DIVISION ONE
FILED: 06-08-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

COMERICA BANK,	)	1 CA-CV 09-0379
	)	
Plaintiff/Appellant,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
CACTUS & TATUM, L.L.C., an Arizona limited liability company; MICHAEL and VIVIAN KAPANICAS, husband and wife,	)	Rule 28, Arizona Rules of Civil Appellate Procedure)
	)	
Defendants/Appellees.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-050933

The Honorable Eddward P. Ballinger, Judge

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART

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B A R K E R, Judge

¶1 Comerica Bank ("Comerica") appeals from the trial court's grant of summary judgment and award of attorneys' fees in favor of appellees Cactus & Tatum, L.L.C. and Michael and Vivian Kapanicas. For the following reasons, we affirm in part and reverse in part as to the grant of summary judgment and vacate the fee award.

Facts and Procedural History[1]

¶2 On June 28, 1999, the Kapanicases purchased real property from Lamb Boys-Cactus & Tatum, L.L.C., a Nevada limited liability company ("Lamb Boys"). Pre-sale discussions concerned building a Superpumper gas station on the property. At the time, Michael Kapanicas was the owner of Superpumper Inc. The purchase contract, though, was between Lamb Boys as seller and "Michael L. Kapanicas and Vivian L. Kapanicas, husband and wife," as buyers.

¶3 On September 4, 2002, Lamb Boys and "Superpumper Inc." entered into an "Ingress/Egress and Cross Access Easement Agreement" ("Agreement") for cross access driveways for the Kapanicases' property that abutted Lamb Boys' property. The Agreement was recorded with the Maricopa County Recorder on May 21, 2003.

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[1] We view the facts and the inferences to be drawn from those facts in the light most favorable to Comerica, the party against whom judgment was entered. *See Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996).

¶4 The Kapanicases conveyed the property to Cactus & Tatum L.L.C., an Arizona limited liability company ("Cactus & Tatum"), of which they were the principals. On March 14, 2005, Cactus & Tatum and Comerica executed a Lease Agreement ("Lease"), stating, *inter alia,* that the property would be used by Comerica for "the operation of a branch bank."

¶5 One year later, in March 2006, Lamb Boys sued Cactus & Tatum, arguing the Agreement was a servitude prohibiting use of the property for anything other than a gas station. In December 2006, the superior court ruled that the Agreement did in fact impose such a restrictive covenant.

¶6 In January 2007, Comerica moved to intervene, arguing the Agreement was not binding on the property because it was between Lamb Boys and Superpumper — an entity that never held title. In October 2007, the superior court reversed its earlier decision, finding the Agreement was executed by "Michael Kapanicas in his capacity as an officer of Superpumper — which had no ownership interest in the land and therefore no power to impose a servitude upon it."[2]

¶7 Before the superior court issued its revised ruling, Comerica filed a complaint against appellees, alleging nine counts: (1) declaratory relief; (2) breach of contract; (3)

[2] The court also denied Comerica's request for attorneys' fees. Comerica appealed that portion of the ruling, and we affirmed.

breach of the implied covenant of good faith and fair dealing; (4) money had and received; (5) unjust enrichment; (6) constructive trust and equitable lien; (7) fraud; (8) aiding and abetting tortious conduct; and (9) punitive damages. Appellees moved to dismiss counts three, four, five, six, eight, and nine pursuant to Arizona Rule of Civil Procedure ("Rule") 12(b)(6). The trial court granted that motion.

¶8 Appellees then moved for summary judgment, arguing the remaining three counts (declaratory relief, breach of contract, and fraud) were predicated on Comerica's claim that the property could not be used as a bank — an assertion disproven by the October 2007 ruling. Appellees also requested attorneys' fees pursuant to the Lease. Comerica responded in opposition and also filed a cross-motion for summary judgment on the breach of contract claim. The superior court granted appellees' motion for summary judgment and awarded them $9000 in attorneys' fees.

¶9 Comerica timely appealed from the grant of summary judgment and the award of attorneys' fees.[3] We have jurisdiction pursuant to Arizona Revised Statute ("A.R.S.") section 12-2101(B) (2003).

