 957-58. Stipulations bind trial and appellate courts as well as the parties. *Id.* Because Defendants stipulated they would not bring (1) any motion for reconsideration; or (2) appeal; the trial court did not err by denying their Motion To Set Aside.

Trial Court’s Jurisdiction

Defendants also asserted the trial court lacked jurisdiction to grant relief because Plaintiff filed its complaint under the name of an improper—and allegedly non-existent party. Although, as stated, the RPEA requires the complaint be brought in the legal name of the party claiming the right to possess the party, Plaintiff included its dba—Woodridge Apartments—as a proper party to the Complaint. Thus, the Complaint indicated possession of the premises was being claimed by Woodbridge Apartments although the legal property owner was incorrect. Plaintiff’s claim did not affect the jurisdiction of the trial court. A.R.S. § 22–201(D) grants justices of the peace jurisdiction over actions where the right to possession of real property is at issue provided the case does not involve the title or ownership of the property.

As part of their lack of jurisdiction issue, Defendants argued the RPEA do not expressly permit the substitution of plaintiffs.¹³ While this Court agrees the RPEA do not expressly permit the substitution of plaintiffs, neither do the RPEA forbid the substitution of plaintiffs. However, whether the RPEA do or do not allow any amendment of the pleadings to (1) change the legal name for a plaintiff; or (2) substitute a party; is not a jurisdictional question. Defendants’ claims about the trial court’s alleged lack of jurisdiction fail.

Properly Raise Issues On Appeal

Defendants changed the focus of their appeal mid-stream. At the hearing on their Motion to Set Aside the Judgment, Defendants focused on their claim that the action was improperly brought by an out-of-state corporation who had no ability to sue in Arizona because it failed to properly register with the Arizona Corporation Commission. This claim was shown to be factually incorrect. Thereafter, on appeal, Defendants argued the trial court lacked jurisdiction to enter judgment because Woodbridge LLC was an improper party. While Defendants asserted Plaintiff’s failure to name the proper party in their motion and at the hearing, the focus of their claim was the proper party was a California corporation—HK Realty. On appeal, however, they focus their claim against 6635 N. 19th Avenue LLC. This claim was not presented to the trial court. Failure to raise an issue at trial waives the right to raise the issue on appeal.¹⁴ *State v.*

¹³ Appellants’ Memorandum at p. 6, ll. 23–24.

¹⁴ Although Defendants attempted to raise this issue again in their Motion To Reconsider, Defendants filed this Appeal before the trial court ruled on the Motion To Reconsider. At that point, the trial court lost jurisdiction over the matter, and the Motion To Reconsider was mooted.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000659-001 DT

03/13/2013

Gendron, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991); accord *McDowell Mountain Ranch Land Coalition v. Vizcaino*, 190 Ariz. 1, 5, 945 P.2d 312, 316 (1997) where the Arizona Supreme Court stated: “But these challenges were not properly raised below and thus we do not consider them here.” Defendants also claimed—for the first time on appeal—the initial Five-Day Notice was deficient because it was brought in the name of Woodbridge Apartments. Because Defendants did not argue their contention—to the trial court—that (1) 6635 N. 19th Avenue LLC was the proper party; or (2) the Notice of Intent To Terminate was improper; they cannot now raise these issues here.

B. Did Defendants Err By Submitting A Memorandum Decision As Authority.

Defendants attempted to bolster their position by referring to an unpublished decision, *Homeq LLC v. Del Turco*. This is inappropriate as unpublished decisions do not create precedent in Arizona. Rules of the Supreme Court of Arizona, Rule 111 defines memorandum decisions as separate from those intended for publication. According to Rule 111, a memorandum decision is a “written disposition of a matter not intended for publication.” Rule 111(c) provides that memorandum decisions shall not be regarded as precedent and shall not be cited except for two limited purposes: (1) establishing the defense of res judicata, collateral estoppel, or the law of the case; or (2) informing the appellate court of other memorandum decisions so the court can decide whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review.

In *Kriz v. Buckeye Petroleum Co., Inc.*, 145 Ariz. 374, 701 P.2d 1182, n. 3 (1985) the Arizona Supreme Court chastised one of the litigants—Black Corporation—for its use of a memorandum decision as authority and said: “We will give no consideration to the memorandum decision Black Corporation has cited.” The Arizona Court of Appeals expanded on this holding and ruled out-of-state memorandum decisions are no more citable than in-state memorandum decisions and refused to grant these decisions any credence. *Walden Books Co. v. Dept. of Revenue*, 198 Ariz. 584, 589, ¶¶ 21–23, 12 P.3d 809, 814 ¶¶ 21–23 (Ct. App. 2000). The prohibition was extended to federal district court memorandum decisions in *Hourani v. Benson Hosp.*, 211 Ariz. 427, 435, ¶ 27, 122 P.3d 6, 14 ¶ 27 (Ct. App. 2005). Persuasively, Ariz. R. Civ. App. P., Rule 28(c) states memorandum decisions shall not be regarded as precedent or cited in any court except for the two limited purposes described above. Although other jurisdictions¹⁵ do

¹⁵ For example, Texas, Utah, and West Virginia allow unpublished decisions to be used as authority. TX R APP Rule 47.7. Citation of memorandum decisions. All opinions and memorandum opinions in civil cases issued after the 2003 amendment have precedential value. W. Va. R. App. P. 21. Memorandum decisions may be cited in any court or administrative tribunal in this State; provided, however, that the citation must clearly denote that a memorandum decision is being cited, e.g. *Smith v. Jones*, No. 11-098 (W.Va. Supreme Court, January 15, 2011) (memorandum decision). Memorandum decisions are not published in the West Virginia Reports, but will be posted to the Court's website. UT R RCRP Rule 37. Published decisions of the Supreme Court and the Court of Appeals may be cited as precedent in all criminal proceedings. Unpublished decisions may also be cited as precedent, so long as all parties and the court are supplied with accurate copies at the time the decision is first cited.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000659-001 DT

03/13/2013

allow the use of memorandum decisions, our Courts and our procedural rules do not allow for the use of memorandum decisions except for the limited purposes cited in Rule 111 and Ariz. R. Civ. App. P., Rule 28(c).

The opinion cited by Defendant was not designated for publication. It forms no precedent for this Court. To the extent Defendant provides these opinions so that this Court can determine if the current opinion is one that should be issued for publication, the case may be instructive. However, to the extent Defendant cites this opinion for any form of precedent or “issue preclusion,” this Court has no alternative but to ignore the opinion.

C. Is Either Party Entitled To Attorneys’ Fees On Appeal.

Each party requested its attorneys’ fees on appeal. Because neither party prevailed, this Court declines to order either party to pay attorneys’ fees to the adverse party. Each party shall bear its own costs and fees.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Encanto Justice Court erred in granting Plaintiff’s Motion To Amend its caption but did not err in refusing to set aside the stipulated judgment to which Defendants agreed.

IT IS THEREFORE ORDERED reversing the judgment of the Encanto Justice Court allowing for the amendment to the caption post-judgment but affirming the judgment of the Encanto Justice Court denying Defendants’ Motion To Set Aside.

IT IS FURTHER ORDERED remanding this matter to the Encanto 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

031320131645