

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2006-000012-001 DT

04/13/2006

HONORABLE GERALD PORTER

CLERK OF THE COURT
L. Rasmussen
Deputy

FILED: 05/03/2006

WINDSONG APARTMENTS 34TH ST

WINDSONG APARTMENTS 34TH ST
1414 N 34TH ST
PHOENIX AZ 85008

v.

LINDA GREEN (001)

EDWARD F THOMAS

DOWNTOWN JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

Lower Court Case No. CV05-01943FD

This court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This case has been under advisement since February 22, 2006. This decision is made within 60 days as required by Rule 9.9, Maricopa County Superior Court Rules of Practice. This court considered and reviewed the record of the proceedings from the East Phoenix #1 Justice Court, nka Downtown Justice Court, and the memoranda submitted by counsel.

On May 16, 2004, appellant signed a 12 month lease to live at the Windsong 34th Street Apartments. The lease signed is a standard Arizona Multi-Housing Association agreement that contains a jury trial waiver provision that applies to both the landlord and tenant in the event that a forcible entry and detainer case ensues as a result of the rental agreement. On July 7, 2005 the landlord delivered to the tenant a notice for immediate termination of the lease for threatening and intimidating management, specifically for threatening to cause bodily harm. The appellant did not dispute that the notice was delivered by process server and received by the tenant.

Upon being served with the forcible entry and detainer action, the appellant requested a jury trial. A jury trial was initially set for July 15th but continued that same day as counsel for
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the appellant was unable to proceed due to a conflict in another court. The trial was reset to a jury on July 20th. On July 20th, appellee filed a motion to quash the jury trial and instead try the case to the court. Appellee argued that a lease provision in the landlord/tenant agreement waived the jury trial right. After argument, the trial court ruled in favor of the appellee.

At trial, appellant pointed out that two prior 10-day notices were given, one on July 5th and the other on July 6th. Both 10-day notices also involve threatening and intimidating action as well as other issues that management believed constituted a material and non-compliant breach of the lease agreement. Appellant's central argument at trial centers around a view that the appellant was not given appropriate time to cure in accordance with the 10 day notices that were served on appellant on July 5th and 6th. Appellant also contested the description of events and denied making any threats to do bodily harm. After a trial to the bench, the court ruled in favor of the appellee and awarded possession accordingly.

On appeal, five issues are presented:

- 1) Appellant argues that the appellee's motion to quash the jury trial was not timely,
- 2) Appellant argues that the right to a jury trial cannot be waived unless it is a knowing, intelligent and voluntary waiver, something appellant could not do because she was unable to read and understand the lease,
- 3) Appellant argues that its witnesses were improperly excluded,
- 4) Appellant argues that she was denied the opportunity to appropriately prepare for trial as her right to discovery was thwarted by appellee, and
- 5) Appellant argues that the trial court improperly denied her right to special action the trial court's decision to deny her a jury trial on the day set for the trial to commence.

Upon review this court will consider all facts in the light most favorable to sustaining the judgments and resolve all conflicts in evidence and all reasonable inferences from it against the defendant. State v. Lopez, 174 Ariz. 131, 847 P.2d 1078 (1993); State v. Zmich, 160 Ariz. 108, 770 P.2d 776 (1989).

The threshold issue raised by appellant concerns the trial court's denial of her request for a jury trial. The record reflects that the parties appeared on July 15th prepared and ready to commence a jury trial except that counsel for the appellant was unavailable due to obligations in another court. The trial court continued the jury trial until July 20th and instructed the parties to finalize outstanding discovery issues and to interview perspective witnesses who had appeared in anticipation of trial. On July 15th counsel for the appellee interviewed a representative from Section 8 Housing who informed him that the appellant's Section 8 lease had been terminated.

On July 20th, appellee filed a motion to vacate the jury trial arguing that since the Section 8 lease had terminated that the lease signed on May 16, 2004 was controlling. Appellee further suggests that the appellant had waived her right to a jury trial when she signed the May 16 lease that contained a jury trial waiver provision. Appellant first argues that the motion to vacate the

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jury trial on the day of trial is untimely. Though appellant cited case law to the court it does not stand for the proposition that the motion objecting to a trial by jury must be made timely. In reviewing case law this court could not find any case that supports appellant's position. Further appellant's position is at odds with Rule of Civil Procedure 39(a) that states:

Rule 39(a). Trial by Jury

When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless:

1. The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury, or
2. The court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist.

In *South Port Maine, L.L.C. v. Gulf Oil Ltd. Partnership*, 56 F. Supp.2d, (D.ME. 1999), the federal district court of Maine in interpreting nearly identical language in Federal Rule of Procedure 39(a)(2) held that the failure to file a motion to strike demand for jury trial until the eve of trial did not waive the objection to a jury trial. The court further stated that even had the objecting party initially consented to a trial by jury, there should be no jury trial unless the plaintiff has a right to such a trial. Here as there, the objecting party initially did not object to the request for a jury trial, and only objected after discovering that the appellant was not entitled to a jury trial setting given that the controlling lease contained a jury trial waiver provision.

