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: 11/23/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MARICOPA INVESTMENT TEAM, LLC, an Arizona limited liability company, Plaintiff/Appellant, and KERCSMAR & FELTUS PLLC, an Arizona professional liability company; and GEOFFREY S. KERCSMAR, an individual, Judgment Debtors/Appellants, v. JOHNSON VALLEY PARTNERS LP, a limited partnership; MURRAY A. JOHNSON III, a single man and trustee of the Johnson Family Revocable Living Trust dated December 29, 1994; MURRAY A. JOHNSON JR. and HARRIET JOHNSON, husband and wife; JOHNSON VALLEY DEVELOPMENT, LLC, an Arizona limited liability company; MURRAY A. JOHNSON JR., as trustee of the Murray A. Johnson Sr. Family Trust, dated November 28, 1977, Defendants/Appellees.	1 CA-CV 12-0047 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-050864

The Honorable Linda H. Miles

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

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G E M M I L L, Judge

¶1 Maricopa Investment Team, LLC ("MIT") appeals from the dismissal of its complaint and the award of attorneys' fees to the Defendants. We affirm the trial court's dismissal of MIT's complaint but vacate and remand the award of attorneys' fees and sanctions.

BACKGROUND

¶2 This lawsuit arises out of a previous lawsuit ("the underlying lawsuit") between a third party, Data Venture, Inc., and one of the defendants/appellees, Johnson Valley Development, LLC ("Johnson Valley"). To settle the underlying lawsuit, Data Venture and all the defendants/appellees, including Johnson Valley (collectively "the Johnson Parties") entered into a confidential settlement agreement. In connection with the settlement, Johnson Valley signed a promissory note secured by a

deed of trust.

¶3 Data Venture, unable to pay legal fees incurred in the underlying lawsuit, assigned its rights in the note to MIT, a limited liability company formed by Data Venture's attorneys. The Johnson Parties made the initial payment under the note of $25,000; however, Johnson Valley did not make the remaining $75,000 payment when it became due.

¶4 MIT sued Johnson Valley to recover under the note and obtained a judgment against it. Next, MIT foreclosed on the real property that secured the note. The property was sold at a trustee's sale and purchased by MIT for a credit bid of almost $50,000.[1] MIT was unable to locate any other assets owned by Johnson Valley from which to collect the nearly $48,000 balance owed under the note (including interest and costs), so MIT filed this lawsuit against the Johnson Parties to attempt to recover the balance.

¶5 The trial court dismissed MIT's complaint. MIT appealed. We have jurisdiction under Arizona Revised Statutes ("A.R.S.") § 12-2101(A)(1) (Supp. 2012).

DISCUSSION

¶6 MIT maintains that its complaint was well pled and

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[1] The record does not reflect any market value of the property other than the bid price.

should not have been dismissed. Dismissal of a complaint under Arizona Rule of Civil Procedure ("Rule") 12(b)(6) is reviewed de novo. *Coleman v. City of Mesa*, ___ Ariz. ___, ___, ¶ 7, 284 P.3d 863, 866 (2012). In reviewing the dismissal of a complaint for failure to state a claim pursuant to Rule 12(b)(6), we accept as true the facts alleged in the complaint and will affirm the dismissal only if the plaintiff would not be entitled to relief under any interpretation of the facts susceptible of proof. *Fidelity Sec. Life Ins. Co. v. State*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580, 582 (1998) (citation omitted). The complaint alleges claims for fraud in the inducement, unjust enrichment, and alter ego/piercing the corporate veil. We affirm the trial court's dismissal for the reasons provided below.

