Representing Residential Tenants in Eviction Actions

BY HON. GERALD A. WILLIAMS

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A friend at your church finds you after the Sunday morning service. He says that his daughter found something odd outside her apartment.

"There was this summons and complaint taped to her door," he tells you. "And it says she is facing an eviction action tomorrow."

You immediately conclude that this cannot possibly be proper service,[1] and because your kids grew up together and are now in college, you agree to appear in court with her tomorrow, just to make sure nothing unfair happens.

You think to yourself, "The judge has to grant a delay because I just got the case. If some amount of money is due, I will just set up a partial payment arrangement."[2]

Anyway, you think, it's only justice court. How hard could it be? What's the worst that could happen?

Eviction Actions Are a Summary Proceeding

As a justice of the peace, I cringe when a well-meaning attorney doing some *pro bono* work appears during one of the two afternoons I hear eviction cases each week and announces, "Your honor, I think we can complete discovery[3] in 60 days and we will need no more than two days to try this case." It's even worse when I learn that the well-intentioned attorney has not heard of the Arizona Rules of Practice for Eviction Actions that were adopted by the Arizona Supreme Court in 2009, and that counsel does not realize that in general, the Arizona Rules of Civil Procedure do not apply to eviction cases.[4]

Some lawyers also may be surprised that although these cases are eligible for a jury trial,[5] residential eviction actions are summary proceedings.[6] A judgment can be signed after a brief conversation among the judge and the parties and often without the need for witness testimony or anything that looks like a formal trial.[7] The case will begin by the judge calling it and asking the tenant whether the allegations in the complaint are true.[8] If the tenant disputes the factual allegations, then the judge will make a decision after a trial has been held; however, that trial could be held the same day.

Though most evictions are for dwelling units, occasionally one involves a rental space in a mobile home park or an RV park. Separate landlord–tenant acts apply to those cases with significantly different notice requirements and cure periods than those required by the Arizona Residential Landlord and Tenant Act.[9]

This article focuses on eviction actions involving apartments and single-family homes.

Nonpayment of Rent

In Maricopa County, the vast majority of residential eviction cases allege nonpayment of rent as one of the allegations. Prior to filing an eviction action, the landlord must give the tenant a five-day cure notice. This notice must: (1) state the amount of any unpaid rent and any other amount due; (2) notify the tenant of the landlord's intent to terminate the lease if the amount due is not received within five days after the notice is given to the tenant, and (3) inform the tenant that if the amount due is not paid, that the tenant must then surrender possession of the residence.[10] On day six, the landlord can file suit.

Other than procedural due process problems, generally the only defense to nonpayment of rent is that the rent was paid in the amount and in the manner provided in the lease. However, there are often some additional issues.

First, Arizona is a "pay and stay" jurisdiction. The tenant can pay all of the rent and any late fees any time before the lawsuit is filed and avoid eviction.[11] If the eviction action has been filed, then the tenant must pay all past due rent, late fees, attorneys' fees and court costs.[12] If the tenant does so literally anytime before a judgment is entered, he can avoid eviction. However, after a judgment has been entered, reinstatement of the lease is solely in the landlord's discretion.[13]

Second, Arizona does not allow tenants to "rent strike." Tenants may not withhold rent unless expressly allowed to do so by statute.[14] If there is a problem with the residence, the tenant cannot simply stop paying rent. Instead, the tenant must first give the landlord an opportunity to repair the problem.

For minor repair issues, if a landlord fails to make repairs, the tenant may notify the landlord of his intention to repair the prob-

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lem at the landlord's expense.[15] If the landlord does not fix the problem within 10 days from receiving the notice, the tenant may hire a licensed contractor, submit a repair bill to the landlord, and deduct the cost of the work from his rent.[16]

For something that qualifies as an essential service,[17] the tenant has several options, but many of them are not realistic.[18] The tenant's best option may be to give a five-day cure notice to the landlord[19] and, if necessary, find substitute housing, like a motel, during the period of the landlord's noncompliance.[20] Sample notices for both major and minor repairs are available on the justice courts section of the Maricopa County Judicial Branch webpage.[21]

