

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000581-001 DT

12/20/2011

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
J. Eaton
Deputy

FIFTY THIRD LANE LLC
JIM MOYER

FIFTY THIRD LANE LLC
PO BOX 38481
PHOENIX AZ 85069
JIM MOYER
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PHOENIX AZ 85069

v.

GENETTE COBURN (001)

GENETTE COBURN
3140 W PECAN DR
PHOENIX AZ 85041

MARYVALE JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2010574081

Defendant Appellant Genette Coburn (Defendant) appeals the Maryvale Justice Court's determination that she was guilty of a forcible detainer. Defendant contends the trial court erred. For the reasons stated below, the Court reverses the trial court's judgment.

I. FACTUAL BACKGROUND.

On September 18, 2010, Defendant signed a lease agreement.¹ As part of the payment terms, Defendant was to pay rent of \$640.00 per month.² Although Defendant paid rent for October and November, 2010, she failed to pay her December rent timely.³ Plaintiff filed a five-day notice⁴ and attempted to serve Defendant by (1) sending her a copy by certified mail on

¹ Trial Transcript, January 5, 2011, at p. 4, ll. 21–24.

² *Id.* at p. 5, l. 8.

³ *Id.* at p. 6, ll. 7–8.

⁴ *Id.* at p. 6, ll. 12–15.

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December 9, 2010; and (2) nailing a copy to her front door on December 23, 2010.⁵ Defendant never claimed the letter.⁶ Defendant was served—by personal service—with the Summons and Complaint on December 28, 2010.⁷ The trial court held a bench trial on January 5, 2011.

At trial Plaintiff admitted he refused to accept Defendant's rent when she offered it to him.⁸ In explanation, Plaintiff stated he did not accept the rent because Defendant had previously told him she was moving out. Plaintiff also admitted he did not bring Defendant a copy of the signed lease agreement.⁹

Defendant testified about her attempts to pay the rent and stated Plaintiff refused to accept the rent.¹⁰ She stated she tried on two occasions to pay the rent but could not force him to take it.¹¹ She also claimed she did not believe she owed the entire rental amount. Defendant claimed: (1) there were roaches; (2) the windows did not lock; and (3) there was no hot water.¹²

The trial court determined Plaintiff's failure to provide Defendant with a copy of the lease turned the lease into a month to month agreement. Defendant testified she did not believe she owed the full rental amount and stated:

I don't feel that I owe him because I still - - I asked him for a court - - a - - a copy of the lease agreement in front of you the last time we were here, and I still yet haven't received a lease agreement.

Defendant also testified about problems with the premises and stated she asked the landlord to fix these problems.¹³ She stated there were problems because of roaches, a missing window lock and a lack of hot water. "so we have to boil water to take a bath to go to work, to go to school."¹⁴ The trial court interpreted this comment as a refusal to pay the rent and determined it was not a legal defense. The trial court granted Plaintiff judgment for the rent for December and January and for court costs. In closing,—and in response to Defendant's query about giving something [the rent] to Plaintiff—the trial court informed defendant she "refused to give them to him".¹⁵

⁵ *Id.* at p. 6, ll. 20–24.

⁶ *Id.* at p. 7, ll. 24–25. See also Notice of Intent to Terminate Rental Agreement witness by Dane Layland on December 23, 2010.

⁷ Declaration of Service dated December 28, 2010.

⁸ Trial transcript, *id.* at p. 10, l. 1.

⁹ *Id.* at p. 11, l. 19.

¹⁰ *Id.* at p. 12, ll. 1–4. According to Defendant, Plaintiff stated he would "rather for me [sic] to be gone instead of paying the rent."

¹¹ *Id.* at p. 14, ll. 19–24 and p. 15, ll. 1–7.

¹² *Id.* at p. 12, ll. 10–21 and p. 13, ll. 13–17.

¹³ *Id.* at p. 12, ll. 1–8.

¹⁴ *Id.* at p. 12, ll. 13–21.

¹⁵ *Id.* at p. 20, ll. 19–20.

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Defendant filed a timely appeal. 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 Abuse Its Discretion In Granting Plaintiff A Forcible Detainer Judgment.*

Defendant challenges the trial court’s ruling and claims the trial court abused its discretion by granting Plaintiff judgment despite Plaintiff allegedly (1) acting in bad faith when he refused Defendant’s December rent; (2) failing to meet his burden of proof and (3) improperly filing a Complaint in forcible detainer. Defendant begins by requesting that this Court review the trial court’s actions de novo. In requesting de novo review, Defendant misunderstands this court’s function. While the Superior Court may review certain actions de novo, not all decisions by a trial court are reviewed in this manner. Thus, this Court must review the trial court’s factual findings in the light most favorable to supporting the trial court’s judgment, *Sw. Soil Remediation Inc. v. City of Tucson*, 201 Ariz. 438, 440, 36 P.3d 1208, 1210 ¶ 2 (Ct. App. 2001). However, this Court will review the trial court’s legal conclusion de novo. *In re Estate of Headstream*, 214 Ariz. 530, 532, 155 P.3d 480, 482 ¶ 9 (Ct. App. 2007).