FRAUD IN THE INDUCEMENT

¶7 MIT's fraud in the inducement claim is barred by the economic loss rule. In *Flagstaff Affordable Housing Limited Partnership v. Design Alliance, Inc.*, 223 Ariz. 320, 223 P.3d 664 (2010) ("*Flagstaff*"), the Arizona Supreme Court extended the economic loss rule to preclude a claim for professional negligence in a construction defect case, holding that "[t]he economic loss doctrine may vary in its application depending on context-specific policy considerations." *Id.* at 325, ¶ 24, 223

P.3d at 669. Thus, to determine whether the economic loss rule applies here, we must consider the underlying policies of tort and contract law in the context of the facts and claim made in this case. *Id.*

¶8 Contract law "seeks to encourage parties to order their prospective relationships, including the allocation of risk of future losses and the identification of remedies, and to enforce any resulting agreement consistent with the parties' expectations." *Id.* at 325, ¶ 25, 223 P.3d at 669. Tort law, however, is intended to deter accidents, promote safety, and allocate losses from accidents. *Id.* at 325, ¶ 27, 223 P.3d at 669. The court in *Flagstaff* noted that in some cases, the policies of "accident deterrence" and "loss-spreading" are not implicated and so there is no need to permit recovery in tort in addition to contractual remedies. *Id.* In such cases, "'the policies of the law generally will be best served by leaving the parties to their commercial remedies' when a contracting party has incurred only 'economic loss.'" *Id.* at 325-26, ¶¶ 27-28, 223 P.3d at 669-70 (citation omitted).

¶9 After *Flagstaff,* this court applied the economic loss rule to preclude claims for fraud in the inducement and misrepresentation. *See Cook v. Orkin Exterminating Co.*, 227 Ariz. 331, 332, ¶ 4, 335, ¶ 20, 258 P.3d 149, 150, 153 (App.

2011). In *Cook,* the homeowners claimed that the pest control company misrepresented its ability to rid their home of termites "thereby inducing them to enter the Agreement, which they otherwise would not have done." *Id.* at 334, ¶ 17, 258 P.3d at 152. That is essentially the same claim that MIT advances here, that if the Johnson Parties had not misrepresented Johnson Valley's ability to satisfy the note, Data Venture would not have entered into the settlement agreement and accepted the note.

¶10 In *Cook,* we rejected the argument that the economic loss rule does not apply to a fraud claim: "The Arizona Supreme Court held in [*Flagstaff]* that a contracting party is *limited wholly* to its contractual remedies for purely economic loss related to the subject of the parties' contract." *Id.* at 335 n.6, ¶ 20, 258 P.3d at 153 n.6 (emphasis in original). The economic loss rule will not always bar a claim for fraud in the inducement; however, it may be a bar in a case where the claimant does not seek to rescind or reform the contract induced by fraud, but essentially affirms the contract by seeking contract damages under a tort theory, as MIT does here.

¶11 Here, the parties were of approximately equal bargaining power. They anticipated the possibility that Johnson Valley would breach the contract by not paying the total amount

due and owing under the note, allocated the risks accordingly, and provided remedies for any such breach. These remedies included the non-judicial foreclosure of the property, owned by an entity other than Johnson Valley, that secured the note. Moreover, in connection with its fraud in the inducement claim, MIT requests an award of contract damages – specifically, the amount that remains due and owing under the note. Absent from MIT's complaint is any claim of physical injury to persons or property which would except this claim from the economic loss rule.

¶12 Under these facts, when there has been no injury except that anticipated and bargained for under the contracts between the parties, the contract law policy of upholding the parties' expectations favors limiting MIT's claims to those sounding in contract. We find no compelling reason to impose tort liability under these facts. *See Cook*, 227 Ariz. at 335, ¶20, 258 P.3d at 153. Thus, MIT is precluded under the economic loss rule from asserting a purely economic loss claim for fraudulent inducement against the Johnson Parties. We affirm the trial court's dismissal of this claim.

UNJUST ENRICHMENT

¶13 MIT also asserts a claim for unjust enrichment. Unjust enrichment occurs when one party has and retains money or

benefits that in justice and equity belong to another. *City of Sierra Vista v. Cochise Enters., Inc.*, 144 Ariz. 375, 381, 697 P.2d 1125, 1131 (App. 1984). To establish a claim for unjust enrichment, a party must show: (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) the absence of justification for the enrichment and the impoverishment; and (5) the absence of a legal remedy. *Trustmark Ins. Co. v. Bank One, Arizona, NA*, 202 Ariz. 535, 541, ¶ 31, 48 P.3d 485, 491 (App. 2002).

