

STATE OF NEW MEXICO
COUNTY OF TORRANCE
SEVENTH JUDICIAL DISTRICT

Robert F. Sartori,
Plaintiff,

vs.

No. D-0722-CV-2015-154

TOWNSEND REALTY, et al.
Defendants.

**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS PHYLLIS L.
TOWNSEND AND MELVIN L. TOWNSEND'S "MOTION FOR HEARING ON THE
ISSUE OF POSSESSION OF THE SUBJECT PREMISES"**

Plaintiff Robert F. Sartori hereby responds to Defendants' Phyllis L. Townsend and Melvin L. Townsend's *Motion for Hearing on the Issue of Possession of the Subject Premises* [hereinafter *Motion*] under Rule 1-007.1(D) NMRA.¹

I. Introduction

1. Defendants have brought a motion requesting a hearing on the "Issue of Possession" of the current home of Plaintiff and his family. Defendants' motion cites no Rule under which it is brought, but it appears to be a motion for summary judgment,

¹ Defendants' *Motion* references a "Motion to Grant Possession of the Subject Premises". Plaintiff has not been served with any such motion. If any such separate motion has been filed, Plaintiff requests that it be re-served and he be given additional time to respond.

although it lacks all the requisite elements of a Rule 1-056 NMRA motion and is not identified as such.

2. Defendants' *Motion* fails to state whether the movant believes the motion will be opposed, and defendants have not sought Plaintiff's concurrence in this matter, contrary to the requirements of Rule 1-007.1(C) NMRA, and fails to contain citations or authorities in support.

3. Additionally, defendants' *Motion* requires consideration of facts not of record, yet the movant has failed to file copies of affidavits, depositions or other documentary evidence, as required by Rule 1-007.1(C) NMRA.

4. For these reasons alone, defendants' *Motion* fails to comply with the Rules, and is therefore insufficient and should be denied.

5. However, exercising an abundance of caution, Plaintiff addresses the issues raised in defendants' *Motion* as follows:

II. Issues

6. Although defendants' *Motion* is captioned in the name of Plaintiff's Petition, naming Robert F. Satori as *Plaintiff*, rather than in the name of their counterclaim, naming Phyllis L. Townsend and Melvin L. Townsend as *Counter-Plaintiffs*², it appears that defendants are requesting relief under the allegations made in *Phyllis L. Townsend and Melvin L. Townsend's Answer to Plaintiff's Petition and Counterclaim for Breach of Contract, for Declaratory Judgment, Ejectment or, Alternatively, for Unlawful Detainer*

² See *Motion* caption

or Alternatively Petition by Owner for Writ or Restitution Under the Uniform Owner Resident Relations Act (hereinafter *Answer and Counterclaim*).

A. No Jurisdictional Statement

7. As an initial matter, defendants counterclaim fails to include a jurisdictional statement³. Defendants allege to be “without sufficient information” and therefore “deny the same”⁴ as regards the jurisdictional statement contained in Plaintiff’s Petition, and thus cannot rely on Plaintiffs jurisdictional statement.

8. Defendants have therefore failed to invoke this Court’s jurisdiction to hear their *Answer and Counterclaim* or any related filings.

B. No Statement of Facts

9. Defendants *Motion* relies on allegations of, and requires consideration of, facts not of record. See Rule 1-007.1(C)

10. Defendants *Answer and Counterclaim* fails to contain a statement of facts, and instead simply contains unsworn “General Allegations Common to All Counts”.⁵ Plaintiff has not stipulated to these alleged facts.⁶

11. Even if the Court determines that defendants need not invoke jurisdiction, defendants have failed to place on record the necessary facts upon which their *Motion* relies, specifically evidence supporting their unsubstantiated allegations that “[...] the

³ See *Answer and Counterclaim* p. 26

⁴ See *Answer and Counterclaim* ¶¶ 10-14

⁵ See *Answer and Counterclaim* pp. 26-28

⁶ See *Joint Reply of Robert F. Sartori and Katherine F. Sartori to the Counterclaim of Phyllis L. Townsend and Melvin L. Townsend*

Sartoris failed to make all payments due” *Motion* ¶ 1, “[...] the Sartoris failed to make the payments due [...]” *Motion* ¶ 2, “[...] the Sartoris failure to comply with the Contract [...]” *Motion* ¶ 4, and any and all similar and related allegations and legal conclusions.