The issue of whether the jury trial had been waived thus turns on appellant's second argument that she did not understand and could not read the lease that she had signed and that she was at a disadvantage because the lease was prepared by appellee that possessed a disproportionate level of expertise in the leasing of apartments. Appellant argues that the waiver must be knowingly, intelligently and voluntarily waived and in this case was not because she was unable to read and therefore could not understand the lease at the time it was signed. This issue was recently addressed in *Harrington v. Pulte Home Corp.*, 211 Ariz. 241, 119 P.3d 1044, (App. 2005). In *Harrington* the court stated, "It is well established in federal jurisprudence that a test of waiver applied to other constitutional rights, i.e., that waiver be shown to be an intentional relinquishment or abandonment of a known right or privilege, is not applied to the right to a jury trial in a civil action. Citing, *inter alia*, 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2321 (2d ed.1995), citing, *inter alia*, *U.S. v. Moore*, 340 U.S. 616, 621, 71 S.Ct. 524, 95 L.Ed. 582 (1951).

Similar to the agreement in *Harrington*, the record shows that the jury trial waiver provision began in an enlarged font "JURY TRIAL WAIVER," was easily readable, was not obscure and was contained in the lease agreement signed by the Appellant. Further, the

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agreement itself is a uniform lease agreement promulgated by the Arizona Multi-Family Housing Association and in wide use in apartment communities throughout the State.

Contrary to Appellant's argument, Arizona courts have long recognized the adhesiory nature of standardized contracts. In Rocz v. Drexel Burnham Lambert, Inc. 154 Ariz. 462, 743 P.2d 971, Ariz.App., (1987), the court adopted the reasoning in Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co. 140 Ariz. 383, 682 P.2d 388 (1984) which held, "The rule which we adopt today for interpretation of standardized contracts ... recognizes that most provisions of standardized agreements are not the result of negotiation; often, neither the customer nor salesperson are aware of the contract provisions. The rule ... charges the customer with knowledge that the contract being "purchased" is or contains a form applied to a vast number of transactions and includes terms which are unknown ...; it binds the customer to such terms. (emphasis added).

Given that the lease is a standard form contract used widely throughout the state the appellant should have reasonably expected such a condition and would have easily understood the provision had she read it or had it read to her prior to signing the agreement.

Having decided that the appellant was not entitled to a jury trial we turn to appellant's remaining arguments. Appellant contends that the trial court improperly denied her the right to call a witness which counsel for appellant contends was disclosed to the appellee on July 15th pursuant to the court's instruction on discovery and disclosure. The issue turns on the trial court's decision to exclude a witness, Kathlene Cadorette, who appellee contends was not disclosed by July 15th, and in fact, not disclosed until the day of trial.

We will overturn the trial court's rulings on the exclusion of evidence only for "abuse of discretion or legal error and prejudice." Brown v United States Fid. & Guar. Co., 194 Ariz. 85, 977 P.2d 807 (App. 1998). A factual determination about the scope of disclosure is for the trial court to make. Zimmerman v. Shakman, 204 Ariz. 231, 62 P.3d 976, (App. 2003). As the Zimmerman court noted, when a trial is set and imminent, the possibility of prejudice to the party not receiving disclosure increases. In such a case the trial judge possesses considerable latitude in determining whether good cause has been shown for late disclosure. If there is no good cause, barring the introduction of evidence not previously disclosed may be a reasonable sanction.

Though the record is incomplete with respect to the court's specific instructions to the parties on July 15th, and although the July 15th witness list that was the basis for the court's decision to exclude the proffered witness is not available to this court, in absence of evidence to the contrary this court will give the presumption to the trial court that the witness list did not disclose appellant's proffered witness. The trial court prevented no other defense witnesses from testifying.

Appellant's fourth argument concerns the court's refusal to compel the production of information contained in tenant/non-party witness files for purposes of confronting witnesses

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who testify at trial. Appellee objected to the production of information in tenant files absent a signed writing authorizing the release of such information from the tenant/non-party witness. The record does not reflect that the information was subpoenaed in accordance with Rule of Civil Procedure 45. Further, had such information been subpoenaed, the trial court has broad discretion in summary proceedings to deny such request.

In Colonial Tri-City Ltd. Partnership v. Ben Franklin Stores, Inc. 179 Ariz. 428, 880 P.2d 648 Ariz.App. Div. 1,1993, the court held that, "the summary proceedings authorized by A.R.S. section 33-361 and the forcible entry and detainer statutes do not furnish all of the procedural safeguards provided in a general civil action. In order to provide an expeditious means of recovering possession, the [forcible entry and detainer] statutes provide for streamlined procedures." Citing *inter alia* 2 Richard R. Powell, Powell On Real Property § 246[3] (1993). "Notice periods are short, pleadings are restricted, triable issues are limited, discovery is generally unavailable, and the judgment is promptly operative." *Id.*

The record in this case reflects that the trial court made limited discovery rulings at the July 15th hearing setting forth a requirement that witness lists and documents to be used at trial be exchanged not later than that date. The documents in question were not proffered at trial by the appellee and therefore the trial court could properly conclude that there was no right to discovery in accordance with appellant's request for production.

Finally, this court need not address the appellant's final argument that it was denied the opportunity to special action the trial court's decision to deny her request for a jury trial given this court's determination that she was not entitled to a jury trial and no prejudice has been shown.

For the above reasons,

IT IS ORDERED affirming the decision of the East Phoenix #1 Justice Court.

IT IS FURTHER ORDERED remanding this matter back to the Downtown Justice Court, fka East Phoenix #1 Justice Court, for any further appropriate proceedings.

/s/ Gerald Porter

HONORABLE GERALD PORTER