[3] Comerica has not challenged the dismissal of counts three, four, five, six, eight, and nine. Additionally, Comerica addresses only two of the three remaining counts in its opening brief – breach of contract and fraud. We thus do not consider the claim for declaratory relief (count one).

Discussion

1. Summary Judgment

¶10 Summary judgment may be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). In reviewing a motion for summary judgment, we determine *de novo* whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000).

a. Implied Covenant of Quiet Enjoyment[4]

¶11 Comerica contends the Lamb Boys' claims interfered with its use of the property from December 2006 until October 30, 2007, causing an actionable breach of the implied covenant of quiet enjoyment.[5] We agree.

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[4] Comerica's breach of the covenant of quiet enjoyment claim falls under the breach of contract count.

[5] Comerica variously describes this interference as a failure to deliver possession of the property; an "eviction" while the Lamb Boys suit progressed; preclusion of use after the December 2006 ruling; and "frustration" of the use of the property during the Lamb Boys litigation. Comerica did not claim below that appellees failed to deliver possession, nor does it adequately develop this assertion on appeal. We thus decline to address it. *See State v. Moody*, 208 Ariz. 424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004). Moreover, Section 1.2 of the Lease Agreement stated the property would "be delivered" at the end of the approval period, if the lease were not earlier terminated. The lease agreement was entered on March 14, 2005, allowing Comerica use of the property before the

¶12 The implied covenant of quiet enjoyment ensures that a tenant will be "free from any interference on the part of the landlord." *Johansen v. Ariz. Hotel*, 37 Ariz. 166, 173, 291 P. 1005, 1008 (1930) (internal quotation omitted). "Where the paramount title holder asserts his interest in the leased property in such a way as to deprive the tenant of the use contemplated by the parties, the tenant is evicted and the landlord is in default . . . ." Restatement (Second) of Property § 4.3 cmt. d (1977) [hereinafter Restatement]. The mere existence of a paramount title does not constitute a default. *Id.* cmt. b. Additionally, the "institution of proceedings" is an insufficient action to assert title because "[t]hese proceedings may disprove the claim." *Id.* Reporter's Note 3. However, "*any culmination* of necessary legal steps involved in asserting the title" is sufficient. *See id.* (emphasis added).

¶13 In considering what constitutes the "culmination of necessary legal steps," we are mindful that the December 2006 ruling in the Lamb Boys litigation was not a signed final judgment. *See* Ariz. R. Civ. P. 54(a) (defining "[j]udgment" as a "decree and an order from which an appeal lies"); *Id*. 58(a)

Lamb Boys suit was filed a year later. Also, Comerica relies on Restatement (Second) of Property § 4.3, which discusses an assertion of paramount title "*after* the tenant enters into possession." Restatement (Second) of Property § 4.3 (1977) (emphasis added).

(providing that "all judgments shall be in writing and signed by a judge" and filed with the clerk); *Lamb v. Superior Court*, 127 Ariz. 400, 403, 621 P.2d 906, 910 (1980) ("[U]ntil the order is in writing, signed by the court and entered by the clerk of the court, it is not effective."). However, the minute entry here was prepared at the direction of the judge, it was noted on the civil docket and stamped by the clerk of the court, and it contains a lengthy explanation by the court. The minute entry with its language "IT IS ORDERED" clearly put counsel on notice that an order had been entered restricting the development of the property to a gas station. *Cf. Beaudry Motor Co. v. Abko Props., Inc.*, 780 F.2d 751, 754-55 (9th Cir. 1986) (discussing an unsigned minute order that was not signed but clearly put counsel on notice that an adverse order had been entered). It was intended by the court as the determination of the rights of the parties and shows in intelligible language its decision. Faced with this order before it, Comerica had the choice to ignore a court order and continue with its plans or abandon the contemplated use of the property until the order could be reversed. Comerica took the latter course and moved to intervene. The court heard evidence and entered a ruling in 2007 reversing its December 2006 order. It is only this time period from December 2006 until October 2007 for which Comerica seeks damages.

