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: 03/23/2010
PHILIP G. URRY,CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TOURELLE DEVELOPMENT, INC., an Arizona corporation,

Plaintiff/Counterdefendant/ Appellant,

and

JOHN THOMAS and MADGE THOMAS, husband and wife,

Third Party Defendants/ Appellants,

v.

KATHRYN PROFFITT, a single woman, PROFFITT INVESTMENTS, INC., an Arizona corporation; and PROFFITT INVESTMENT HOLDINGS, L.L.C., an Arizona limited liability company,

Defendants/Counterclaimants/ Third Party Plaintiffs/ Appellees.

No. 1 CA-CV 09-0148

DEPARTMENT D

MEMORANDUM DECISION

(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2004-091530

The Honorable Christopher Whitten, Judge

AFFIRMED

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By Brad A. Denton
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By Mark R. Jewett
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J O H N S E N, Judge

¶1 Tourelle Development, John Thomas and Madge Thomas ("Appellants") appeal from the superior court's grant of summary judgment in favor of Kathryn Proffitt, Proffitt Investments and Proffitt Investment Holdings ("Appellees") on Appellants' claims for lost profits and punitive damages and Appellees' claim to enforce a promissory note and the superior court's denial of Appellants' motion for leave to file a second amended complaint. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 In October 2002, Tourelle Development ("Tourelle") obtained the right to purchase an undeveloped 31-lot residential subdivision ("the Project"). Shortly thereafter, John Thomas, Tourelle's president, and Kathryn Proffitt executed the Vimana Properties LLC Operating Agreement (the "Vimana Agreement"), forming an equal partnership for the purchase, development and sale of the Project. Thomas and Proffitt applied for a loan to purchase the property but were denied due to Thomas's credit history. After the loan was denied, the parties abandoned the

Vimana Agreement, and Proffitt decided to finance the project on her own, with Proffitt Investment Holdings ("PIH") taking title. The purchase closed in March 2003. The $2,980,000 purchase price was comprised of approximately $2,650,000 contributed by Proffitt (including $2 million in borrowed funds) and $350,000 contributed by Thomas.[1]

¶3 According to Thomas, after he and Proffitt abandoned the Vimana Agreement, but before the March 2003 closing, they orally agreed to develop the Project in a partnership whereby the parties' ownership interests would be 45% and 55%, respectively. Thomas asserts that at Proffitt's encouragement he worked from March 2003 to June 2004 to develop the Project to ready the lots for sale. According to Thomas, after he completed most of the work, however, Proffitt hired a contractor to finish the development, thus forcing him out of the Project in violation of their agreement.

¶4 According to Proffitt's version of events, after she and Thomas abandoned the Vimana Agreement, there was no other agreement to develop the Project as a partnership. Rather, she asserts, she hired Thomas and Tourelle as the general contractor to develop the Project and paid him a monthly salary to do so.

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[1] Several months later, John Thomas and Madge Thomas considered refinancing their home with a second mortgage. Proffitt offered to make them a loan instead. Thomas drafted and recorded a deed of trust and a promissory note, and Proffitt loaned the couple $250,000. *See infra* ¶¶ 21-34.

After learning that Thomas lacked a general contractor's license and that Tourelle lacked the required class of license, she fired Thomas and hired another contractor. Additionally, Proffitt alleges that Thomas's $350,000 contribution to the Project's purchase price was intended as a loan to PIH.

¶5 Appellants filed their complaint shortly after Proffitt replaced Thomas as contractor on the Project, alleging breach of contract, fraud, unjust enrichment, breach of duty of good faith and fair dealing, breach of fiduciary duty, declaratory action, quantum meruit and promissory estoppel, and seeking damages, an accounting and preliminary and permanent injunctive relief.

¶6 On April 30, 2007, the superior court granted Appellees' motion for partial summary judgment on Appellants' punitive damages claim based on the alleged fraud.[2] On May 8, 2007, the superior court granted Appellees' motion for partial summary judgment as to Appellants' claims for lost profits. That ruling effectively nullified most of Appellants' substantive claims because each of them was premised on a lost-profits theory of damages. After an unsuccessful motion for new trial, Appellants moved for leave to amend their complaint to add a partition claim. The court denied them leave to amend.

[2] Shortly thereafter, the court also granted Appellees' motion for partial summary judgment on their claim for breach of a promissory note. *See supra* note 1.

