

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2017-000274-001 DT

09/07/2017

HONORABLE ROGER E. BRODMAN

CLERK OF THE COURT
M. Corriveau
Deputy

TOWN SQUARE HOMEOWNERS
ASSOCIATION

LORI L VOEPEL

v.

ANDREW HETTINGER (001)
ROBERT A TOMICZEK (001)

CHRISTOPHER J BERRY

REMAND DESK-LCA-CCC

ORDER GRANTING SPECIAL ACTION RELIEF

The Court reviewed the Motion for Relief, the Response and Reply.

No one challenged this Court's jurisdiction. The Court finds that it has jurisdiction over this special action pursuant to A.R.S. §§ 12-2021, 12-2029 and ARPSA 1, 3 and 4. The Court accepts special action review.

The facts of this matter are largely undisputed. After a trial before a Justice of the Peace, a judgment was entered on Robert Tomiczek's counterclaim on June 20, 2017. Counterdefendant Town Square Homeowners Association (Town Square) filed a notice of appeal on July 5, 2017. Town Square did not pay a filing fee or file a cost bond at the same time it filed its Notice of Appeal. The filing fee is \$75 and the cost bond is \$250.

On July 18, 2017, Judge Hettinger dismissed the appeal on the grounds that the appellant 1) failed to timely file a Notice of Appeal; and 2) failed to post a cost bond or, alternatively, a motion to waive the cost bond. *See* Notice of Final Disposition of Appeal by Trial Court (Civil) dated July 18, 2017.

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The Court finds that the defendant Judge exceeded his authority and abused his discretion in dismissing the appeal.

First, the appeal was not untimely. The appellant had 14 days to file the Notice of Appeal. Since the 14th day fell on July 4, 2017 (a holiday), the Notice of Appeal filed on July 5 was timely. *See* Ariz. R. Civ. P. 6(a)(3).

Second, the failure to file a cost bond is not jurisdictional. Rule 6(b) of the Superior Court Rules of Appellate Procedure (Civil) must be read in conjunction with A.R.S. § 22-263. That statute provides as follows concerning civil proceedings in justice courts:

No appeal shall be dismissed or judgment affirmed by reason of any defect, informality or insufficiency of the appeal bond, if appellant, within such time and upon such terms as the court orders, files a legal and sufficient bond.

See also Ariz. R. Civ. App. P. 8(d) and *Riendeau v. Wal-Mart Stores, Inc.*, 223 Ariz. 540, 541, ¶ 6 (App. 2010) (plaintiff's untimely payment of a cost bond on an appeal from arbitration did not deprive the superior court of jurisdiction). Appellant demonstrated good cause to be given additional time. Appellant should have been given a reasonable opportunity to correct the matter before the appeal was dismissed.

In its discretion, the Court declines to award appellant its attorneys' fees. The Court does not believe an award of fees is in the interests of justice.

IT IS ORDERED that this Court accepts special action jurisdiction and grants mandamus relief.

IT IS FURTHER ORDERED that the July 18, 2017 order dismissing the appeal is vacated and the appeal filed by Counterdefendant Town Square is reinstated.

IT IS FURTHER ORDERED that the defendant Judge is directed to issue an order providing Counterdefendant Town Square a reasonable opportunity to file a cost bond and filing fee.

IT IS FURTHER ORDERED that defendant Judge and the Moon Valley Justice Court Clerk's Office amend its docket and service list to reflect the parties as Plaintiff/Counterdefendant (Town Square) and Defendant/Counterclaimant (Robert Tomiczek) and to reflect that the law firm of Jones, Skelton & Hochuli, PLC represents Town Square on the Counterclaim.

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IT IS FURTHER ORDERED that Town Square's request for costs and attorneys' fees is denied.

This is a final ruling and no matters remain pending before this Court. As a result, the Court is issuing a signed order which is subject to appeal.

DATED this 7th day of September, 2017.

/s/ Roger Brodman
HONORABLE ROGER BRODMAN
JUDICIAL OFFICER OF THE SUPERIOR COURT

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.