Plaintiff filed a forcible detainer action. A forcible detainer is a summary proceeding designed to provide a speedy remedy to gain possession of property. The trial court in a forcible detainer is limited to determining the right to actual possession. Once a forcible detainer is filed, the court must determine if there is a legal defense to the claim. Ariz. R.P. Evict. Act (RPEA) Rule 11 (b) (1). Here, Defendant readily admitted to failing to timely pay the December rent. However, she stated she tried to pay the rent after the due date but Plaintiff refused to accept the rent because her attempt was not timely. Plaintiff was obligated to accept rent—even if late—provided it was offered during the “cure” period.¹⁶ A.R.S. §22–1368 (B).

Defendant also testified she was not willing to pay the full amount. Instead, she argued for an offset because Plaintiff failed to repair the premises. She alleged problems with a window, roaches, and a lack of hot water as the reason the rent should be less than the full amount. These problems, are subject to the provisions of the Arizona Residential Landlord and Tenant Act (ARLTA), A.R.S. § 33–1301 et seq.

A.R.S. § 33–1324 requires that landlords maintain fit premises. Maintaining hot water is part of maintaining fit premises. A.R.S. § 33–1324 (A) (6). Any lack of hot water can materially affect the health and safety of the occupants of a residential dwelling unit. A.R.S. §9–1303 (1) (c). Here, the Landlord failed to provide Defendant with necessary hot water. She testified she

¹⁶ 17 A.R.S., RPEA, App. A informs tenants: If this lawsuit has been filed for not paying rent, the tenant can stop it and continue living in the residence by paying all rent now due, late fees, attorney’s fees and court costs. After a judgment has been granting, reinstatement of the lease is solely in the landlord’s discretion.

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needed to boil her water in order to have hot water in which to bathe. This falls below the standard mandated by law.

During her residency, Defendant complained to the landlord about the problems with the premises. Thereafter, however, the landlord refused to accept Defendant's rent payments. Landlords are prohibited from engaging in retaliatory conduct. A.R.S. § 33-1381 states:

Except as provided in this section, a landlord may not retaliate by increasing rent or decreasing services or by bringing or threatening to bring an action for possession after any of the following:

1. The tenant has complained to a governmental agency charged with responsibility for enforcement of a building or housing code of a violation applicable to the premises materially affecting health and safety.
2. The tenant has complained to the landlord of a violation under section 33-1324. . .

Should the landlord act against the tenant, there is a (1) a presumption that the landlord's conduct was retaliatory, and (2) a defense to any possessory action the landlord undertakes. While a landlord may—according to A.R.S. § 33-1381 (C)—bring an action if the tenant defaults on the rent, the landlord may not contribute to the problem by refusing to accept the rental payment. In *Van Buren Apartments v. Adams*, 145 Ariz. 325 701 P.2d 583 (Ct. App. 1984) the Court of Appeals held that tenants could raise the retaliatory eviction defense in a forcible detainer action. Here, Defendant now attempts to raise the same defense by claiming a lack of hot water and unfit living conditions. The trial court did not specifically rule on any retaliatory eviction defense. Although Defendant did discuss her issues with the lack of repairs, she failed to raise this defense with the trial court. The general rule is appellate courts will not consider a question not first litigated in the lower court. *Town of South Tucson v. Board of Sup'rs of Pima County*, 52 Ariz. 575, 582, 84 P.2d 581, 584. (1938).

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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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 Defendant failed to present this claim to the trial court, this Court finds she waived any retaliatory eviction defense.

B. Did Plaintiff State a Claim On Which Relief Could Be Granted When They Filed Their Complaint Alleging Defendant Failed To Tender The Full Amount of Rent.

On appeal, Defendant alleges Plaintiff failed to state a claim on which relief could be granted because “[a]ppellant tendered to Appellees the full amount owed in certified funds before Appellees filed their complaint.”¹⁷ This is a fact question. In court, Defendants argued they attempted to pay their rent and alleged Plaintiff refused to accept it.¹⁸ Plaintiff asserted he had not been paid for December or January rent.¹⁹ Defendant agreed the December rent was not paid when she testified she had the December rent with her.²⁰ The trial court determined the December rent had not been timely paid. While this Court agrees with Defendant’s legal position that the payment of rent would preclude the filing of a forcible detainer action, this Court must adopt the trial court’s factual finding that the rent was not timely paid. Therefore, Plaintiff did state a claim on which relief could be granted.

C. Did Plaintiff Establish Defendant Failed to Tender Rent By A Preponderance of the Evidence.

Defendant claims Plaintiff did not meet his burden of proof by a preponderance of the evidence. This claim lacks merit. Each party provided testimony to the trial court. Neither party called any witnesses. The parties dispute a factual question where the evidence conflicted. Consequently, the fact portions will be reviewed on an abuse of discretion standard. Any interpretation and application of statutes will be reviewed *de novo*. *Bank of New York Mellon v. De Meo*, 227 Ariz. 192, 254 P.3d 1138 ¶ 11 (Ct. App. 2011). 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 conclusion. 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

¹⁷ Appellant’s Opening Memorandum, p 4, ll. 8–9.