Finally, after a bench trial on the only remaining issue - the nature of Thomas's $350,000 contribution to the Project's purchase - the court found that Appellees were obligated to repay the $350,000 loan to Appellants, with prejudgment interest. Appellants timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") § 12-2101(B) (2003).

DISCUSSION

¶7 Appellants raise four issues on appeal. We address each in turn.

A. The Motions for Summary Judgment.

1. Standard of review.

¶8 We review a grant of summary judgment *de novo* to determine whether any issue of material fact exists and whether the superior court correctly applied the law. *Cannon v. Hirsch Law Office, P.C.*, 222 Ariz. 171, 174, ¶ 7, 213 P.3d 320, 323 (App. 2009). Summary judgment is appropriate when there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c)(1). In our review of summary judgment, we view evidence and reasonable inferences in the light most favorable to the opposing party. *Wells Fargo Bank v. Ariz. Laborers Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 482, ¶ 13, 38 P.3d 12, 20 (2002). The superior court properly granted Appellees' motions

for summary judgment in this case only if the facts Appellants produced "have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by [Appellants] . . . ." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

2. Lost profits.

¶9 To recover lost profits damages, a party must "establish[] a reasonably certain factual basis for computation of lost profits." *Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 140 Ariz. 174, 184, 680 P.2d 1235, 1245 (1984). Once a plaintiff has proven the right to damages, the amount of lost profits damages may be shown with "a lesser degree of certainty." *Pasco Indus., Inc. v. Talco Recycling, Inc.*, 195 Ariz. 50, 64, ¶ 66, 985 P.2d 535, 549 (App. 1998). There must be, however, "a reasonable basis in the evidence for the trier of fact to fix computation when a dollar loss is claimed." *Rancho Pescado*, 140 Ariz. at 184, 680 P.2d at 1245. Thus, lost profits do not require "absolute certainty," but "the court or jury must be guided by some rational standard in making an award." *Id.*

¶10 In response to Appellees' motion for summary judgment, Appellants offered the following evidence of the Project's value: (1) an August 2005 appraisal performed for a bank that valued the lots at $16,500,000 if sold in bulk or $23,028,959 if

sold individually; (2) an appraisal by Appellees' real estate agent, based on comparable sales data, valuing the lots at $23,727,000; and (3) data from a bulk sale of six of the Project's lots in April 2006. Appellants failed to provide any evidence of future Project expenses, instead arguing the lots could be sold without incurring any additional expense. On this point they offered testimony of Proffitt's contractor to the effect that the Project was complete and ready for sale in August or September 2005. Appellants argued they were entitled to receive $8,085,649.66 in lost profits, which they calculated as 45% of the difference between the Project's July 27, 2005 appraised value of $23,028,959 and total Project expenses (as of the time of the motion) of $5,283,070.86.

¶11 We agree with the superior court that Appellants failed to meet their burden of providing facts to support a "reasonable basis" for calculating their alleged lost profits damages. Even assuming Appellants offered satisfactory evidence of the Project's then-current value, *see* Arizona Rule of Civil Procedure 56(e), that evidence failed to take into account expenses that reasonably would be expected to be incurred before the Project would sell out. Notwithstanding Appellants' contention that one of the appraisals they offered assumed the lots would be sold within a year, the appraisal does not constitute competent evidence that the lots *would be sold* within

that time. Nor did the contractor's statement that the Project was "complete" in August or September 2005 establish that the lots would be sold within any particular timeframe. And as long as lots remained unsold, property taxes, loan payments, commissions, utilities, administrative costs, accounting fees, marketing costs and other expenses would continue to accrue.

¶12 Appellants argue the superior court imposed an impossible burden on them because Appellees controlled the Project, such that Appellants could only speculate as to when Appellees would sell the lots. But Appellants only were required to offer evidence providing a "reasonable basis" to support the expenses that were necessary for calculating lost profits. *Rancho Pescado*, 140 Ariz. at 184, 680 P.2d at 1245. Appellants could have satisfied this burden by offering evidence of the expenses that would be incurred by a reasonable seller over the time period in which the lots reasonably could be expected to sell. In other cases, this burden has been satisfied by, for example, "expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like." Restatement (Second) of Contracts § 352 cmt. b (1981).

