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
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ARIZONA BUSINESS BANK, a division of CoBiz Bank, formerly known as First Capital Bank of Arizona, Plaintiff/Appellee, v. JEFF M. LEVETON, Defendant/Appellant.	1 CA-CV 09-0390 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-005994

The Honorable Sam J. Myers, Judge

AFFIRMED

Simmons & Gottfried, PLLC — Phoenix
By Jared C. Simmons,
Attorney for Appellant

Collins May Potenza Baran & Gillespie, P.C. — Phoenix
By Daniel P. Collins
and Maureen P. Henry
Attorneys for Appellees

H A L L, Judge

¶1 Jeff M. Leveton (Leveton) appeals from the trial court's grant of summary judgment in favor of Arizona Business Bank (ABB). For the reasons that follow, we affirm the trial court's judgment.

FACTS AND PROCEDURAL HISTORY

¶2 Leveton owns two packaging materials distributorships in Arizona and one in Nevada. Leveton signed as a guarantor on three commercial loans made by ABB on July 28, 2005 to one of these distribution companies, Discount Package Supply, Inc. (Borrower). Borrower signed three promissory notes agreeing to repay the debts in full on various maturity dates, with regular monthly payments of all accrued unpaid interest. The notes were for $1,500,000.00 (Note 1), $360,000.00 (Note 2), and $140,000.00 (Note 3). In each Note, Borrower agreed that upon any default, including its failure to make any payment when due or its pursuit of bankruptcy proceedings, ABB could "declare the entire unpaid principal balance on [the] Note and all accrued unpaid interest immediately due."

¶3 As security for the loans, Leveton and his ex-wife each executed a commercial guaranty. Leveton's two other distribution companies, in Scottsdale and Nevada, also entered agreements granting ABB a security interest in the companies' collateral, including but not limited to all "Inventory, Chattel

Paper, Accounts, Equipment, and General Intangibles" to secure Borrower's debt. ABB recorded UCC-1 forms covering this property collateral in Nevada and Arizona. ABB also recorded a deed of trust from Adaptive Industrial, another company owned by Leveton, for commercial real property in Tempe, Arizona.

¶4 Leveton's three distribution companies filed for Chapter 11 bankruptcy protection on March 30, 2007. On April 9, 2007, ABB filed suit against Leveton for breach of the personal guaranty, initiating the instant case. Leveton filed an answer on May 18, 2007. On July 17, 2007, ABB exercised its right of sale under the Adaptive Industrial deed of trust and sold the Tempe real estate to the highest bidder for $343,241.79. ABB also seized collateral held by Leveton's Nevada company pursuant to an emergency writ of possession, and ultimately sold it at auction on January 10, 2008. The sale was conducted by The Arizona Auctioneers, an auction and liquidation company, yielding $77,830.42 after deducting commission and advertising costs. The proceeds of these transactions relieved Borrower's obligation under Note 2.

¶5 On March 4, 2008, ABB filed a motion for summary judgment in its suit against Leveton for the deficiencies on Notes 1 and 3 due after the sales of collateral. ABB supported its motion with a sworn affidavit by Kyle Kennedy, President of

ABB, and twenty-five documents relating to the loan, guarantees, and collateral sales. The affidavit included information on the loan documents, the collateral sales, and the remaining deficiencies on each note. On April 4, 2008, the court granted Leveton's attorney's motion to withdraw from the case. The parties filed a joint pretrial memorandum on May 8, 2008.

¶6 Representing himself, and pursuant to a stipulated extension of time to respond, Leveton filed a response to the motion for summary judgment on May 9, 2008. Leveton alleged: (1) that Mrs. Leveton did not sign the Commercial Guaranty on the date claimed by ABB; (2) that the bank failed to wire funds to an account, causing Borrower to breach its lease agreement; and (3) that the loan documents were "arguably one-sided." His response did not offer any affidavits or documents supporting his opposition to the motion. Leveton invoked Arizona Rule of Civil Procedure 56(f) (granting the court discretion to allow further discovery because the nonmoving party "cannot for reasons stated present by affidavit facts essential to justify the party's opposition"), but did not explain what information he was unable to obtain. In its reply filed on May 29, 2008, ABB argued that Leveton's response was irrelevant and "[did] not dispute the facts set out in the Statement of Facts in Support of [ABB's] Motion for Summary Judgment."

