DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JEFFREY C. STONE, INC., an Arizona corporation dba SUMMIT BUILDERS, Plaintiff/Appellant, v. BMO HARRIS BANK, N.A., fka M&I MARSHALL & ILSLEY, a Wisconsin corporation, Defendant/Appellee.	1 CA-CV 11-0823 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)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. CV2009-013699

The Honorable John A. Buttrick, Judge (Retired)

AFFIRMED IN PART; REVERSED IN PART; REMANDED

Fennemore Craig, P.C. — Phoenix
By John Randall Jefferies
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and

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D O W N I E, Judge

¶1 Jeffrey C. Stone, Inc., dba Summit Builders ("Summit"), appeals the dismissal of its claims against BMO Harris Bank, N.A., fka M&I Marshall & Ilsley ("M&I"). With the exception of Summit's unjust enrichment count, we affirm the dismissal orders.

FACTS AND PROCEDURAL HISTORY[1]

¶2 Windsor Century Plaza, LLC ("Windsor") was the owner of a condominium conversion project (the "Project") in Phoenix. Windsor retained Summit to serve as general contractor. In anticipation of providing Project financing, M&I retained Abacus Project Management, Inc. ("Abacus") in February 2006 to provide on-site observation and other services. Windsor hired OTL Consulting, Inc. ("OTL") to oversee daily Project operations. Summit began work on the Project in early 2006.

¶3 Summit asked its lien servicing company to prepare an "Arizona Preliminary Twenty Day Lien Notice" pursuant to Arizona Revised Statutes ("A.R.S.") section 33-992.01. No lender was

[1] In reviewing the grant of summary judgment on the stop notice claim, we view the evidence and inferences therefrom in the light most favorable to Summit. *Sonoran Desert Investigations, Inc. v. Miller*, 213 Ariz. 274, 276, ¶ 5, 141 P.3d 754, 756 (App. 2006) (citation omitted). In considering dismissal of the other claims under Rule 12(b)(6), Arizona Rules of Civil Procedure ("Rule"), we "assume as true the facts alleged in the complaint." *Fid. Sec. Life Ins. Co. v. State*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580, 582 (1998).

identified on the ensuing notice, which was mailed only to Windsor on August 15, 2006.

¶4 On August 16, 2006, M&I and Windsor signed a Loan Agreement whereby M&I agreed to loan $36,852,000 for the acquisition, development, and construction of the Project and to provide a $3,000,000 line of credit. Also on August 16, M&I recorded a deed of trust against the property. The Loan Agreement specified the process by which M&I would disburse funds to Windsor. M&I agreed to reimburse 90% of the expenditures for labor and materials upon receipt of a disbursement request providing details of the construction. The remaining 10%, designated the retention funds, would be disbursed upon completion of the Project, once certain conditions precedent were satisfied. During the construction process, Summit and Abacus personnel met monthly to review Summit's pay applications.

¶5 Windsor defaulted on its loan obligations on or about September 1, 2008. On September 2, Summit and Abacus representatives met to review Summit's August 2008 pay application. M&I released loan proceeds for the August work, less the retention sums.

¶6 On September 5, M&I notified Windsor that its loan had "matured on September 1, 2008" and demanded immediate payment in full. Windsor and M&I signed a forbearance agreement on October

1, 2008. M&I agreed not to exercise its rights and remedies under the Loan Agreement as long as Windsor complied with the terms of the agreement. M&I agreed to satisfy pending pay requests and to fund future draws "during the Forbearance Period" for work certified by Windsor.

¶7 Summit and Abacus reviewed Summit's September pay application on October 7, 2008. M&I released loan proceeds in satisfaction of that pay application, less the retention sums.

¶8 On November 15, 2008, Windsor defaulted on its obligations under the forbearance agreement. M&I gave Windsor until November 21 to cure its defaults, but Windsor failed to do so. In December 2008, Summit learned of Windsor's default. Summit filed liens against the Project.

¶9 On February 19, 2009, Summit issued to M&I a "Stop Notice Pursuant to A.R.S. § 33-1055." Summit submitted an amended stop notice on March 13, claiming entitlement to $1,812,210.22, plus interest, fees, and costs. The stop notices stated:

> **YOU ARE HEREBY NOTIFIED** to withhold sufficient monies held by you on the above described project to satisfy claimant's demand and any additional sums to cover interest, court costs and reasonable costs of litigation as provided by law.