¶14 The trial court properly dismissed this claim under Rule 12(b)(6) because MIT failed to plead the absence of a legal remedy. Even if we liberally construe MIT's allegations to allege that it had no adequate remedy at law, the unjust enrichment claim was properly dismissed. "As our supreme court has explained in *Brooks v. Valley Nat'l Bank*, 113 Ariz. 169, 548 P.2d 1166 (1976), if there is 'a specific contract which governs the relationship of the parties, the doctrine of unjust enrichment has no application.'" *Trustmark*, 202 Ariz. at 542, ¶ 34, 48 P.3d at 492 (quoting *Brooks,* 113 Ariz. at 174, 548 P.2d at 1171). Here, not only could MIT have pursued a breach of contract claim based on the note, it actually did so and obtained a judgment against Johnson Valley. MIT also foreclosed on the real property owned by another Johnson Party that secured

the note. Because these contractual documents governed the relationship of the parties, the trial court properly dismissed MIT's unjust enrichment claim.

PIERCING THE CORPORATE VEIL

¶15 MIT’s final claim is to pierce the corporate veil to reach the assets of defendant/appellee Murray A. Johnson, III. MIT alleges that Johnson Valley was formed for the sole purpose of avoiding liability to Data Venture. Even assuming this to be true, MIT’s claim to pierce the corporate veil stems from Data Venture’s assignment of the note to MIT. Arizona law is well-established that an assignee’s rights are no greater than the rights of the assignor. *K.B. v. State Farm Fire & Cas. Co.*, 189 Ariz. 263, 267, 941 P.2d 1288, 1292 (App. 1997). Although MIT was only an assignee of the promissory note, as the Johnson Parties’ assignee-judgment creditor, we must examine the settlement agreement in order to determine whether Data Venture would have been permitted to bring a claim to pierce the corporate veil. If Data Venture would have been barred under the settlement agreement from asserting such a claim, then MIT is also barred, even though MIT is not an assignee of the settlement agreement.

¶16 The settlement agreement entered into between Data Venture and the Johnson Parties contained broad releases.

“Construction and enforcement of settlement agreements, including determinations as to the validity and scope of release terms, are governed by general contract principles.” *Emmons v. Superior Court*, 192 Ariz. 509, 512, ¶ 14, 968 P.2d 582, 585 (App. 1998). A guiding principle of contract interpretation is that courts attempt to enforce a contract according to the parties' intent. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993). “In order to determine what the parties intended, we first consider the plain meaning of the words in the context of the contract as a whole.” *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593, ¶ 9, 218 P.3d 1045, 1050 (App. 2009) (citation omitted). If, after such consideration, the parties' intent is clear, the contract contains no ambiguity. *Id.* "Language in a contract is ambiguous only when it can reasonably be construed to have more than one meaning." *In re Estate of Lamparella*, 210 Ariz. 246, 250, ¶ 21, 109 P.3d 959, 963 (App. 2005) (citation omitted).

¶17 Data Venture, released all known and unknown claims against the Johnson Parties. The release expressly applies to Data Venture, its attorneys and assigns:

> Unless otherwise provided herein, *the Data Parties*, and all those claiming through it or on its behalf, including, but not limited to, . . . [its] *attorneys* . . . or *assigns*, hereby release, acquit, relieve, and forever

> discharge the Johnson Parties . . . from, and *covenant not to directly or indirectly sue* for or otherwise assert against *the Johnson Parties* in any forum, any and all claims, rights, actions, complaints, demands, causes of action, obligations, promises, contracts, agreements, controversies, suits, debts, expenses, damages, attorneys' fees, costs, and/or liabilities *of any nature whatsoever, whether or not now known, suspected or claimed, matured or unmatured, fixed or contingent, which the Data Parties had, now has, or may claim to have against the Johnson Parties (either directly or indirectly)*, arising out of or related to the Arbitration, the Project, the Dispute, *and any act, event, occurrence, or matter whatsoever*, and/or the relationship and/or alleged relationship between the Data Parties on the one hand and the Johnson Parties on the other hand with regard to the claims in the Arbitration and/or Dispute, *in the broadest sense*.

