NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 10/23/2012
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BANK OF THE WEST, a California banking corporation, Plaintiff/Appellee, v. RUSSELL E. CAULEY aka Rusty Cauley, an individual; CAULEY FAMILY LIMITED PARTNERSHIP, a California limited partnership; LONOAK FARMS LIMITED PARTNERSHIP L.P., a California limited partnership; PEBBLE BEACH RANCHES, L.L.C., a California limited liability company; PACIFIC VALLEY HARVESTING L.P., a California limited liability company, Defendants/Appellants.	No. 1 CA-CV 12-0046 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-023473

The Honorable Jeanne Garcia, Judge

AFFIRMED

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N O R R I S, Judge

¶1 Defendants/Appellants Russell E. Cauley, the Cauley Family Limited Partnership, Lonoak Farms Limited Partnership, Pebble Beach Ranches L.L.C., and Pacific Valley Harvesting Limited Partnership ("Guarantors") timely appeal from the superior court's grant of summary judgment in favor of Plaintiff/Appellee Bank of the West. On appeal, the Guarantors argue the superior court should not have granted summary judgment because material issues of fact existed as to whether the Bank had disposed of the collateral securing the underlying indebtedness in a commercially reasonable manner. We disagree and affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

¶2 The Bank and a third party, Desert Organics, L.L.C., entered into various agreements secured by the collateral. The Guarantors each executed a Continuing Guaranty with the Bank and agreed to pay any indebtedness owed by Desert Organics to the Bank. Desert Organics failed to make certain payments as required by the agreements, the Bank declared it in default, and then demanded payment from the Guarantors; they refused.

¶3 The Bank sued the Guarantors for breach of guaranty and subsequently moved for summary judgment. In response to the

motion, the Guarantors argued the Bank had failed to mitigate damages by, inter alia, not disposing of the collateral after repossession in a commercially reasonable manner. In support of this argument, the Guarantors submitted a declaration from one of the Guarantors, Russell Cauley ("Cauley declaration"), in which he asserted "upon information and belief" the collateral was worth significantly more than the amount the Bank had collected at the sale, the Bank had not conducted a commercially reasonable sale, and the Bank had "misappropriated funds" from the sale by failing to set-off all the proceeds from the sale against the alleged debt secured by the collateral. The Guarantors also generally alleged the deposition testimony of the Bank's representative "spell[ed] out further failures" of the Bank to mitigate damages.

¶4 The superior court granted the Bank's motion, finding the Guarantors had failed to "support their position with relevant, admissible evidence." The court also found the Cauley declaration was not supported by facts based on his personal knowledge and the deposition testimony of the Bank's representative did not support the Guarantors' argument the Bank had failed to mitigate damages.[1]

[1]The court also agreed with the Bank's argument the Guarantors had waived any duty by the Bank to mitigate damages by conducting a commercially reasonable sale of the collateral. On appeal, the Guarantors challenge this ruling. We do not need to address this issue because, even assuming such a duty, they

DISCUSSION

¶5 On appeal, the Guarantors argue that because "[e]very party to a valid contract has a duty to mitigate damages in the event" of a breach, the Bank had a duty to dispose of the collateral in a commercially reasonable manner. Acknowledging the "party in breach has the burden of proving that mitigation was reasonably possible but not reasonably attempted," *Fairway Builders, Inc. v. Malouf Towers Rental Co., Inc.*, 124 Ariz. 242, 255, 603 P.2d 513, 526 (App. 1979),[2] the Guarantors then argue the record contains "factual issues" as to whether the Bank failed to mitigate its damages. The problem with this argument is that the Guarantors failed to meet their burden on summary judgment to show the existence of a triable issue of fact regarding mitigation. *See Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000) (on appeal from grant of summary judgment, appellate court reviews de novo whether there are any genuine issues of material fact and whether superior court properly applied the law).

¶6 When a party moving for summary judgment makes a prima facie showing that no disputed issue of material fact exists

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did not show a genuine issue of material fact regarding the Bank's disposition of the collateral.

[2]We note the underlying credit agreement referred to the Uniform Commercial Code ("U.C.C."). Neither party argued in the superior court that any section of the U.C.C. applied to their dispute.

warranting a trial and it is entitled to judgment as a matter of law, the burden shifts to the opposing party to show the existence of a genuine issue of material fact that must be resolved at trial. *See Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 114-15, ¶ 12, 180 P.3d 977, 979-80 (2008). The adverse party cannot merely claim the existence of an issue of fact, but must show that evidence is available on that issue to justify going to trial. *Portonova v. Wilkinson*, 128 Ariz. 501, 502, 627 P.2d 232, 233 (1981). Affidavits opposing the motion must be based on personal knowledge, set forth specific facts admissible in evidence showing that a genuine issue exists, and establish that the affiant is competent to testify on the matters contained in the affidavit. Ariz. R. Civ. P. 56(e); *see Herring v. Ry. Express Agency, Inc.*, 13 Ariz. App. 28, 31, 474 P.2d 35, 38 (1970). General allegations or conclusions of ultimate facts or law do not satisfy the requirement to set forth specific facts. *Pace v. Sagebrush Sales Co.*, 114 Ariz. 271, 275, 560 P.2d 789, 793 (1977).

¶7 Here, in support of their arguments in responding to the Bank's summary judgment motion, the Guarantors submitted the Cauley declaration, which, as discussed, made various assertions "upon information and belief." These assertions, however, failed to comply with Rule 56(e). An affidavit made "on information and belief" is not based on personal knowledge and

cannot be considered in determining whether an issue of fact exists. *Herring*, 13 Ariz. App. at 31, 474 P.2d at 38; 3 Am. Jur. 2d Affidavits § 15.[3] Thus, the superior court correctly concluded the Guarantors had "failed to support their position with relevant, admissible evidence."

¶8 The Guarantors also argue that questions of fact existed regarding mitigation because the Bank admitted through its representative's deposition testimony that it was not certain what collateral had been sold, how the proceeds had been used to offset any debt, and whether any of the collateral had been resold unreasonably. Our review of the representative's deposition testimony reveals no admission that would raise a question of fact regarding mitigation. The representative testified the Bank had received little or no cooperation from the debtor or Guarantors in recovering the collateral, knew of no collateral still in the debtor's possession, and all of the collateral that had been surrendered by the debtor had been sold and the proceeds applied to the debt.

¶9 In sum, the Guarantors did not produce evidence of a disputed issue of fact warranting a trial on mitigation.

[3]Although the parties are not relying on the U.C.C., we note that under the U.C.C., a secured party's failure to realize a certain price for collateral does not necessarily establish the sale was commercially unreasonable. *See* A.R.S. § 47-9627(A) (2005).

Therefore, the superior court properly entered summary judgment against the Guarantors.

¶10 The Bank requests an award of attorneys' fees and costs on appeal pursuant to A.R.S. §§ 12-341.01 (2003) and 12-341 (2003). In our discretion, we grant the request contingent on its compliance with Rule 21(a), Arizona Rules of Civil Appellate Procedure.

CONCLUSION

¶11 For the foregoing reasons, we affirm the superior court's judgment in favor of the Bank.

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Judge

/s/
JON W. THOMPSON, Judge