DIVISION ONE
FILED: 12/29/2011
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

RENEGADE TECHNOLOGY GROUP, INC., a Delaware corporation; JAMES A. VERBIC and BRENDA J. VERBIC, husband and wife; GERONIMO ATM FUND, LLC; and ARAPAHOE ATM FUND, LLC, Appellants, v. PALI CAPITAL, INC., a Delaware corporation; HERBERT SOROCA; HERBERT SOROCA IRA #2; TIMOTHY MAGEE; BRAD BERK; ELK ASSOCIATES FUNDING CORP.; ALLAN DUFFY; KEVIN FISHER; KEVIN FISHER IRA; MICHAEL FEINSOD; DONALD FEINSOD; JAMES FRISCIA; JOHN JAKOBSON; PETER JAKOBSON; HERMAN GROSS; KENNETH L. GROSS; KENNETH L. GROSS as Trustee for KENNETH L. GROSS PROFESSIONAL CORP. PROFIT SHARING TRUST; BRADLEY REIFLER; BRADLEY REIFLER IRA; BRADLEY REIFLER as Trustee for KELSEY REIFLER TRUST; BRADLEY REIFLER as Trustee for COLE REIFLER TRUST; BRADLEY REIFLER as Trustee for PAIGE REIFLER TRUST; STEVE STRASSER; HOWARD SLOAN; LEO WETTER; LEONARD SIMPSON;	1 CA-CV 10-0249 DEPARTMENT A **MEMORANDUM DECISION** Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)

LOIS HAMILTON; THOMAS H. DITTMER; THOMAS H. DITTMER as Trustee for the THOMAS H. DITTMER DECLARATION OF TRUST; HANNA RIVKIN, MYRON L. NATHAN; MYRON L. NATHAN ROTH CONVERSION IRA; BEAR STEARNS SECURITIES CORP.; DAVID H. SCHWARTZ; RICHARD J. BELL; and POTOMAC DEVELOPMENT CORPORATION,	)
Appellees.	)

Appeal from the Superior Court in Maricopa County

Cause No. CV2006-002417; CV2006-003000; CV 2007-002568
(Consolidated)

The Honorable Robert H. Oberbillig, Judge

AFFIRMED

ISRAEL & GERITY, PLLC By Michael Gerity Attorneys for Appellants	Phoenix
STEPTOE & JOHNSON LLP By Francis J. Burke, Jr. Bennett Evan Cooper Jason Sanders Michella A. Kras Attorneys for Appellees	Phoenix

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B A R K E R, Judge

¶1 This is a consolidated civil action in which the trial court granted summary judgment. For the reasons that follow, we affirm.

Facts and Procedural History

¶2 The primary business of Renegade Technology Group, Inc. ("Renegade") was placing and operating automated teller machines ("ATMs") in retail stores, grocery stores, and amusement parks. James Verbic ("Verbic") was the President, the CEO, a director, and a shareholder of Renegade.

¶3 In an effort to raise operating capital, Renegade formed and became the sole owner of Geronimo L.L.C. and Arapahoe L.L.C. (collectively, "LLCs"). Renegade entered into a Placement Agent Agreement ("Placement Agreement") with the brokerage firm Pali Capital, Inc. ("Pali"). The substance of the Placement Agreement was that Pali would secure investors for various offerings of promissory notes that Renegade would effectuate through the LLCs. Pali would also later become the operating agent for several of such investors, who are now parties to this proceeding (collectively, "Investors" or "Pali Investors"). [1]

[1] Those investors are as follows: Herbert Soroca, Timothy Magee, Brad Berk, Elk Associates Funding Corp., Donald Feinsod, Michael Feinsod, Kenneth L. Gross, Potomac Development Corporation, James Friscia, John Jakobson, Peter Jakobson, Herman Gross, Bradley Reifler individually and as Trustee for the Kelsey Reifler Trust, Cole Reifler Trust, and Paige Reifler Trust, Steve Strasser, Howard Sloan, Hanna Rivkin, Thomas H. Dittmer as Trustee for the Thomas H. Dittmer Declaration of Trust, Leo Wetter, Lois Hamilton, and Allan Duffy.