¶14 Because of our concern in establishing a rule finding that legal proceedings could "culminate" without there being a final judgment entered, we now turn to some of the unique factors in this case that cause us to find such a culmination here. In particular, our concern is that the conduct that caused the ten-month "work stoppage," if you will, for which Comerica seeks damages, was caused by appellees.

¶15 A tenant "can hold the landlord in default under the lease if a third party under a paramount right evicts the tenant from all or a portion of the leased property and thereby deprives the tenant of the use contemplated by the parties." Restatement § 4.3 cmt. a. "Where the tenant has not been ousted from possession by the assertion of the paramount title but the assertion prevents the use contemplated by the parties, the tenant has been evicted and the rule of this section is applicable . . . ." *Id.* cmt. d. Here, it was the conduct of Mr. and Mrs. Kapanicas, as both principals in Superpumper and as principals in Cactus & Tatum, as well as acting on their own behalf, that resulted in temporarily depriving Comerica of "the use contemplated by the parties."[6]

¶16 The lease between Cactus & Tatum and Comerica specifically provided that Comerica was permitted to use the

[6] Mr. and Mrs. Kapanicas were the principals and acted as the landlords of Cactus & Tatum. Comerica does not dispute this.

property to build and operate a commercial bank. The lease provides:

> [Comerica] shall use the Premises solely for the purpose of conducting its business, which is expressly limited to the operation of a branch bank and all uses relating thereto, including, without limitation, a retail banking and financial services business . . . . [Comerica] shall not use or permit the Premises to be used for any other purpose or purposes except with the prior written consent of Landlord . . . .

Thus, Mr. and Mrs. Kapanicas, as principals in Cactus & Tatum, permitted Comerica to enter the lease with the understanding that the sole purpose was to run a bank despite a previous agreement with Lamb Boys that the premises would only be used as a gas station and convenience store. *See Stewart Title & Trust of Tucson v. Pribbeno*, 129 Ariz. 15, 16, 628 P.2d 52, 53 (App. 1981) (holding that constructive eviction occurs through intentional conduct by landlord that deprives tenant of beneficial enjoyment of leased property). Although Comerica was not ousted from possession of the property, there was an order of the court, in place for approximately ten months, that precluded it from using the property for the purpose specified in the lease. Additionally, and critical to our analysis here, is that the basis for the order was a document signed by Mr. and Mrs. Kapanicas in their capacity as principals in Superpumper. Thus, in the situation before us it was the landlord who caused

the circumstance that interfered with the tenant's use of the property. Further, the document that interfered with the use of the property was an "access agreement," to which one would not necessarily look for restrictions on the property. This explains why Comerica would not have been aware of the potential for its expressly granted use to be limited. See Restatement § 4.3 cmt. a.

¶17 Therefore, under the unique circumstances of this case, we determine there was a culmination of necessary legal steps sufficient to breach the covenant of quiet enjoyment. *Id.* Reporter's Note 3. Lamb Boys claims interfered with Comerica's use of the property causing an actionable breach of the implied covenant of quiet enjoyment for the period of time from December 2006 to October 30, 2007. Of course, we express no view as to damages, which will be an issue on remand.

b. Fraud

¶18 The fraud count requires us to consider some of the same facts against different elements. The facts here, though they create a breach of the covenant of quiet enjoyment, do not leave a triable issue as to fraud. Actionable fraud requires proof of nine separate elements:

> (1) A representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably

> contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) his consequent and proximate injury.

Waddell v. White, 56 Ariz. 420, 426-27, 108 P.2d 565, 568-69 (1940) (internal citation omitted). If any one element is not proven, the fraud claim fails. *Id.* at 427, 108 P.2d at 569.