M&I refused to release additional loan proceeds.

¶10 Summit sued M&I. The first amended complaint alleged claims for negligent failure to disclose, intentional failure to disclose, tortious interference with contractual and business relationship, unjust enrichment/quantum meruit, fraudulent concealment, and enforcement of stop notice.

¶11 M&I moved to dismiss all counts of the first amended complaint pursuant to Rule 12(b)(6), Arizona Rules of Civil Procedure ("Rule"), with the exception of the stop notice claim. After briefing and argument, the court granted M&I's motion. Summit filed a motion to amend its complaint, which the court granted in part in March 2010, permitting Summit to add claims for intentional misrepresentation and fraud.

¶12 On December 30, 2010, M&I moved for summary judgment on the only remaining claim of record: enforcement of the stop notice. M&I argued, *inter alia,* that the stop notice was invalid because Summit had not served it with the preliminary 20-day notice.

¶13 Summit filed a second amended complaint on January 14, 2011. Five days later, it moved to extend the time for filing that pleading. The court denied the motion, concluding Summit had not established excusable neglect under Rule 6(b).

¶14 In opposing M&I's motion for summary judgment, Summit advised that the parties were litigating whether it was required to serve M&I with the preliminary 20-day notice in a different

case (the "mechanic's lien litigation") pending before Judge Garcia. Summit argued, *inter alia,* that M&I was neither the actual nor reputed lender when Summit served the preliminary 20-day notice and thus was not statutorily entitled to notice.

¶15 M&I filed a sur-reply advising the court (Judge Buttrick) that Judge Garcia had ruled in the mechanic's lien litigation that Summit was required to serve M&I with the 20-day notice. Specifically, Judge Garcia ruled that "Summit's negotiations of the construction contract directly with M&I before August 15, 2006 establishes that Summit knew that if not the actual lender, M&I was the reputed lender."

¶16 M&I argued that the doctrine of collateral estoppel barred Summit from re-litigating whether it was required to serve M&I with the preliminary 20-day notice. At oral argument, Summit's counsel conceded the point, acknowledging the issues regarding the 20-day notice were "identical" and stating: "[I]t would be inappropriate for me to ask you to consider an issue that Judge Garcia has already resolved," and asking Judge Buttrick to "defer to Judge Garcia on her ruling on the preliminary notice." Judge Buttrick noted that everyone agreed Judge Garcia's ruling had preclusive effect, but he agreed to delay issuing his ruling until Judge Garcia resolved a pending motion for reconsideration. Judge Buttrick thereafter dismissed Summit's stop notice claim with prejudice "[i]n light of the

ruling in the parallel case (CV2009-007376)." He also formally dismissed the remaining counts of the first amended complaint under Rule 12(b)(6).

¶17 Summit filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

DISCUSSION

I. The Stop Notice

¶18 Summary judgment is appropriate 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." Rule 56(c)(1); *see also Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). We review *de novo* the grant of summary judgment. *Schwab v. Ames Constr.*, 207 Ariz. 56, 60, ¶ 17, 83 P.3d 56, 60 (App. 2004) (citation omitted).

¶19 We need not decide whether Judge Buttrick erred by giving preclusive effect to Judge Garcia's ruling because the court properly granted summary judgment to M&I on the merits of the stop notice claim. *See Ariz. Bd. of Regents ex rel. Univ. of Ariz. v. State ex rel. Ariz. Pub. Safety Ret. Fund Manager Adm'r*, 160 Ariz. 150, 154, 771 P.2d 880, 884 (App. 1989) (appellate court will affirm if the trial court's ruling is correct for any reason).

¶20 A stop notice is a written notice given to a construction lender, accompanied by a bond to cover the amount

claimed due. A.R.S. § 33-1051(1), (4). Upon receipt of a bonded stop notice, a construction lender must "withhold from the borrower or other person to whom it or the owner may be obligated to make payments or advances out of the construction fund sufficient monies to answer the claim and any claim of lien that may be recorded." A.R.S. § 33-1058(A). A stop notice attaches like a lien on unexpended loan funds. *Connolly Dev., Inc. v. Superior Court (Diamond Int'l Corp.)*, 553 P.2d 637, 641 (Cal. 1976).