¶7 In a June 30, 2008 minute entry, the court granted Leveton leave to supplement his request under Rule 56(f). The court ordered Leveton to submit an affidavit no later than July 18, 2008 specifying:

> (1) the particular evidence that is beyond his control, (2) the location of the key evidence, (3) what he believes the evidence will reveal, (4) the methods to be used to obtain it, and (5) an estimate of the time needed to conduct the additional discovery.

Leveton filed an affidavit on July 28 repeating his allegation that ABB failed to make an electronic funds transfer on Borrower's behalf, leading to a breach of Borrower's lease. The affidavit also included a copy of Borrower's wire transfer agreement with ABB. The court granted Leveton a sixty-day continuance pursuant to Rule 56(f), and ordered him to file a supplemental response to the summary judgment motion by October 21, 2008.

¶8 Leveton's supplemental response, filed on October 22, did not include any additional affidavits or documentary evidence. Leveton claimed to have a computer problem, and promised to "manually assemble the text and exhibits" and deliver them to the court. On November 14, 2008, having received no additional documents from Leveton, the trial court granted ABB's motion for summary judgment. Leveton ultimately filed several responses to the motion after the court's

judgment: a Supplemental Response on November 25, 2008 and three "Affidavits of Response" filed on March 19 and March 23, 2009. Leveton filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(B) (2003).

STANDARD OF REVIEW

¶9 A court shall grant summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). In reviewing a decision granting summary judgment, we review whether any genuine issues of material fact exist de novo. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). "A 'genuine' issue is one that a reasonable trier of fact could decide in favor of the party adverse to summary judgment *on the available evidentiary record*." *Martin v. Schroeder*, 209 Ariz. 531, 534, ¶ 12, 105 P.3d 557, 580 (App. 2005) (emphasis added). Although we view the evidence and reasonable inferences in favor of the nonmoving party, summary judgment may nonetheless be granted when the facts produced in response to a summary judgment motion have "so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch.*

v. Reeves, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We apply de novo review to the trial court's legal conclusions. *State Comp. Fund v. Yellow Cab Co.*, 197 Ariz. 120, 122, ¶ 5, 3 P.3d 1040, 1042 (App. 1999).

¶10 As a preliminary issue, we note that Leveton submitted a November 25, 2008 Supplemental Response and three "Affidavits of Response" filed on March 19 and March 23, 2009 after the court granted summary judgment. Accordingly, they were not part of the record available to the trial court when summary judgment was entered, and we will not consider them, nor any other facts presented after summary judgment was entered, in determining whether a genuine issue of material fact existed. *See Martin*, 209 Ariz. at 534, ¶ 12, 105 P.3d at 580.

DISCUSSION

¶11 On appeal, Leveton does not contest the validity of the promissory notes, the Borrower's default, his liability for Borrower's debt, ABB's power to sell the collateral, or that a deficiency remained after the sale of the collateral. Rather, Leveton's primary argument is that the trial court granted summary judgment based only on his failure to present evidence challenging the facts in ABB's motion for summary judgment. Leveton contends that the court failed to determine whether ABB's motion for summary judgment standing alone was sufficient

to show that ABB was entitled to the judgment it sought. Specifically, Leveton claims that the court should have denied summary judgment because the commercial reasonableness of ABB's disposition of collateral was a genuine issue of material fact. We conclude that the reasonableness of the collateral sale was not a necessary part of ABB's prima facie case because it is a defense that Leveton failed to properly raise in his pleadings.