¶19 Section 2.3 of the Lease established a ninety-day approval period, requiring Comerica to "use reasonably diligent efforts to inspect the Premises" and allowing Comerica to conduct a "Land Title Survey" and "inspections, studies and tests." At the end of the approval period, Comerica had the option of terminating the Lease if it was not "satisfied, in Tenant's sole discretion, with the condition of the Premises." Otherwise, the Lease "shall continue in full force and effect," and the property would be "delivered to Tenant and accepted by Tenant 'AS-IS, WHERE-IS'." The Lease further recited that Comerica was "an experienced and sophisticated lessee, capable of evaluating the merits of the transaction," that Comerica would conduct all inspections it deemed "necessary or appropriate to evaluate the condition of the premises" before the approval period expired, and that its decision to enter the Lease was based on Comerica's "independent due diligence investigations and not based upon any representations or warranties of Landlord."

¶20 We agree with Comerica's assertion that "[s]ellers and lessors are not permitted to hide behind a disclaimer [or] warranties to avoid the consequences of a fraud." *See Wagner v. Rao*, 180 Ariz. 486, 488-89, 885 P.2d 174, 176-77 (App. 1994) (holding that an "as is" provision or integration clause is not dispositive of waiver when a material misrepresentation occurs). However, the gravamen of Comerica's fraud claim is its assertion that the pre-sale discussions between Lamb Boys and the Kapanicases were "sufficient to raise a triable question of fact as to whether [appellees] were aware at the time of the Lease that Lamb Boys would or might claim a use restriction." We disagree.

¶21 According to Comerica, "every [pre-sale] conversation" between Lamb Boys and the Kapanicases concerned placement of a "Super[p]umper on the site," and a Lamb Boys representative specifically told the Kapanicases he "'would have a problem'" with any use other than a gas station. A Lamb Boys representative suggested that the purchase contract expressly limit use of the property to a Superpumper facility; without such a limitation, he believed "Superpumper would be free to erect any type of facility or expand the current building." However, the resulting purchase agreement between Lamb Boys and the Kapanicases included no such limitation — a fact Comerica itself asserted in its reply in support of its motion for

summary judgment in the Lamb Boys litigation, arguing Lamb Boys conveyed the property "without any conditions on its use."[7]

¶22 The only reference the purchase agreement made to a gas station was a provision allowing the parties sixty days "from the opening of [e]scrow to enter into a separate written agreement pertaining to the installation of ATM Machines in the Buyer's existing business known as 'Superpumper.'" While the record indicates the parties created such an agreement, it was later abandoned. As the superior court summarized during oral argument, Comerica's claim thus rested on the theory that appellees should have disclosed the "negotiations in 1999, that didn't result in an agreement regarding a use restriction, but

[7] In Comerica's motion to intervene in the Lamb Boys litigation, it stated:

> [T]he Ingress/Egress Agreement . . . was not and has never been executed by the owner of the Property, Michael and Vivian Kapanicas. Instead, the Ingress/Egress Agreement was signed by a corporation known as Superpumper, Inc. Yet, Superpumper, Inc. is a stranger to title of the Property, and thus lacked capacity to bind the actual owners, Michael L. Kapanicas and Vivian L. Kapanicas. In other words, Superpumper, Inc.'s purported grant of not only a cross-access easement, but also a putative use restriction, is ineffective.

there may be someone that frivolously claims one based upon a document that you've been provided."[8]

¶23 Comerica also contends a material fact question exists about whether it discovered the Agreement "in the course of its due diligence, so as to negate any reliance by Comerica." The record establishes that the Agreement was part of Comerica's file and was specifically identified in the title report for the property, which Comerica received and later provided in response to a request for production in the Lamb Boys litigation.[9] Even assuming a genuine issue of material fact exists as to when Comerica received the title report, the Agreement was recorded. In Arizona, recording provides at least constructive notice that

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[8] Indeed, at oral argument on the motions for summary judgment, Comerica's counsel stated:

> We do not allege and we don't seek to prove that there was, in fact, an enforceable use restriction on the property, and that the defendants concealed that fact. That is not our case.
>
> Our case is what the defendants didn't tell us is what they had discussed with Lamb Boys. What Lamb Boys knew, and what Lamb Boys believed, and what Lamb Boys was likely to do in terms of trying to enforce the use restriction, based upon the discussions that they had with Lamb Boys back in 1999 and the agreements that followed.