(Emphasis added.)

¶18 Additionally, the settlement agreement contained a waiver paragraph in which both parties waived all claims and defenses, known and unknown, suspected or unsuspected: "In furtherance of such intention, the release herein given shall be and remain in effect as a full and complete release of such matters covered hereunder notwithstanding the discovery of any additional claims, defenses, or facts relating thereto."

¶19 Finally, in the settlement agreement the parties represented and warranted that:

> [N]o Party has made any statement or

> representation to any other Party regarding any fact, which statement or representation is relied upon by any other Party in entering into this Agreement. In connection with the execution of the Agreement or the negotiating of the terms provided for herein, no Party to this Agreement has relied upon any statement, representation, or promise of any other Party not expressly contained herein.

The settlement agreement contained no representation by the Johnson Parties as to Johnson Valley's capitalization or ability to satisfy the note. And as already indicated, Johnson Valley's obligation under the note was secured by a deed of trust on real property.

¶20 Considering the plain meaning of the mutual releases and the context of the settlement agreement as a whole, we conclude the intent of the parties is clear. Data Venture would be barred under the settlement agreement from asserting this claim against the Johnson Parties. MIT is therefore likewise barred.

ATTORNEYS' FEES AND SANCTIONS AWARD

¶21 MIT also appeals the trial court's award of attorneys' fees and the imposition of Rule 11 sanctions. Because we conclude that the trial court's award of fees and sanctions lacks the requisite specificity, we vacate the award of fees and sanctions and remand for further proceedings.

¶22 We review an award of attorneys' fees under Rule 11 for an abuse of discretion; however, we review the basis of a Rule 11 sanction de novo. *Villa De Jardines Ass'n v. Flagstar Bank, FSB*, 227 Ariz. 91, 96, ¶ 12, 253 P.3d 288, 293 (App. 2011) (citations omitted). MIT argues the court erred by not reciting the reasons that sanctions were warranted. We agree. When imposing Rule 11 sanctions, the "trial court must make specific findings to justify its conclusion that a party's claims or defenses are frivolous." *Wells Fargo Credit Corp. v. Smith,* 166 Ariz. 489, 497, 803 P.2d 900, 908 (App. 1990) (citing *State v. Richey*, 160 Ariz. 564, 774 P.2d 1354 (1989)).

¶23 Here, the trial court awarded $13,600.50 in attorneys' fees based on A.R.S. § 12-341.01 (Supp. 2012) and Rule 11, but did not explain its reasons for the Rule 11 sanctions. The order and judgment also do not state whether the Rule 11 sanctions were for the entire amount awarded or some lesser portion. Additionally, the court in granting fees under § 12-341.01 did not specify which subsection — (A) or (C) — was applicable, although we assume from the parties' arguments that the court was applying subsection (A). In regard to A.R.S. § 12-341.01(A), the court did not explain which claim or claims it determined to arise out of contract within the meaning of § 12-

341.01(A).[2] On this record, we believe the best approach is to set aside the award of fees and sanctions in its entirety and remand for further proceedings.

¶24 The Johnson Parties also request attorneys' fees and costs incurred on appeal in accordance with A.R.S. § 12-341.01(A). In the exercise of our discretion, we decline to award attorneys' fees to the Johnson Parties in this appeal, but we will award them their taxable costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶25 For the foregoing reasons, we affirm the trial court's dismissal of MIT's complaint, but vacate the award of attorneys' fees under A.R.S. § 12-341.01 and Rule 11 and remand for further proceedings consistent with this decision.

/s/
JOHN C. GEMMILL, Judge

CONCURRING:

/s/
ANN A. SCOTT TIMMER, Presiding Judge

/s/
MARGARET H. DOWNIE, Judge

[2] Under subsection 12-341.01(C), specific findings must be made in support of an award of fees as a sanction. *See Richey*, 160 Ariz. at 565, 774 P.2d at 1355.