IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ELIZABETH M. ENTERTAINMENT L.L.C., et al., *Plaintiffs/Appellants-Cross Appellees*,

v.

DEBRA WHITCOMB, et al., *Defendants/Appellees-Cross Appellants*.

No. 1 CA-CV 19-0036
FILED 1-28-2020

Appeal from the Superior Court in Maricopa County
No. CV2016-009328
The Honorable Daniel G. Martin, Judge

AFFIRMED IN PART; REVERSED AND REMANDED IN PART; VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

Chief Judge Peter B. Swann delivered the decision of the court, in which Acting Presiding Judge David D. Weinzweig and Judge David B. Gass joined.

S W A N N, Chief Judge:

¶1 Elizabeth M. Entertainment, L.L.C. ("EME") sued numerous defendants for business torts related to conduct surrounding the termination of a commercial lease. The superior court granted summary judgment to the defendants. After reviewing the evidence submitted in the summary judgment proceedings, we hold that the defendants were entitled to judgment as a matter of law on all claims except one—trespass to chattels. As to the claim for trespass to chattels, we hold that there exists a genuine issue of material fact regarding whether EME abandoned property within the leased building. We therefore affirm the judgment in part and reverse it in part. We vacate the judgment's award of attorney's fees because the claims did not arise out of contract for purposes of A.R.S. § 12–341.01 and the court did not set forth reasons for an award under § 12–349.

FACTS AND PROCEDURAL HISTORY

¶2 Debra Whitcomb and Drew Hassler are co-trustees of GPW Trust ("GPW"). GPW owns a commercial building in Scottsdale, which it leased to Sigmaeta in 2003 for a term of three years and three months. At the end of the lease term, Sigmaeta renewed the lease for eight years and the parties amended the lease to give Sigmaeta renewal rights for three additional eight-year terms with 120 days' notice before the end of a term.

¶3 Sigmaeta assigned the lease, with GPW's approval, to EME in December 2006. In March 2011, EME assigned the lease to its parent company, Elizabeth Entertainment, Inc. ("EEINC"), which subleased the property back to EME. In August 2011, EEINC sold 40% of its ownership interest in EME to HMJ Entertainment, L.L.C. ("HMJ"). In early 2012, EEINC sold its remaining ownership interest in EME to HMJ. Under the lease, any sale, assignment, mortgage, transfer, or subletting was void if not approved by GPW. GPW was unaware of EEINC's sale of EME to HMJ until May 2014. GPW received the rent late almost every month from mid-2013 to October 2014.

¶4 On April 15, 2014, the deadline for exercising the option to renew the lease, EEINC notified GPW that it wished to renew the lease for an additional eight-year term. The following week, GPW responded that before accepting the option to renew the lease, it needed letters of credit, evidence of liability insurance, and documentation about any assignments or subleases. GPW also noted the issue of late rental payments. EEINC did not promptly provide the requested information. When GPW followed up in May 2014, EEINC supplied evidence of liability insurance, the first page of the lease assignments and subleases between EEINC and EME, and documentation of the sale of EME to HMJ. Because the letters of credit were still missing, GPW responded that until all defaults were cured, it did not have to accept EEINC's exercise of the renewal option. EEINC did not thereafter provide letters of credit.

¶5 On July 23, 2014, GPW notified EEINC and EME to vacate the property because the lease would not be renewed and therefore would expire at the end of the month. The next day, HMJ's manager, Jason Johnson, informed Whitcomb that he had a new partner and that he would lose money if he could not renew the lease. Whitcomb asked Johnson if he or his new partner had an attorney and, if so, for the attorney's contact information. On July 26, 2014, Johnson provided Whitcomb the names of two new partners, Scott Williams and Brian O'Loughlin,[1] and he asked Whitcomb to let him know what information she required. Whitcomb repeated her request for information regarding the partners' legal representation.

¶6 The next day, Williams responded that he did have legal counsel and that an email introduction to Whitcomb's attorney would be helpful. That same day, Johnson and Williams called Whitcomb and the group discussed the expiring lease and Whitcomb's confusion about the nature of Johnson's role with EME. Whitcomb thereafter emailed both Johnson and Williams, asking for a copy of any written agreement between Johnson and EEINC. Williams responded that he wanted to talk about a new lease. Whitcomb replied that she needed to know that Johnson was the actual owner before discussing a lease. Williams then asked what the next steps would be if Johnson did not own EME. Whitcomb sent a final email to Williams and Johnson on July 29, 2014, asking them to consent in

[1] The superior court found that EME abandoned its tortious interference claim against GPW regarding Brian O'Loughlin and EME does not challenge this finding on appeal.

writing to have her counsel contact them directly. Williams provided consent, and the parties' direct communications stopped.

