

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2011-000135-001 DT

08/09/2011

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT  
T. Melius  
Deputy

SIMON ESTEPHAN

SIMON ESTEPHAN  
20441 N 40TH LN  
GLENDALE AZ 85308

v.

IVAN PINNER (001)

IVAN PINNER  
20451 N 37TH AVE  
GLENDALE AZ 85308

NORTH VALLEY JUSTICE COURT  
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

**Lower Court Case No. CC2010517936**

Defendant Appellant Ivan Pinner (Defendant) appeals the North Valley Justice Court's determination that he was guilty of a forcible detainer. Defendant contends the trial court erred. For the reasons stated below, this Court affirms the trial court's judgment.

I. FACTUAL BACKGROUND.

On October 13, 2010, Plaintiff Appellee (Plaintiff) Simon Estephan filed a forcible detainer action against Defendant claiming Defendant breached his lease by allowing his girlfriend to live at the residence. Plaintiff claimed Defendant owed him \$300.00 for the costs of cleaning and deodorizing after eight cats<sup>1</sup> and \$106.00 for court costs and processing fees. This was Plaintiff's second attempt to evict Defendant.<sup>2</sup> The previous month, in September, 2010, Plaintiff filed a forcible detainer, making the same allegations. Plaintiff was not successful in evicting Defendant. This second forcible detainer listed the non-compliance as having been on September 28, 2010. Defendant answered the complaint and alleged the eviction action lacked merit and was retaliatory. Plaintiff provided proof—in the form of an e-mail, from Defendant—indicating (1) he was not living at the rental home and (2) Vallen Brooks—Defendant's girlfriend—was residing at the home.<sup>3</sup>

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<sup>1</sup> Defendant admitted to the presence of 3 cats in his Answer—Forcible/Special Detainer.

<sup>2</sup> Judgment in CC2010-502342. The case was dismissed based on a procedural error. Audio recording of October 20, 2010, 11:47:46.

<sup>3</sup> Plaintiff's Exhibit 1.

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The underlying problems between the parties stemmed from Defendant's September request to modify his lease and allow his girlfriend and her cats to live at the residence with him. Plaintiff was initially only willing to accommodate this request if Defendant would agree to an upwards modification of the rent. At that time, the parties were also disagreeing about Plaintiff's ability to enter the rental home, inspect the property, and engage in repair/replacement of the air filter. Defendant did not readily agree to these inspections. Nonetheless, Plaintiff sought entry into the home. On September 28, 2010, Plaintiff mailed a 10 day notice to Plaintiff requesting a 10 day cure for Defendant's breach of the pet and visitor provisions of his lease.<sup>4</sup> Plaintiff ultimately entered the home on October 7, 2010, nine days after sending the 10 day notice to Defendant.<sup>5</sup> Plaintiff also announced he planned to do daily inspections of the property.

The court held a bench trial on October 20, 2010. Plaintiff testified and alleged Defendant rented the property but it was never Defendant's intent to live there.<sup>6</sup> Plaintiff described the continuing problems he had with Defendant. These problems began when Plaintiff requested access to the home so he could replace the air filter. Defendant repeatedly found ways to prevent Plaintiff from coming to the home, first alleging work conflicts and later stating he was ill.<sup>7</sup> On September 13, 2010,—by e-mail—Defendant told Plaintiff he was not living at the home

Plaintiff testified about Defendant's girlfriend living at the property<sup>8</sup> and Defendant's e-mail which stated "I can't lie to you anymore. I have not been living at the home."<sup>9</sup> Plaintiff further said he had explained to the Defendant that Defendant was the only person who was to live at the home when Defendant first rented the home.<sup>10</sup>

Defendant also testified about this e-mail. He stated he sent the e-mail to Plaintiff because Defendant was angry with his girlfriend, Ms. Vallen,<sup>11</sup> and he was trying to "get even"<sup>12</sup> with her. Defendant did not explain how this e-mail to Plaintiff would help him "get even." Defendant also stated Ms. Vallen never lived in the house<sup>13</sup> but said she visits twice a week<sup>14</sup> and keeps clothes and shoes there.<sup>15</sup>

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<sup>4</sup> Plaintiff's Exhibit 2, re: Notice of Intent to Terminate Lease for Breach of Rental Agreement (Ten Day Notice), dated September 28, 2010. The notice lists the problems as: (1) Possession of pets in violation of lease agreement; and (2) Occupancy of the rental property by persons not named on the lease or rental agreement.