Third, the other issue that often arises within a nonpayment of rent case is some type of either offset or counterclaim for a diminution in value of the rental residence.[22] If a landlord "willfully diminishes" the value of the rental property (such as by interrupting utility service), then tenant can recover either up to two months' rent or twice his actual damages.[23] If the tenant is claiming that he withheld rent because the landlord did something to decrease the value of the rental property, some judges direct that the tenant pay the undisputed amount of rent into the court (as a bond or litigant deposit) prior to trial.[24]

Military Orders and Lease Provisions

Under the Servicemembers' Civil Relief Act (SCRA), a military member may break his or her lease for any of the following four reasons: (1) the lease was signed before starting active duty, (2) the lease was signed by a reserve or guard member being recalled to active duty for at least 180 days, (3) upon receipt of Permanent Change of Station orders or (4) upon receipt of deployment orders where the deployment period is at least 90 days.[25] The SCRA also applies to any of the military member's family members who may have responsibility under the lease.[26] A military tenant who is either moving or being deployed is still responsible for any reasonable repair costs to the residence beyond normal wear and tear.

To terminate a lease under the SCRA, the military member must provide the landlord with written notice and a copy of the orders.[27] The rental period ends on the last day of the month following the month in which proper notice was given. For example, if the lease is for one year and the notice of termination was given on July 20, the effective date of termination would be August 31.

There is an unresolved issue concerning military leases and rental concessions. A rental concession is a discount on the amount of rent that is due based on the alleged fair market rental value of the residence. For example, if the lease states that the fair market rental value is $1,000, but the rent due is only $800, the difference each month is often called a rental concession. If the tenant breaches the lease, then that additional amount typically becomes due.

Nothing in the SCRA specifically addresses lease incentives or concessions. Perhaps the best argument for landlord attorneys is based on a section that reads, "Rents or lease amounts unpaid for the period preceding the effective date of the lease termination shall be paid on a prorated basis."[28] An argument could be made that this provision allows for the collection of rental concessions extended in anticipation of a completed 12-month lease.

There are at least two counterarguments: (1) The concessions are not "amounts unpaid" under the SCRA because their payment was never envisioned; and (2) the termination of the lease resulted from an involuntary requirement imposed by military service. The tenant had no control over the event and should not be penalized for it.

Domestic Violence Victims and Lease Provisions

If a tenant is a victim of domestic violence, she or he can break the lease if the tenant provides written notice to the landlord.[29] As proof, the tenant should provide either a copy of the Order of Protection or the police report.[30] If the landlord requests, the tenant must provide documentation showing that the Order of Protection has been submitted to be served.[31] A tenant who falsely claims to be a victim of domestic violence in order to end the lease early may be charged with a crime and may have to pay the landlord treble damages.[32]

> Other than procedural due process problems, generally the only defense to nonpayment of rent is that the rent was paid in the amount and in the manner provided in the lease.

Material Noncompliance

If the landlord alleges a material noncompliance with the rental agreement, then the landlord must give a 10-day cure notice.[33] If the problem is not fixed, then the lawsuit can be filed on or after the 11th calendar day. The notice is required to state the acts or omissions that constitute the breach and is required to state that if the breach is not remedied within 10 days, then the rental agreement will terminate.

Examples of a material noncompliance of the rental agreement include unauthorized occupants or unauthorized pets. If the case is litigated, the dispute is often a simple question of fact (e.g., "That dog was just there for one day and he is now out of my apartment.").

Material and Irreparable Breach

If the landlord alleges that the tenant has committed a material and irreparable breach, then the landlord may deliver a notice of immediate termination of the rental agreement.[34] These cases are sometimes called an "immediate." The complaint may be filed on or after the same day. In these cases, the landlord is most likely alleging that the tenant is involved in criminal conduct.[35]

Counsel representing tenants should anticipate that the landlord will be present with witnesses and ready for trial on the

first court date. This type of eviction action is especially significant for the tenant because a writ of restitution ordering possession of the residence may be issued the next day.

Evictions During and After Trustees' Sales

An increasingly common problem occurs after a tenant finds a notice of trustee's sale taped to his or her front door. Many tenants believe that if the landlord is not making the mortgage payments, then the tenant should not pay the rent.[36] Other tenants realize that they must continue to pay their rent, but do not know *whom* they should pay. To help resolve these problems, Congress passed and the President signed the Protecting Tenants at Foreclosure Act of 2009 (PTFA) for federally related loans.