¶12 To evaluate Leveton's contention, we must review the law controlling dispositions of collateral. A disposition of collateral is "commercially reasonable" if it is made "in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition."[1] A.R.S. § 47-9627(B)(3) (2005). In an action determining the amount of a deficiency arising from a commercial transaction, "[a] secured party need not prove compliance with the provisions of this article relating to collection, enforcement, disposition or acceptance unless the debtor . . . places the secured party's compliance at issue." § 47-9626(A)(1). But if compliance is

[1] A disposition may also be commercially reasonable if made "[i]n the usual manner on any recognized market," A.R.S. § 47-9627(B)(1), or "[a]t the price current in any recognized market at the time of the disposition," § 47-9626(B)(2). But the term "recognized market" is "quite limited," and "applies only to markets in which there are standardized price quotations for property that is essentially fungible." U.C.C. § 9-627, cmt. 4. These subsections do not apply because no such market exists for the non-fungible collateral in this case.

placed in issue, the secured party has the burden of showing "that the collection, enforcement, disposition or acceptance was conducted in accordance with this article." § 47-9626(A)(2).

¶13 Thus, under Arizona law, the commercial reasonableness of the disposition of collateral is not part of a prima facie deficiency case. Rather, it is a defense that must be raised by the debtor. In this case, Leveton did not properly raise the issue under § 47-9626(A)(1), and ABB was therefore not required to offer proof of commercial reasonableness in its motion for summary judgment. Although Leveton included commercial reasonableness as an issue in the joint pretrial memorandum with respect to the sale of the real property, ABB did not stipulate or agree that this issue was material. The inclusion of an issue in the pretrial memorandum does not amend the pleadings to include the issue unless such a stipulation occurs. *Lake Havasu Cmty. Hosp., Inc. v. Arizona Title Ins. and Trust Co.*, 141 Ariz. 363, 370-71, 687 P.2d 371, 378-79 (App. 1984) (*disapproved on other grounds by Barmat v. John and Jane Doe Partners A-D*, 155 Ariz. 519, 524, 747 P.2d 1218, 1223 (1987)). Nor did Leveton raise the issue in any of his timely responses to ABB's motion

for summary judgment, or in his answer.[2] Accordingly, ABB was not required to show the commercial reasonableness of the sale.

¶14 Leveton contends that under *Schwab v. Ames Construction*, 207 Ariz. 56, 83 P.3d 56 (App. 2004), his failure to timely respond to ABB's summary judgment motion does not justify the court's grant of summary judgment. In that case, Schwab and another plaintiff filed separate complaints alleging that defendants' negligence caused their injury near a roadway construction site. *Id.* at 57, ¶ 2, 83 P.3d at 57. Schwab's attorney withdrew from the case, and Schwab failed to respond to two summary judgment motions against him. *Id.* at 57-58, ¶¶ 3, 5, 83 P.3d at 57-58. The trial court awarded summary judgment against Schwab "solely because he had failed to respond to the motion," but denied the same motions with respect to the other plaintiff. *Id.* at 58, ¶ 6, 83 P.3d at 58. We reversed the summary judgment order, holding that "the court was also required to determine that Defendants' summary judgment motions demonstrated Defendants' *entitlement* to the requested relief," and reasoning that it had not done so by granting the motion

[2] Leveton filed his Answer to the breach of guaranty Complaint on May 18, 2007, before any collateral was sold and before a deficiency was sought. Accordingly, we do not interpret its references to "fair market value" and "setoff" to question the commercial reasonableness of a collateral sale that had not yet occurred.

against one plaintiff but not another on the same facts and claims. *Id.* at 60-61, ¶ 20, 83 P.3d at 60-61.

¶15 *Schwab* does not control here. Unlike *Schwab*, the court's grant of summary judgment in this case was not based on Leveton's failure to respond. It was based instead on Leveton's failure to submit sufficient competent evidence to the record before the trial court, either to controvert ABB's proof of its prima facie case or to raise the commercial reasonableness defense. Ariz. R. Civ. P. 56(e) ("[A]n adverse party may not rest upon the mere allegations or denials of [its] pleading . . . [it] must set forth specific facts showing that there is a genuine issue for trial."); *see also Kelly v. NationsBanc Mortgage Corp.*, 199 Ariz. 284, 287, ¶ 15, 17 P.3d 790, 793 (App. 2000). By failing to challenge the facts of ABB's prima facie case or raise a defense, Leveton essentially rested on the assertions in his pleadings.

