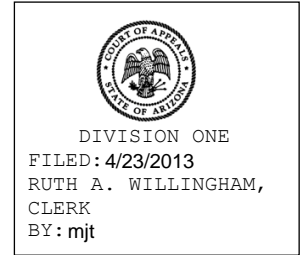


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



AXIS/CASHMERE OF GILBERT, LLC, ) 1 CA-CV 12-0481  
dba Axis Sports and Cashmere )  
Boutique, an Arizona limited ) DEPARTMENT A  
liability company, )  
)  
) **MEMORANDUM DECISION**  
Plaintiff/Appellant, ) (Not for Publication -  
) Rule 28, Arizona Rules of  
v. ) Civil Appellate Procedure)  
)  
)  
GILBERT TUSCANY LENDER, LLC, )  
an Arizona limited liability )  
company, )  
)  
)  
Defendant/Appellee. )  
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-092860

The Honorable John R. Ditsworth, Judge

**AFFIRMED**

Hendrickson Law Firm, PLLC  
By Troy R. Hendrickson  
Attorneys for Appellant

Tempe

Law Offices of Richard L. Strohm, PC  
By Richard L. Strohm  
Attorneys for Appellee

Phoenix

**C A T T A N I**, Judge

¶1 Axis/Cashmere of Gilbert, LLC ("Axis") appeals from entry of partial summary judgment and award of attorney's fees

in favor of Gilbert Tuscany Lender, LLC ("Lender") on Axis's claims for breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment. For the reasons that follow, we affirm.

#### **FACTS AND PROCEDURAL BACKGROUND**

¶2 This dispute stems from Axis's occupancy of a commercial suite in a shopping center financed by Lender.<sup>1</sup> In April 2005, Lender provided a loan totaling over \$11,000,000, secured by a deed of trust, for the construction of a shopping center in Gilbert. Just under two years later, the owner of the shopping center defaulted on the loan, and Lender began a non-judicial foreclosure on the deed of trust a few months later. The owner filed bankruptcy, which stayed the foreclosure until July 2009. Lender acquired title to the shopping center by trustee's deed on a bid of \$5,500,000 at the trustee's sale on July 17, 2009.

¶3 During that time, Axis had been occupying a commercial suite in the as-yet-unfinished shopping center and had been operating its business there since at least March 2008, but had and has never paid rent on the premises. During the bankruptcy

---

<sup>1</sup> On review of an order granting or denying summary judgment, we view the evidence and draw all reasonable inferences in the light most favorable to the non-moving party. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 482, ¶ 13, 38 P.3d 12, 20 (2002).

proceedings, the then-owner of the shopping center provided Lender a lease from June 2007 purporting to govern Axis's tenancy. When Lender contacted Axis, however, Axis claimed never to have entered the June Lease and instead provided Lender a copy of a lease dated September 2007. By several communications through the close of 2009, Lender informed Axis that it "considered the validity of the September Lease doubtful" and, in any event, "the September Lease had been terminated as a result of the trustee sale."

¶4 When the parties could not reach an agreement to govern Axis's occupancy of the suite, Lender filed a forcible detainer action to evict Axis. Lender's complaint in the eviction action disputed the validity of the September Lease, but also alleged Axis was not entitled to possession of the premises under the terms of either lease document. On June 24, 2010, the superior court entered judgment finding Axis guilty of forcible detainer and terminated Axis's right to possession of the premises. In pertinent part, the judgment found that Axis's claimed right to possess the premises on the basis of the September Lease failed because the lease, by its express provisions, had already expired.<sup>2</sup>

---

<sup>2</sup> The September Lease provided a two-year term after commencement of the lease. The commencement date was defined in Article 1.D. as "[t]he later of completion of the center, the opening of [an established Mexican] restaurant, or the repayment

¶15 While the forcible detainer action remained pending, Axis filed this suit against Lender alleging, as relevant here, (1) Lender breached the term of the September Lease requiring the landlord to reimburse Axis for up to \$170,000 spent on improvements to the leased premises (the "Reimbursement Claim"), (2) Lender breached the covenant of good faith and fair dealing implied in the September Lease by failing to reimburse Axis for the improvements or finish the shopping center (the "Good Faith and Fair Dealing Claim"), and (3) in the alternative, Lender would be unjustly enriched by retaining the benefit of Axis's improvements without reimbursing Axis for their construction costs (the "Unjust Enrichment Claim").<sup>3</sup> As a preliminary basis for the Reimbursement and Good Faith and Fair Dealing Claims (collectively, the "Contract Claims"), the complaint alleged Lender had "assented to, adopted and affirmed the [September]