¹⁸ Trial Transcript, *id* at p. 11 l. 25, and p. 12, l. 1–2.

¹⁹ *Id.* at p. 9, ll. 2–5.

²⁰ *Id.* at p. 12, l. 2.

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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. Plaintiff asserts Defendant did not timely pay the rent while Defendant maintains she offered the rent before—and even during—the trial. The trial court found Defendant did not timely pay the rent. Because determining which party to believe is a fact question and within the trial court’s discretion, and because the parties presented contrary versions of the facts, this Court must affirm the trial court’s factual decision.

D. Did Plaintiff Comply With The Procedural Requirements Before Filing The Forcible Detainer.

Forcible detainer actions are limited proceedings. They are intended to provide “a summary, speedy and adequate remedy for obtaining possession of the premises withheld by a tenant”—and allow the rightful owner to retain—or gain—possession of the property. *Old Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 204, 167 P.2d 394, 397 (1946). The right to actual possession is the only issue to be determined in a forcible detainer action. *Id.* This standard has been re-iterated in numerous decisions. *Gangadean v. Erickson*, 17 Ariz. App. 131, 134, 495 P.2d 1338, 1341 (Ct. App. 1972),

Before a party can proceed with a forcible detainer, the party must follow the prescribed procedural safeguards. Because forcible detainer actions are statutory proceedings and because of the expedited nature of the forcible detainer action, the procedural features of the statutes are integral to their function. *Hinton v. Hotchkiss*, 65 Ariz. 110, 114, 174 P.2d 749, 753 (1946).

A.R.S. § 33–1368 provides a landlord with the procedure for obtaining relief if the tenant fails to pay rent in a timely manner. The landlord may terminate the rental agreement if the tenant fails to pay rent within five days after written notice by the landlord of (1) nonpayment and of (2) the landlord’s intent to terminate the rental agreement if the rent is not paid within that time period. This statute requires the landlord to give the tenant written notice of the landlord’s intent to terminate the rental agreement before filing the forcible detainer action. Written notice gives the tenant the opportunity to cure the defect before the summary proceeding is instituted.

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Tenants have five days to cure any non-payment of rent. A.R.S. § 33–1368 (B). A review of the chronology of this case shows the notice of breach was served—by personal service—on Defendant on Thursday, December 23, 2010. Plaintiff filed the Summons and Complaint on December 28, 2010. In so doing, he violated the five day notice provision. When counting days, the day of the act from which the time period begins to run is not counted. Additionally, when the time period is for less than 11 days, intermediate Saturdays, Sundays, and legal holidays are not to be included. A.R.C. P. Rule 6 (a). Because of the intervening weekend and Christmas holiday, the first day was Friday, December 24, 2010. Day 2 was Monday, December 27, 2010. The fifth day after service was Thursday, December 30, 2010. Under the rules, then, Defendant had until the end of Thursday, December 30, 2010, in which to comply with Plaintiff’s demand for payment and Plaintiff could not file his complaint with the court until the sixth day or December 31, 2010. Indeed, the Arizona Supreme Court ruled forcible entry and detainer proceedings cannot be commenced until five days after the giving of this notice. *Alton v. Tower Capital Co., Inc.*, 123 Ariz. 602, 601 P.2d (1979).

A.R.S. § 33–1368 (B) states:

A tenant may not withhold rent for any reason not authorized by this chapter. If rent is unpaid when due and the tenant fails to pay rent within five days after written notice by the landlord of nonpayment and the landlord’s intention to terminate the rental agreement if rent is not paid within that period of time, the landlord may terminate the rental agreement by filing a special detainer pursuant to § 33–1377. Before filing of a special detainer action the rental agreement shall be reinstated if the tenant tenders all past due and unpaid periodic rent and a reasonable late fee set forth in a written rental agreement, After a special detainer action is filed the rental agreement is reinstated only if the tenant pays all past due rent, reasonable late fees set forth in a written rental agreement, attorney fees and court costs. After a judgment has been entered in a special detainer action in favor of the landlord, any reinstatement of the rental agreement is solely in the discretion of the landlord.

RPEA Rule 13 (a) (2) provides the trial court shall determine if the tenant (1) received a proper termination notice and (2) was provided the applicable opportunity to cure any defect. If (1) the notice was not properly served; or (2) if the notice did not comply with statutory mandates, the trial court must dismiss the action. The trial court failed to comply with these statutory requirements. Because the trial court did not comply with this mandate, the trial court erred. Defendant was entitled to the full amount of time within which to cure the alleged defect. Therefore, this Court finds the trial court erred in failing to dismiss the action.

Defendant requests her costs on appeal as the prevailing party. Plaintiff alleged the matter is based on a rental agreement. Pursuant to RPEA, Rule 13(c)(2)(H), Defendant is

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awarded her costs. Defendant further requests the underlying action be dismissed with prejudice but provides no legal authority or reason as to why the case should be dismissed with prejudice.

III. CONCLUSION.

Because Defendant prevailed in this matter she is awarded her costs for this appeal. The decision of the trial court is vacated without prejudice.

IT IS THEREFORE ORDERED reversing the judgment of the Maryvale Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Maryvale 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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