

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2018-000210-001 DT

12/13/2018

HONORABLE PATRICIA ANN STARR

CLERK OF THE COURT

C. Avena
Deputy

TOWN SQUARE HOMEOWNERS
ASSOCIATION

LORI L VOEPEL

v.

ROBERT A TOMICZEK (001)

CHRISTOPHER J BERRY

JUDGE STARR
MOON VALLEY JUSTICE COURT
REMAND DESK-LCA-CCC

HIGHER COURT RULING / REMAND

Lower Court Case No. CC2015-144356RC.

Appellant Town Square Homeowners Association (“the Association”) seeks an order reversing the judgment in favor of Appellee Robert A. Tomiczek on Counterclaims D and E, or alternatively, an order modifying the amount of damages awarded on those counterclaims. For the following reasons, this Court reverses the judgment of the trial court on Counterclaims D and E.

I. FACTS AND PROCEDURAL BACKGROUND

In August of 2015, the Association filed a Complaint against Tomiczek, alleging breach of contract for failure to pay assessments and related charges. (Complaint at 2.) Tomiczek filed an Answer and Counterclaim. Among Tomiczek’s Counterclaims were allegations that the Association’s landscapers had damaged a block wall on his property, and that the landscape company spread chemicals in his front yard that killed vegetation. (Answer and Counterclaim, filed February 5, 2016.)

The case eventually proceeded to a bench trial. At that trial, Tomiczek testified that the Association’s landscapers damaged his block wall with a piece of machinery, and killed his vegetation by spreading fertilizer into the “bender box” area of his front yard.

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After trial, the trial court made the following findings:

- The Association met its burden of proof and prevailed on its claim for breach of contract.
- Tomiczek failed to prove three of his counterclaims by a preponderance of the evidence.
- Tomiczek met his burden of proof and prevailed on Counterclaims D and E, regarding his wall and vegetation.

(Judgment, June 20, 2017.) The trial court awarded damages to the Association in the amount of \$3,559.00; the trial court awarded damages to Tomiczek in the amount of \$1,477.50 for the wall, and \$6,402.78 for the vegetation. (*Id.*)

The Association appealed from the judgment in favor of Tomiczek on his two successful counterclaims.

This Court has jurisdiction pursuant to A.R.S. §§ 12-124(A) and 22-261.

II. ISSUES

The Association raises two issues on appeal:

(1) Did the trial court improperly award damages to Tomiczek for breach of contract based on an erroneous interpretation of the Association's contractual duties?

(2) Did the trial court award Tomiczek damages in excess of those necessary to make him whole?

III. LEGAL ANALYSIS

On appeal, Tomiczek presents his claims as negligence claims. At trial, Tomiczek stated that "ultimately what he's trying to prove is that the board breached its obligations" to him. (Reporter's Transcript of Proceedings, April 26, 2017 at 12.) Tomiczek further agreed with the trial court that the issue at trial was whether "the HOA breach[ed] their contractual responsibility to maintain the property." (*Id.* at 17.)

Having chosen to present his claims as breach of contract claims at the trial court level, Tomiczek may not now change his theory of the case to assert he is entitled to relief on the basis

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of the principles of negligence. To allow otherwise would be to unfairly prejudice the Association, which defended breach of contract claims in the trial court, not negligence claims.

The Court thus addresses the arguments in the context of a breach of contract, not negligence. To prove a breach of contract claim, a plaintiff must prove the existence of the contract, a breach of the contract, and damages. *Thomas v. Montelucia Villas, LLC*, 232 Ariz. 92, 96, ¶ 16 (2013). An appellate court reviews the interpretation of a contract de novo. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593, ¶ 9 (App. 2009).

Here, Tomiczek established the existence of a contract, namely the Amended and Restated Declaration of Covenants, Conditions and Restrictions (“the Declaration”). But he did not establish that the Association breached that contract.

With respect to the wall, the applicable section of the Declaration states that if a party wall or common wall is damaged “by reason of any cause other than an act or negligence of a party, the same shall be repaired or rebuilt at the joint expense of the parties,” with the expense to be borne equally. Declaration, Article II, Section 13(A). Tomiczek argued at trial that the Association breached the Declaration when its agent negligently damaged his block wall.

Under the Declaration, the Association had no duty to indemnify Tomiczek for damage to the wall. Before this Court, Tomiczek argues that the Association is responsible for the negligence of the landscapers, and thus must pay for repairs to the wall. But again, he did not bring a negligence claim in the trial court, but rather a breach of contract action. Assuming that the wall was damaged by reason of negligence of a party (the Association), Tomiczek did not establish that the Association breached a contractual duty under the Declaration by not repairing the wall at its expense.

As to the vegetation, the applicable section of the Declaration provides that the Association is responsible for maintaining the common areas and front yards of each unit in the community, including fertilizing. Declaration, Article IX, Section 1(A). Nothing in the Declaration addresses the situation presented here, where the Association complied with its duty to fertilize Tomiczek’s yard, but in the process negligently damaged other vegetation on his property.

Instead, the arguments made by Tomiczek in this appeal go to whether the Association and/or its landscaping company negligently damaged his vegetation.

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Tomiczek's counterclaims were brought as breach of contract claims. And under the relevant contract, which is the Declaration, Tomiczek did not establish that the Association breached its duties to him.

Because this Court has concluded that the trial court erroneously awarded damages to Tomiczek on the counterclaims, it need not reach the second issue regarding the correct calculation of the damages due to Tomiczek.

IV. CONCLUSION

Based on the foregoing, this Court finds

IT IS THEREFORE ORDERED vacating the judgment of the Moon Valley Justice Court as to Counterclaims D and E.

IT IS FURTHER ORDERED remanding this matter to the Moon Valley Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED any Application for Attorneys' Fees and Costs must be submitted within 20 days of the filing of this minute entry. Any response must be filed within 20 days thereafter. No reply shall be filed.

IT IS FURTHER ORDERED signing this minute entry as a formal order of the Court.

/s/ Patricia A. Starr
THE HON. PATRICIA A. STARR
JUDGE OF THE SUPERIOR COURT

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