

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2010-000857-001 DT

05/09/2011

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT

T. Melius

Deputy

MCKINLEY COURT

JAMES E HOLLAND JR.

v.

FABIAN WILTZ (001)

JESSE D COOK

REMAND DESK-LCA-CCC

WEST MCDOWELL JUSTICE COURT

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC20102010287042

The West McDowell Justice Court ordered Defendant-Appellant Fabian Wiltz (Defendant) evicted from his apartment on June 11, 2010. Defendant contends the trial court erred. For the reasons stated below, the court affirms the trial court's judgment.

I. FACTUAL BACKGROUND.

On June 8, 2010, Plaintiff sent Defendant a Notice of Immediate Termination of the rental agreement for unit #204 at 815 N. 3rd Ave., Phoenix, AZ., claiming Defendant had violated the terms of the lease by (1) disturbing or threatening the rights, comfort, health, safety or convenience of others; (2) disrupting business operations; (3) disturbing the neighbors' peaceful enjoyment of the premises; (4) refusing access to the landlord; and (5) threatening the landlord if the landlord entered the unit. Plaintiff demanded Defendant immediately vacate the property and informed Defendant if he failed to do so, Plaintiff may proceed with a forcible detainer action. The notice also informed Defendant his obligations under the lease continued.

Plaintiff filed the Complaint and Notice with the West Phoenix Justice Court on June 8, 2010, at 4:54 P.M. The Complaint states the required written notice was served on the Defendant on May 21, May 24, and June 8, 2010, and was served both by certified mail and by door posting. Defendant was served with a Summons and Forcible Detainer on June 9, 2010. The following day, June 10, 2010, Defendant filed a counterclaim alleging: (1) Plaintiff refused to make the premises habitable or provide alternate habitable premises and (2) Plaintiff caused him stress. The trial court set trial for June 11, 2010.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2010-000857-001 DT

05/09/2011

At trial, both parties testified about the conditions of the premises¹ and about Defendant's alleged threatening conduct. Plaintiff stated Defendant came to her office on more than one occasion and just stood there and stared at her.² Defendant denied "threatening conduct"³ and stated there was no police report or evidence of: "physical or threatening aggression".⁴ Plaintiff testified Defendant posted a sign on his window in violation of the lease⁵ and the sign stated: "Caution if you enter the unit you should, you could be potentially be shot, stabbed, suffer injuries or killed."⁶

Defendant alleged the eviction was retaliation for contacting Maricopa County Environmental Services⁷ but later corrected his testimony to reflect he had already received a 10-day notice prior to filing a complaint with the County.⁸ Defendant testified that he did not disturb anyone⁹ and never refused entry to anyone.¹⁰ He further stated that the caution sign was "colorful" and similar to "signs that you can get at Walmart saying hey, you come in here, you're going to get shot, with a cowboy riding the dog."¹¹ When cross examined, Defendant stated that he meant the signs to be warning signs although he maintained that the sign was just "caution"¹² and stated his purpose was to deter crime.¹³ Defendant admitted he did not inform either the landlord or any of the other tenants they did not need to worry about the sign.¹⁴

The judge evicted Defendant and denied his counterclaim after finding the sign was threatening and Plaintiff's conduct was not retaliatory. Defendant filed a timely appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12-124(A).

¹Transcript of the June 11, 2010 hearing. Plaintiff testified about Plaintiff's attempts to remediate Unit 204 and Defendant's complaints about dirt and roaches p. 13; p. 14 ll. 6-12; p. 18, ll. 20-14. Defendant testified about his complaints about roaches and dirt p. 43, ll. 1-16.

² *Id.*, at p. 21, l. 20 and p. 22, ll. 4-10.

³ *Id.*, at p. 46 ll. 21-24 and p. 47, ll. 4-10..

⁴ *Id.*, at p. 48, ll. 9-14.

⁵ *Id.*, at p. 24, ll. 9-12 and p. 29.

⁶ *Id.*, at p. 27, ll. 1-5. *See* Exhibit 2 which reads "!!! Caution !!! If you enter unit #204 without permission or notification you could be but not limited to: shot-stabbed-suffer injuries-punched killed By entering unit #204 without permission or notification the personess [sic] are fully aware of what can happen. If you need to enter contact F.W."

⁷ *Id.*, at 48, ll. 20-25 and p. 53, ll. 7-10.

⁸ *Id.*, at p. 61, ll. 4-25.

⁹ *Id.*, at p. 54, ll. 4-7.

¹⁰ *Id.*, at ll. 15-22.

¹¹ *Id.*, at p. 58, ll. 12-18.

¹² *Id.*, at p. 64, ll. 6-25,

¹³ *Id.*, at p. 64, l. 22.