After a trustee's sale, the new owner is prohibited by the PTFA from evicting any existing tenants in certain situations. If an existing tenant wishes to keep possession of the property following a trustee's sale, the existing tenant must prove that a "bona fide" lease was in place at the time of the trustee's sale. To qualify as a "bona fide" lease, the tenant must prove: (1) that the lease was signed before the property was transferred; (2) that the defaulting borrower is not the tenant; (3) that the lease is the result of an arm's-length transaction; and (4) that the lease requires an amount of rent that is close to the "fair market rent" for the property.[37]

Even if the tenant establishes a bona fide lease, he still may have to move. However, the tenant must be given at least 90 days to move if the new owner intends to occupy the home as a primary residence. If the property's new owner has purchased the real estate as an investment, then the existing lease will simply continue, except that the landlord is now the new owner.

For cases in which the original property owner refuses to leave, there is an initial threshold question concerning whether justice courts have jurisdiction to hear evictions after the property has been sold through a trustee's sale or foreclosure. A.R.S. § 12-1173.01(A)(1) states that forcible detainer actions are to be "filed with the clerk of the superior court" if the "property has been sold through the foreclosure of a mortgage, deed of trust or contract for conveyance of real property." However, that does not end the jurisdictional analysis, in part because this statute is literally titled "Additional definition of forcible detainer."

Eviction actions also may be filed under A.R.S. § 12-1173, which appears to conflict with a requirement in A.R.S. § 12-1173.01 that evictions after foreclosures be filed in superior court. However, the Arizona Supreme Court stated, "Long before A.R.S. § 12-1173.01 was adopted, the court of appeals held that A.R.S. § 12-1173 was broad enough to authorize a forcible detainer action to obtain possession of property after an occupant's interest had been terminated pursuant to a nonjudicial sale."[38] In addition, a trustee's deed creates a presumption of compliance and is conclusive evidence that the trustee's sale of the deed of trust property was conducted regularly and in accordance with the required statutory notice provisions.[39]

Many if not most justices of the peace believe that they have the authority to hear eviction actions after a trustee's sale. The legal theory for doing so is that persons who remain in a property after it has been sold are common-law tenants at sufferance.[40] A.R.S. § 12-1173(1) states that a landlord may file a forcible detainer action after providing a written demand for possession, and the three statutes that provide for the filling, appearance and trial procedure in forcible entry and detainer actions all specifically reference either a justice of the peace or a justice court.[41] Consequently, eviction actions after trustee's sales are often filed in justice courts.

Writs of Restitution

A landlord who has obtained a judgment for possession of the residence may file a writ of restitution. When filed in justice court, the writ[42] is a request for the justice of the peace to order the constable to go to the residence, change the locks and remove any and all occupants. Unless the judgment awarded immediate possession of the residence, the writ of restitution cannot be issued until five calendar days after the judgment is signed.[43] A motion to set aside or to vacate the eviction judgment will not delay the enforcement of a writ of restitution unless the judge finds good cause.[44] A former tenant who breaks back into the residence after the writ has been served faces liability for criminal trespass in the third degree.[45]

Retaliatory Eviction

A landlord is expressly prohibited from bringing or threatening to bring an eviction action after the tenant has complained either to a government agency about building or housing code violations or to the landlord concerning the fitness of the premises.[46] If there is evidence of a complaint from the tenant within six months prior to the eviction action, then it creates a rebuttable presumption of retaliation.[47]

A tenant may recover damages for retaliatory evictions, in an amount equal to two months' rent or twice his or her actual damages, whichever is greater.[48]

Conclusion

Residential evictions are a fairly specialized area of law. The cases move very quickly and often appear confusing to an outside observer. (It does not help that the eviction statutes and rules use a vocabulary that include terms of art in the criminal context. For example, the first and maybe only court date is called an "initial appearance," and the tenant may be asked to enter a plea of either guilty or not guilty to a detainer action.)