<sup>5</sup> Audio recording, *id.*, at 12:09:29.

<sup>6</sup> *Id.* at 11:55.

<sup>7</sup> *Id.* at 12:04:48–12:05.

<sup>8</sup> *Id.* at 11:57:50–11:58:48.

<sup>9</sup> *Id.* at 11:57:27; and at 12:05:09.

<sup>10</sup> *Id.* at 12:03:26.

<sup>11</sup> *Id.* at 12:32:18.

<sup>12</sup> *Id.* at 12:32:50.

<sup>13</sup> *Id.* at 12:32:36.

<sup>14</sup> *Id.* at 12:24:43.

<sup>15</sup> *Id.* at 12:27:21.

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Plaintiff testified about the October 7, 2010, home inspection. Upon arriving at the home, Plaintiff found both Defendant and Defendant's girlfriend there.<sup>16</sup> Plaintiff stated Ms. Vallen was present when he arrived. Plaintiff found Ms. Vallen's personal property<sup>17</sup> when he inspected the property. Plaintiff also stated that during the inspection Defendant and his girlfriend admitted—to the police officer called for a civil standby—she was living at the home.<sup>18</sup>

The trial court granted judgment in favor of Plaintiff and made the following findings of fact: (1) there was a landlord–tenant relationship; (2) there was an unauthorized occupant living in the unit; (3) the landlord filed notice of breach of the lease agreement on September 28, 2010; (4) the Defendant's girlfriend was apparently living at the home on October 7, 2010; (5) the 10 day cure period did not end until October 8, 2010; (6) There was no testimony or evidence showing Defendant's girlfriend moved out on October 8, 2010; (7) Defendant's testimony was not credible; and (8) there was no factual basis indicating a retaliatory eviction pursuant to A.R.S. §22–1381. Defendant was ordered to pay court costs of \$106.00.

Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

*A. Did the Defendant File a Timely Appellate Memorandum.*

Plaintiff alleges Defendant filed an untimely memorandum based on the date stamp on Defendant's Memorandum. The Justice Court provided a notice indicating the incorrect date resulted from an error on the court's date stamper. All parties were notified of the following:

Please note the Appellant Memorandum originally stamped with incorrect date because our date stamper was not working properly. Date has been changed to reflect correct filing date. Copy included for your records.

The trial court mailed the notice to all parties on January 6, 2011. The trial court recognized the error on the date stamp. Consequently Plaintiff's argument fails.

*B. Did the Trial Court Demonstrate Bias Against a Party Because the Party Previously Appeared Before the Trial Court.*

Defendant challenges the trial court's impartiality in his appellate memorandum. However, he provides no factual or legal support for this challenge. When challenging a trial court's impartiality, the party must overcome a strong presumption that trial judges are free of bias and prejudice. To meet this burden, the party must prove either a hostile feeling, spirit of ill-will, undue friendship, or favoritism towards one of the litigants. *State v. Cropper*, 205 Ariz. 181, 185, 68 P.3d 407, 411 (2003). Defendant suggests the trial court is biased merely because other cases

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<sup>16</sup> *Id.* at 12:10:08.

<sup>17</sup> *Id.* at 12:11:09–12:11:27 and 12:18:23–12:18:59.

<sup>18</sup> *Id.* at 12:11:49–12:02:02 and 12:12:37–12:12:47.

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involving Plaintiff have been assigned to the trial judge. To that end, he attaches court print-outs showing the trial judge was assigned five cases involving the Plaintiff.<sup>19</sup> The Plaintiff was not successful in all of these cases; at least two of the five cases ended in a dismissal or termination. The Defendant failed to present any credible evidence to support his claim and overcome the strong presumption of impartiality. Defendant's argument fails.

*C. Did the Trial Court Abuse Its Discretion in Granting Judgment to Plaintiff on the Forcible Detainer.*

Defendant alleges the trial court abused its discretion in finding Defendant guilty of a forcible detainer and claims he timely cured any breach of the covenants of his lease. He states the trial court erred by: (1) allowing Plaintiff to perform "an illegal inspection" following the dismissal of the first forcible detainer action; (2) failing to provide Defendant's girlfriend the opportunity to testify; and (3) ruling Defendant breached his lease when Plaintiff failed to prove Defendant did not cure the alleged breach. In determining if the trial court abused its discretion, this court must consider the standards for an abuse of discretion claim. The Supreme Court of Arizona stated:

In exercising its discretion, the trial court is not authorized to act arbitrarily or inequitably, nor to make decisions unsupported by facts or sound legal policy. . . . Neither does discretion leave a court free to misapply law or legal principle.

