

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



DIVISION ONE
FILED: 02/08/2011
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

DENNIS WITUCKI and GAIL WITUCKI,) No. CA-CV 10-0253
Husband and wife,)
) DEPARTMENT D
Plaintiffs/Appellees,)
)
and) **MEMORANDUM DECISION**
) (Not for Publication -
GRANT GROSSER and REESE GROSSER,) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
Defendants/Cross-Claimant/)
Appellees,)
)
v.)
)
HOWARD LEEF,)
)
Defendant/Cross-Defendant/)
Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-053480

The Honorable Brian R. Hauser, Judge

AFFIRMED

Keller, Keller & Newman, PLLC
By Donald J. Newman
Attorneys for Plaintiffs/Appellees

Phoenix

Howard Leef
Defendant/Cross-Defendant/Appellant In *Propria Persona*

Goodyear

O R O Z C O, Judge

¶1 Howard Leef (Leef) appeals from the superior court's judgment in favor of Dennis and Gail Witucki (the Wituckis).¹ For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 The Wituckis leased certain business premises from Rosalie Morton and Aileen Leavitt pursuant to a Vehicular Service Facility Lease agreement (the Lease) dated May 10, 2000. The Lease was originally set to expire after five years, but was subsequently extended an additional five years.

¶3 On May 6, 2005, the Wituckis entered into a sublease agreement (the Sublease) with Grant Grosser and Reese Grosser (the Grossers) under which the Grossers assumed the Wituckis' obligations under the Lease. On December 15, 2006, the Grossers assigned all of their rights, title and interest in the Sublease to the Leef Corporation, pursuant to an Assignment and Assumption of Sublease Agreement (the Assumption Agreement). Leef and his wife, Italia Leef, (the Leefs) personally

¹ The notice of appeal was signed by Leef on behalf of himself, his wife, Italia Leef, and The Leef Corporation, USA (Leef Corporation). Because Leef is not an attorney, he cannot represent his wife or Leef Corporation in this appeal. See *Haberkorn v. Sears, Roebuck & Co.*, 5 Ariz. App. 397, 399, 427 P.2d 378, 380 (App. 1967) (a non-lawyer may not represent a spouse in court); *Boydston v. Strole Dev. Co.*, 193 Ariz. 47, 50, ¶ 14, 969 P.2d 653, 656 (1998) (a lawyer must sign a notice of appeal on behalf of a corporation). Therefore, the notice of appeal is invalid as to Italia Leef and Leef Corporation and those two defendants are not parties to this appeal.

guaranteed Leef Corporation's monetary obligations under the Assumption Agreement. The Grossers, however, were not released from liability under the Sublease. The Wituckis, the Grossers, the Leefs, and Leef as president of Leef Corporation, all signed the Assumption Agreement.

¶4 In August 2008, Leef Corporation breached the Assumption Agreement by failing to pay rent and the Grossers failed to cure the breach of the Sublease. The Wituckis filed a complaint against Leef Corporation and the Leefs (collectively, Leef Defendants) and the Grossers, seeking damages for breach of contract. The Grossers filed a cross-claim against Leef Defendants. After filing answers to the complaint and cross-claim, Leef Defendants' attorney withdrew from representation. The court granted the Wituckis' motion for summary judgment against the Grossers and the claims against Leef Defendants were set for a bench trial.

¶5 Prior to trial, Leef Defendants filed a motion in limine to preclude a "Consent to Assignment of Lease" from being admitted at trial on grounds that the document was not legible. The court denied the motion following oral argument the day of trial. After the trial concluded, the court ruled in favor of the Wituckis and the Grossers and against Leef Defendants. Leef

filed a notice of appeal.² We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) section 12-2101.B. (2003).

DISCUSSION

Motion in Limine

¶6 Leef first argues the court erred by hearing argument on the motion in limine the day of trial because the motion was filed prior to trial without objection. We review the superior court's ruling on a motion in limine for an abuse of discretion. *Warner v. Southwest Desert Images, LLC*, 218 Ariz. 121, 133, ¶ 33, 180 P.3d 986, 998 (App. 2008).

¶7 The motion in limine was filed almost two months prior to trial. Leef, however, did not press the court for resolution of the motion in limine prior to trial, and instead, raised the issue of the pending motion before trial began. The court heard argument and denied the motion. Leef did not oppose the court's consideration of the motion just prior to the start of trial, nor did he raise the Grossers' or the Wituckis' lack of objection as grounds for granting the motion. See *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) (errors not asserted in the trial court cannot be raised on appeal);

² Leef's notice of appeal was premature, but the superior court later entered a final appealable judgment on April 13, 2010. See *Barassi v. Matison*, 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981). Because several other judgments were entered, but no notice of appeal was filed for those judgments, we only consider the April 13, 2010 judgment.

accord *City of Tempe v. Fleming*, 168 Ariz. 454, 456, 815 P.2d 1, 3 (App. 1991). Further, Leef cites no legal authority supporting his argument that the court could not hear oral argument on the motion in limine immediately prior to trial.³ See *Cullum v. Cullum*, 215 Ariz. 352, 355 n.5, ¶ 14, 160 P.3d 231, 234 n.5 (App. 2007) ("We will not consider arguments posited without authority.").