¶7 On August 5, 2014, GPW sent a notice of default to EEINC and EME, stating that if it did not pay its overdue rent balance by August 12, 2014, GPW would repossess the property. Two days later, EME paid all but $400 of the overdue rent and late fees. Based on the shortage, GPW returned the check to EME, demanded that EME vacate the premises, placed a "For Sale" sign on the building, and changed the locks. Whitcomb also called Johnson's real estate agent and left a voicemail stating that she was trying to get Johnson out of the building. When Johnson discovered the locks had been changed, he broke into the building and continued to operate his business. To resolve the issue, GPW and EME entered into a "Tenant Performance Agreement" extending the lease on a month-to-month basis. By that time, Williams had decided not to invest in EME.

¶8 In mid-August 2014, Mitchell Fox, owner of Fox Companies, LLC, approached Johnson about buying EME's liquor license. Johnson sold EME's liquor license to Fox Companies on October 14, 2014. That same day, EME, EEINC, GPW, and Fox Companies executed a series of agreements, including ones terminating the lease between EEINC and GPW and the sublease between EEINC and EME, and executing a new lease between Fox Companies and GPW.

¶9 After EME terminated its sublease with EEINC, Johnson orally agreed with Fox to continue to operate his business on the property until October 31, 2014. Hassler, who was unaware of the agreement, went to the building to evict EME on the night of October 14, 2014. While at the building, Johnson informed Hassler of the oral agreement and Hassler left. Later that night, Fox emailed Johnson and rescinded the oral agreement, stating that it conflicted with the terms of his lease. The following morning, Hassler went back to the building and had a locksmith change the locks for Fox. When Johnson discovered that the locks had been changed, he asked Fox for permission to enter the building to get EME's remaining property. Fox denied that request. EME then sent a demand letter to Fox and GPW demanding the return of its property. The property was never returned.

¶10 In August 2015, Johnson and EME sued Fox and Fox Companies for the value of EME's property that was left in the building. EME and Fox entered into a walkaway agreement and the lawsuit was dismissed. EME then filed this action against GPW, Hassler, and Whitcomb for tortious interference with EME's sublease with EEINC, tortious interference with Johnson's oral agreement with Fox, tortious interference

with EME's business expectancy with Williams, and trespass to chattels. EME and GPW cross-moved for summary judgment on each claim. The superior court denied EME's motion, granted GPW's motion, and awarded attorney's fees to GPW at a reduced amount.

¶11 EME appeals the judgment, and GPW cross-appeals the reduction of the attorney's fees award.

DISCUSSION

¶12 "We review a grant of summary judgment *de novo*, considering the evidence and all reasonable inferences in the light most favorable to the non-moving party." *Lennar Corp. v. Transamerica Ins. Co.*, 227 Ariz. 238, 242, ¶ 7 (App. 2011). A party is entitled to summary judgment when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a).

I. THE SUPERIOR COURT PROPERLY ENTERED SUMMARY JUDGMENT FOR GPW ON EME'S CLAIMS FOR TORTIOUS INTERFERENCE WITH CONTRACT.

¶13 EME first challenges the entry of summary judgment for GPW on the claim of tortious interference with EME's sublease with EEINC. To succeed on a claim for tortious interference with contract, the plaintiff must prove that (1) a valid contractual relationship existed, (2) the defendant knew of the relationship, (3) the defendant engaged in intentional interference inducing or causing a breach, (4) the defendant acted improperly, and (5) the interference caused damages. *ABCDW LLC v. Banning*, 241 Ariz. 427, 437, ¶ 37 (App. 2016). The interference need not cause an actual breach; liability may exist if the defendant "causes a party's performance under the subject contract to be more expensive or burdensome." *Plattner v. State Farm Mut. Auto. Ins. Co.*, 168 Ariz. 311, 316 (App. 1991).