---

of the tenant of \$170,000 plus accrued interest . . . , subject to Article 3." Article 3.B. provided for an early commencement date when Axis "commences occupying any portion of the Premises for the conduct of [Axis's] business, and such earlier date shall thereupon constitute the Commencement Date for all purposes hereof." Because Axis did not dispute that it had been conducting business on the premises since at least March 2008, the court in the eviction action found the lease had commenced pursuant to Article 3.B. and had terminated by the terms of Article 1.E. at the end of March 2010.

<sup>3</sup> Axis's original complaint also raised claims for breach of contract by Lender's allegedly-early termination of the lease and for wrongful eviction. Axis amended its complaint to remove these causes of action after the eviction judgment in favor of Lender.

Lease." Lender filed a counterclaim seeking payment of rent (or fair rental value) for the time after the trustee's sale that Axis had occupied the premises rent-free.

¶16 Both parties moved for partial summary judgment, Axis on the Reimbursement Claim and Lender on all three of Axis's claims. After full briefing and oral argument on the motions, the superior court granted summary judgment in favor of Lender on all three of Axis's claims, denied summary judgment to Axis, and awarded Lender its reasonable attorney's fees. The court entered judgment on May 7, 2012, certifying "[t]here is no just reason for the Court to delay entry of this Judgment." On May 16, 2012, the court again entered judgment, identical to the May 7 judgment in all respects other than an increase in the attorney's fee award.

¶17 Axis timely appealed from both judgments. See Ariz. R. Civ. P. 54(b).<sup>4</sup> We have jurisdiction pursuant to Article 6,

---

<sup>4</sup> Under Arizona Rule of Civil Procedure 54(b), the superior court "may direct the entry of final judgment as to one or more but fewer than all of the claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." The rule requires this express determination "to prevent piecemeal appeals." *McHazlett v. Otis Eng'g Corp.*, 133 Ariz. 530, 532, 652 P.2d 1377, 1379 (1982).

Here, the judgment included language of finality without explicit reference to Rule 54(b). There is no record discussion, however, of whether 54(b) certification is appropriate given the relationship between the adjudicated claims and those that remain outstanding. Moreover, the court's stay of the matter pending disposition on appeal suggests the

Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) and -2101(A)(1).<sup>5</sup>

## DISCUSSION

### I. Summary Judgment.

¶18 Axis contends the superior court erred by granting summary judgment in favor of Lender on Axis's Contract Claims and Unjust Enrichment Claim and by denying summary judgment in favor of Axis on its Reimbursement Claim. We review de novo the superior court's summary judgment decisions. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 482, ¶ 13, 38 P.3d 12, 20 (2002).

¶19 Summary judgment is proper if the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). In appropriate circumstances, the moving party may make its initial showing by "point[ing] out by specific reference to the relevant discovery that no evidence

---

adjudicated claims and the remaining counterclaims are sufficiently related that Rule 54(b) certification may not have been warranted. Nevertheless, because the judgment "dispose[s] of 'one or more' of the claims," *Musa v. Adrian*, 130 Ariz. 311, 313, 636 P.2d 89, 91 (1981) (quoting Ariz. R. Civ. P. 54(b)), and in the interest of judicial economy, see *Cont'l Cas. v. Superior Court*, 130 Ariz. 189, 192, 635 P.2d 174, 177 (1981), jurisdiction in this court is proper.

<sup>5</sup> Absent material revisions after the relevant date, we cite a statute's current version.

exist[s] to support an essential element of the claim." *Orme Sch. v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990).

¶10 Once the moving party makes an initial showing of no genuinely disputed material facts and entitlement to judgment as a matter of law, the party opposing summary judgment must produce evidence showing the existence of some issue of material fact. *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 5, 795 P.2d 827, 831 (App. 1990); *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213, ¶ 17, 292 P.3d 195, 199 (App. 2012). If the opposing party fails to present controverting facts through competent evidence, the moving party's allegations of fact may be considered true. *GM Dev. Corp.*, 165 Ariz. at 5, 795 P.2d at 831.