¶13 Appellants' evidence showed the Project's value and development and carrying costs incurred prior to trial. But because they provided no evidence of the costs that reasonably

would be incurred before the lots would be sold, they presented no rational basis for a fact-finder to determine the lost profits the Project reasonably could be expected to yield. As a result, the superior court properly entered partial summary judgment against them on the issue of lost profits.[3]

3. Punitive damages.

¶14 Appellants next contend the superior court erred in granting Appellees' motion for summary judgment on punitive damages based on Appellants' fraud claim. Appellants contend they were entitled to punitive damages because Proffitt fraudulently induced Thomas into signing over title to the land and performing development work by promising him he would share as a partner in the proceeds from the Project.

¶15 Recovery of punitive damages requires "something more" than the "mere commission of a tort." *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 330, 723 P.2d 675, 679 (1986) (internal quotation and citation omitted). The inquiry should focus on the wrongdoer's mental state, and the evidence must

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[3] Appellants also argue the superior court erred by ignoring its own power to craft an equitable remedy that might be available (even if lost profits were not) on their claims for an accounting and unjust enrichment. Appellants, however, did not raise the issue of possible equitable remedies until their motion for new trial. Issues raised for the first time in a motion for new trial are waived. *Conant v. Whitney*, 190 Ariz. 290, 293-94, 947 P.2d 864, 867-68 (App. 1997). More generally, Appellants' inability to establish a legally permissible measure of lost profits effectively doomed their accounting and unjust enrichment claims. *See also infra* ¶¶ 35-39.

demonstrate the defendant's "evil mind," plus conduct that is "outwardly aggravated, outrageous, malicious, or fraudulent." *Id.* at 330-31, 723 P.2d at 679-80. A plaintiff seeking punitive damages may demonstrate the defendant's "evil mind" by showing the defendant intended to injure the plaintiff or, where injury was not intended, that the "defendant consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others." *Rawlings v. Apodaca*, 151 Ariz. 149, 162, 726 P.2d 565, 578 (1986). If a reasonable juror could not find the existence of an evil mind by clear and convincing evidence, a motion for summary judgment on punitive damages should be granted. *Thompson v. Better-Bilt Aluminum Prods. Co.*, 171 Ariz. 550, 558, 832 P.2d 203, 211 (1992).

¶16 Appellants assert Proffitt had decided by January 2003 that she would not share profits from the Project with Thomas, but nevertheless purported to enter into an oral partnership agreement with him prior to March 2003 to replace the abandoned Vimana Agreement. In furtherance of the alleged fraud, Proffitt purportedly encouraged Thomas to transfer ownership of the Project from Tourelle to PIH at closing by telling him they would memorialize the partnership agreement once she returned from a trip out of town. As proof, Appellants offered evidence that in the months after the March 2003 closing, Proffitt described the $350,000 Appellants had paid toward the purchase

as their “contribution” to the Project, told Thomas that Tourelle would receive Project profits, referred to “the partnership” in conversations with Thomas and described Thomas to third parties as her partner.

¶17 According to Thomas’s own deposition testimony, however, he and Proffitt still were negotiating and had not reached a partnership agreement to replace the Vimana Agreement even months after the March 2003 closing. Thomas testified that “negotiations [with Proffitt] continued after escrow, and in June, . . . we ended up with a verbal agreement. And that agreement [Proffitt] didn’t sign.” When asked why Proffitt did not sign the purported agreement, Thomas testified “she wanted some more changes.”

¶18 The merits of the fraud claim are not before us, but we conclude based on the record on summary judgment that no jury reasonably could find by clear and convincing evidence that Proffitt acted tortiously with an evil mind, as Appellants allege. *See id.* at 558, 832 P.2d at 211. Thomas’s testimony shows that at the time he made the $350,000 contribution to the purchase at closing, he and Proffitt had yet to come to an agreement regarding sharing of future profits from the Project. In fact, Thomas’s testimony suggests that contrary to Appellants’ complaint, the parties never came to any final

agreement – he admitted they never signed the written agreement because Proffitt wanted "more changes."

¶19 Although in a later affidavit Thomas asserted that he and Proffitt entered into an agreement "prior to March 2003," parties may not avoid summary judgment by creating issues of fact "through affidavits that contradict their own depositions," unless they show they were confused when they were deposed and their affidavits address that confusion or they lacked access to material facts and their affidavits contain newly discovered evidence. *Wright v. Hills*, 161 Ariz. 583, 588, 780 P.2d 416, 421 (App. 1989) *abrogated on other grounds as recognized by James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Prot.*, 177 Ariz. 316, 319-20, 868 P.2d 329, 332-33 (App. 1993); *see also MacLean v. State Dep't of Educ.*, 195 Ariz. 235, 241, ¶ 20, 986 P.2d 903, 909 (App. 1999) ("party's affidavit which contradicts his own prior deposition testimony should be disregarded on a motion for summary judgment") (internal quotation and citation omitted). There is no indication in the record that Thomas was confused at his deposition or lacked access to material facts.

