IN THE SUPREME COURT OF GUAM

SAN UNION, INC. dba HARMON GARDEN APARTMENTS,
Plaintiff-Appellee,

v.

RICHARD ARNOLD,
Defendant-Appellant.

Supreme Court Case No.: CVA16-010
Superior Court Case No.: CV0309-16

OPINION

Cite as: 2017 Guam 10

Appeal from the Superior Court of Guam
Argued and submitted on March 3, 2017
Hagåtña, Guam

Appearing for Defendant-Appellant:
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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ROBERT J. TORRES, Associate Justice.

TORRES, J.:

[1] Defendant-Appellant Richard Arnold appeals from a Superior Court judgment in favor of his former landlord and employer, Plaintiff-Appellee San Union, Inc. ("San Union"), awarding San Union possession of a rental unit along with attorney's fees and costs of suit after a summary proceeding for unlawful detainer.

[2] Arnold argues on appeal that the trial court erred in failing to dismiss the action for a defective statement of jurisdiction, refusing to recuse itself for a conflict of interest, failing to address the lawfulness of Arnold's discharge from employment, and not recognizing an equitable defense to unlawful detainer for retaliatory eviction. Arnold further contends that the court improperly awarded attorney's fees. For the reasons herein, we affirm the Superior Court judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] Arnold worked for several years as a maintenance person for San Union, which owns Harmon Garden Apartments. Ellen Wilkinson is the president of San Union. From June 6, 2014, until June 5, 2015, Arnold rented a unit in Harmon Garden Apartments pursuant to a discounted one-year lease. No new lease was signed thereafter, though Arnold continued living in the apartment and paying rent.

[4] On March 9, 2016, Arnold was injured and subsequently procured a doctor's note. Two days later, San Union delivered a document terminating Arnold's employment and giving him 30-days' notice to vacate the unit he occupied. This same notice informed Arnold that his rent

for the portion of the following month before quitting the premises would be a prorated share of $800, rather than his discounted rate of $475.

[5] Arnold failed to vacate the premises within 30 days. A few days later, San Union filed a complaint for unlawful detainer, which was later amended. Arnold filed an answer and purported counterclaims.

[6] The same day that Arnold filed his answer and counterclaims, the parties appeared briefly before the trial court, during which time the following exchange occurred:

> THE COURT: Good morning.
>
> Ms. Wilkinson, previous realtor . . . realtor for the home I live in now, about 10 years ago. Right? She helped me find that home; we're very happy in that home. Notwithstanding Ms. Wilkinson, we don't necessarily have anything beyond that, no other business dealings; let me make that disclosure now.
>
> Mr. Arnold, do I know you?
>
> MR. ARNOLD: No, sir.
>
> THE COURT: Okay.
>
> MR. ARNOLD: All right. I have not been before you before.
>
> THE COURT: Okay. Well, good.

Transcript ("Tr.") at 2-3 (Hr'g, Apr. 29, 2016) (ellipsis in original).

[7] The parties again appeared before the trial court for the unlawful detainer hearing. During this proceeding, Arnold was represented by counsel. Arnold's counsel attempted to argue that Arnold's firing was retaliation for the possible filing of a worker's compensation claim and that the rent increase was unlawful. *See* Tr. at 19 (Unlawful Detainer Hr'g, May 10, 2016). He argued that such evidence was relevant because the court had the ability to deny San Union relief on equitable grounds. *Id.* at 51. The court limited introduction of evidence

regarding Arnold's injury and subsequent report while allowing evidence regarding the increase in rent. *See id.* at 37, 55-56.

[8] At the end of the proceeding, the court and parties reached an understanding regarding the status of arguments that Arnold had raised as counterclaims before acquiring counsel and without the understanding that the proceeding for unlawful detainer was a summary one.