¶14 EME failed to prove that a genuine issue of material fact existed that GPW tortiously interfered with the sublease between EEINC and EME. EME does not contend on appeal that any of GPW's conduct induced or caused EEINC to breach the sublease with EME or even that GPW's conduct caused the termination of the sublease. Additionally, EME does not contend that GPW's conduct made EEINC's or EME's performance under the sublease more expensive or burdensome. Finally, EME does not allege that EME suffered any pecuniary loss as a result of GPW's conduct. Rather, EME contends that its damages consisted of

GPW's breach of the covenant of quiet enjoyment. Breach of the covenant of quiet enjoyment, however, is a cause of action that can give rise to a damage recovery—it is not a measure of damages. *See Johansen v. Ariz. Hotel*, 37 Ariz. 166, 169 (1930). EME failed to provide evidence to generate a triable issue of fact as to its claim that GPW tortiously interfered with the sublease between EEINC and EME. The superior court properly entered summary judgment for GPW on the tortious interference claim.

¶15 EME next challenges the entry of summary judgment for GPW on the claim of tortious interference with Johnson's oral agreement with Fox. Though GPW changed the locks to the building, this occurred the day *after* Fox rescinded the oral agreement. EME presented no evidence that GPW was responsible for Fox's decision. Indeed, Johnson testified in his deposition that he did not know whether GPW had caused Fox to rescind. Though the sequence of events could permit one to speculate that GPW was behind Fox's change of mind, speculation is insufficient to defeat summary judgment. *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, 520, ¶ 19 (App. 2009). The superior court properly entered summary judgment for GPW on the tortious interference claim.

II. THE SUPERIOR COURT PROPERLY ENTERED SUMMARY JUDGMENT FOR GPW ON EME'S CLAIM FOR TORTIOUS INTERFERENCE WITH A BUSINESS EXPECTANCY.

¶16 EME challenges the entry of summary judgment for GPW on the claim of tortious interference with EME's business expectancy with Williams. To succeed on a claim of tortious interference with a business expectancy, the plaintiff must prove (1) a valid business expectancy existed, (2) the defendant knew of the business expectancy, (3) the defendant intentionally induced or caused termination of the business expectancy, (4) the defendant acted improperly, and (5) the interference caused damages. *Dube v. Likins*, 216 Ariz. 406, 412, ¶ 14 (App. 2007); *Miller v. Hehlen*, 209 Ariz. 462, 471, ¶ 32 (App. 2005).

¶17 EME presented no evidence that GPW induced or caused Williams to terminate the business expectancy. The only evidence that EME presented on this point was Johnson's deposition testimony that Williams told him that he got a "bad vibe" from Whitcomb, that he "did not want to deal with this person," and that he decided to step away until Johnson and Whitcomb "got [their] stuff figured out." When asked what GPW did to drive Williams away, Johnson testified, "I don't know specifically," and "I'll have to ask him." EME presented no evidence that any specific act of interference by GPW caused Williams to terminate his business expectancy

with EME. Again, speculation is insufficient to defeat summary judgment. *Modular Mining Sys.*, 221 Ariz. at 520, ¶ 19.

¶18 Additionally, EME failed to present evidence of damages. EME first contended that if Williams had invested in EME, it would have rebranded from a live music venue to a nightclub in anticipation of the 2015 Super Bowl, which would have been successful based on Johnson's prior experience with a different nightclub. EME asserted that it suffered $150,000 in lost profits because similar bars quadrupled their revenue in 2008, the last time a Super Bowl was held in Arizona. No damages can be allowed for lost profits, however, if such damages are "uncertain, contingent, conjectural, or speculative." *Schuldes v. Nat'l Sur. Corp.*, 27 Ariz. App. 611, 616 (App. 1976). EME's claimed damages were entirely speculative and uncertain because they were based on the putative success of a rebranding effort that never occurred and unsupported claims of profits of other bars and restaurants from seven years earlier.

¶19 EME next contended that because GPW interfered with its business expectancy with Williams, EME sold its liquor license to Fox Companies at a reduced price. It claimed that it suffered $180,000 in damages because HMJ spent $400,000 to purchase EME and EME sold the liquor license to Fox for $220,000. But EME did not present any evidence that it could have sold the liquor license for more if Williams had invested in EME. Indeed, EME argued below that it would not have sold the liquor license at all if Williams had invested. Again, EME's claimed damages were speculative.

¶20 The speculative nature of the alleged damages, as well as the absence of any evidence that GPW induced Williams' decision not to invest, warranted the entry of summary judgment for GPW on EME's claim for tortious interference with a business expectancy.