*City of Phoenix v. Geyley*, 144 Ariz. 323, 328–329, 697 P.2d 1073, 1078–1079. (1985) (citations omitted). Thus, a trial court abuses its discretion if it:

1) applied the incorrect substantive law or preliminary injunction standard; 2) based its decision on a clearly erroneous finding of fact that is material to the decision to grant or deny the injunction; or 3) applied an acceptable preliminary injunction standard in a manner that results in an abuse of discretion.

*McCarthy Western Constructors v. Phoenix Resort Corp.*, 169 Ariz. 520, 523, 821 P.2d 181, 184 (Ct. App. 1991) (citation omitted). In addressing discretionary conduct, the Arizona Supreme Court stated:

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 im-

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<sup>19</sup> Defendant provides a copy of the case history for: (1) 0724CV–0206168, *Estephan v. Smith*, an adjudicated case showing no judgments on file; (2) 0724CV–030111311, *Estephan v. Smith*, a dismissed case; (3) 0724CV–0400000893, *Estephan v. Coria*, a terminated case; (4) CC2007–003965, *Estephan v. Howard*, an adjudicated case showing no judgment on file; and (5) CC2010–0502343, *Estephan v. Pinner*, the dismissed September 27, 2010 forcible detainer action.

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mediate 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, there are contradictory facts. Indeed, Defendant admits to lying to his landlord on at least one occasion. In his Appellate Memorandum,<sup>20</sup> Defendant asserts:

. . . I emailed Simon Estephan and lied to him. I stated that I never lived there and that my girlfriend has been there since day one. None of that was true.

At the hearing, the trial court remarked about the contents of the e-mail and found it a “startling” admission of unauthorized occupancy. Defendant now wants this court to discredit his prior admission. This is an “assessment of conflicting procedural, factual or equitable considerations . . . which can be better determined or resolved by the trial judge.” The trial court made a factual determination and it is not appropriate for this Court to “substitute [its] judgment for that of the trial judge.” This Court does note Defendant’s assertion in his appellate memorandum about the truthfulness of his prior statements casts his credibility into serious doubt.

Defendant also asserts the trial court granted “an illegal inspection” on September 27, 2010, after Defendant “won the false eviction action.” This assertion both misstates the facts and is inappropriate in the present appeal. Defendant did not “win” any previous case. The case was procedurally dismissed and neither party won or lost at the prior proceeding. Furthermore, any disagreement with orders stemming from a prior proceeding must be addressed in a motion to set aside the order pursuant to Rule 15, RPEA, or an appeal from that action pursuant to Rule 17, RPEA. It is inappropriate to ask this Court to address allegations from a different case in this appeal. Defendant’s notice of appeal applies only to the trial court’s actions in this case.

The object of a notice of appeal is to advise the opposite party that an appeal has been taken from a specific judgment in a specific case. We have held that a notice of appeal cannot apply to two separate cases.

*State v. Good*, 9 Ariz. App 388, 392, 452 P.2d 715, 719 (Ct. App. 1969) (citations omitted).

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<sup>20</sup> Defendant’s Appellant Memoranda [sic], p. 2.  
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Defendant also claims his girlfriend did not get a chance to testify at the trial. His girlfriend was present in the courtroom. Defendant had the opportunity to call her as a witness and have her testify. If his trial strategy precluded her testimony, he must live with his choice.

Defendant next asserts he cured the defect on October 7, 2010, the ninth day after he received the 10 day notice. He provides no citation to the record about this assertion. Instead, Defendant maintains Plaintiff failed to demonstrate that Defendant did not cure any breach of his lease. Defendant argues the trial court erred in finding him guilty of a forcible detainer when he allegedly cured the defect.

Defendant is correct in asserting A.R.S. § 33–1368 allows 10 calendar days after the 10 day calendar notice is received. Here, both parties agree Plaintiff posted his 10 day notice on September 28, 2010. Plaintiff filed his forcible detainer action on October 13, 2010, more than 10 calendar days after first posting the notice on September 28, 2010.

Forcible detainer actions are summary statutory proceedings. RPEA, Rule 2. The only issue to be tried is the right to possession. *Gangadean v. Erickson*, 17 Ariz. App. 131, 495 P.2d 1338 (Ct. App. 1972). In this case, Plaintiff asserts his right to possession of the premises. Defendant challenges this assertion but Defendant’s testimony and allegations may be cast into doubt because of his admission he lied in the past.