¶20 Because at the time of the closing the parties still were in negotiations, the record contains insufficient evidence to create a material issue of fact concerning Appellants' argument that Proffitt acted with an evil mind in inducing

Thomas to participate in the transaction by fraud. Accordingly, the superior court properly granted Appellees' motion for summary judgment on punitive damages.

4. Promissory note.

¶21 Appellants next argue the superior court erred in granting summary judgment in favor of Proffitt on a promissory note. The August 15, 2003 note, drafted by John Thomas and signed by John and Madge Thomas, obligated the Thomases to repay $350,000, plus interest at a rate of 10% annually, to Kathryn Proffitt. Monthly payments of "interest only on the unpaid balance" were to begin on September 30, 2003, with that same date serving as the note's date of maturity.

¶22 Although interpretation of a clear and unambiguous contract is an issue of law for the court, when a contract is ambiguous, "the parties may offer evidence to help interpret it, in which case construction is a question for the jury." *Hall Family Props., Ltd. v. Gosnell Dev. Corp.*, 185 Ariz. 382, 388, 916 P.2d 1098, 1104 (App. 1995). Whether a contract is ambiguous is a question of law for the court. *Webster Constr. Co. v. Reppel Steel & Supply Co., Inc.*, 123 Ariz. 138, 142, 598 P.2d 116, 120 (App. 1979). Additionally, a court must not consider extrinsic evidence that would vary or contradict a contract's written terms if the written language is not "reasonably susceptible" to the interpretation offered by the

proponent of the extrinsic evidence. *Long v. City of Glendale*, 208 Ariz. 319, 328, ¶ 29, 93 P.3d 519, 528 (App. 2004).

¶23 Appellants first argue that inconsistencies within the note and between the note and the corresponding deed of trust create an ambiguity that requires admission of extrinsic evidence. Specifically, the note lists September 30, 2003 as both the date monthly payments were to commence and the date on which full repayment was due. According to Appellants, the parties agreed that Appellants would repay the note only out of their profits from the Project.

¶24 We conclude the fact that the note lists the same date for commencement of payment and full repayment does not render the document ambiguous. Certainly the note is not "reasonably susceptible" to the meaning that Appellants urge, which is that there was no fixed date of repayment because the parties agreed that Appellants would not have to repay the note until distribution of profits from the Project. Nor does Appellants' proffered extrinsic evidence create an issue of material fact. In his deposition, John Thomas testified that the note's "closing date" was "long past" and that the reason he did not make monthly payments on the note was because he "didn't have it." Only later, in an affidavit submitted with Appellants' statement of facts in support of their response to Appellees' motion for summary judgment, did Thomas state that the note's

stated maturity date was incorrect and that the parties intended for the debt to be paid from Appellants' profits from the Project. We will not consider those portions of Thomas's affidavit because they contradict his deposition testimony that the note was past due and that he failed to make payments on the note because he did not have the money. *Wright*, 161 Ariz. at 588, 780 P.2d at 421.

¶25 Appellants also argue that an inconsistency between the note and the deed of trust – that the note specified a maturity date of September 30, 2003 and the deed of trust specified a maturity date of September 30, 2004 – creates an ambiguity requiring admission of extrinsic evidence. In support of their argument, Appellants cite *Pearll v. Williams*, 146 Ariz. 203, 206, 704 P.2d 1348, 1351 (App. 1985), for the proposition that the court should read "substantially contemporaneous" instruments together. That same case instructs, however, that "when the terms of a note and a mortgage conflict, the terms of the note prevail." *Id.* Therefore, even reading the documents together, the note's September 30, 2003 maturity date controls. Moreover, even if we were to conclude the conflicting dates created ambiguity, Thomas's deposition testimony demonstrates that payments were not intended to be due until the Project yielded profits.

¶26 Appellants also argue that the parties' conduct evidences their intent that payments on the note would not be due until Appellants received profits from the Project. They contend that the fact that they made only one payment on the note - a single interest payment that they asserted had tax benefits for both parties – and the fact that Proffitt never demanded a payment or penalty or gave a notice of default create an issue of material fact as to the parties' intent.