[9] The commitment for title insurance was effective February 28, 2005. Nevertheless, Comerica has not conceded that it received the title report and commitment before expiration of the due diligence period under the Lease.

the land is encumbered. *See* A.R.S. § 33-411(A) (2007); *Butler v. Quinn*, 40 Ariz. 446, 452, 14 P.2d 250, 252 (1932) ("Public records are, of course, notice to all persons of the existence and contents of their properly recorded documents."). Comerica states it "was never informed and never understood" that the Agreement "prevented a bank from being constructed on the Property." But Comerica knew the Agreement was tied to the leased property. Had Comerica reviewed the document, it would also have seen that the Agreement was between "Superpumper" and "Lamb Boys" and contained a "Use" section stating that the property would "be developed as a gasoline station." Just as we decline to allow Lamb Boys to use a document it created to avoid responsibility for delays, we likewise decline to allow Comerica to use a document it could have read as a basis for a fraud claim.

¶24 The fact that the Agreement was recorded also distinguishes this matter from cases Comerica cites to support its contention that "disclaimers and 'as-is' clauses in a contract do not deprive a buyer (or lessee) of the right to prove fraud or misrepresentation inducing the execution of the contract." *See Reilly v. Mosley*, 301 S.E.2d 649, 652 (Ga. Ct. App. 1983) (holding that the "'as is' language" in contract for purchase of used vehicle was ineffective to negate an express warranty regarding the accuracy of the vehicle's odometer

reading and prior ownership); *St. Croix Printing Equip., Inc. v. Rockwell Int'l Corp.*, 428 N.W.2d 877, 878, 882 (Minn. Ct. App. 1988) (holding "as is" clause did not per se determine whether reliance on seller's affirmation that printing press was in "good working condition" was justified); *CNC Serv. Ctr., Inc. v. CNC Serv. Ctr., Inc.*, 731 F. Supp. 293, 302 (N.D. Ill. 1990) (finding "as-is" clause in business purchase agreement did not stand when a "party [was] not alerted to the alleged fraud simply by reading the terms of the document" because "Sellers had concealed material facts that rendered all the independent investigation meaningless").

¶25 In *Formento v. Encanto Business Park*, 154 Ariz. 495, 744 P.2d 22 (App. 1987), real property was represented as being "zoned IP (Industrial Park)," a classification that normally allowed a forty-foot building. *Id.* at 496, 744 P.2d at 23. This particular property, however, was governed by a more restrictive height limitation that was not discernable from the zone map or through independent inquiry by the buyer. *Id.* The land sale agreement included a clause affirming that the buyer had inspected the property and did not rely on "'any representations or statements of the Seller.'" *Id.* at 497, 744 P.2d at 24 (quoting the agreement). In *Formento*, we held that "when a 'positive, distinct and definite representation' regarding the zoning status of the property is made, the buyer

is entitled to rely on that representation with no duty to make independent inquiry." *Id.* at 500, 744 P.2d at 27 (quoting *Barnes v. Lopez*, 25 Ariz. App. 477, 480, 544 P.2d 694, 697 (1976)). Here, the Lease stated Comerica could use the property as a bank, which it can. And, as noted *supra,* the Agreement was available for Comerica's review before accepting the Lease.

¶26 Comerica failed to present competent evidence establishing a triable issue of fact as to false representations by appellees (let alone knowingly false and material representations) or justifiable reliance. The superior court properly granted judgment as a matter of law on the fraud count.

2. Attorneys' Fees

¶27 Comerica claims the superior court erred in awarding attorneys' fees to appellees because they failed to make such a claim in a "pleading," as required by Rule 54(g)(1). We agree.

¶28 An award of attorneys' fees is typically reviewed for an abuse of discretion. *Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, 265, ¶ 18, 99 P.3d 1030, 1035 (App. 2004). However, the interpretation of Rule 54(g)(1) is a question of law subject to *de novo* review. *King v. Titsworth*, 221 Ariz. 597, 598, ¶ 8, 212 P.3d 935, 936 (App. 2009).