¶4 Throughout 2004, Renegade executed and issued a number of promissory notes to the Investors on behalf of the LLCs. Under the terms of the notes, Renegade agreed to use the note proceeds to "purchase automated teller machines ("ATMs"), contracts related thereto, for transaction costs and working capital of Renegade." Renegade would operate the ATMs on behalf of the LLCs, but title to the ATMs would be in the LLCs' names. This arrangement provided the Investors with a security interest in the event of default. The revenues earned by the ATMs were to be used to repay the Investors' loans. The LLCs agreed to make regular interest and principal payments to Investors according to the particular terms and payment schedules of the notes.

¶5 The notes provided that Geronimo's and Arapahoe's "obligations to make the payments" provided for in the notes were "absolute and unconditional and [were] not subject to any defense, set-off, counterclaim, recission, recoupment or adjustment whatsoever." Renegade executed a separate "Guarantee and Security Agreement" for each of the LLCs in which Renegade guaranteed payment on the notes. The guarantees were each an "absolute, unconditional and continuing guaranty of the full and punctual payment and performance" of the terms of the notes.

¶6 In January 2005, Renegade's President, Nicholas Smith, and Chief Operating Officer, Susan Baldwin, reported to Pali

their belief that Verbic had misappropriated the proceeds of the Arapahoe offering. They also informed Herbert Soroca (the Senior Managing Director of Pali) that checks from Geronimo to the Investors had bounced. In February 2005, Soroca requested that Smith and Baldwin exclude Verbic and Roland Cooper (a Renegade director) from the operations of Renegade, including locking them out of the building. Smith and Baldwin complied with the request, believing it was within Pali's creditor rights, as agent for the Investors, to make such a request under the circumstances.

¶7 Later that same month, James Verbic, Brenda Verbic, and Roland Cooper brought a shareholder action in Delaware to regain control of Renegade. The Delaware court granted their Temporary Restraining Order permitting them to return to operate Renegade. Renegade and Pali resolved the Delaware action by entering into a "Memo of Understanding" ("MOU"). Under the MOU, Pali agreed to return "all documents, records, computers, files and objects removed from Renegade's corporate offices" including the keys to a secure storage facility where the documents "collected and inventoried by an independent private investigation firm" were taken and stored. However, Renegade was not successful. Payments to investors were not made. Litigation began and, ultimately, three lawsuits were consolidated into one.

¶8 At issue in this appeal are three motions for summary judgment. In the first motion, Pali, Herb Soroca, Tim Magee, and the Investors (collectively, the "Pali parties") moved for summary judgment on all thirteen claims brought against them by Renegade, Geronimo, Arapahoe, James Verbic, and Brenda Verbic (collectively, the "Renegade parties"). In the second motion, the Pali parties moved for summary judgment on nine of the same thirteen claims on which they moved for summary judgment in the first motion. In this second motion, however, they argued that these nine claims (four contract claims and five tort claims) belonged exclusively to Renegade and that Geronimo, Arapahoe, and the Verbics lacked standing. The court granted both the first and the second motion, thereby dismissing all of the Renegade parties' claims.

¶9 In the third motion, Pali and the Investors moved for summary judgment on certain of their own claims against the Renegade parties. Those claims included breaches of the LLCs' promissory notes and security agreements, breaches of Renegade's guarantees, and conversion of investor funds. They also alleged the Verbics were personally liable for all claims under an alter ego theory. The court granted this motion as well.

¶10 After all the motions for summary judgment were granted in their favor, the Pali parties moved the court for final judgment. They moved to dismiss the remainder of their

claims against the Renegade parties, and they requested the court to accept an updated damages calculation from their expert. The Renegade parties objected that the Pali parties had never properly raised the issue of damages in their previous motions for summary judgment. The court granted the motion over the objection.