¶27 As we have concluded, however, the contract's written terms, which required payment in full on September 30, 2003, are not "reasonably susceptible" to the contention that payment was due at some later unspecified date when Appellants realized profits from the Project. *See Long*, 208 Ariz. at 328, ¶ 29, 93 P.3d at 528. Instead, the interpretation Appellants assert directly contradicts the note's clear, unambiguous written language. As a result, the superior court correctly declined to consider this extrinsic evidence of the parties' alleged intent.[4]

[4] Appellants also argue in their reply brief that the court should have considered their extrinsic evidence because Proffitt fraudulently induced the Thomases into signing the note and "the parol evidence rule does not bar evidence of fraud in the inducement of a contract." *Fomento v. Encanto Bus. Park*, 154 Ariz. 495, 499, 744 P.2d 22, 26 (App. 1987). But because Appellants did not argue fraudulent inducement in their response to Proffitt's motion for summary judgment, that argument is waived on appeal. *See Maher v. Urman*, 211 Ariz. 543, 548, ¶ 13, 124 P.3d 770, 775 (App. 2005).

¶28 Appellants also contend the superior court erred when it granted summary judgment in favor of Proffitt on the note because Proffitt waived her right to payment according to the note's terms.

¶29 "Waiver generally requires a finding of intentional relinquishment of a known right or of conduct that would warrant such an inference." *Minjares v. State*, 223 Ariz. 54, 58, ¶ 17, 219 P.3d 264, 268 (App. 2009). Waiver based on a party's conduct requires evidence of acts inconsistent with intent to assert the party's right. *Id.; see also Jones v. Cochise County*, 218 Ariz. 372, 379, ¶ 23, 187 P.3d 97, 104 (App. 2008). The party arguing waiver must make "a clear showing of intent to waive." *Minjares*, 223 Ariz. at 58, ¶ 17, 219 P.3d at 268.

¶30 The only "acts" Appellants assert demonstrate Proffitt's intent to waive her right to enforce the note are non-acts. They point to her failure to mention late payments or to send a notice of default. Even viewing these facts in the light most favorable to Appellants, we cannot conclude that Proffitt's mere inaction creates a material issue of fact as to the existence of a "clear showing" of her intent to waive the note's repayment terms. Moreover, the note itself states, "Even if, at a time when [borrower is] in default, the Note Holder does not require [borrower] to pay immediately in full as described above, the Note Holder will still have the right to do

so if [borrower is] in default at a later time.” Thus, the note plainly provides that failure to demand payment will not constitute a waiver of the right to later demand payment.

¶31 Appellants contend, however, that the note’s waiver provision does not control because Proffitt did not waive the right to repayment by failing to demand payment, but rather waived the right to be repaid until after the Project yielded profits. Nothing in the note, however, requires the Project to yield profits before Proffitt could demand repayment. Accordingly, the superior court did not err in concluding that Appellants failed to present evidence sufficient to create a material issue of fact concerning Proffitt’s alleged waiver.

¶32 Finally, Appellants argue the court erred in granting summary judgment on the promissory note because it was Proffitt who first breached the agreement. Appellants contend Proffitt promised to lend them a total of $350,000, but loaned them only $250,000 and refused to loan the remaining $100,000. They also assert Proffitt promised to refrain from collecting on the note until Appellants received profits from the Project.

¶33 The promissory note states:

> The face amount of the loan is $350,000, which represents the maximum amount of the loan. The initial amount loaned shall be $170,000, with an additional amount of $80,000 to be loaned on August 21, 2003. Borrower shall pay lender 2% (points) on the amounts loaned, in addition to the stated

> interest, which shall be considered loaned
> upon receipt of funds.

Another provision of the note reads, "In return for a loan that I have received, [borrower] promise[s] to pay U.S. $350,000.00 (this amount is called 'Principal'), plus interest, to the order of Lender." Nothing in the note's express terms obligates Proffitt to lend to Appellants more than $250,000; it states only that the maximum amount of the loan is $350,000.