> THE COURT: . . . I do understand how Mr. Arnold has responded in some fashion. Let me just make for the record, the cross-complaints, I'm not saying they're without merit, I would say that this is not the venue for those to be completed. This is just about, really, tenancy . . . .
>
> MR. ARNOLD: Your Honor, may I withdraw those --
>
> [ARNOLD'S COUNSEL]: No --
>
> THE COURT: I'm not dismissing them. I'm just saying that you can take them at another venue. You may file those at a different time. You are not precluded, as a result of your filing them in your answer, from taking some other action at another venue, or through another filing.
>
> [SAN UNION'S COUNSEL]: Your Honor, to clarify, we don't have to respond to that filing and the context --
>
> THE COURT: No, you do not. At this -- I'm not addressing it any further.
>
> [ARNOLD'S COUNSEL]: There are no counterclaims allowed in a -- I acknowledge that there are no counterclaims allowed in a summary proceeding --
>
> THE COURT: Right. Correct, correct.
>
> [ARNOLD'S COUNSEL]: -- unlawful detainer, and so the court doesn't have jurisdiction over them --
>
> THE COURT: That's right.
>
> [ARNOLD'S COUNSEL]: -- so because the court doesn't have jurisdiction over them, it has -- this ruling has no effect on them. They're --
>
> THE COURT: None whatsoever. Take none from it.

> [ARNOLD'S COUNSEL]: -- (indiscernible) he can bring up in a different action.
>
> THE COURT: This is strictly about, again, the occupation of the premises.

Id. at 66-67.

[9] After hearing testimony from Wilkinson and Arnold, the court ordered Arnold to vacate the unit according to a negotiated schedule. *Id.* at 57-65. Thereafter, San Union's counsel clarified that they were seeking attorney's fees under a provision of the lease. *Id.* at 68. The amended complaint states that San Union was seeking "forfeiture of the [l]ease, and restitution and possession of the [p]remises; and . . . such other and further relief as the [c]ourt may deem just and proper." Record on Appeal ("RA"), tab 9 at 3-4 (Verified Am. Compl., Apr. 26, 2016). San Union's counsel stated that the restitution they were seeking was the attorney's fees. Tr. at 45, 68 (Unlawful Detainer Hr'g). The court allowed "strictly whatever application you have for reasonable attorney's fees associated with the statute." *Id.* at 68.

[10] The court signed a proposed judgment submitted by San Union, which granted San Union immediate possession of the unit and specified that San Union "recovers reasonable attorneys [sic] fees" and "recovers the costs of suit." RA, tab 19 at 2 (Proposed J., May 23, 2016). Arnold's attorney signed the proposed judgment, approving it as to form. Arnold timely appealed, appearing *pro se*.

[11] Now before this court, Arnold filed a motion to supplement the record, seeking to include two exhibits—apparently screenshots memorializing Facebook text chat conversations with his son—and an affidavit about an oral contract he had purportedly reached with San Union, which were not introduced in the trial court. San Union, Inc. v. Arnold, CVA16-010 (Mot. to Suppl. R. (Dec. 7, 2016)). We denied the motion, as the proposed documents were outside of the trial

court record, did not merit exercise of this court's inherent power to supplement the record on appeal, and were not amenable to judicial notice. San Union, Inc. v. Arnold, CVA16-010 (Order (Dec. 23, 2016)).

II. JURISDICTION

[12] This court has jurisdiction over an appeal from a final judgment of the Superior Court. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-43 (2017)); 7 GCA §§ 3107, 3108(a) (2005).

III. STANDARD OF REVIEW

[13] This court interprets the requirements of the Guam Rules of Civil Procedure and the Guam Superior Court Rules *de novo*. *Cf. People v. Callahan*, 2015 Guam 24 ¶ 8 (applying *de novo* review to interpretation of the Guam Rules of Appellate Procedure); *Melwani v. Hemlani*, 2015 Guam 17 ¶ 16 (applying *de novo* review to statutory interpretation).

[14] The interpretation of a statute is a legal question subject to *de novo* review. *Guerrero v. Santo Thomas*, 2010 Guam 11 ¶ 8 (citing *Apana v. Rosario*, 2000 Guam 7 ¶ 9).

[15] "A trial court's ruling on the relevance of evidence is reviewed for an abuse of discretion." *People v. Guerrero*, 2001 Guam 19 ¶ 26 (citing *United States v. Easter*, 66 F.3d 1018, 1020 (9th Cir. 1995)).

[16] "Whether a judge should be disqualified from hearing a matter is reviewed for appearance of impropriety." *People v. Camaddu*, 2015 Guam 2 ¶ 9 (citing *Dizon v. Superior Court of Guam (People)*, 1998 Guam 3 ¶ 8).