¶11 The Renegade parties timely appealed the court's rulings. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

Discussion

¶12 In reviewing a grant of summary judgment, our task is to determine *de novo* whether any genuine issues of material fact exist and whether the trial court correctly applied the law. *L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997). We review the facts in the light most favorable to the Renegade parties as they are the parties against whom summary judgment was entered. *Riley, Hoggatt & Suagee, P.C. v. English*, 177 Ariz. 10, 12, 864 P.2d 1042, 1044-45 (1993). "Where facts set forth in support of the motion are not controverted by the opposing party, they are presumed to be true." *W. J. Kroeger Co. v. Travelers Indem. Co.*, 112 Ariz. 285, 286, 541 P.2d 385, 386 (1975). Summary judgment is appropriate "if the facts produced in support of the claim or defense 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 or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We will affirm the entry of summary judgment if it is correct for any reason. *Hawkins v. Ariz. Dep't of Econ. Sec.*, 183 Ariz. 100, 103, 900 P.2d 1236, 1239 (App. 1995).

¶13 Because the admissibility of Verbic's affidavit is central to resolving the other issues on appeal, we turn first to that question.

1. Verbic's Affidavit

¶14 The Renegade parties contend that as to all the motions for summary judgment, the court erroneously disregarded the "affidavit" of James Verbic. Because Verbic's testimony was not a sworn affidavit, we disagree. Although the parties' filing was entitled "AFFIDAVIT OF JAMES VERBIC," Verbic failed to sign the statement, date it, or swear before a notary public that his testimony was true and accurate. Neither did the affidavit state that it was sworn under penalty of perjury. Thus, Verbic's statement was merely an unsworn statement. *See In re Wetzel*, 143 Ariz. 35, 43, 691 P.2d 1063, 1071 (1984) ("An 'affidavit' is a signed, written statement, made under oath before an officer authorized to administer an oath or affirmation in which the affiant vouches that what is stated is true."); Ariz. R. Civ. P. 80(i). Such statements are not

admissible for purposes of opposing a motion for summary judgment. *See Prairie State Bank v. IRS*, 155 Ariz. 219, 221 n.1A, 745 P.2d 966, 968 n.1A (App. 1987) ("Generally, the 'facts' which the trial court will consider as 'admissible in evidence' in ruling on a motion for summary judgment are those which are set forth in an affidavit or a deposition; an unsworn and unproven assertion in a memorandum is not such a fact."); Ariz. R. Civ. P. 56(c) (Summary judgment is proper when "the pleadings, deposition[s], answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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."). Accordingly, the court properly disregarded the declaration in its consideration of the various motions to dismiss.

¶15 The Renegade parties argue the court should not have considered the admissibility of Verbic's affidavit because the Pali parties objected only in their reply to the motion for summary judgment. The Renegade parties argue that Pali was required to make the objection in a motion to strike and that the objection was waived by not doing so. To support this proposition, Renegade cites to *In re 1996 Nissan Sentra*, 201 Ariz. 114, 117, 32 P.3d 39, 42 (App. 2001). In that case, we held that a party had waived its objection to evidence submitted

in support of a summary judgment motion because the party "fail[ed] to file a motion to strike."[2] *Id.* In so holding, however, we cited to *Johnson v. Svidergol*, 157 Ariz. 333, 757 P.2d 609 (App. 1988). In *Johnson*, we took a broader view and held that a party opposing evidence filed in support of a summary judgment motion must either object *or* file a motion to strike. 157 Ariz. at 335, 757 P.2d at 611.

¶16 We took a similarly broad view in *Airfreight Express Ltd. v. Evergreen AirCenter, Inc.*, 215 Ariz. 103, 112, ¶ 26, 158 P.3d 232, 241 (App. 2007). There, we held that Evergreen had waived its ability to object to documentary evidence filed in opposition to Evergreen's motion for summary judgment because Evergreen did not make a "contemporaneous objection" *or* file a motion to strike. *Id.* We clarified the meaning of "contemporaneous objection" by noting that Evergreen could have objected in its reply in support of its motion for summary judgment or in its objection to opposing party's statement of facts. *Id.* Consistent with these decisions, we reject Renegade's argument that the Pali parties waived their objection to the Renegade parties' evidence by not doing so in a motion to strike.