¹⁴ *Id.*, at p. 65, ll. 3-25.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2010-000857-001 DT

05/09/2011

II. ISSUES:

A. Did the Trial Court Err by Holding Trial on June 11, 2010 When Defendant Was Not Served Until June 9, 2010.

Defendant was served on June 9, 2011, and the Court held trial on June 11, 2011. At time of trial, Defendant requested a continuance so he would have more time to prepare for the trial. He did not, however, claim that insufficient time had passed since the date of service. This claim was not presented to the trial court. It is rare for an appellate court to rule on an issue that was not first presented to the trial court. “Thus, although Arizona appellate courts have the discretion to hear arguments first raised on appeal, we rarely exercise that discretion.” *Harris. v. Cochise Health Systems*, 215 Ariz. 344, 160 P.3d 223 ¶ 17 (Ct. App. 2007). Additionally, in *Town of South Tucson v. Board of Sup’rs of Pima County*, 52 Ariz. 575, 582, 84 P.2d 581, 584 (1938), our Supreme Court ruled:

. . . One of the rules of well-nigh universal application established by courts in the administration of the law is that questions not raised and properly presented for review in the trial court will not be reviewed on appeal. 3 C.J. 689. The reason for the rule is plain. If the question had been raised below, the situation might have been met by the opposite party by way of amendment or of additional proof. In such circumstances, therefore, for the appellate court to take up and decide on an incomplete record questions raised before it for the first time would, in many instances at least, result in great injustice, and for that reason appellate courts ordinarily decline to review questions raised for the first time in the appellate court. . . . Whether this court should review a question raised here for the first time depends upon the facts and circumstances disclosed by the particular record. It undoubtedly has the power, but ordinarily will not exercise it.

This Court does not find Defendant’s claim to be of such importance as to affect the general public—particularly since he had already received a 10-day notice from Plaintiff—and does not believe this case falls outside the rule precluding Defendant from raising issues for the first time on appeal.

On appeal, Defendant claims trial was set less than 2 days after he was served (he was served on June 9, 2010, at 4:00 P.M. and trial was set for June 11, 2010, at 9:00 A.M.). Rule 3(a) of the Ariz. R. Proc. Evic. Act (RPEA) states that “time limitations prescribed in these rules shall mean calendar days” and Rule 5(e) RPEA states that the “date of the initial appearance shall be counted for that purpose” (as a day when computing time). A. R. S. § 33–1377 (B) requires that a summons be served at least 2 days before the return day. Similarly, A.R.S. §12-1175 also requires that the “summons shall be served at least 2 days before the return day, and return made thereof on the day assigned for trial.”

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2010-000857-001 DT

05/09/2011

Appellate courts review a trial court's interpretation and application of court rules de novo. *Bilke v. State*, 206 Ariz. 462, 80 P.3d 269 ¶ 10 (2003) (statutes); *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, 181 P.3d 1126 ¶ 18 (Ct. App. 2008) (court rules). Words used in statutes are to be given their obvious and natural meaning. *Mendelsohn v. Superior Court*, 76 Ariz. 163, 169, 261 P.2d 983, 988 (1953). In harmonizing the statute and rule, the Court determines sufficient time passed between the date of the summons and the day of trial. For statutory purposes, the summons must be served at least 2 days before the return day. June 9 is 2 calendar days prior to the June 11 trial day. Consequently, Defendant's claim fails.

B. Did the Trial Court Err In Failing to Grant Defendant's Request for a Continuance.

Defendant requested a continuance when he appeared for trial claiming he had insufficient time to prepare his defense. Rule 11 RPEA states that trial should be held on the initial return date. While the court has the discretion to grant a continuance, the court, by rule, shall give priority to hearing and resolving alleged "immediate and irreparable" evictions. Defendant was (or should have been) aware of the eviction action as Plaintiff served him with a 10 day notice on May 24, 2010. Consequently, he was not taken by surprise. Defendant alleged that he needed to gather additional information but did not state—either to the trial judge or on appeal—why he did not have enough time to get this information. Furthermore, the trial court has discretion in determining when and if to grant a continuance.

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

State v. Chapple, 135 Ariz. 281, 297 n. 18, 660 P.2d 1208, 1224 n. 18 (1983) (citation omitted). Here, the trial court was in the best position to evaluate Defendant's need for a continuance and the appellate court will not disturb that ruling.

C. Did the Trial Court Err by Dismissing Defendant's Counterclaim.

Defendant alleges the trial court improperly dismissed his counterclaim and failed to properly allow him to present evidence about his claims. This statement is inaccurate. The trial court provided Defendant the opportunity to testify about the cleanliness of the apartment, the roaches, his stress in living in the apartment, and his claims that Plaintiff's actions were retaliatory. The trial judge specifically mentioned his counterclaim¹⁵ and offered Defendant the opportunity to present evidence about these claims.