[17] "An award of attorney's fees is generally reviewed for abuse of discretion." *Duenas v. George & Matilda Kallingal, P.C.*, 2012 Guam 4 ¶ 9 (citing *Fleming v. Quigley*, 2003 Guam 4 ¶

14). "However, determination of the legal basis for an award of attorney's fees is reviewed *de novo* as a question of law." *Id.*

IV. ANALYSIS

[18] Many of the arguments Arnold raises on appeal are not properly before the court.[1] As explained more fully below, most of the remaining arguments—although questions of law—are raised for the first time on appeal. We do not exercise our discretion to reach the merits of several of these questions. *See Tanaguchi-Ruth + Assocs. v. MDI Guam Corp.*, 2005 Guam 7 ¶ 80 (citation omitted) (allowing us to reach unraised issues on a discretionary basis, subject to several broad constraints).

[19] This court traditionally affords *pro se* litigants considerable leeway. *See, e.g.*, *McGhee v. McGhee*, 2008 Guam 17 ¶ 11. But although Arnold is *pro se* before this court, he was represented by counsel before the trial court, where these issues went unpreserved. The arguments now before the court are legally complex and without simple application to the facts of this case. Many are matters of first impression. Although most of the arguments raised for the first time on appeal are questions of law, they are matters on which the court would benefit from a fuller record.

[20] This opinion proceeds to address issues in five parts: first, whether the trial court erred by failing to dismiss the action because the complaint purportedly had a defective statement of jurisdiction; second, whether the trial court erred by not recusing itself from the case pursuant to 7 GCA § 6105; third, whether the trial court erred by failing to determine whether Arnold was

[1] For instance, Arnold asks this court to evaluate the impact of a purported oral agreement, Appellant's Br. at 9-10, 17-18 (Oct. 17, 2017); to investigate matters associated with a criminal case, Appellant's Reply Br. at 14-15 (Feb. 1, 2017); to address the issue whether San Union, after the hearing, failed to properly abide by the trial court's move-out schedule, Appellant's Br. at 9; to determine whether San Union's rent increase was unlawful even though San Union did not seek to recover rent in this action, *id.* at 12; and to return to him $35,000.00 he argues should have been released by the court in another action, *id.* at 3.

lawfully discharged pursuant to 21 GCA § 21103(a); fourth, whether the trial court erred in failing to recognize an equitable defense against unlawful detainer for retaliatory eviction; and fifth, whether attorney's fees were properly awarded.

A. The Trial Court Did Not Err by Failing to Dismiss the Complaint for Purportedly Having a Defective Statement of Jurisdiction

[21] San Union's amended complaint states, in relevant part: "This is an action for unlawful detainer and this court has jurisdiction over this case pursuant to Title 7 GCA § 3105 and Title 21 GCA § 21101 *et seq*." RA, tab 9 at 1 (Verified Am. Compl.). Title 21 GCA § 21101 is titled "Forcible Entry Defined." The next section, 21 GCA § 21102, is titled "Forcible Detainer Defined." Finally, 21 GCA § 21103 is titled "Unlawful Detainer Defined."

[22] "*Et seq.*" is an abbreviation of the Latin phrase "et sequentia," which means "[a]nd those (pages or sections) that follow." *Et seq.*, *Black's Law Dictionary* (10th ed. 2014). Although it would have been clearer if San Union cited 21 GCA § 21103 directly, San Union's jurisdictional statement clearly expresses the action is one "for unlawful detainer." RA, tab 9 at 1 (Verified Am. Compl.). A reading of the complaint does not render it ambiguous; this could not have been a complaint for forcible entry or forcible detainer.

[23] Arnold's argument that forcible and unlawful detainer, as summary remedies, must be strictly construed, Appellant's Br. at 15-16 (citing *Bank of Haw. v. Chan*, 2003 Guam 7), does not counsel for a different outcome. *Chan* and the cases it cites speak to strictly construing the requirements of the statute because it is a summary remedy. *See* 2003 Guam 7 ¶ 8 (citing *Archbishop of Guam v. G.F.G. Corp.*, 1997 Guam 12 ¶ 10; *Berry v. Soc'y of St. Pius X*, 81 Cal. Rptr. 2d 574, 579 (Ct. App. 1999)). The specific requirement for setting forth a jurisdictional statement in pleadings does not come from the statute but from the Guam Superior Court Rules. Guam Super. Ct. R. 10.1; *see also* Guam R. Civ. P. 8(a) (requiring only "a short and plain

statement of the grounds upon which the court's jurisdiction depends"). In any event, there is no reason to believe that Arnold or the trial court was misled by the jurisdictional statement, and it provided adequate guidance. As such, the trial court did not err in failing to dismiss the case on this basis.