However, as is true in almost any civil litigation, the best thing you can do for a tenant might be to simply pick up the phone, call the landlord's attorney and ask, "How can we work this out?"

endnotes

1. "Nail and mail" service is authorized in many residential eviction actions. A.R.S. § 33-1377(B); Arizona Rules of Procedure for Eviction Actions, *hereinafter* RPEA, Rule 5(f).
2. The landlord will most likely decline an offer for a partial payment prior to judgment. Doing so generally ends the plaintiff's ability to pursue the eviction action until the following month. A.R.S. § 33-1371.
3. There are "disclosure" requirements, and the complaint is required to be fairly detailed; however, traditional discovery methods are generally not available in residential eviction actions. RPEA 5 (Summons and Complaint: Issuance, Content and Service of Process) and RPEA 10 (Disclosure).
4. RPEA 1 (Title and Scope of Rules).
5. A.R.S. § 12-1176; RPEA 12 (Trial by Jury). The right to a jury trial may be waived in the

lease, and many rental agreements contain jury trial waivers. These waivers appear to be enforceable. *Harrington v. Pulte Home Corp.*, 119 P.3d 1044, 1052 (Ariz. Ct. App. 2005) (held by signing a contract with an arbitration clause, home purchasers waived their right to a jury trial).

6. The procedures for eviction actions are detailed in the RPEA. The term *forcible detainer* refers to the procedures set forth in A.R.S. §§ 12-1171 through 12-1183. The term *special detainer* refers to the procedures set forth in A.R.S. §§ 33-1377 and 33-1485.
7. RPEA 11 (Initial Appearance and Trial Procedures).
8. RPEA 11(b). Every judge is somewhat different, but I generally ask something like, "Your landlord is alleging that you have not paid your rent for April; is that true?" If the tenant says yes, then I ask why and listen for anything that sounds like a possible defense (e.g. "Well, it has been really hard since he cut off our power."). Neither financial hardship nor "my landlord is a jerk" are a defense to nonpayment of rent.
9. The Arizona Residential Landlord and Tenant Act applies to the rental of a dwelling unit (e.g., apartments and single-family homes). A.R.S. §§ 33-1301 through 33-1381. Mobile home parks are governed by the Arizona Mobile Home Parks Residential Landlord and Tenant Act. A.R.S. §§ 33-1401 through 33-1501. Another key set of statutes is the Recreational Vehicle Long-Term Rental Space Act. A.R.S. §§ 33-2101 through 33-2148. There are also two innkeeper statutes. A.R.S. §§ 33-301 through 33-302. Finally, there is a group laws, beginning at A.R.S. § 33-321, that apply to landlord–tenant relationships that are not governed by the other sets of statutes. A.R.S. § 33-381.
10. A.R.S. § 33-1368(B). If the allegation alleges nonpayment of rent for a space in a mobile home park, then the landlord must give the tenant a seven-day notice.
11. A.R.S. § 33-1368(B). Also, a landlord may obtain a judgment for rent, costs and attorneys' fees where possession of the dwelling was returned to landlord after the eviction was filed, but before the judgment was signed. *Keenen v. Biles*, 17 P.3d 111, 113 (Ariz. Ct. App. 2001).
12. A.R.S. § 33-1368(B).
13. *Id.*
14. *Id.*
15. A.R.S. § 33-1363.
16. *Id.* In 2011, the Legislature passed and the Governor signed Senate Bill 1474. It amended A.R.S. § 33-1363(B) and appears to limit a tenant's right to make minor repairs at the landlord's expense under this statute to items that "constitute a breach of the fit and habitable condition of the premises." However, that same legislation amended A.R.S. § 33-1324(A), and the landlord's duty to maintain a fit premises now appears to be specifically tied to a fairly extensive list of potential property inspection violations enumerated in A.R.S. § 9-1303.
17. Essential services include running water, gas and/or electrical service, reasonable amounts of hot water, heat and/or air conditioning. A.R.S. § 33-1364.
18. With the utility company's approval, a tenant group or group of tenants can pay a landlord's delinquent utility bill and deduct that amount from their rent. A.R.S. § 33-1364. The tenant also has an option to file suit and to recover damages based on the decreased rental value of the residence. *Id.*
19. A.R.S. § 33-1361(A).
20. *Id.* § 33-1364(A)(3).