#### **A. Contract Claims.**

¶11 The superior court granted summary judgment in favor of Lender on Axis's Contract Claims on the grounds that the trustee's sale terminated the September Lease and Axis had presented no evidence to show Lender had adopted or ratified the lease.<sup>6</sup> Axis argues the court erred because the judgment in the

---

<sup>6</sup> The court offered two alternative bases for summary judgment on the Contract Claims: if the lease were enforceable against Lender, the terms of the lease would bar the claims against Lender (as opposed to against the former owner that entered the lease) and, even if the claims were not barred, Axis's rent obligation under the lease would fully offset the allowable reimbursement for tenant improvements. We need not address these alternative theories in light of our decision

eviction action determined the September Lease was valid and enforceable against Lender, which Axis argues precludes summary judgment for Lender and supports summary judgment in favor of Axis.

¶12 The existence of a valid, enforceable contract between Axis and Lender is essential to both of Axis's Contract Claims. See *Graham v. Asbury*, 112 Ariz. 184, 185, 540 P.2d 656, 657 (1975) (claim for breach of contract requires proof of existence of a contract as well as breach and resulting damages); *Rawlings v. Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (1986) (covenant of good faith and fair dealing implied by law "in every contract"). Here, there is no such contract.

¶13 The July 17, 2009 trustee's sale terminated Axis's lease agreement with the previous owner. Under A.R.S. § 33-811(E), a trustee's deed conveys title, "including all interest or claim in the trust property acquired subsequent to the recording of the deed of trust and prior to delivery of the trustee's deed[,] . . . clear of all liens, claims or interests that have a priority subordinate to the deed of trust." The September Lease was allegedly entered on September 1, 2007, over two years after the deed of trust was recorded in April 2005. Additionally, the September Lease was by its terms explicitly

---

affirming summary judgment on the basis that the trustee's sale terminated the lease.



"subject and subordinate to all Mortgages now or hereafter placed upon the Property, and all other encumbrances and matters of public record applicable to the Building and Property." Accordingly, under the statute, title passed to Lender free of the September Lease.

¶14 Axis's primary argument on appeal focuses on the res judicata effect of the eviction judgment. Axis contends the eviction court "established as a matter of law for this case that there is an enforceable Lease between the parties despite the trustee sale." A forcible entry and detainer judgment operates as a conclusive determination "between the parties as to matters which could [and] should have been adjudicated as well as to matters put in issue and determined" in that action. *Heywood v. Ziol*, 91 Ariz. 309, 311, 372 P.2d 200, 201 (1962) (quoting *Cannon v. Ariz. Game & Fish Comm'n*, 85 Ariz. 1, 5, 330 P.2d 501, 503 (1958)). Although "the *only issue* in such an action is the right of actual possession," subsidiary issues of fact and law actually determined and necessary to determine the right to possession also have preclusive effect. *Id.*, 372 P.2d at 202.

¶15 Axis argues the eviction judgment implicitly determined the September Lease to be valid and enforceable by evicting Axis on the ground that the September Lease had expired by its express provisions. The eviction judgment, however, was

premised on Axis claiming a right to possession of the premises only on the basis of the September Lease. Because the court concluded that the lease, by its own terms, had already expired, it was unnecessary to determine the validity and enforceability of the lease. The court simply concluded that, even if Axis were correct that the September Lease controlled, Lender would still be entitled to possession of the premises.

¶16 As Axis points out, Lender's complaint in the eviction action sought possession on the basis that Axis was not entitled to possession under the terms of, as relevant here, the September Lease, not that the lease had been extinguished by the trustee's sale; the complaint also, however, expressly disputed the validity of the September Lease. Given this explicit statement disputing the validity of the lease and because no determination of validity or enforceability was necessary to the eviction judgment, the eviction judgment does not preclude summary judgment for Lender.

¶17 Axis further argues that Lender, by its conduct after the trustee's sale, ratified and implicitly agreed to be bound by the September Lease. Lender, however, presented competent evidence through Lender's manager Richard Lynton's affidavit and supporting documents that it consistently informed Axis of Lender's position "as to the doubtful validity of the September Lease and that even if the Lease were valid, it had been

terminated by the trustee sale." Indeed, Lender presented a letter sent to Axis in early December 2009 not only stating Lender "do[es] not consider [the September Lease] to be applicable to us," but also proposing terms "to work out a new lease" to govern the relationship.