B. The Trial Court Did Not Err by Failing to Recuse Itself from the Case Pursuant to 7 GCA § 6105

[24] Arnold next contends that the trial judge should have recused himself, Appellant's Br. at 19, after disclosing that Wilkinson was the "previous realtor . . . for the home [he] live[s] in now," which was purchased "about 10 years ago," Tr. at 2-3 (Hr'g) (ellipses in original). As set forth in 7 GCA § 6105(a):

> Any Judge shall disqualify himself or herself in any proceeding in which his or her impartiality might reasonably be questioned, but if, following complete disclosure to all parties in the proceeding of the reasons for disqualification, all parties agree to having the Judge continue to sit in the proceedings, he or she need not disqualify himself or herself.

7 GCA § 6105(a) (2005). "Guam courts apply an objective, reasonable person standard in determining whether there is an appearance of bias meriting disqualification." *People v. Tennessen*, 2010 Guam 12 ¶ 49 (citing *People v. Johnny*, 2006 Guam 10 ¶ 20). "[J]udges and justices have 'as strong a duty to sit when there is no legitimate reason to recuse as they do to recuse when the law and facts require.'" *Id.* (alteration in original) (quoting *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995)). "7 GCA § 6105[] is not intended to 'bestow veto power over judges or to be used as a judge shopping device.'" *Camaddu*, 2015 Guam 2 ¶ 80 (quoting *Nichols*, 71 F.3d at 351). We have also recognized the need to "apply the reasonable person standard within the contexts of the jurisdictions, parties, and controversies involved," and we have acknowledged the realities that small island communities impose on a rule that might be more rigid otherwise. *Ada v. Gutierrez*, 2000 Guam 22 ¶ 13.

[25] Assuming without deciding the trial judge's relationship to Wilkinson appeared improper, Arnold agreed to allow the trial judge to hear the case. Our rule on disqualification is based on 28 U.S.C. § 455. *Ada*, 2000 Guam 22 ¶ 12 n.2 (citing 28 U.S.C. § 455(a)). The federal scheme allows for parties to waive grounds for disqualification if the grounds are based only on the appearance of partiality, but not for an enumerated list of actual conflicts. *See* 28 U.S.C. § 455. Guam law, on the other hand, allows for a judge to avoid disqualification in all cases so long as the parties agree. 7 GCA § 6105(a), (b).

[26] Federal courts have repeatedly found that a party's failure to object to a judge's continued hearing of a matter constitutes a waiver of any potential disqualification. *See, e.g., Shervin v. Partners Healthcare Sys., Inc.*, 804 F.3d 23, 41 (1st Cir. 2015) ("[Plaintiff] did not seek the judge's disqualification but, rather, by her silence acquiesced in the judge's continued participation."); *United States v. Nobel*, 696 F.2d 231, 236 (3d Cir. 1982) ("[U]nder the circumstances of this case the failure to object constitutes a waiver of disqualification . . . ."), *cert. denied*, 462 U.S. 1118 (1983); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987).

[27] Guam law does not speak explicitly of waiver, but does require that "all parties agree." 7 GCA § 6105(a), (b). To avoid the possibility of parties "l[ying] in wait, raising the recusal issue only after learning the court's ruling on the merits," *Phillips*, 799 F.2d at 1472, we nonetheless adopt the silence-as-waiver rule as to 7 GCA § 6105(a). Because Arnold remained silent in the court below, we cannot find that the trial judge erred by not recusing himself from this case.[2]

[2] We do not address the question whether even the most egregious conflicts are waivable through silence. *See* 7 GCA § 6105(b) (allowing, for instance, a judge to continue to sit "[w]here he or she has a personal bias or prejudice concerning a party" so long as "all parties agree"). Under federal law, such a judge "shall recuse himself," 28 U.S.C. § 455(b)(1), and no waiver is possible, 28 U.S.C. § 455(e).