¶21 A stop notice is effective only if the claimant has given a preliminary 20-day notice in accordance with A.R.S. § 33-992.01. A.R.S. § 33-1056(B)(1). Section 33-992.01(B) requires a preliminary 20-day notice to be served on "the construction lender, if any, or reputed construction lender, if any." As noted *supra*, Summit did not serve M&I with the preliminary 20-day notice.

¶22 In discussing Summit's statutory obligations, both parties rely on *Kodiak Industries, Inc. v. Ellis*, which states:

> [I]f a claimant has sufficient information to reasonably believe that a putative lender is the actual lender, he must either serve such a lender or bear the risk that the putative lender is the actual lender. The test is an objective one and a claimant must be deemed to possess sufficient information about a reputed lender when a reasonable person, given the claimant's information, would have been led to believe in good faith

> that the putative lender was the actual lender.

229 Cal. Rptr. 418, 426 (Cal. Ct. App. 1986). A claimant who "fails to give notice to the reputed lender . . . bears the risk that the reputed lender is in fact the true lender." *Id*. at n.6.

¶23 As noted *supra*, M&I retained Abacus in February 2006 to perform jobsite duties, and Summit began work on the Project no later than March 2006 under a letter of intent with Windsor. During the summer of 2006, Summit received communications about financing for the Project from M&I and the Tuckerman Group. The communications with M&I were extensive. For example, in early July, Summit communicated with M&I, OTL, Abacus, and Windsor regarding the loan agreements and the "proposed Summit Stipulated Sum contract" ("Construction Contract"). One result of these communications was a document summarizing concerns and recommendations of the "Lender," Summit, Abacus, and OTL. Various resolutions were suggested, including revisions to the contract language. Summit and Windsor signed the Construction Contract on July 19, 2006.

¶24 On July 24, Karl Nichol, Summit's Project Executive, emailed a summary document to M&I, Windsor, and OTL to alert them to "changes made to [the] contract." The next day, Nichol emailed a revised copy of a contract exhibit to the same

parties. On July 31, Nichol emailed Windsor, OTL, M&I, and Abacus a document highlighting changes to the Construction Contract (the "101" and "201"). The next day, OTL emailed the same recipients, inquiring whether the contract issues had been resolved. Later that day, M&I responded that the contract changes were "acceptable to the Bank." M&I requested a "clean copy of the final versions of both the 101 and [201]." That same day, Windsor emailed Summit, stating it had terminated discussions with the Tuckerman Group. According to Summit, Windsor did not state in that email what "final arrangements" had been made for Project financing.[2]

¶25 The emails between M&I, Summit, OTL, and Abacus reflect detailed communications regarding the "Loan Agreements" and the "Summit Contract," and they refer to M&I as the "Lender." Based on these communications, Summit made substantive revisions to its contract with Windsor. Furthermore, the communications between Summit and M&I did not conclude once Summit and Windsor signed the Construction Contract. M&I thereafter advised that the contract changes were "acceptable to the Bank" and requested clean copies of the Construction Contract. These communications were more than

[2] Unlike the emails discussed *supra*, the record does not include the August 1 email message from Windsor to Summit.

sufficient to lead a reasonable person to believe that M&I was a Project lender.[3]

¶26 We conclude that, as a matter of law, Summit possessed the requisite knowledge that M&I was a Project lender as of August 15, 2006. Summit's evidence in opposition is of such limited probative value that a reasonable person could not conclude otherwise. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008 (summary judgment should be granted "if the facts produced in support of the claim . . . 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"). Because Summit did not serve M&I with the preliminary 20-day notice, its stop notice was ineffective as a matter of law. The superior court properly granted summary judgment to M&I on the stop notice claim.

[3] A construction project may be financed by more than one lender. Indeed, M&I's Loan Agreement references an additional loan between Windsor and another lender for $2.5 million. And the relevant definition of "construction lender" includes "*any* mortgagee or beneficiary under a deed of trust lending funds all or a portion of which are used to defray the cost of construction." A.R.S. § 33-992.01(A)(1) (emphasis added). Nothing prevented Summit from serving M&I with the preliminary 20-day notice and, if another lender materialized, serving an amended notice. *See Wang Electric, Inc. v. Smoke Tree Resort, LLC*, 230 Ariz. 314, 324, ¶ 31, 283 P.3d 45, 55 (App. 2012) (claimant may serve multiple notices to "cover its bases").