¶8 Leef does not argue the court erred in denying the motion in limine on substantive grounds and, therefore, we consider this argument abandoned.⁴ See *Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 208 Ariz. 176, 180, ¶ 17, 91

³ Arizona Rule of Civil Procedure 7.2 governs motions in limine and provides, in part, that motions in limine should be ruled on before trial unless the court determines an issue of admissibility is better considered at trial. Ariz. R. Civ. P. 7.2(d). Leef does not cite this rule, but even if he did, the court ruled on the motion before trial began.

⁴ Even if Leef did argue the merits, the record reveals no abuse of discretion. First, although not entirely clear, the consent is legible. Additionally, the consent pertained to a prior sublease not at issue in this case and was irrelevant to the court's ultimate decision. See *Lopez v. Safeway Stores, Inc.*, 212 Ariz. 198, 201 n.2, ¶ 8, 129 P.3d 487, 490 n.2 (App. 2006) (reversal requires a showing of prejudice to appellant's substantial rights). Indeed, Leef did not dispute the failure to pay rent, but merely maintained the Sublease and the Assumption Agreement were invalid because the original lessors, Leavitt and Morton, did not consent to those assignments as required by the Lease. The testimony at trial, however, revealed the lessors verbally consented to the Sublease and the Assumption Agreement. Regardless, the court determined that even if the lessors did not consent, Leef Defendants performed under the Assumption Agreement for 19 months, and thus, waived any objection to a lack of consent and further, the consent was for the benefit of the lessors, not the lessee. Accordingly, there was no abuse of discretion.

P.3d 1019, 1023 (App. 2004) (an issue not raised in an appellant's opening brief is deemed abandoned or conceded). Therefore, the court did not abuse its discretion in hearing oral arguments and denying the motion on the day of trial.

Judgment as to other Leef Defendants

¶19 Leef also appears to challenge the judgment as to the other Leef Defendants on grounds that neither was represented by an attorney at trial. See *State v. Eazy Bail Bonds*, 224 Ariz. 227, 229, ¶ 12, 229 P.3d 239, 241 (App. 2010) (a corporation cannot appear in court without an attorney). The Leefs appeared in the proceedings below and the court entered judgment against Leef Defendants for \$210,069.84 plus attorneys' fees and costs. As previously stated, only Leef signed the notice of appeal. Because Leef is not a licensed attorney, he cannot represent his wife or Leef Corporation in this appeal.⁵ Consequently, the notice of appeal is invalid as to Italia Leef and Leef Corporation and those two defendants are not parties to this appeal. See *State v. One Single Family Residence at 1810 East Second Ave., Flagstaff, Ariz.*, 193 Ariz. 1, 2 n.1, 969 P.2d 166, 167 n.1 (App. 1997) (notice of appeal invalid as to a spouse who did not sign it when the spouse who signed the notice is not a licensed attorney); *Boydston*, 193 Ariz. at 51, ¶ 15, 969 P.2d at

⁵ There are several exceptions in which an individual not licensed to practice law may represent a corporation in certain types of proceedings; none of which are applicable here. See Ariz. R. Sup. Ct. 31(d).

657 (notice of appeal defective when signed by a non-lawyer on behalf of a corporation).

¶10 There were no efforts made to cure the defective notice of appeal as to Italia Leef and Leef Corporation after this court notified Leef of the issue. *Cf. Boydston*, 193 Ariz. at 51, ¶ 15, 969 P.2d at 657 (once notified of the defective notice of appeal, counsel immediately appeared on behalf of the corporation). Because Leef is the only appellant in this appeal, he lacks standing to raise arguments pertaining solely to Italia Leef and Leef Corporation. *See Goglia v. Bodnar*, 156 Ariz. 12, 18, 749 P.2d 921, 927 (App. 1987) ("When an error applies to only one party who does not appeal, another party cannot make that argument on its own behalf."); *accord In re Estate of Friedman*, 217 Ariz. 548, 552, ¶ 11, 177 P.3d 290, 294 (App. 2008). Accordingly, we will not consider Leef's argument on appeal concerning the other two defendants. *See State v. B Bar Enter., Inc.*, 133 Ariz. 99, 101 n.2, 649 P.2d 978, 980 n.2 (1982) (our reluctance to consider issues raised when there is no standing is a rule of judicial restraint).

¶11 To the extent Leef is attempting to attack the judgment against himself or his community property on the basis that his wife and the corporation were not represented by counsel at trial, we are not persuaded because his wife was present at trial and both his wife and the corporation had the

choice of being represented by counsel. The mere fact they were not represented by counsel at trial does not invalidate the judgment against Leef.

Attorneys' fees

¶12 The Wituckis request attorneys' fees on appeal pursuant to the Lease which was incorporated into the Sublease and the Assumption Agreement. The Lease provides that any breach or default by the lessee, including failing to timely pay rent, entitles the lessor to recover all damages from the lessee including reasonable attorneys' fees. The Sublease incorporates the terms of the Lease as if the Wituckis are the lessors and the Grossers are the lessees. Similarly, under the Assumption Agreement, Leef Defendants agreed to be bound by the terms of the Sublease, as if originally made by Leef Corporation. Accordingly, we grant the Wituckis their reasonable attorneys' fees and costs on appeal against Leef, subject to the Wituckis' compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶13 For the foregoing reasons, we affirm the superior court's judgment in favor of the Wituckis.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

/S/

PATRICIA K. NORRIS, Presiding Judge

JOHN C. GEMMILL, Judge