C. Breach of Contract

12. Defendants’ *Motion* is based on an underlying claim of an alleged default by Plaintiff, resulting in an alleged breach of contract by Plaintiff, an issue that has not yet been determined by this Court.⁷

13. Nowhere does defendants’ instant motion reference an alleged breach of contract by Plaintiff, nor can defendants claim that Plaintiff has defaulted after a breach has occurred by the defendants, and absent a ruling in their favor on the allegation that Plaintiff materially breached the contract, defendants’ other claims are groundless and fail.

14. Defendants’ motion references an “Affidavit of Uncured Default and Election of Termination on October 22, 2015 in Book 333, Page 2593, as document number 21522756, the records of the Torrance County Clerk, Torrance County, New Mexico” recorded by a debt collector, however that “affidavit” is subsequent to Plaintiff’s Notice of Seller’s Default recorded on October 15, 2015 in Book 333, Page 2404, as document number 2152695 [see attached Exhibit 13], as well as Plaintiff’s February 18, 2015 Rescission Notice sent to defendants Phyllis L. Townsend and Melvin L. Townsend, at PO Box 60 McIntosh, New Mexico 87032 via United States Postal Service Certified Mail Return Receipt number 70123050000200539720. [see attached Exhibit 14]

⁷ See *Answer and Counterclaim*, Count I

14. Defendants have admitted that they received Plaintiff's February 18, 2015 Rescission Notice⁸, and the record fails to show evidence that they responded.

15. Plaintiff has alleged in his verified Petition that it is the defendants who breached the contract,⁹ and concealed or failed to disclose material facts regarding the condition of the property¹⁰.

16. If Plaintiff prevails, defendants' claims are not legally possible.¹¹

D. Rescission Notice

17. Defendants allege in their motion that "[t]he declaratory/injunctive relief sought by the Sartoris in their Complaint, seeks in pertinent part, that the Court declare/confirm rescission of the Contract as opposed to specific performance of the obligations by the parties thereto." *Motion* ¶ 9

18. Rescission, specific performance, injunction, and declaratory judgment are separate forms of equitable relief, so defendants are incorrect in the statement that Plaintiff seeks "declaratory/injunctive relief" of rescission. Rather, Plaintiff seeks equitable remedy to restore the status quo ante.

19. Defendants further state that "the Sartoris' position can be reasonably interpreted to mean that the Sartoris are aware, and are in fact requesting, to eventually

⁸ See *Answer and Counterclaim* ¶ 55

⁹ See *Petition* ¶¶ 71-83

¹⁰ See *Petition* ¶¶ 89-102

¹¹ See *Famiglietta v. Ivie-Miller Enterprises*, 966 P.2d 777 (N.M. Ct. App. 1998), see *Camino Real Mobile Home Park Partnership v. Wolfe*, 119 N.M. 436, 443, 891 P.2d 1190, 1197 (1995), see *Snell v. Cornehl*, 81 N.M. 248, 466 P.2d 94 (1970)

terminate their occupancy of the Premises.” *Motion* ¶ 9 Plaintiff seeks to sever any and all ties to the defendants, however rescission is conditional to tender.

20. Plaintiff’s February 18, 2015 Rescission Notice “demands that lender rescind the entire contract and return all monies paid by borrower in return for value due lender, by, on or before the 60th day after receipt of this document.” [see attached Exhibit 14, p. 15] Plaintiff has already offered to return the property to the defendants, but defendants elected not to respond.

21. It is Plaintiff’s specific claim that the Townsend’s breached the contract. If a breach is found to be material, the nonbreaching party is entitled to rescind the contract and is relieved of its obligations under the contract.¹² The party who breaches a contract is ‘responsible for all damages flowing naturally from the breach.’¹³

E. No Urgency Arising

22. Defendants allege that “[t]he issue of possession of the Premises is one of great urgency [...]” *Motion* ¶ 10, yet the facts of this case demonstrate otherwise.