C. The Trial Court Did Not Err by Failing to Determine Whether Arnold was Lawfully Discharged Pursuant to 21 GCA § 21103(a)

[28] Arnold next argues "that the court failed to determine whether [he] was lawfully fired from his employment with San Union as GCA 21 § 21103(a) [sic] indicates that an employee must be lawfully discharged from his employment to be guilty of unlawful detainer." Appellant's Br. at 5; *see also* Appellant's Br. at 12, 16-19; Appellant's Reply Br. at 8-11. Section 21103(a) reads:

> A tenant of real property, for a term less than life, is guilty of unlawful detainer:
>
> > (a) When he continues in possession . . . of the property . . . after the expiration of the term for which it is let to him, without the permission of his landlord . . . including a case where the person to be removed became the occupant of the premises as a servant or employee, and the relation of master and servant or employer and employee has been lawfully terminated, or the time fixed for such occupancy by the agreement between the parties has expired; but nothing in this subdivision contained shall be construed as preventing the removal of such occupant in any other lawful manner . . . .

21 GCA § 21103(a) (2005).

[29] San Union argues that Arnold abandoned these claims through counsel when counsel acknowledged that counterclaims were not properly before the court. Appellee's Br. at 21-22 (Dec. 29, 2016). But if unlawful termination is a defense under 21 GCA § 21103(a), then Guam Rule of Civil Procedure 8(c)—which allows the court to treat a defense mistakenly designated as a counterclaim as a defense, *see* Guam R. Civ. P. 8(c)—would be applicable. We do not find that a statutory argument was abandoned; none was made. Arnold's counsel tried to introduce workplace injury evidence, but stated that it was relevant not to any statutory argument but to equitable considerations. *See* Tr. at 51 (Unlawful Detainer Hr'g).

[30] It is within the court's discretion to entertain an unraised argument "(1) when review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process; (2) when a change in law raises a new issue while an appeal is pending; [or[3]] (3) when the issue is purely one of law." *Tanaguchi-Ruth*, 2005 Guam 7 ¶ 80 (quoting *Dumaliang v. Silan*, 2000 Guam 24 ¶ 12 n.1). Because this is a question purely of law and is of ready determination, we choose to address it.

[31] Although the initial, year-long lease period had elapsed in this case, testimony established that the lease continued thereafter on a month-to-month basis. Tr. at 33-34 (Unlawful Detainer Hr'g). This is consistent with Guam law, under which the lease was to continue "on the same terms and for the same time, not exceeding one month when the rent is payable monthly, not in any case one year." 18 GCA § 51105 (2005). Such a lease is terminable on one-month notice. 18 GCA § 51106 (2005). Because 21 GCA § 21103(a) is not to "be construed as preventing the removal of such occupant in any other lawful manner," and because Arnold was instructed to quit the premises in accordance with the requirements of the lease and standard notice under Guam law, the trial court did not have to determine the lawfulness of his employment termination.

[32] The lease at issue in this case was not one where the period of tenancy was linked to employment. If it had been, and if Arnold's termination was unlawful—a question we need not reach—21 GCA § 21103(a) would have acted to prevent San Union from evicting Arnold, which they could otherwise have done immediately.[4]

[3] We have recognized that this list is disjunctive. *Tanaguchi-Ruth*, 2005 Guam 7 ¶ 80 (citing *Bolker v. Comm'r*, 760 F.2d 1039, 1042 (9th Cir. 1985)).

[4] "A person who occupies premises belonging to his employer as part of his compensation has no right to continue in possession on the termination of his employment. The discharged person is a tenant at sufferance and is

D. The trial court did not err in failing to recognize an equitable defense against unlawful detainer for retaliatory eviction.

[33] On appeal, Arnold cites California case law establishing a defense against unlawful detainer for retaliatory eviction. Appellant's Reply Br. at 7-10. Arnold's counsel argued before the trial court more generally that the court "may use equity to deny the relief sought in the summary proceeding if the intent is to further some illegal purpose . . . ." Tr. at 51 (Unlawful Detainer Hr'g). We believe this exchange with the trial court was an attempt to invoke equity broadly, not an attempt to invoke the specific defense as now further elaborated on appeal. If this were already a well-used or recognized defense in Guam, the trial court may have been able to properly engage with the argument. However, under the circumstances—where a defense has not yet been recognized in the jurisdiction and the arguments that were made were vague and unsupported—the trial court was not provided what it needed to rule in Arnold's favor. *See, e.g.*, *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1141 (10th Cir. 2007) ("This Court will not consider a new theory advanced for the first time as an appellate issue, even a theory that is related to one that was presented to the district court. Nor does the 'vague and ambiguous' presentation of a theory before the trial court preserve that theory as an appellate issue." (citations omitted)); *Hartman v. Edwards*, 442 S.W.3d 13, 15 (Ark. 2014) ("Appellants' objection at trial was vague and failed to give notice to the court of the particular error."); *In re Vt. Yankee Nuclear Power Station*, 2003 VT 53 ¶ 13 (holding that to be preserved for appeal, issue "must be presented with sufficient specificity and clarity to give the tribunal below a fair opportunity to rule on it").

entitled to no notice before an unlawful detainer action is commenced." *Karz v. Mecham*, 174 Cal. Rptr. 310, 311 (App. Dep't Super. Ct. 1981) (citations omitted).