II. Summit's Other Claims

¶27 We review *de novo* the dismissal of Summit's other claims under Rule 12(b)(6). *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7, 284 P.3d 863, 866 (2012). We will affirm the superior court's judgment only if Summit would not be entitled to relief under any interpretation of the well-pled facts. *See Fid. Sec.*, 191 Ariz. at 224, ¶ 4, 954 P.2d at 582. We do not consider facts or evidence submitted in connection with M&I's motion for summary judgment, which was filed over one year after the court granted M&I's motion to dismiss. *See Weekly v. City of Mesa*, 181 Ariz. 159, 166 n.6, 888 P.2d 1346, 1353 n.6 (App. 1994); *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4-5, 795 P.2d 827, 830-31 (App. 1990).

A. Negligent Failure to Disclose

¶28 A party may be liable for negligent failure to disclose if that party had a duty to exercise reasonable care to disclose the information at issue. Restatement (Second) of Torts § 551(1), (2). Whether a duty exists is a question of law. *Kesselman v. Nat'l Bank of Ariz.*, 188 Ariz. 419, 421, 937 P.2d 341, 343 (App. 1996) (citation omitted).

¶29 Summit alleged the following conduct in its negligent failure to disclose count: (1) M&I knew that Summit provided labor, materials, and services before and after Windsor's default; (2) M&I "had a duty to notify Summit of

Windsor's alleged default and intention to stop funding" the loan; (3) M&I "never notified" Summit of Windsor's default or "M&I's intention to not pay for completed or ongoing work"; (4) "M&I permitted Summit to continue providing labor, materials and services to the Project" despite Windsor's default; and (5) "M&I did not exercise reasonable care or competence in communicating information to Summit concerning Windsor's alleged default or M&I's decision not to pay for further completed work." Summit relied on the same conduct in opposing M&I's motion to dismiss.

¶30 Given the nature of its allegations, Summit's reliance on *R.A. Peck, Inc. v. Liberty Federal Savings Bank*, 766 P.2d 928 (N.M. Ct. App. 1988), is unpersuasive. In *Peck*, the plaintiff agreed to construct improvements for the bank's customer. *Id.* at 931. Before beginning, the plaintiff contacted the bank and received assurances the project loan had been funded. *Id.* After the customer failed to pay plaintiff, the bank instructed plaintiff to make all pay requests directly to the bank, assuring plaintiff that all pay requests would be honored, even though the bank knew the loan funds were exhausted. *Id.* Under these facts, the court ruled that, "[a]lthough the Bank may not have had an initial duty to disclose the status of Customer's account, once it affirmatively involved itself . . . in the capacity other than as a money lender, it had a duty to disclose material facts concerning the account." *Id*. at 935.

¶31 We are not bound by *Peck*. *See Bunker's Glass Co. v. Pilkington PLC*, 202 Ariz. 481, 491, ¶ 40, 47 P.3d 1119, 1129 (App. 2002) ("[T]he laws of other jurisdictions, while sometimes instructive, are not binding upon us."). More fundamentally, Summit has not alleged the type of affirmative, direct representations that were at issue in *Peck*. Summit's own allegations, coupled with the established tenet that banks generally have "no duty to third parties to disclose information about a customer's account," *Kesselman*, 188 Ariz. at 421, 937 P.2d at 343, persuade us that the superior court properly dismissed the negligent failure to disclose count under Rule 12(b)(6).

¶32 *Gipson v. Kasey*, 214 Ariz. 141, 150 P.3d 228 (2007), does not compel a contrary conclusion. In *Gipson*, the defendant provided prescription drugs to a person who then gave them to another individual who died from ingesting the drugs and alcohol. *Id.* at 143, ¶¶ 5-6, 150 P.3d at 230. The decedent's mother sued. *Id*. at ¶ 7. *Gipson* held that public policy supported the existence of a duty of care based on a statute criminalizing the defendant's conduct. *Id*. at 146, ¶¶ 25-26, 150 P.3d at 233.