23. Defendants received Plaintiff’s Rescission Notice on February 24, 2015 and elected not to respond. [attached Exhibit 14]

24. Defendants waited until October 15, 2015 (after Plaintiff recorded his Notice of Seller’s Default [attached Exhibit 13]) to file a “notice of termination” in the county records, yet still failed to act to reclaim the Premises.

¹² *Famiglietta v. Ivie-Miller Enterprises*, 966 P.2d 777 (N.M. Ct. App. 1998)

¹³ *Camino Real Mobile Home Park Partnership v. Wolfe*, 119 N.M. 436, 443, 891 P.2d 1190, 1197 (1995)

25. Only now, over a year after defendants allege Plaintiff “failed to make the payments due”, do defendants unconvincingly allege that there is “great urgency”.

F. No Reason to Fear Damage

26. Defendants “seek a hearing to be held as soon as possible on the issue of possession, as the longer the issue of possession is left open, the greater the risk that damage may occur to Premises [...]” *Motion* ¶ 11, yet offer no evidence of this alleged risk.

27. Defendants’ motion fails to state any reason, or raise any theory to substantiate their claim that “the greater the risk that damage may occur to Premises” while Plaintiff’s family continues to live in their current home. [...]” *Motion* ¶ 11

28. In fact, a home with people living in it is safer than a vacant home¹⁴, easier to insure^{15,16}, and has a higher likelihood of selling¹⁷.

G. Request for Rent or Bond Inappropriate

29. Defendants ask that “should the Court find that the issue of possession of the Premises is not ripe to be decided at this time or in this manner, and should the Sartoris be allowed continued occupancy of the Premises, the Townsends request the Court enter an Order requiring the Sartoris to pay rent each month or post a bond in an amount to be set by the Court, until such time that the issue of possession of the Premises is decided by the Court.” *Motion* ¶ 12

¹⁴ <http://bizjournals.com/albuquerque/stories/2010/02/22/story1.html>

¹⁵ <http://www.foxbusiness.com/features/2011/04/27/home-kill-insurance.html>

¹⁶ http://m.huffpost.com/us/entry/empty-homes-need-addition_b_1370308.html

¹⁷ http://www.trulia.com/voices/Home_Selling/Is_an_empty_home_easier_to_sell_than_one_that_is_o-75600

30. Defendants cite no legal grounds for this request, nor, subsequent to their breach and repudiation of the contract, are they entitled to such¹⁸.

31. The parties are before this Court due to defendants' misappropriation of Plaintiff's funds, failure to respond to Plaintiff's information requests and failure to respond to Plaintiff's Rescission Notice.¹⁹

32. It is inappropriate that defendants now seek additional funds from Plaintiff to misappropriate, and should defendants claims prevail over those of Plaintiff, defendants have recourse in law for obtaining damages.

H. Defendants Request Will Not Resolve Controversy

33. Defendants admit that "[t]he Sartoris claims for monetary damages (which are specifically denied by the Townsends) if any are ultimately awarded by the Court, would not be affected by the relief sought in this motion, and any such award could address any payment(s) made by the Sartoris in the interim." *Motion* ¶ 12

34. It is a well-established fact that if a contract can be interpreted to avoid forfeiture, it should be so construed.²⁰ Even if the Court finds that Plaintiff's claims are based on mistake, he is entitled to ratable abatement plus interest, and reformation of the contract.²¹

¹⁸ See *Famiglietta v. Ivie-Miller Enterprises*, 966 P.2d 777 (N.M. Ct. App. 1998) and *Camino Real Mobile Home Park Partnership v. Wolfe*, 119 N.M. 436, 443, 891 P.2d 1190, 1197 (1995)

¹⁹ See *Petition* ¶¶ 26, 27, 55, 59, 61-64, 66-70, 71-83, 84-88

²⁰ *Davies v. Boyd*, 73 N.M. 85, 385 P.2d 950 (1963)

²¹ *Chromo Mountain Ranch Ptnshp. v. Gonzales*, 681 P.2d 724 (1984) (quoting *Gonzales v. Garcia*, 89 N.M. 337, 339, 552 P.2d 468, 470 (1976))

35. Both parties have alleged, among other claims, Breach of Contract. *Petition* ¶¶ 71-83; *Answer and Counterclaim* ¶¶ 14-19 Only one party can be correct on this claim. It would be inappropriate to grant any type of remedy to either party prior to a determination of the breach.