¶34 Accepting for purposes of argument Appellants' contention that they would not be obligated to repay the $250,000 they borrowed if Proffitt promised to loan them even more money, we find no ambiguity as to the amount of the loan. The note plainly states Appellants' obligation to pay to Proffitt $350,000 plus interest and Proffitt's obligation to lend $250,000 in separate payments of $170,000 and $80,000, with $350,000 to be the maximum amount that could be loaned under the agreement. Because we conclude note was not ambiguous, the superior court correctly declined to consider extrinsic evidence in interpreting that term. *See Hall Family Props.*, 185 Ariz. at 388, 916 P.2d at 1104 (extrinsic evidence considered to aid in interpreting contract when term is ambiguous).

B. Motion for Leave to Amend the Complaint.

¶35 Appellants also argue the superior court abused its discretion when it denied their motion for leave to file a

second amended complaint. The court granted Appellees' motion for summary judgment on lost profits on May 8, 2007; then, on December 10, 2007, the court set a trial date of June 19, 2008 for remaining issues. On January 9, 2008, Appellants filed a motion for leave to file a second amended complaint to add a claim to have their alleged partnership interest partitioned under A.R.S. §§ 12-1222 (2003) and -1223 (2003). Citing the fact that "all substantive motions were due long ago," "the procedural status of this case, and the futility of the proposed amend[ment]," the court denied the motion.

¶36 We review the denial of leave to amend a complaint for an abuse of discretion. *Dewey v. Arnold*, 159 Ariz. 65, 68, 764 P.2d 1124, 1127 (App. 1988). "Leave to amend shall be freely given when justice requires." Ariz. R. Civ. P. 15(a)(1). Although it is generally an abuse of discretion to deny leave to amend when the amendment simply seeks to add a new legal theory, denial is proper when "the court finds undue delay in the request, bad faith, undue prejudice, or futility in the amendment." *MacCollum v. Perkinson*, 185 Ariz. 179, 185, 913 P.2d 1097, 1103 (App. 1996).

¶37 Appellants' proposed amended complaint alleged the existence of a partnership agreement that entitled Tourelle to "45% . . . of the net profits from the development and sale of the Lots" in the Project. It alleged that Tourelle's interest

in the net profits constituted a personal property interest subject to partition pursuant to A.R.S. § 12-1222. That statute provides that in a partition action, "[t]he separate value of each article of the personal property shall be ascertained and an allotment in kind made to each owner as he is entitled." If the property "will not admit of an equitable partition, the court shall ascertain the proportion to which each owner is entitled and shall order that the property be sold." A.R.S. § 12-1223(B). Once the property is sold, the court must "pay over the proceeds of sale to the parties entitled thereto in the proportion ascertained by judgment of the court." *Id.*

¶38 The property Appellants sought to partition was not the real estate comprising the Project, but rather a 45% partnership "interest[] in the net profits attributable to the development and sale of the Lots." But by the time Appellants moved for leave to amend, the superior court already had entered summary judgment against them on their claim for lost profits on the ground they offered insufficient evidence of the net profits they asserted they were entitled to collect on the Project. *See supra* ¶¶ 9-13. Having failed to offer sufficient evidence to support their asserted right to share in the profits of the Project on their other claims, Appellants' effort to collect a share of those same net profits by way of partition was futile, as the superior court correctly determined.

¶39 Appellants suggest several means by which the superior court could have accomplished a partition of the net profits of the Project: By dividing the lots according to the parties' respective shares, ordering the lots sold and the profits divided between the parties or "by some other appropriate means," including appointing a special master to oversee the payment of net profits. Appellants, however, do not point to any authority that would authorize the court to take the actions they suggest in connection with the nature of the partition they sought. Moreover, the premise of each of the measures Appellants suggest necessarily would have been a determination of the value of the share in the net profits of the Project claimed by Appellants. As noted, however, because Appellants failed on summary judgment to offer evidence sufficient to establish the value of the net profits they sought in connection with their other claims, the court acted within its discretion in denying Appellants' motion for leave to amend to try to obtain those same net profits by another means. *See Walls v. Ariz. Dep't of Pub. Safety*, 170 Ariz. 591, 597, 826 P.2d 1217, 1223 (App. 1991) (denial of leave to amend not an abuse of discretion when amendment was subject to dismissal on summary judgment).

CONCLUSION

¶40 For the foregoing reasons, the judgment of the superior court is affirmed. In the exercise of our discretion, we grant Appellees' request for attorney's fees pursuant to A.R.S. § 12-341.01 (2003) and their costs on appeal, contingent on their compliance with ARCAP 21.

/s/_______________________________
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/_______________________________
PATRICIA A. OROZCO, Presiding Judge

/s/_______________________________
JON W. THOMPSON, Judge