

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



DIVISION ONE  
FILED: 7/25/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

FISHER INDUSTRIES, INC., an ) No. 1 CA-CV 12-0641  
Arizona corporation and division )  
of FISHER SAND & GRAVEL CO., a ) DEPARTMENT C  
North Dakota corporation, )  
)  
) **MEMORANDUM DECISION**  
Plaintiff/Appellee, ) (Not for Publication -  
) Rule 28, Arizona Rules of  
v. ) Civil Appellate Procedure)  
)  
AJ CONSTRUCTORS, INC., a Nevada )  
corporation, )  
)  
)  
Defendant/Appellant. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-022038

The Honorable Colleen L. French, Judge *Pro Tempore*

**AFFIRMED**

Lewis and Roca LLP  
by Frances J. Haynes  
Kimberly A. Demarchi  
Cindy Villanueva  
Attorneys for Plaintiff/Appellee

Phoenix

Douglas M. Schumacher  
Attorney for Defendant/Appellant

Fountain Hills

S W A N N, Judge

¶1 In this breach of contract case, AJ Constructors, Inc. appeals the superior court's grant of summary judgment in favor

of Fisher Industries, Inc. The superior court properly concluded that a contract existed, that Fisher performed, and that AJ Constructors failed to pay Fisher. It further concluded that no other party was responsible for the payment. Finding no error, we affirm.

*FACTS AND PROCEDURAL HISTORY*

¶12 A.R. Mays Construction, Inc. was the general contractor for a commercial development project in Peoria, Arizona (the "Project"). AJ Constructors, a subcontractor on the Project, entered into a Materials Quote, Scope of Work Supplement (the "Contract") with Fisher. The Contract provided that Fisher would supply two sizes of rock -- 1¼" minus aggregate and 3" minus aggregate -- to be crushed on-site at the Project. Fisher provided materials pursuant to the Contract. Fisher repeatedly demanded payment from both A.R. Mays and AJ Constructors, but \$116,535.50 remained unpaid.

¶13 Fisher filed a complaint against AJ Constructors and A.R. Mays, alleging that AJ Constructors breached the Contract and that both AJ Constructors and A.R. Mays were unjustly enriched in the amount of the remaining payment owed to Fisher. AJ Constructors then filed an answer and cross-claim. AJ Constructors alleged that it had "paid all amounts due and owing to Fisher with respect to AJ Constructors' obligations[,] and while it had not been unjustly enriched, A.R. Mays had been.

For its part, A.R. Mays admitted unjust-enrichment liability to Fisher for \$34,000 worth of 1¼" minus aggregate for which AJ Constructors never applied for payment, but otherwise denied all material allegations set forth in Fisher's complaint and AJ Constructors' cross-claim.

¶14 Fisher filed a motion for summary judgment against both AJ Constructors and A.R. Mays. AJ Constructors filed a response to Fisher's motion. AJ Constructors contended that A.R. Mays was responsible for paying a portion of the Contract sum because the 3" minus aggregate was provided for A.R. Mays's use and A.R. Mays had directed the crushing of the 3" minus aggregate. A.R. Mays also filed a response to Fisher's motion, and filed its own motion for summary judgment. A.R. Mays contended that it had paid AJ Constructors the full amount of their subcontract. In support of this contention, A.R. Mays provided a copy of an Unconditional Waiver and Release on Final Payment, in which AJ Constructors stated that it had been paid in full for its work on the Project and expressly waived and released any right to any claim for payment from A.R. Mays.

¶15 After hearing oral argument, the court granted Fisher's motion for summary judgment regarding the 1¼" minus aggregate, denied it as to the 3" minus aggregate, and took the remainder of the motion under advisement. The next month, the court granted A.R. Mays's motion for summary judgment, finding

that "[t]here was no contract between A.R. Mays and Fisher" and "A.R. Mays has paid AJ Constructors for the work performed by AJ Constructors under the contract between A.R. Mays and AJ Constructors[,]" as "evidence[d] by the unconditional waiver and release signed by AJ Constructors indicating that it had been paid in full by A.R. Mays." The summary judgment awarded A.R. Mays its attorney's fees and costs, and awarded Fisher the \$34,000 for which A.R. Mays admitted liability.