¶33 Summit has cited no comparable statutory authority that would support imposing a duty of disclosure on M&I. To be sure, the legislature has enacted statutes protecting

contractors' financial interests. *See* A.R.S. §§ 32-1129 through -1129.07 (the Prompt Pay Act), 33-981 through -1008 (mechanics' and materialmen's liens), and 33-1051 through -1067 (stop notices). But such legislation is a far cry from a statute criminalizing the conduct that is at issue in the civil proceeding, as was the case in *Gipson*.

B. Intentional Failure to Disclose

¶34 Summit acknowledges that Arizona has not recognized a cause of action for intentional failure to disclose. Moreover, Summit concedes such a claim is dependent on the existence of a duty to disclose, which we have determined does not exist. For these reasons, Summit's claim for intentional failure to disclose was properly dismissed.

C. Unjust Enrichment

¶35 To recover under an unjust enrichment theory, a party must prove: "(1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and impoverishment, (4) the absence of justification for the enrichment and impoverishment, and (5) the absence of a remedy provided by law." *Freeman v. Sorchych*, 226 Ariz. 242, 251, ¶ 27, 245 P.3d 927, 936 (App. 2011). Summit argued below that its unjust enrichment claim was viable because it did not render services gratuitously and because M&I's foreclosure against the property gave it the benefit of Summit's work without paying for it.

¶36 M&I sought dismissal of the unjust enrichment count on two grounds.[4] It first argued Summit had a remedy at law against Windsor. However, the inadequate remedy at law element refers to a legal remedy versus the same defendant against whom the unjust enrichment claim is asserted -- in this case, M&I, not Windsor. *See Loiselle v. Cosas Mgmt. Grp., LLC*, 224 Ariz. 207, 211, ¶ 14, 228 P.3d 943, 947 (App. 2010) (citations omitted).

¶37 Second, M&I contended unjust enrichment may not be asserted against "a stranger to a contract" when one of the contracting parties fails to perform, citing *Flooring Sys., Inc. v. Radisson Grp., Inc.*, 160 Ariz. 224, 772 P.2d 578 (1989). In *Flooring Systems*, the general contractor subcontracted with Flooring Systems for renovation work at a local resort. *Id*. at 225, 772 P.2d at 579. The general contractor did not fully pay Flooring Systems, and the resort withheld $25,000 due under the general contract. *Id*. Flooring Systems sued the resort, alleging unjust enrichment. *Id*. Relying on *Stratton v. Inspiration Consolidated Copper Co.*, 140 Ariz. 528, 683 P.2d 327 (App. 1984), and *Advance Leasing & Crane Co., Inc. v. Del E. Webb Corp.*, 117 Ariz. 451, 573 P.2d 525 (App. 1977), the resort argued an unjust enrichment claim was unavailable when a

[4] We do not consider M&I's rather cursory argument, raised for the first time on appeal, that Summit asserted other claims in the mechanic's lien litigation that demonstrate it has a remedy at law. *See Richter v. Dairy Queen of S. Ariz., Inc.*, 131 Ariz. 595, 596, 643 P.2d 508, 509 (App. 1982).

contract between the subcontractor and general contractor exists. *Flooring Sys.*, 160 Ariz. at 225-26, 772 P.2d at 579-80.

¶38 The Arizona Supreme Court distinguished *Stratton* and *Advance Leasing*. *Id.* at 226, 772 P.2d at 580. The owners in those cases had fully paid the general contractor. *Id*. The court noted that, in other cases where an owner has accepted work but paid no one for it, courts have permitted unjust enrichment claims against the owners -- despite the existence of a contract between the subcontractor and the general contractor. *Id*. at 226-27, 772 P.2d at 580-81 (citing *Commercial Cornice & Millwork, Inc. v. Camel Constr. Servs. Corp.*, 154 Ariz. 34, 739 P.2d 1351 (App. 1987), and *Costanzo v. Stewart*, 9 Ariz. App. 430, 453 P.2d 526 (1969)). The court stated:

> In determining whether it would be unjust to allow the retention of benefits without compensation, a court need not find that the defendant intended to compensate the plaintiff for the services rendered or that the plaintiff intended that the defendant be the party to make compensation. This is because the duty to compensate for unjust enrichment is an obligation implied by law without reference to the intention of the parties. . . . What is important is that it be shown that it was not intended or expected that the services be rendered or the benefit conferred gratuitously, and that the benefit was not "conferred officiously."