¶16 In any event, the evidence Leveton cites on appeal in support of the defense, including (1) an estimated value of the Nevada collateral higher than its sale price, and (2) a delay between ABB's possession of the collateral and its disposition, without more, would not have been sufficient to defeat ABB's evidence of commercial unreasonableness. Section 47-9610(B) (2005) allows for commercially reasonable disposition of

collateral by "public or private proceedings, . . . as a unit or in parcels, and at any time and place and on any terms." Section 47-9627(A) provides that:

> The fact that a greater amount could have been obtained by a collection, enforcement, disposition or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition or acceptance was made in a commercially reasonable manner.

ABB presented evidence that it sold the collateral "to the highest bidder at an advertised public sale conducted by a well known and established auctioneer." In response to ABB's motion for summary judgment, Leveton produced no evidence to challenge this fact. Accordingly, we conclude that Leveton did not properly raise the issue of commercial reasonableness, nor develop it as a genuine issue of material fact before the court in response to the summary judgment motion.

¶17 Leveton also alleges, as he did in his initial response to the summary judgment motion,[3] that ABB violated its

[3] Leveton's opening brief on appeal cites his untimely filings before the trial court in an attempt to raise additional factual allegations to support his bad faith claim. Leveton contends that ABB's possession actions "capitalized on a personal injury" sustained by Leveton, and that ABB "engaged in credit default swaps and derivatives . . . directly and indirectly betting against Leveton's companies." These unsupported allegations were not before the trial court when it granted summary judgment, and we do not consider them on review.

contractual duty of good faith and fair dealing by failing to make automatic monthly bill payments electronically from his companies' accounts pursuant to an "ongoing business relationship and course of conduct." Leveton claims that he presented a genuine issue of material fact by asserting that his companies' bankruptcies were precipitated by such a failure to make a rent payment in September 2006. We disagree.

¶18 We recognize that "[t]he law implies a covenant of good faith and fair dealing in every contract." *Beaudry v. Ins. Co. of the West*, 203 Ariz. 86, 91, ¶ 18, 50 P.3d 836, 841 (App. 2002) (quoting *Rawlings v. Apodaca*, 151 Ariz. 149, 153-54, 726 P.2d 565, 569-70 (1986)). "The essence of that duty is that neither party will act to impair the right of the other to receive the benefits which flow from their agreement or contractual relationship." *Rawlings*, 151 Ariz. at 153-54, 726 P.2d at 569-70 (citing *Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 383, 710 P.2d 1025, 1038 (1985)).

¶19 The evidence presented to the trial court does not support Leveton's allegation, and did not raise bad faith as a genuine issue of material fact. The agreement provided by Leveton by its own terms only authorizes ABB to transfer funds from Leveton's company accounts "at such times, and in such amounts as the Customer may from time to time direct." This

agreement and Leveton's one-time transfer order directly contradict his allegation that the bank breached an agreement to automatically debit his accounts on a monthly basis. Leveton provided no other competent evidence of an ongoing agreement, or of any bad faith act under the agreement by ABB.[4] Even if the claim had merit, we fail to see how an alleged breach of the duty of good faith under Leveton's *wire transfer* agreement with ABB could have created an issue of material fact with respect to his separate *personal guaranty* agreement with the same party.

[4] Leveton uses the same factual allegation to invoke the equitable doctrine of unclean hands for the first time on appeal. We do not consider legal arguments that were not presented to the trial court. *County of Cochise v. Faria*, 221 Ariz. 619, 624, ¶ 18, 212 P.3d 957, 962 (App. 2009) (citing *Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, 57 n.2, ¶ 17, 156 P.3d 1157, 1162 n.2 (App. 2007)) (appeals court will not consider arguments that were not before the trial court when it considered a summary judgment motion).

CONCLUSION

¶20 For the foregoing reasons, we affirm the trial court's judgment. In addition, we award ABB its reasonable attorneys' fees on appeal pursuant to A.R.S. § 12-341.01(A) (2003) contingent upon its compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Presiding Judge

/s/
PATRICK IRVINE, Judge