¶16 Fisher filed a second motion for summary judgment against AJ Constructors on its breach of contract claim concerning the 3" minus aggregate. AJ Constructors did not respond, but filed an Emergency Motion to Extend Deadlines because of a medical emergency of AJ Constructors' counsel. The superior court granted the motion and extended the response deadline for 45 days. But AJ Constructors never responded, and the court ultimately granted the second motion for summary judgment. The court entered judgment for Fisher against AJ Constructors for the full \$116,535.50 sought by the complaint, interest on that amount, and attorney's fees and costs.

¶17 AJ Constructors timely appeals. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

#### *DISCUSSION*

¶18 AJ Constructors first contends that the superior court erred by granting Fisher's second motion for summary judgment

"solely upon the belief that AJ Constructors had not filed a response and opposition." AJ Constructors further contends that because one of the claims that Fisher asserted was for unjust enrichment, an equitable remedy, the court should have awarded Fisher only those attorney's fees related to the breach of contract claim. We address these arguments in turn.

I. *THE SUPERIOR COURT DID NOT ERR BY GRANTING FISHER'S SECOND MOTION FOR SUMMARY JUDGMENT.*

¶9 We review the grant of summary judgment in favor of Fisher de novo, viewing the facts in the light most favorable to AJ Constructors. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). We determine de novo whether there are any genuine issues of material fact and whether the superior court erred in applying the law. *L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997).

¶10 To carry its burden of persuasion, a plaintiff who seeks summary judgment must submit "undisputed admissible evidence that would compel any reasonable juror to find in its favor on every element of its claim." *Comerica Bank v. Mahmoodi*, 224 Ariz. 289, 293, ¶ 20, 229 P.3d 1031, 1035 (App. 2010). A failure to respond to the motion with a written memorandum or opposing affidavits cannot, by itself, entitle the movant to a summary judgment. A "party who fails to respond to

a motion for summary judgment, however, 'does so at his peril because uncontroverted evidence favorable to the movant, and from which only one inference can be drawn, will be presumed to be true.'" *Rudinsky v. Harris*, 231 Ariz. 95, 99, ¶ 14, 290 P.3d 1218, 1222 (App. 2012) (citation omitted).

¶11 AJ Constructors contends on appeal that the superior court's granting of Fisher's second motion for summary judgment "was based solely upon the belief that AJ Constructors had not filed a response and opposition to the [second motion for summary judgment.]"<sup>1</sup> It further argues that "there are clearly questions of fact as to the material terms and conditions of the agreement and payment obligations as between Fisher, AR Mays and AJ Constructors[,]" and that the court erred by not considering "any of the facts and argument of AJ Constructors in granting a Summary Judgment motion by default."

¶12 In response, Fisher contends that "[t]he determinations made by the trial court in the ruling on A.R. Mays's motion for summary judgment are law of the case, binding on all parties." We disagree. "[A]t the trial court level, the

---

<sup>1</sup> The court's "belief" that AJ Constructors had not filed a response was entirely correct -- the only response that AJ Constructors ever filed in this case was a response to Fisher's first motion for summary judgment. But we do not read the superior court's order as granting summary judgment solely because of the lack of a response. As we explain, the record supports the entry of summary judgment in Fisher's favor as a matter of law.

doctrine of the law of the case is 'merely a practice that protects the ability of the court to build to its final judgment by cumulative rulings, with reconsideration or review postponed until after the judgment is entered.'" *Zimmerman v. Shakman*, 204 Ariz. 231, 236, ¶ 15, 62 P.3d 976, 981 (App. 2003) (citation omitted). This case involved multiple claims for relief and multiple parties, and the court's interlocutory order granting summary judgment for A.R. Mays was not made final under Ariz. R. Civ. P. 54(b). The law of the case doctrine therefore does not apply.