¶29 "A claim for attorneys' fees shall be made in the pleadings." Ariz. R. Civ. P. 54(g). When interpreting the language in rules or statutes, "the word 'shall' normally

indicates a mandatory provision while 'may' generally indicates a permissive one." *See State v. Seyrafi*, 201 Ariz. 147, 150, ¶ 14, 32 P.3d 430, 433 (App. 2001) (providing for the interpretation of statutes); *State v. Sanders*, 205 Ariz. 208, 217, ¶ 38, 68 P.3d 434, 443 (App. 2003) (allowing courts to interpret rules of court in the same fashion as they construe statutes).

¶30 Cactus & Tatum requested attorneys' fees for the first time in its motion for summary judgment. A motion for summary judgment is not a pleading. *King*, 221 Ariz. at 598-99, ¶ 10, 212 P.3d at 936-37; *see also* Ariz. R. Civ. P. 7(a) (defining a pleading as a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, and a third-party answer). Appellees assert that under the "unusual circumstances" of this case, we should treat the fee request in the motion as "a claim in a pleading." We conclude otherwise.

¶31 Cactus & Tatum could and should have made its fee request in a pleading, as the rule requires, before filing its motion for summary judgment. Cactus & Tatum's motion to dismiss sought dismissal of only six of the nine counts. Even assuming Cactus & Tatum could properly await a ruling on its motion to dismiss before answering the remaining counts, it failed to file a timely answer. *See* Ariz. R. Civ. P. 12(a)(1)(A) ("A defendant shall serve and file an answer within twenty days after the

service of the summons and complaint . . . ."); *Id.* 12(a)(3) (setting different deadlines for an answer after a ruling on a Rule 12 motion). Appellees did not file an answer that included an attorneys' fees request until January 2, 2009 — after the trial court granted their motion for summary judgment, after appellees filed an application for attorneys' fees, and seventeen months after the complaint was served.

Conclusion

¶32 We affirm in part and reverse in part the grant of summary judgment to appellees and vacate the award of attorneys' fees incurred below. We remand for further proceedings consistent with this decision. Appellees made a timely request for fees on appeal. The Lease provides for an award of fees to the "successful party." We decline to award attorneys' fees to either party at this time as the matter is still ongoing. Attorneys' fees incurred on appeal may be considered at the time of the final disposition in the trial court.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

D O W N I E, Judge, concurring in part and dissenting in part:

¶33 I agree that the superior court properly granted summary judgment against Comerica on its fraud claim. I also concur with the majority's resolution of the attorneys' fees issue. I part company with the majority, however, regarding Comerica's claim for breach of the covenant of quiet enjoyment. I believe the superior court properly granted summary judgment to appellees on that claim as well.

¶34 As the majority notes, the mere existence of a paramount title does not establish a breach of the covenant of quiet enjoyment, and the institution of legal proceedings is insufficient because those proceedings may disprove the claim. It is the "culmination of necessary legal steps involved in asserting title" that is of legal significance. Restatement (Second) of Property § 4.3 cmt. b, n.3.

¶35 It is undisputed that the December 2006 interlocutory ruling in the Lamb Boys litigation was not a final judgment. Additionally, no injunction was ever issued to prohibit or restrict Comerica's use of the property.[10] Comerica was not evicted or dispossessed of the property; nor did it abandon the premises. Although Comerica faced uncertainty and some measure of financial risk in light of the interlocutory ruling, I

[10] This distinguishes the situation at bar from Restatement § 4.3, illus. 11, where an injunction was issued.

believe the Lamb Boys claim "culminated" within the meaning of Restatement § 4.3 in October 2008, when the superior court issued a final, appealable judgment granting Comerica's motion for summary judgment and ruling that the Agreement did not in fact prohibit use of the property as a bank. Thus, I would affirm the grant of summary judgment to appellees on the claim for breach of the covenant of quiet enjoyment.

/s/
_____
MARGARET H. DOWNIE, Judge