Id. at 227, 772 P.2d at 581. Concluding it was potentially unjust to allow the resort to retain the benefit of Flooring

Systems' work, the supreme court reversed the grant of summary judgment. *Id*. at 227-28, 772 P.2d at 581-82.

¶39 As *Flooring Systems* instructs, the existence of a contract between Windsor and Summit does not end the inquiry and does not mandate dismissal of Summit's unjust enrichment claim. Because neither of M&I's stated bases for dismissing the unjust enrichment count was legally sustainable, we reverse the dismissal of that count.[5]

D. Fraudulent Concealment

¶40 Arizona describes the tort of fraudulent concealment as follows:

> One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had stated the nonexistence of the matter that the other was thus prevented from discovering.

Wells Fargo Bank v. Ariz. Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund, 201 Ariz. 474, 496, ¶ 87, 38

[5] We express no opinion about whether M&I engaged in improper conduct –- an issue that could not be adjudicated in the context of M&I's motion to dismiss. *See, e.g., Wang Electric*, 230 Ariz. at 319-20, ¶¶ 14-15, 283 P.3d at 50-51 (requiring "some form of improper conduct by the party to be charged" to recover for unjust enrichment). Among other things, the loan documents were not part of the record when the superior court ruled on the Rule 12(b)(6) motion.

P.3d 12, 34 (2002) (quoting Restatement (Second) of Torts § 550 (1976)).

¶41 In its motion to dismiss, M&I argued fraudulent concealment applies only to parties to the same transaction. In responding to the motion, Summit did not address that argument. At oral argument, though, Summit's counsel asserted that Summit, Windsor, and M&I were all parties "to one, big transaction where everybody is working together to get this project completed." Summit contended a direct contractual relationship was not required.

¶42 On appeal, Summit appears to abandon the argument made below, now contending that, even if Summit and M&I were not parties to a single transaction, M&I "made itself a *de facto* party [to the contract between Windsor and Summit] from the beginning of the Project." We decline to address this argument raised for the first time on appeal.[6] *See CDT, Inc. v. Addison, Roberts & Ludwig, C.P.A., P.C.*, 198 Ariz. 173, 178, ¶ 19, 7 P.3d 979, 984 (App. 2000) (appellate court considers only those arguments, theories, and facts properly presented below).

[6] We also note the apparent inconsistency in arguing that M&I was a *de facto* party to the July 2006 Construction Contract while at the same time maintaining Summit had no reason to believe M&I was a Project lender as of August 15, 2006.

E. Tortious Interference

¶43 Summit contends its tortious interference claim was sufficiently pled to survive dismissal. However, the claim Summit argues on appeal is not the same one asserted below.

¶44 Summit now alleges M&I interfered with performance of its contract with Windsor by inducing Summit to continue working, despite knowing Windsor had defaulted and that M&I would not fully pay Summit. Summit contends M&I's actions in "maintaining a false appearance of the status quo" prevented it from protecting itself and exercising rights under the contract with Windsor. This theory of tortious interference is based on Restatement (Second) of Torts § 766A, which permits a cause of action by parties whose performance of their own contractual obligations to a third party has been rendered more expensive, burdensome or impossible because of interference by the defendant. *See Plattner v. State Farm Mut. Auto. Ins. Co.*, 168 Ariz. 311, 315-16, 812 P.2d 1129, 1133-34 (App. 1991).

¶45 In contrast, the claim in the first amended complaint is that M&I intentionally interfered with Summit's contract with Windsor by "fail[ing] to advance funds from the Development Loan to cover the costs of the labor, materials and services provided to the Project by Summit." In its motion to dismiss, M&I noted that one element of tortious interference requires that the defendant's intentional interference caused a third party (not

the plaintiff) to breach the contract or terminate the relationship with the plaintiff. M&I clearly understood Summit's claim to be that M&I's failure to advance funds caused Windsor to breach its contract with Summit. Summit's response to the motion to dismiss did not disavow that theory, but again asserted interference based on M&I's failure to disburse loan proceeds.