III. THE SUPERIOR COURT ERRED BY ENTERING SUMMARY JUDGMENT FOR GPW ON EME'S CLAIM FOR TRESPASS TO CHATTELS.

¶21 EME finally challenges the entry of summary judgment for GPW on the claim that GPW committed trespass to chattels by intentionally dispossessing or intermeddling with EME's personal property after GPW changed the locks to the building in October 2014. A trespass to chattel is committed by "intentionally dispossessing another of the chattel or using or intermeddling with a chattel in the possession of another." *Koepnick v. Sears Roebuck & Co.*, 158 Ariz. 322, 330–31 (App. 1988). Dispossession

includes intentionally "taking a chattel from the possession of another without the other's consent" *or* intentionally "barring the possessor's access to a chattel." Restatement (Second) of Torts § 221(a) and (c). "[O]ne who refuses to permit another to remove [] chattel . . . after the other's right or privilege to remain upon the land has expired, has dispossessed the other of the chattel." *Id.* at cmt. e.

¶22 GPW argues that it never exercised exclusive dominion or control over EME's property. But the undisputed evidence shows that after the terminations of the lease between GPW and EEINC and the sublease between EEINC and EME, GPW barred EME's access to its personal property by changing the locks and refusing to give EME access to the building.

¶23 GPW contends that it nonetheless did not dispossess EME of its property because EME abandoned the property. To abandon personal property, a person must voluntarily and intentionally give up a known right. *Grande v. Jennings*, 229 Ariz. 584, 588, ¶ 13 (App. 2012). The sublease termination agreement to which EME agreed stated simply that EME would have "no further rights to the Premises." Under the terms of the lease, however, EME was entitled to an opportunity to remove its personal property left inside the building:

> All alterations, improvements, maintenance, repairs and additions installed in or changes made to the remaining in, on or about the Premises at the expiration of this Lease shall be deemed abandoned and shall become the property of Landlord; provided, however, that Tenant may, at the expiration of this Lease, at its sole expense, remove any furniture, trade fixtures and equipment instead in or about the Premises and paid for by Tenant and any other assets of Tenant's business then owned by Tenant; provided that Tenant is not in default hereunder and, further provided that Tenant shall immediately, at its sole expense, repair all damage occasioned by said removal.

¶24 Johnson testified that Fox entered into an oral agreement with him to operate his business until October 31, 2014, and Hassler acknowledged that Johnson told him about the oral agreement on October 14, the day the lease and sublease were terminated. On October 15, after the locks were changed, Johnson emailed Fox asking for permission to remove EME's property from the building. EME also sent a demand letter to both GPW and Fox Companies regarding EME's desire to collect its

property. Based on the foregoing, there existed a genuine issue of material fact regarding whether EME abandoned its property after terminating the sublease.

¶25 GPW last contends that EME waived any claim to the property because it entered into a walk-away agreement with Fox Companies. Because GPW fails to cite any authority to support its argument, we do not consider it. *See* ARCAP 13(a)(7). We conclude that the superior court erred by granting GPW's motion for summary judgment for trespass to chattels. We therefore reverse the entry of summary judgment as to that claim.

ATTORNEY'S FEES

¶26 EME challenges the superior court's award of attorney's fees to GPW. We review a superior court's award of attorney's fees for an abuse of discretion. *Democratic Party of Pima Cty. v. Ford*, 228 Ariz. 545, 547, ¶ 6 (App. 2012).

¶27 EME first contends that the superior court erred by awarding GPW its attorney's fees under A.R.S. § 12–341.01. Section 12–341.01(A) gives the court discretion to award the successful party its reasonable attorney fees if the action arises out of a contract. "The duty not to interfere with the contract of another arises out of law, not contract." *Bar J Bar Cattle Co., Inc. v. Pace*, 158 Ariz. 481, 486 (App. 1988). The superior court's entry of summary judgment for GPW on its tortious interference claims therefore did not justify an award of attorney's fees under § 12–341.01(A).

¶28 EME next contends that the superior court erred by awarding GPW its attorney's fees under A.R.S. § 12–349. Section 12–350 requires the court to set forth the specific reasons for an award made under § 12–349. The superior court did not do so.

¶29 We therefore vacate the attorney's fees award in its entirety, and we need not address GPW's cross-appeal regarding the amount of the award. We deny both parties' competing requests for attorney's fees on appeal.

CONCLUSION

¶30 For the foregoing reasons, we affirm the superior court's entry of summary judgment in favor of GPW on EME's claims for tortious interference with contracts and a business expectancy. We reverse the entry

of summary judgment for GPW on EME's claim for trespass to chattels and remand for further proceedings. We vacate the award of attorney's fees.

AMY M. WOOD • Clerk of the Court
FILED: AA