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[2] We also noted that the party waived its objection because it attached the statements at issue to its cross-motion for summary judgment. *Nissan Sentra*, 201 Ariz. at 117, 32 P.3d at 42.

¶17 Renegade also argues that because the Pali parties objected in their reply to their motion for summary judgment, Renegade was deprived of an opportunity to respond to the objection prior to the court's ruling. We disagree. In their reply on the motion for summary judgment on Renegade's claims, the Pali parties entitled their lead argument as follows: "1. The Renegade Parties Have Conceded Pali's Facts and Have Not Submitted Any Admissible Contrary Evidence." Their argument under that heading asserted that the failures in the evidence were "unverified discovery responses, a few pages of Verbic's deposition, and *his improper, unsigned affidavit.*" As to certain of the points the Pali parties addressed in that same document, they asserted "[t]he only thing that Renegade cites is Verbic's *unsigned* affidavit." This reply was filed on July 22, 2009. Clearly, Renegade was on notice of the objection to the affidavit and the assertion that it was inadmissible because it was unsigned as of that date. However, in the one month between the date of the Pali parties' reply and the oral argument on the motions on August 24, 2009, Renegade did nothing to cure the defect in the affidavit. It would have been a minor matter to file a motion to supplement its papers with a copy of the signed affidavit, rather than an unsigned version. However, this did not occur. Indeed, at the oral argument the issue of the affidavit being unsigned also arose:

> [Mr. Burke]: Then all of a sudden out of the blue comes an unsigned affidavit, some man claiming - -
>
> The Court: Which, by the way, let me ask Counsel. Do we have a signed version now of the affidavit? Did an original signature page get signed - - filed.
>
> [Mr. Gerity]: I don't know.

In fact, as the Pali parties pointed out at oral argument in the trial court, the affidavit still had not been signed as of the date of the oral argument. The court ruled on the motion for summary judgment on August 26, and the minute entry was filed August 27. It was not until almost two months later, on October 13, 2009, that Renegade filed a signed affidavit. That affidavit was filed in response to the Pali parties' motion for entry of final judgment. In short, Renegade had a month in which to correct the unsigned affidavit prior to oral argument and ruling on the motion for summary judgment. It took no steps to do so. It did not seek to file a motion for reconsideration or motion for new trial after the issue was again raised in oral argument. Renegade had multiple opportunities to promptly respond to the objections asserted, but failed to do so.

¶18 Finally, the Renegade parties argue that even if Verbic's affidavit was not admissible when they first submitted it, it was nevertheless admissible when they later submitted a signed version. As noted, the Renegade parties did not submit

the signed version until almost two months after the court ruled on the Pali parties' motion for summary judgment. Our review is limited to whether the trial court erred based on the evidence that was before it when deciding the summary judgment motions, not based on what was before the court several months after its ruling. *See GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990) (stating that appellate court's review is limited to evidence that was "before the trial court at the time it considered the motion for partial summary judgment"). Accordingly, we reject the Renegade parties' argument. Verbic's affidavit that was submitted in response to the Pali parties' motion for summary judgment was inadmissible. There was no timely effort to correct that error. Thus, it was proper for the trial court to not consider the affidavit when ruling on the motions for summary judgment. The assertions in the affidavit, either as first filed or as subsequently amended, form no basis for finding a question of fact that would defeat the entry of summary judgment on appeal.

2. The Renegade Parties' Claims

¶19 The Renegade parties argue the trial court erred in granting summary judgment on each of their claims. The Renegade parties filed thirteen affirmative claims for relief against the

Pali parties.[3] The thirteen claims are as follows: (1) Breach of "Management/Operating Contract," (2) Breach of the Covenant of Good Faith and Fair Dealing, (3) Conversion, (4) Fraudulent Inducement of the MOU, (5) Breach of the MOU, (6) Bad Faith Breach of the MOU, (7) Interference with Contractual Relationships, (8) Tortious Interference with Prospective Advantage, (9) Breach of Fiduciary Duty, (10) Unlawful Activity Pursuant to A.R.S. § 13-2314.04, (11) Declaratory and Injunctive Relief, (12) Extortion, and (13) Defamation. At the hearing on the motion for summary judgment, the Renegade parties agreed to the dismissal of counts ten (RICO), eleven, and twelve.