36. As such, granting defendants' motion will accomplish nothing except to displace Plaintiff and his family resulting in undue hardships for Plaintiff in this action and increasing damages owed him by defendants should Plaintiff prevail.

I. No Claim for Ejectment

37. Defendants claim a cause of action under §§ 42-4-1 through 42-4-13 NMSA 1978 for Ejectment.²²

38. However, defendants admit in their counterclaim that Plaintiff and his family “were in possession of the premises pursuant to the Contract”.²³

39. An action for ejectment requires that a party allege that *after* some named day, a party *entered* into the premises and *unlawfully withheld* possession thereof.²⁴

40. As Plaintiff was “in possession of the premises pursuant to the Contract”, and no legal determination has yet been made regarding rights of possession, and Plaintiff has offered to tender the premises back to defendants, defendants cannot claim that Plaintiff *entered* the premises *after* a certain day and *unlawfully withheld* such.

²² See *Answer and Counterclaim* ¶¶ 24-30

²³ See *Answer and Counterclaim* ¶ 26

²⁴

41. Further, the counterclaim alleges that Plaintiff held the property “contrary to the rights” of the defendants, not that he held it unlawfully.²⁵ It is insufficient to allege that the premises are unjustly withheld or held “contrary to the rights” of defendants.²⁶

III. Jury Trial Demanded

42. Defendants have submitted a Hearing Request in which they ask that this matter be resolved without a jury.

43. Pursuant Rule 1-038(A) NMRA “In civil actions any party may demand a trial by jury of any issue triable of right by serving upon the other parties a demand therefor in writing after the commencement of the action [...]”

44. Under 44-6-10 NMSA 1978, which defendants, in part, bring their allegations, “[w]hen a proceeding under the Declaratory Judgment Act [...] involves the determination of an issue of fact, the issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.”

45. Under 42-4-15 NMSA 1978, which defendants, in part, bring their allegations, Plaintiff is entitled to a trial by jury.

46. Plaintiff has demanded, and paid for, and has a right to a trial by jury in this action.

²⁵ See *Answer and Counterclaim* ¶¶ 11-12

²⁶ See *Osborne v. United States*, 1885-NMSC-010, ¶ 9, 3 N.M. 337; 5 P 465 (S. Ct. 1885)

IV. Conclusion

47. Defendants have sought, through their improper motion, which fails to conform to the Rules, to circumvent traditional judicial proceedings. For defendants to prevail on this motion, they must not only prevail on their Breach of Contract claim over Plaintiff's Breach of Contract claim, but must also prevail over Plaintiff's nondisclosure and common law fraud claims, success by Plaintiff on any one of which would cause defendants' claim to fail.

48. Defendants' *Motion*, which is more properly a Motion for Summary Judgment, though it lacks all requisite elements of such, is nothing more than an attempt to derail these proceedings, harass the Plaintiff, and constitutes abuse of process.

49. As the record fails to show evidence of an alleged default or breach on the part of the Plaintiff, and fails to show that defendants have raised any legal argument that they are entitled to remedy absent evidence of a default or breach on the part the Plaintiff, and have failed to plea to the requirements of ejectment, they can show no good grounds for the submission of their *Motion*.

WHEREFORE, Plaintiff prays that this court enter an Order DENYING defendants' motion, and issuing any appropriate sanctions against them for such an untimely and frivolous.

Respectfully submitted this the 31 day of March, 2016.

VERIFICATION

State of _____)

) SS.

County of _____)

I, Robert F. Sartori, do affirm the facts & allegations within the attached hereto to be
TRUE & CORRECT to the very best of my knowledge & belief. **SO HELP ME GOD!**

Plaintiff, Pro se

Robert F. Sartori

P.O. Box 24

McIntosh, New Mexico 87032

Sworn to & subscribed before me on this ____ day of _____ 2016.

Notary Public – State of _____.

My Commission expires: _____