

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-094631

02/06/2013

COMM. BERNARD C. OWENS

CLERK OF THE COURT
K. Conway
Deputy

CASA DEL MONTE INC

KELLIE J CALLAHAN

v.

COREY L COX

COREY L COX
4525 N 66TH ST # 76
SCOTTSDALE AZ 85251

MINUTE ENTRY

Defendant Corey Cox has filed motions to vacate the judgment dated October 19, 2012, in this forcible detainer case. She filed her first motion on November 9, 2012, and on November 16, 2012, she filed a second “motion to vacate eviction judgement (sic), award defendant reasonable expenses, attorney fees and double damages.” On November 26, 2012, she filed a “correction to motion to vacate eviction.” Plaintiff filed its response to the motions on December 3, 2012. On December 12, 2012, defendant filed her “response to plaintiff’s response to November 15 motion to vacate eviction judgement (sic),” and she filed a “correction to response to response to my motion” on December 14, 2012. Oral argument has not been requested, and the Court finds that oral argument would not assist it in resolving defendant’s motion.

Plaintiff filed its complaint on June 22, 2012, and served defendant on June 26, 2012. At the initial return hearing on July 3, 2012, both parties appeared, informed the Court they were discussing settlement and together moved to continue the initial hearing. The matter was continued to July 13, 2012. Plaintiff appeared at the July 13, 2012, hearing, but defendant neither appeared nor filed an answer to the complaint. The Court granted plaintiff’s request to proceed by default and found that by failing to appear or answer that defendant admitted the allegations in the complaint. The court directed plaintiff to lodge a form of judgment along with its

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-094631

02/06/2013

application for attorney fees and costs. The Court heard oral argument on plaintiff's application for attorney's fees on August 28, 2012, and ruled by minute entry order signed September 26, 2012. Plaintiff then lodged a form of judgment and the Court signed it on October 19, 2012.

In her motions to set aside the judgment, defendant initially argues that prior to filing its complaint plaintiff failed to give her proper notice pursuant to statute and her sublease.

Defendant's statutory argument is that she did not receive the notice required by A.R.S. 33-1242, a statute that applies to alleged violations regarding the "condition of the property." Plaintiff has not asserted that there were problems with the condition of defendant's property. It only alleges that she did not pay her "ground rents, taxes, maintenance charges and/or assessments." By its terms, A.R.S. 33-1242 does not apply to this situation.

With respect to notice required by the sublease, defendant argues that plaintiff did not send her the written notice required by section 14.3(a) of the sublease. Section 14.3 directs the lessor to give written notice to a lessee that a default has occurred regarding the payment of "ground rents, taxes, maintenance charges and/or assessments" and that if the default continues for 60 days after this written notice that lessee's sublease could be terminated pursuant to section 14.4 of the sublease. For its part, plaintiff alleges it sent defendant two notices. The first was dated April 3, 2012. It included defendant's payment history and asked her to notify plaintiff if the history was not accurate. It did not say she had 60 days to cure any deficiency or face termination of her lease. The second notice was a letter dated April 18, 2012. It informed defendant that she had failed to pay "ground rents, taxes, maintenance charges and/or assessments" for more than 60 days and that her sublease would expire on May 18, 2012, pursuant to section 14.4 of the sublease. Neither notice, however, is the notice required by section 14.3. The April 3, 2012, letter did not inform defendant what would happen if the delinquency in her account continued for 60, and plaintiff sent the April 18, 2012, letter only 15 days later. The April 18, 2012, letter is clearly the notice required by section 14.4 and is, by the terms of section 14.4, in addition to the notice required by section 14.3. A review of the complaint reveals that plaintiff did not allege that it complied with the section 14.3 notice requirement and plaintiff did not otherwise present evidence that it complied with this section. By her default, defendant admitted to all well-pled allegations in the complaint, but her default does not include an admission to matters that were not pled, and in this case that includes a failure by plaintiff to allege that it complied with the written notice requirement set out in section 14.3. Rule 15(a)(3), Rules of Procedure for Eviction Actions, provides that failure to receive proper notice is a ground to set aside a judgment.