¶20 As to the ten counts that remained for the trial court to rule on, the Pali parties' motion asserted the lack of evidence as to at least one element of each claim. The Renegade parties' controverting factual statement was based on three exhibits: (1) unverified interrogatory answers, (2) excerpts from Verbic's deposition, and (3) the unsigned affidavit of Verbic discussed above. The trial court, although it made substantial comments and asked numerous questions during oral

[3] Those claims are contained in the original complaint in CV 2006-002417 as well as in their second-amended counter-claim and third-party complaint. Because the second-amended counter-claim and third-party complaint contains the most recent recitation of their claims, we utilize that document.

argument, subsequently granted the Pali parties' motion without giving underlying reasons.

¶21 On appeal, one would expect that the Renegade parties would identify the specified count of their claims, the elements of the legal theory that apply to that count which were put at issue by the Pali parties, and cite to the record for a disputed issue of material fact that defeats summary judgment. The Renegade parties have not done this. We decline to do it for them. In large measure, the Renegade parties have taken a generalist approach. For instance, they assert the temporal relationship between the conduct of the Pali parties and the subsequent loss of the Renegade parties' business was so great that there must be a basis for relief. However, not one of the claims asserted by the Renegade parties is a strict liability claim.

¶22 We are cognizant of our cases which require consideration of the entire record. *See Schwab v. Ames Constr.*, 207 Ariz. 56, 59, ¶ 15, 83 P.3d 56, 59 (App. 2004) ("The trial court must consider the entire record before deciding a summary judgment motion."). However, there is a difference between (1) reviewing a limited file for references which may have been overlooked and (2) taking on the role of an advocate in a complex civil case with thousands of pages of documents. Our supreme court has stated that "neither we, the trial court, nor

the court of appeals should be required to perform counsel's work by searching the record to attempt to discover facts which establish or defeat the [summary judgment] motion. *These are tasks which must be left to counsel."* *Mast v. Standard Oil Co. of Cal.*, 140 Ariz. 1, 2, 680 P.2d 137, 138 (1984) (emphasis added); *see also Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 343, 678 P.2d 525, 528 (App. 1984) ("We are not required to assume the duties of an advocate and search voluminous records and exhibits to substantiate an appellant's claims."). Thus, we affirm the entry of summary judgment on the Renegade parties' claims.

3. Entry of Summary Judgment on the Pali Parties' Contract and Conversion Claims

¶23 As noted above, the Pali parties moved for summary judgment on five of their claims against the Renegade parties: Breach of Contract re: Geronimo (Count 1) and Arapahoe (Count 2) on their Promissory Notes; Breach of Contract re: Geronimo's (Count 3) and Arapahoe's (Count 4) Security Agreements and Renegade's guaranty as to both; and Conversion (Count 7). The trial court granted the motion. Because of the similarity in the arguments, we address all four contract counts together. We then address the conversion count.

a. Counts One and Two: Breach of the Geronimo and Arapahoe Promissory Notes

¶24 Part of the funding mechanism employed in this matter was the issuance of twelve percent five-year secured promissory notes issued by Geronimo or Arapahoe to the individual investor. The eight-page notes contained a schedule of payments. Term 7.1 specifies as follows:

> The obligations to make the payments provided for in this Note are *absolute and unconditional* and are not subject to any defense, set-off, counterclaim, rescission, recoupment, or adjustment whatsoever.

(Emphasis added.) Under the security agreements, a default occurs when there is a failure to pay pursuant to the notes. Renegade's guarantee specifically stated that it "unconditionally guarantees . . . that Borrower will duly and punctually pay or perform" as required by the notes. The notes also contained a choice of law provision providing for the application of New York law:

> This note and the obligations of Payor and the rights of Payee shall be governed by and construed in accordance with the substantive laws of the State of New York without giving effect to the choice of laws rules thereof.

Promissory Note § 8.3.