¶46 In its motion to dismiss, M&I also noted that tortious interference with contract requires the conduct constituting the interference to be improper. *See Barrow v. Ariz. Bd. of Regents*, 158 Ariz. 71, 78, 761 P.2d 145, 152 (App. 1988) (elements of tortious interference include "a showing that the defendant acted improperly"). M&I argued that ceasing to advance funds was not improper because the lender was exercising contractual rights under the loan documents. Summit responded only that whether M&I acted improperly was a question of fact for the jury.

¶47 The conduct to which Summit refers on appeal is different from that alleged in its complaint and that relied on in opposing M&I's motion to dismiss. We decline to consider Summit's new theory of liability for the first time on appeal. *See CDT, Inc.*, 198 Ariz. at 178, ¶ 19, 7 P.3d at 984. We further conclude Summit has abandoned any argument of error

relating to the dismissal of its claim under its original theory of tortious interference.

III. Second Amended Complaint

¶48 Finally, Summit contends the court abused its discretion in denying its motion to extend the time for filing the second amended complaint. We disagree.

¶49 The court granted Summit leave to file a second amended complaint in March 2010. Summit, though, did not file the complaint until January 14, 2011. It moved to extend the filing deadline on January 19, 2011.

¶50 Once a court grants leave to file an amended complaint, a party has ten days to file and serve that pleading unless the court sets a different deadline. Rule 15(a)(2). If a party fails to timely file the pleading and seeks an extension after expiration of the ten-day period, the court may grant the request "where the failure to act was the result of excusable neglect." Rule 6(b).

¶51 "Excusable neglect" is neglect that "might befall a reasonably prudent lawyer under similar circumstances." *Ellman Land Corp. v. Maricopa County*, 180 Ariz. 331, 339, 884 P.2d 217, 225 (App. 1994). "[D]iligence is the final arbiter of whether mistake or neglect is excusable." *City of Phoenix v. Geyler*, 144 Ariz. 323, 332, 697 P.2d 1073, 1082 (1985). Secretarial errors resulting in missed deadlines may constitute excusable

neglect. *Cook v. Indus. Comm'n of Ariz.*, 133 Ariz. 310, 312, 651 P.2d 365, 367 (1982); *Ellman*, 180 Ariz. at 340, 884 P.2d at 226. Courts decide on a case-by-case basis whether neglect is excusable under the circumstances presented. *Ellman*, 180 Ariz. at 339, 884 P.2d at 225.

¶52 We review the denial of a request for an extension of time for an abuse of discretion. *Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 66, ¶ 24, 226 P.3d 1046, 1052 (App. 2010) (citations omitted). In applying this standard, "[t]he question is not whether the judges of this court would have made an original like ruling, but whether a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of reason. We cannot substitute our discretion for that of the trial judge." *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 571, 694 P.2d 1181, 1185 (1985).

¶53 We find no abuse of discretion. Summit argued below that "a clerical oversight befell counsel." It offered an attorney's affidavit stating that the firm had established procedures for calendaring deadlines and that a secretary who no longer worked there failed to follow those procedures, resulting in the filing deadline for the second amended complaint being missed. No further details were offered.

¶54 To be excusable, even clerical errors must be of a type "which might be made by a reasonably prudent person who attempted to handle the matter in a prompt and diligent fashion." *Geyler*, 144 Ariz. at 332, 697 P.2d at 1082. But even if the initial clerical error were excusable, Summit failed to demonstrate that the ensuing nine-month delay was excusable. Summit states that during that time, the parties were attempting to schedule mediation and were engaged in motion practice in the mechanic's lien litigation. Summit does not explain how engaging in predictable litigation activities would cause a reasonably prudent or diligent lawyer to neglect, for a substantial period of time, the filing of an amended pleading. We find no abuse of the superior court's considerable discretion in denying an extension of time to file the second amended complaint. *See Ulibarri v. Gerstenberger*, 178 Ariz. 151, 163, 871 P.2d 698, 710 (App. 1993) (in the context of seeking relief from judgment, "[c]arelessness does not equate to excusable neglect").

CONCLUSION

¶55 We reverse the dismissal of Summit's unjust enrichment claim and remand for further proceedings as to it. We affirm the remainder of the superior court's judgment. We deny

Summit's request for an award of attorneys' fees and costs because it is not the overall prevailing party.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
ANN A. SCOTT TIMMER, Presiding Judge

/s/
JOHN C. GEMMILL, Judge