Defendant admitted his girlfriend kept cats on the property. A.R.S. 33–1368 (G) provides that a tenant “shall be held responsible for the actions of the tenant’s guests that violate the lease agreement.” Keeping cats on the property violated the lease agreement. Plaintiff also established Defendant had an unauthorized person living on the premises. Both of these conditions violated the lease.

Plaintiff filed an earlier attempt to evict Defendant in September. Although this suit was procedurally dismissed, the action certainly should have given Defendant warning his girlfriend was not able to stay on the premises and cats were not allowed. Nonetheless, Defendant continued to allow his girlfriend access to the premises. The trial court determined Defendant’s girlfriend lived on the premises on October 7, 2010. This is a factual determination.

Defendant next alleges Plaintiff failed to prove Defendant did not cure the breach on the 10<sup>th</sup> day after the eviction notice was filed. Defendant’s argument is premised on Plaintiff’s failure to return to the property after the ninth day following the eviction notice. Defendant asserts he cured the breach on October 7, 2010—the ninth day. He further asserts Plaintiff never returned to the property after October 7 and therefore cannot show Defendant did not cure the breach.<sup>21</sup> The only evidence of this cure is Defendant’s unsupported testimony. Defendant presented this argument to the trial court. Plaintiff, on the other hand, argued the breach was not

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<sup>21</sup> This Court notes Defendant filed an Injunction Against Harassment against Plaintiff. The IAH precluded Plaintiff from going to the property. Defendant cannot use the IAH procedure as both a sword and a shield. He cannot argue Plaintiff’s failure to go to the residence after he stopped Plaintiff from going there.

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cured. Plaintiff established Defendant allowed an unauthorized person to live on the premises. Defendant admitted his girlfriend was there at least two days per week. Clearly, the parties disagree about whether Ms. Vallen was living at the premises. This Court finds that when and if any cure—of the breach—occurred is a factual question left to the sound discretion of the trial court.

The evidence in this case conflicts. Rule 13 (a) RPEA provides that the trial court shall determine whether the facts alleged, if proven, would be sufficient to determine that plaintiff has a superior right of possession because of a material breach of the lease agreement. Factual questions are usually determined by the trial court. An appellate court does not normally sit as a second chance to retry conflicting factual assertions and does not re-weigh the evidence to determine if it would reach the same conclusion as the original trier-of-fact. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Here, the trial court was required to determine which party was more credible. Because this issue requires an “assessment of conflicting procedural, factual, or equitable considerations which vary from case to case” rather than a “question . . . of “law or logic”<sup>22</sup> it is not appropriate for this Court to substitute its judgment for that of the trial court. This Court will not look over the shoulder of the trial court when the dispute involves conflicting factual considerations. The trial court chose to disbelieve Defendant and believe Plaintiff. The trial court found Defendant’s testimony was not credible. This Court will adopt that ruling.

Defendant alleges—in his conclusion—Plaintiff’s action is based on hearsay because the trial court admitted testimony about the September 13, 2010 e-mail from Defendant to Plaintiff. Defendant did not show how or why he asserts Plaintiff’s action is hearsay. Additionally, Defendant did not object to the e-mail or develop this argument at trial. Since Defendant failed to preserve any objection at trial, he cannot now raise the argument on appeal. An appellate court usually will not address issues that were not first presented at trial. *Town of South Tucson v. Board of Sup’rs of Pima County*, 52 Ariz. 575, 582, 84 P.2d 581, 584 (1938); *accord, Harris v. Cochise Health Systems*, 215 Ariz. 344, 160 P.3d 223 ¶ 17 (Ct. App. 2007).

One of the rules of well-neigh 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.

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<sup>22</sup> *State v. Chapple, id.*  
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It undoubtedly has the power, but ordinarily will not exercise it. The question is one of administration, not of power.

*Town of South Tucson, id.*, 52 Ariz. at 582–83, 84 P.2d at 584 (citations omitted).

Because this case involves competing factual considerations best left to the trial court to determine, this Court concludes the trial court did not abuse its discretion and correctly resolved this case.

III. CONCLUSION.

Based on the foregoing, this Court concludes the North Valley Justice Court did not err.

**IT IS THEREFORE ORDERED** affirming the judgment of the North Valley Justice Court.

**IT IS FURTHER ORDERED** remanding this matter to the North Valley 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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