¶25 The Renegade parties do not contest that the payment schedule was not met. As they noted in the response to the pertinent motion for summary judgment: "[T]here is little

question that these Promissory Notes have not been repaid in full." Rather, the Renegade parties assert that the terms of the promissory note (and consequently the security agreement and guarantees) cannot be enforced based on the alleged wrongful conduct of the Pali parties.

¶26 Pursuant to the terms of the choice of law provision, this case must be resolved according to New York law. New York law, like Arizona law, gives effect to the plain language of contracts. *Eur. Am. Bank v. Lofrese*, 586 N.Y.S.2d 816, ___, 182 A.D.2d 67, 73 (N.Y. App. Div. 1992); *Grubb & Ellis Mgmt. Servs., Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, 86, ¶ 12, 138 P.3d 1210, 1213 (App. 2006). New York case law, however, specifically permits consideration of "wrongful conduct" in considering whether to enforce the terms of an "unconditional" obligation such as we have here. *Canterbury Realty & Equip. Corp. v. Poughkeepsie Savs. Bank*, 524 N.Y.S.2d. 531, 533 (N.Y. App. Div. 1988) ("wrongful conduct on the part of the Bank" created "an issue of fact . . . as to whether the Bank unfairly brought about the occurrence of the very condition precedent . . . upon which it relied to accelerate the loan."); *Red Tulip, L.L.C. v. Neiva*, 842 N.Y.S.2d 1, 7 (N.Y. App. Div. 2007) (recognizing the principle from *Canterbury* that if a "triable issue existed 'as to whether the Bank had unfairly brought about the occurrence of the very condition

precedent . . . upon which it relied to accelerate the loan,'" judgment in favor of the bank on the note would be inappropriate).

¶27 The flaw in the Renegade parties' position on this count is similar to the flaw with regard to its own claims; Renegade failed to produce admissible evidence to create a fact issue. To create a fact issue showing wrongful conduct on the part of the Pali parties, the opening brief refers us to those same "facts" asserted in support of its own claims. As set forth above, the Renegade parties did not make such a showing based on admissible facts of record. Although the Renegade parties considered the generalized statements to be "substantial evidence," *Opening Brief* at 30, the reply brief more correctly recognizes the nature of their submissions as being allegations not supported by admissible facts of record: "New York law unquestionably allows defenses to 'unconditional guaranties' *based upon allegations* that the lender caused or contributed to the failure to pay." *Reply Brief* at 13 (emphasis added). This latter description, referencing "allegations" rather than "admissible facts of record," is in our view the more accurate description of what the Renegade parties have asserted to attempt to create an issue of fact to defeat summary judgment. As discussed, this is insufficient.

4. Pali's Conversion Claim

¶28 The Renegade parties assert error in the trial court's grant of summary judgment to the Pali parties on their conversion claim. As noted earlier, conversion is an "intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." *See Focal Point, Inc. v. U-Haul Co. of Ariz.*, 155 Ariz. 318, 319, 746 P.2d 488, 489 (App. 1986) (emphasis omitted). The Pali parties set forth admissible evidence that the Renegade parties converted funds by (1) spending investors' funds on personal and corporate expenses, (2) failing to transfer previously owned or later acquired ATMs and contracts to Geronimo, (3) failing to purchase ATMS or transfer title to ATMs based on the Arapahoe funds, and (4) giving investors security interests of no value in shell companies that did not own ATMs. On appeal, the Renegade parties assert that the Verbics contributed more money to Renegade than the amount of the alleged conversion. This argument misses the point, as the conversion is of the *investors'* funds, not Renegade's. Further it does not address the failure to title or transfer the ATMs and funds that are at issue. Summary judgment on this count was appropriate.