¹⁵ *Id.*, at p. 66, ll. 18–25
Docket Code 512

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2010-000857-001 DT

05/09/2011

The trial court dismissed the counterclaim because the trial court did not find any retaliation by Plaintiff.¹⁶ Furthermore, the trial court stated that the trial court considered the dates of the various actions taken by the parties in arriving at this conclusion. While Defendant is correct that he provided most of his testimony about the counterclaim during cross examination, nothing in the record reflects that he was stopped or precluded from testifying about his counterclaim during his initial presentation.¹⁷ The trial court even specifically reminded Defendant about his counterclaim.¹⁸

D. Did Plaintiff Present Sufficient Evidence That Defendant's Actions Constituted Harassment or Intimidation.

Defendant contends that Plaintiff did not present sufficient evidence that his actions constituted threats or intimidation, although Plaintiff alleged she felt threatened when Defendant came to her office and stood there without speaking after he had complained about problems with his apartment. Defendant countered Plaintiff's testimony and defended that she never called the police about her concerns. Plaintiff further testified that she felt threatened once she saw the "Caution" note at his apartment. Although Defendant stated that his note was just an example of "colorful" language, the trial court disagreed. In so doing, the trial court stated:

You don't put something out like that. I would not even knock at a door if I saw a sign like that because I'd be afraid, and I don't even live there.

Your interpretation, your interpretation of what you think is threatening and what's not, perception is everything and you would know that, especially, you say you're a behavior coach. . . . And in, it's, it's very disturbing.¹⁹

Defendant's sign is a threat. In *Miller v. Citizen Publishing Co.*, 210 Ariz. 513, 115 P.3d 107 ¶29 (2005) the Arizona Supreme Court stated:

[T]he court determined that "true threats" are those statements made "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or take the life of [a person]."

(Citations omitted). The language of the sign speaks for itself.

Although Defendant contends Plaintiff experienced no fear as the police were not called or involved, Defendant's argument fails. Not only is there no requirement of police involvement to prove fear on a victim's part, the state of mind of the victim is not material. The Court of

¹⁶ *Id.*, at p. 87, ll. 7–14.

¹⁷ The trial court specifically asked Defendant if he had anything else when he finished testifying. Transcript, *id.*, at p. 52, ll. 10–11 and p. 55, l. 10.

¹⁸ *Id.*, at p. 55, ll. 16–18.

¹⁹ *Id.*, at p. 86, ll. 20–25, p. 87, ll. 1–6.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2010-000857-001 DT

05/09/2011

Appeals established a reasonable person standard in evaluating threats. “In other words, would a *reasonable person* foresee that the statement would be understood by those who heard the statement as a genuine threat to inflict harm.” *In re Ryan A*, 202 Ariz. 19, 39 P.3d 543 ¶ 11 (Ct. App. 2002). The Court of Appeals referred to Webster’s Dictionary, where the term threatens is defined as “a person ‘threatens’ another by uttering “an expression of intention to inflict evil, injury or damage”. *In re Kyle M.*, 200 Ariz. 447, 27 P.3d 804 ¶ 18 (Ct. App. 2001).

In this case, the trial court determined a reasonable person would read Defendant’s “Caution” sign as a genuine threat and not as colorful language or merely a sign to deter trespassers. The sign is not addressed to trespassers. Although a specific victim is not listed, the sign is directed to anyone who might enter the home. Plaintiff, as apartment manager, was a person who might, under the lease terms,²⁰ enter the home. Plaintiff testified to other indicia of Defendant’s conduct that scared her (staring) and also stated that Defendant expressed displeasure with his current unit. The sign’s explicit language referring to stabbing, shooting, punching, killing, and suffering injuries would cause a reasonable person to feel threatened.

Defendant’s contention relates to the sufficiency of the evidence presented to the trial court. In reviewing the sufficiency of the evidence, the appellate court determines if substantial evidence supports the factual findings when viewed in the light most favorable to sustaining those finding. Conflicting evidence is reviewed in favor of sustaining those findings. *State v. Bearup*, 221 Ariz. 163, 211 P.3d 684, ¶ 16 (2009). Based on the testimony and exhibit admitted in evidence, this Court concludes Plaintiff presented sufficient evidence to support the trial court’s decision. Defendant posted a sign on his door “!!Caution !! If you enter Unit # 204 Without Permission or notification you could be but not limited to: shot, stabbed, suffer injuries, punched, killed.” Although Defendant characterized this language as “colorful,” the trial court determined that the language evidenced a threat. Since this issue requires “an assessment of conflicting procedural, factual, or equitable considerations which vary from case to case,”²¹ it is not appropriate for this Court to substitute its judgment for that of the trial court. This Court concludes that the trial court correctly resolved this case.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court appropriately found a basis for the eviction action.

²⁰ Exhibit 1 paragraph 27 “When We May Enter”.

²¹ *State v. Chapple, id.*, at 297 n. 18.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2010-000857-001 DT

05/09/2011

IT IS THEREFORE ORDERED affirming the judgment of the West McDowell Justice Court.

IT IS FURTHER ORDERED remanding this matter to the West McDowell 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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