¶18 In response, Axis did not dispute this correspondence from Lender, but rather asserted without supporting documentation that "[Lender] consistently represented to [Axis] that the requirements of the Lease, opening of [the established Mexican restaurant] and completion of the shopping center, would be met by [Lender]." Despite Axis's argument disputing Lender's actions, Axis failed to present any competent evidence supporting its contention that Lender ratified the September Lease. Thus, Lender's facts as alleged -- which Axis did not dispute -- are considered true. See *GM Dev. Corp.*, 165 Ariz. at 5, 795 P.2d at 831. Because Axis failed to present any evidence (as opposed to argument) that Lender adopted the September Lease, the court did not err by finding no contract existed between Lender and Axis, rendering Lender entitled to judgment as a matter of law on Axis's Contract Claims.

¶19 Axis additionally argues the superior court erred by failing to enter summary judgment in its favor on the Reimbursement Claim. Our decision affirming summary judgment in

favor of Lender and against Axis on that claim renders this argument moot.

**B. Unjust Enrichment Claim.**

¶20 The superior court granted summary judgment in favor of Lender on Axis's alternative claim for unjust enrichment "because it is based upon a specific contract [and because] . . . . [Axis] has presented no evidence that would satisfy the elements of an equitable claim for unjust enrichment." On appeal, Axis challenges both grounds.

¶21 "An unjust enrichment claim requires proof of five elements: '(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.'" *Wang Elec., Inc. v. Smoke Tree Resort, LLC*, 230 Ariz. 314, 318, ¶ 10, 283 P.3d 45, 49 (App. 2012) (quoting *Freeman v. Sorchych*, 226 Ariz. 242, 251, ¶ 27, 245 P.3d 927, 936 (App. 2011)). An unjust enrichment claim is not cognizable where the parties' relationship is governed by contract. *Brooks v. Valley Nat'l Bank*, 113 Ariz. 169, 174, 548 P.2d 1166, 1171 (1976).

¶22 The superior court did not err by entering summary judgment in favor of Lender on this claim. Although, the claim is cognizable in light of our conclusion that Lender took title free of the lease, the claim is meritless. Axis offered no

evidence that Lender received an unjustified enrichment. Lender acquired the shopping center by placing and paying the highest bid at the trustee's sale: \$5,500,000. Axis presented no proof that this price did not adequately represent the value of the shopping center. See A.R.S. § 33-811(B) ("The trustee's deed shall raise the presumption of compliance with the requirements of the deed of trust and this chapter relating to the exercise of the power of sale and the sale of the trust property, including . . . the conduct of the sale."); *In re Krohn*, 203 Ariz. 205, 212, ¶ 29, 52 P.3d 774, 781 (2002) (noting that in context of adequacy of price paid at trustee's sale, "issuance of a trustee's deed carries with it the presumption of compliance with all requirements"). Absent proof of some enrichment to Lender, Axis's Unjust Enrichment Claim fails as a matter of law.

¶123 Moreover, Axis offered no evidence that any alleged benefit to Lender would approach or exceed the value of rent Axis failed to pay. After Lender's motion for summary judgment pointed to an absence of evidence of either enrichment or impoverishment, Axis rested on only unsupported assertions that the improvements had "increased the value of the commercial property" and that "[Lender] can lease the premises at a higher rent because of the improvements." Axis offered no evidence (as opposed to argument) disputing Lender's assertion that the value

of rent Axis failed to pay exceeded the cost of improvements. See Ariz. R. Civ. P. 56(e) (when directed to absence of evidence on an essential element of a claim, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial"). Because Axis failed to present any competent evidence of enrichment or, indeed, impoverishment, the superior court appropriately granted summary judgment in favor of Lender. See *Orme Sch.*, 166 Ariz. at 310, 802 P.2d at 1009.

## **II. Attorney's Fees.**

¶24 The superior court signed and entered two separate judgments in favor of Lender, identical but for the amount of attorney's fees awarded. The first judgment, entered May 7, 2012, awarded \$11,172.20 in fees; the second, entered nine days later on May 16, awarded \$26,112.20. Axis argues that the entry of multiple, inconsistent judgments itself warrants reversal.