THE COURT FINDS that this rule is properly applied here. There is no basis for finding that plaintiff sent the notice required by section 14.3. If plaintiff seeks to terminate a lease, then it must follow the terms of the sublease at each step. An important and mandatory first step is to

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-094631

02/06/2013

provide the written notice required by section 14.3. Absent compliance, plaintiff cannot declare a default and termination of the sublease.

IT IS THEREFORE ORDERED granting defendant's motion to set aside the October 19, 2012, judgment. That judgment is hereby vacated.

In her motions, defendant also made a number of other arguments, none of which, the Court finds, have merit.

Defendant alleges that the default was premised on a perceived foreclosure of her property and alleged delinquent conduct by her son. The complaint, however, alleged only that defendant failed to pay "ground rents, taxes, maintenance charges and/or assessments." Plaintiff did not make allegations about foreclosure or delinquent conduct in its complaint. There is no merit to this assertion.

Defendant claims she did not appear at the July 13, 2013, hearing because she believed she and plaintiff had reached a settlement. This, in essence, is an assertion of excusable neglect. Rule 15(a)(4), Rules of Procedure for Eviction Actions. Defendant attended the July 3, 2012, hearing where she received actual notice of the July 13, 2012, hearing. The matter was continued so the parties could discuss settlement. Defendant asserted that she did not attend the July 13, 2012, hearing because she thought the parties had reached a settlement. Defendant, however, has not produced a written settlement agreement, and no such agreement was made in open court. See Rule 80(d), Arizona Rules of Civil Procedure. Further, the Court did not issue any notice that vacated the July 13, 2012, hearing. Plaintiff also maintains that defendant took part in settlement discussions on July 12, 2012, and that the discussion concluded without a settlement agreement.

THE COURT FINDS that defendant's neglect regarding her attendance at the July 13, 2012, hearing is not excusable.

Defendant argues that she made a partial payment of the past due "ground rents, taxes, maintenance charges and/or assessments" in the amount of \$5,500 by check dated July 3, 2012. She claims she presented this check to plaintiff on July 4, 2012, and that the money was deducted from her account on July 6, 2012. She argues that acceptance of the payment constitutes a waiver of plaintiff's right to terminate the rental agreement, citing A.R.S. 33-1371. Plaintiff responds by arguing that it informed defendant by letter dated July 11, 2012, that the payment was not accepted as full payment, and that it reasserted this position during settlement discussions with defendant on July 12, 2012. Thus prior to the hearing on July 13, 2012, defendant knew plaintiff's position about the payment, yet she did not file an answer and did not appear at the July 13, 2012, to answer orally.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-094631

02/06/2013

THE COURT FURTHER FINDS that by failing to appear on July 13, 2012, with knowledge of the situation regarding her payment, defendant waived her claim regarding any payment.

Defendant argues that plaintiff made misrepresentations to her and committed other non-specific acts of misconduct. The alleged misrepresentations and misconduct are said to have taken place during settlement negotiations. The Court has reviewed the record and finds no evidence that supports a conclusion that plaintiff misrepresented facts or engaged in other misconduct.

Plaintiff alleges that plaintiff brought this action without substantial justification, filed it primarily for delay or harassment, or took steps to delay or unreasonably expanded this case. The Court has reviewed the record and finds no facts that support these allegations.

Defendant disputes the calculation by plaintiff regarding delinquent “ground rents, taxes, maintenance charges and/or assessments.” Defendant was aware of this issue, or had reason to be aware of it, prior to the July 13, 2012, hearing. By failing to file an answer and appear at this hearing, defendant waived this issue. Further, plaintiff sought a judgment only for possession and its attorney’s fees and costs. It did not seek a judgment for the delinquent “ground rents, taxes, maintenance charges and/or assessments.”

Defendant made a claim for attorney’s fees and costs, citing A.R.S. 12-349. The court has reviewed the record and finds that an award of attorney’s fees and costs pursuant to A.R.S. 12-349 is not warranted because defendant was not represented by counsel and because the Court cannot identify any conduct by plaintiff or its counsel that would permit an award under A.R.S. 12-349.

Based upon these reasons,

IT IS ORDERED denying defendant Cox’s motions for all relief, except for the setting aside of the judgment dated October 19, 2012, as ordered above.

IT IS FURTHER ORDERED that both parties are to bear their own attorney’s fees and costs.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk’s Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.