21. http://justicecourts.maricopa.gov/CaseTypes/eviction.aspx
22. A.R.S. § 33-1364(A)(2). There is a long line of Arizona cases that have adopted the implied warranty of habitability; however, they are either construction-defect cases or cases between a buyer and seller of real property. Arizona considered but rejected extending the implied warranty of habitability to landlord–tenant cases. *See Shirkey v. Crain & Associates Mgmt Co. Inc.*, 629 P.2d 95 (Ariz. Ct. App. 1981) (held that landlord was not liable for tenant's injuries after bathroom fixture came loose when landlord had no knowledge it was not properly installed). There are no similar statutes permitting counterclaims in the other landlord–tenant acts. RPEA 8(a) prohibits someone from going forward with a counterclaim in an eviction action unless there is a statutory basis for doing so.
23. A.R.S. § 33-1367. If a landlord unlawfully enters the residence, then the tenant can recover damages of not less than one month's rent. *Id.* § 33-1376(B).
24. *Id.* § 33-1365.
25. 50 U.S.C. App. § 535(a). Landlords who violate the SCRA face federal criminal penalties. *Id.* § 535(h).
26. *Id.* § 535(a)(2).
27. *Id.* § 535(c)(1)(A). The military member may either deliver this notice in person or mail it certified mail, return receipt requested, to his or her landlord. *Id.* § 535(c)(2).
28. *Id.* § 535(e).
29. A.R.S. § 33-1318(A). There are no counterparts to this provision in the other Arizona landlord–tenant acts.
30. *Id.*
31. *Id.* § 33-1318(A)(1).
32. *Id.* § 33-1318(H).
33. *Id.* § 33-1368(A). Again, mobile home parks are governed by a different set of statutes. In a mobile home park, a tenant is given 14 days to cure or 30 days vacate.
34. *Id.* § 33-1368(A).
35. Examples listed in the statute include illegal discharge of a weapon, homicide, prostitution, criminal street gang activity, the manufacture or sale of illegal drugs, threatening or intimidating, assault and acts that constitute a nuisance. *Id.* § 13-1368(A)(2). A single criminal act may be considered a material breach of the lease. *City of Phoenix v. Bellamy*, 736 P.2d 1175 (Ariz. Ct. App. 1987) (tenant in public housing was convicted of felony drug possession).
36. Perhaps the worst thing a tenant can do in this situation is stop paying rent. An eviction action for nonpayment of rent can occur in approximately two weeks. A trustee's sale will take at least 90 days. Consequently, the landlord often wins these types of cases. One option for the tenant, after the case has been filed but prior to judgment, is to pay their rent into the court as a litigant deposit. *See also* A.R.S. § 33-1331 (notice requirements for leases entered into after foreclosure has started).
37. The Protecting Tenants at Foreclosure Act of 2009 (PFTA), Pub. L. No. 111-22, Sec. 702, 123 Stat. 1660 (2009), 12 U.S.C. § 5220, note; *See generally, Bank of New York Mellon v. De Meo*, 254 P.3d 1138 (Ariz. Ct. App. 2011) (purchaser at trustee's sale was required to provide 90 days' actual notice to tenant even though eviction action hearing did not occur until 97 days after five-day notice). An amendment to the PTFA provided that "the date of a notice of foreclosure shall be deemed to be the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed." Pub. L. No. 111-203, Title XIV, § 1484(1), 124 Stat. 2204 (2010); 12 U.S.C.A. § 5220, note. The effect of foreclosure on Section 8 tenancies is governed by amendments to the United States Housing Act of 1937. *See generally* 42 U.S.C. § 1437(f).
38. *Curtis v. Morris*, 925 P.2d 259, 260 (Ariz. 1996) (the validity of a trustee's deed cannot be challenged in a forcible detainer action).
39. A.R.S. § 33-811(B); *In re Hills*, 299 B.R. 581 (Bankr. D. Ariz. 2002).
40 *Andreola v. Arizona Bank*, 550 P.2d 110 (Ariz. Ct. App. 1976) (summary remedy of forcible detainer is appropriate and available after a trustee's sale).
41. A.R.S. §§ 12-1175 through 12-1177.
42. *Id.* § 12-1178; RPEA 14.
43. A.R.S. § 12-1178(C).
44. *Id.*; RPEA 14(a). A bankruptcy will not stop the constable from serving a writ of restitution. 11 U.S.C. § 362(b)(22) (automatic stay in bankruptcy does not apply if the plaintiff obtained a judgment for possession prior to the bankruptcy being filed).
45. A.R.S. § 12-1178(D).
46. *Id.* § 33-1381.
47. *Id.* § 33-1381(B).
48. *Id.*