¶13 But while the court's earlier ruling may not have had preclusive effect, it was nonetheless sound and the superior court was under no obligation to revisit it. AJ Constructors argues, in effect, that Fisher's second motion for summary judgment should have caused the court to dig through the record and *sua sponte* reconsider its earlier ruling on the basis of AJ Constructors' earlier response. We are aware of no authority that would require the court to engage in such an exercise, and decline to adopt such a rule here.

¶14 Our review of the record reveals no genuine dispute of fact as to the material terms and conditions of the Contract. AJ Constructors' sole defense was that even though it owed Fisher for the 1¼" minus aggregate, a separate obligation existed between Fisher and A.R. Mays for the 3" minus aggregate.

There is no evidence that such a contract existed. Indeed, the Contract between AJ Constructors and Fisher expressly encompassed both 1¼" minus aggregate and 3" minus aggregate. The superior court properly determined that there was no contract between A.R. Mays and Fisher, and AJ Constructors unconditionally released all claims for payment from A.R. Mays.<sup>2</sup>

¶15 Fisher is still owed for the work it performed pursuant to the Contract. Because we conclude that no reasonable juror could have found that Fisher had not established the elements of its breach of contract claim against AJ Constructors, we conclude that the superior court did not err by granting Fisher's second motion for summary judgment. We do not address AJ Constructors' contention that the judgment amount should have been offset by the \$34,000 judgment against A.R. Mays because AJ Constructors failed to make this argument in the superior court proceedings or in its opening brief. *Wasserman*, 143 Ariz. at 9 n.4, 691 P.2d at 721 n.4.

## II. ATTORNEY'S FEES

¶16 A.R.S. § 12-341.01(A) authorizes a discretionary award of reasonable attorney's fees to the successful party in a

---

<sup>2</sup> AJ Constructors argues in its reply brief that the court erred because "it did not address whether the lien waiver in favor of AR Mays applied to Fisher." This issue was not presented in the opening brief as required by ARCAP 13(a). We will not consider an issue first raised in a reply brief on appeal. *Wasserman v. Low*, 143 Ariz. 4, 9 n.4, 691 P.2d 716, 721 n.4 (App. 1984).



contested action arising out of contract. We 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). We will affirm unless there is no reasonable basis for the award. *Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, 265, ¶ 18, 99 P.3d 1030, 1035 (App. 2004).

¶17 After considering Fisher's fee applications, AJ Constructors' response, and oral argument, the superior court awarded attorney's fees in the amount of \$36,913.

¶18 We reject AJ Constructors' argument that because Fisher made two claims -- one for breach of contract and one for the equitable remedy of unjust enrichment -- the court erred by failing to allocate attorney's fees for each claim and reduce the award by the amount attributable to the unjust enrichment claim. A party cannot use an unjust enrichment claim to circumvent express contractual limitations on its recovery. *Trustmark Ins. Co. v. Bank One, Ariz., NA*, 202 Ariz. 535, 542-43, ¶¶ 35-37, 48 P.3d 485, 492-93 (App. 2002). But if the existence of a contract is disputed, a party is permitted to argue unjust enrichment as an alternative claim. *Id.* Here, there is no dispute regarding the existence of a contract between AJ Constructors and Fisher, and the unjust enrichment claim did not circumvent any contractual limitations on Fisher's

recovery.<sup>3</sup> We conclude that the superior court did not abuse its discretion by awarding Fisher the full amount of its attorney's fees.

CONCLUSION

¶19 For the following reasons, we affirm the superior court's granting of Fisher's second motion for summary judgment against AJ Constructors and the award of reasonable attorney's fees to Fisher.

¶20 As the prevailing party, Fisher is entitled to its costs on appeal. In the exercise of our discretion, we award Fisher its reasonable attorney's fees on appeal upon compliance with ARCAP 21.

/s/

---

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

---

DIANE M. JOHNSEN, Judge

/s/

---

RANDALL M. HOWE, Judge

---

<sup>3</sup> We note that even if Fisher had a claim for unjust enrichment, Fisher would still be entitled to attorney's fees because the unjust enrichment claim arose from the contractual claim. See *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 543, 647 P.2d 1127, 1141 (1982).