¶25 Lender's application for attorney's fees sought an award of \$11,172.20 for legal services by local counsel Lake & Cobb and \$14,940.00 for legal work completed by Lynton, an attorney licensed to practice in Colorado as well as Lender's manager. By a minute entry ruling dated May 7, as Axis concedes, the superior court overruled Axis's objections to Lender's fee request.

¶126 Although not explicitly stated by the superior court, the second judgment appears to correct an "error[] . . . arising from oversight or omission [that] may be corrected by the court at any time of its own initiative." Ariz. R. Civ. P. 60(a). The May 7 judgment awarded only the amount of fees requested for Lake & Cobb's legal services, although the minute entry of the same date overruled Axis's objections to the entire fee request. The May 16 judgment, which awarded precisely the total amount of fees requested for both Lake & Cobb's and Lynton's legal work, simply corrects the omission of Lynton's fees.

¶127 Axis next argues that the superior court erred by awarding fees for work performed by Lynton because Lynton, as manager of Lender, was "self-representing" and therefore not entitled to fees and because Lynton, although licensed to practice law in Colorado, was not authorized to practice in Arizona. We review de novo the interpretation of the attorney's fees statute, but review the superior court's award of attorney's fees for an abuse of discretion. *Dooley v. O'Brien*, 226 Ariz. 149, 152, ¶ 9, 244 P.3d 586, 589 (App. 2010).

¶128 Although "one who acts on his own behalf, including an attorney, is not engaged in the practice of law . . . [and] is therefore not entitled to attorney's fees," a member of an entity "attempt[ing] to represent the [entity] is not acting only for himself." *Hunt Inv. Co. v. Eliot*, 154 Ariz. 357, 362-

63, 742 P.2d 858, 863-64 (App. 1987). Lynton, although the managing member of Lender, was not acting only for himself when performing legal services for Lender. Thus, "[t]he necessary conclusion is that he acted in his capacity as an attorney, in an attorney-client relationship." See *Id.* at 363, 742 P.2d at 864.

¶129 Axis contends that, because Lynton is not authorized to practice law in Arizona, the court erred by awarding Lender attorney's fees for Lynton's legal services. The stated purpose of an award of attorney's fees under A.R.S. § 12-341.01 is "to mitigate the burden of the expense of litigation to establish a just claim or a just defense." A.R.S. § 12-341.01(B). Axis does not argue that the cost of Lynton's legal work falls outside of "the burden of the expense of [Lender's] litigation," *id.*, but rather that Lynton's assistance of Lake & Cobb constituted unauthorized practice of law.

¶130 Lynton's affidavit in support of Lender's application for attorney's fees recited that Lynton is "an attorney licensed to practice law in the State of Colorado," who "assisted [Lender's] counsel of record," "subject to his review," in providing legal services to Lender. Although not admitted to practice in Arizona, Lynton simply assisted Lake & Cobb under the supervision of a Lake & Cobb attorney, who Axis does not dispute is authorized to practice law in Arizona. See E.R.



5.5(c)(2) (lawyer licensed outside of Arizona may provide short-term legal services in Arizona regarding litigation if assisting person authorized to appear in the proceeding); *cf. Cont'l Townhouses E. Unit One Ass'n v. Brockbank*, 152 Ariz. 537, 545, 733 P.2d 1120, 1128 (App. 1986) (in exercising discretion to determine amount of attorney's fee award, court may "consider the value of services rendered in a case by legal assistants, law clerks, and paralegals, applying the same standards as are used in evaluating lawyers' time"). The superior court did not err by awarding Lender the attorney's fees associated with Lynton's legal work.

¶31 Lender has requested its attorney's fees on appeal pursuant to A.R.S. § 12-341.01. In the court's discretion, Lender is awarded its reasonable attorney's fees upon compliance with ARCAP 21. As the successful party on appeal, Lender is entitled to its costs upon compliance with ARCAP 21.

**CONCLUSION**

¶132 The superior court's judgment entered May 16, 2012, is affirmed.

/S/  
KENT E. CATTANI, Judge

CONCURRING:

/S/  
PATRICIA A. OROZCO, Presiding Judge

/S/  
PETER B. SWANN, Judge