4. Verbic's Personal Liability for Contract Claims

¶29 The Renegade parties argue the trial court erred in granting summary judgment on the Pali parties' claim that the Verbics were the alter ego of Renegade and the LLCs, and as such, personally liable for those entities' obligations. The Arizona standard for determining whether the corporate veil should be pierced due to the alter ego status of individuals is as follows:

> The courts have conditioned recognition of corporateness on compliance with two requirements: (1) business must be conducted on a corporate and not a personal basis; (2) the enterprise must be established on an adequate financial basis. The corporate fiction will be disregarded when the corporation is the alter ego or business conduit of a person, and when to observe the corporation would work an injustice. *The alter ego status is said to exist when there is such a unity of interest and ownership that the separate personalities of the corporation and the owners cease to exist.*

Deutsche Credit Corp. v. Case Power & Equip. Co., 179 Ariz. 155, 160, 876 P.2d 1190, 1195 (App. 1994) (emphasis added) (citation omitted) (quoting *Ize Nantan Bagowa, Ltd. v. Scalia*, 118 Ariz. 439, 442, 577 P.2d 725, 728 (App. 1978)). The *Deutsche* case listed a number of considerations to take into account. We decline to set forth the facts establishing each factor as we agree with the Pali parties' assessment that the Verbics essentially conducted the business "like a personal piggybank,

not a corporation with shareholders, investors, and lenders." The trial court appropriately entered summary judgment on this front.

5. Damages

¶30 The Renegade parties contend that the Pali parties did not properly raise or brief the issue of damages in their motion for summary judgment and that the court erred by awarding damages.

¶31 The motion for summary judgment that the Pali parties filed specifically asked "that the court enter partial summary judgment in its favor, and order Renegade, Geronimo, Arapahoe and the Verbics to pay damages in an amount equal to the unpaid balance of the notes as well as interest in the amount of 17% on all past due amounts." The statement of facts that was filed in conjunction with the motion for summary judgment sought a specific dollar amount. Additionally, there was a supporting declaration from the damage experts that calculated damages and took into account the amounts that had been paid by the Renegade parties. There was no responsive or controverting statement of facts from the Renegade parties contesting these amounts. The response did acknowledge, however, that damages had been put at issue. It noted that "in fact, there have been some payments on those notes, which payments the Pali parties failed to acknowledge."

¶32 In short, the Renegade parties failed to contest the damages element after it had been put at issue and the Pali parties had provided admissible facts entitling them to summary judgment in the amount requested.

¶33 The first objection made to the damages calculations did not take place until more than one month after the superior court granted the Pali parties' summary judgment motion. Rule 56(c) calls for a timely response. There was none, and the trial court did not err in choosing not to consider the subsequent, untimely response. *Johnson*, 157 Ariz. at 335, 757 P.2d at 611 ("Having failed to challenge the sufficiency of the opposition, the [responding party has] waived any objection they may have had to the documents submitted.").

¶34 Contrary to what the Renegade parties assert, the Pali parties' motion for entry of final judgment did not raise new damages issues. It merely updated the interest calculation to be current as of the time of the date of judgment. Thus, the trial court did not err in granting summary judgment on damages and declining to consider untimely material submitted on the damages issue.

6. Attorneys' Fees

¶35 The Renegade parties assert that the trial court abused its discretion in awarding approximately $450,000 in attorneys' fees. The Renegade parties do not contest the

entitlement to fees; rather, they contest whether the amount was reasonable. "The trial court has broad discretion in fixing the amount of attorneys' fees actually awarded." *Haldiman v. Gosnell Dev. Corp.*, 155 Ariz. 585, 592, 748 P.2d 1209, 1216 (App. 1987). Just as significant here: "Once a party establishes its entitlement to fees and meets the minimum requirements in its application and affidavit for fees, the burden shifts to the party opposing the fee award to demonstrate the impropriety or unreasonableness of the requested fees." *Nolan v. Starlight Pine Homeowners Ass'n*, 216 Ariz. 482, 491, 167 P.3d 1277, 1286 (App. 2007). In this case, other than pointing to the total amount of fees and the amount of fees assigned to the contract claims, the Renegade parties point to no specific circumstances where the fees were excessive or the rates unreasonable. This was a protracted three-year litigation. The eventual judgment was in excess of $7 million. We find no abuse of discretion by the trial court with regard to its fee award.

Conclusion

¶36 For the foregoing reasons, we affirm.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
ANN A. SCOTT TIMMER, Presiding Judge

/s/
_____
PATRICK IRVINE, Judge