[34] We afford *pro se* litigants considerable leeway. *See, e.g.*, *McGhee*, 2008 Guam 17 ¶ 11. But although Arnold is *pro se* before this court, he was represented by counsel before the trial court. It is true, as already stated, that we have discretion to consider unpreserved arguments, *Tanaguchi-Ruth*, 2005 Guam 7 ¶ 80, but we decline to do so where the application of the equitable rule is not clear cut.

[35] In *Schweiger v. Superior Court of Alameda County (Bonds)*, the Supreme Court of California "recognize[d] in unlawful detainer actions a defense that the eviction is sought in retaliation for the exercise of statutory rights by the tenant." 476 P.2d 97, 103 (Cal. 1970); *see also* Cal. Civ. Code § 1942.5(a) (West 2017) (codifying later a defense for retaliatory eviction). The court remarked, "If we deny tenants a defense against retaliatory eviction in unlawful detainer actions, we lend the exercise of the judicial process to aid landlords in punishing those tenants with the audacity to exercise their statutory rights." *Schweiger*, 476 P.2d at 100. It concluded, "If a tenant factually establishes the retaliatory motive of his landlord in instituting a rent increase and/or eviction action, such proof should bar eviction." *Id.* at 103. The case, however, focuses on balancing competing directives from housing-related statutes. *Id.* at 99-101.

[36] San Union offers the court another case that makes this focus explicit. *See* Appellee's Surreply Br. at 12 (Feb. 24, 2017) (quoting *Four Seas Inv. Corp. v. Int'l Hotel Tenants' Ass'n*, 146 Cal. Rptr. 531, 533-34 (Ct. App. 1978)).

> Retaliatory eviction occurs . . . "[w]hen a landlord exercises his legal right to terminate a residential tenancy in an authorized manner, but with the motive of retaliating against a tenant who is not in default but has exercised his legal right to obtain compliance with requirements of habitability. . . ." It is recognized as an affirmative defense in California.

Four Seas Inv. Corp., 146 Cal. Rptr. at 533-34 (citation omitted). In California, the defense also "extends beyond warranties of habitability into the area of First Amendment rights." *Id.* at 534.

[37] Although Arnold tries on appeal to introduce habitability rationales, *see, e.g.*, Appellant's Reply Br. at 7-10, and these rationales appeared as part of a purported counterclaim, RA, tab 13, Ex. 1 at 2-4 (Answer, Countercl. & Mot.), no evidence was provided on the habitability rationale during the hearing. The evidence that was offered involved the workplace injury. *See, e.g.*, Tr. at 53 (Unlawful Detainer Hr'g).

[38] The preceding discussion is not intended to act as a decision on the merits that this court recognizes California's equitable defense but does not apply it to workplace-related claims even where the employer is also the landlord. This court may in the future recognize the defense and could extend its application. Rather, the discussion is included to explain that the issue is not a simple one and to better articulate why we decline to exercise our discretion to reach this issue when it has not been expressly preserved.

E. Attorney's Fees were Properly Awarded

[39] Arnold also raises for the first time on appeal the issue whether attorney's fees were properly awarded. As with the preceding issue, we decline to exercise our discretion to reach this issue. Not only did Arnold's counsel fail to object to the award of fees, *id.* at 45, 68, he signed the proposed judgment, which included the award of fees and costs, approving it as to form, RA, tab 19 at 2 (Proposed J.).

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V. CONCLUSION

[40] Because we cannot say the trial court erred by failing to dismiss the action, by not recusing itself, by failing to address the lawfulness of Arnold's discharge, by not recognizing an equitable defense to unlawful detainer for retaliatory eviction, or by awarding attorney's fees, the Superior Court judgment is **AFFIRMED**.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice