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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JMA INVESTMENTS, L.L.C., an Arizona limited liability company, Plaintiff/Appellant/ Counterdefendant, v. ALFREDO PUCHI, JR.; PUCHI PROPERTIES, INCORPORATED, an Arizona corporation, Defendants/Appellees/ Counterclaimants.	2 CA-CV 2008-0107 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CV-05-016

Honorable Charles A. Irwin, Judge

AFFIRMED

Gust Rosenfeld, P.L.C.
By Mark L. Collins and Robert M. Savage
Tucson
Attorneys for Plaintiff/Appellant/
Counterdefendant

The Law Office of Robert F. Kuhn, P.L.L.C.
By Robert F. Kuhn
Tucson

and

Donald E. Gabriel — Tucson
Attorneys for Defendants/Appellees/
Counterclaimants

V Á S Q U E Z, Judge.

¶1 In this action for injunctive relief, appellant JMA Investments, L.L.C. (JMA) sought to enjoin appellees Alfredo Puchi and Puchi Properties, Inc. (Puchi) from connecting to a sewer manhole and a drainage and sewer pipeline (sewer improvements) physically located within an easement granted to JMA. JMA appeals the trial court's entry of summary judgment against JMA on this claim and on Puchi's counterclaim for tortious interference with a business expectancy. For the reasons that follow, we affirm.

Facts and Procedure

¶2 We view the facts in the light most favorable to the party against whom summary judgment was granted. *Corbett v. ManorCare of Am., Inc.*, 213 Ariz. 618, ¶ 2, 146 P.3d 1027, 1030-31 (App. 2006). In 1989, Jesus Barron, his wife, and another married couple, the Ponces, purchased a tract of land in Santa Cruz County (Eastern Property) from Pioneer Trust Company. Barron, the Ponces, and the original owner later agreed to share the expense of building an eight-inch sewer line extending from the eastern edge of Highway 189, which bordered Barron's property on the west, continuing underneath the highway, and terminating on the seller's remaining property on the west side of the highway (Western Property). Barron later acquired title to the Western Property. He subsequently declared

bankruptcy. In 1997, as part of the bankruptcy proceeding, the Dino and Nelida Panousopoulos Living Trust purchased the Western Property, comprised of Parcels A and B, from Barron as a debtor-in-possession.

¶3 In 1999, JMA acquired Parcel A from Delta Properties, L.L.P., successor to the Panousopoulos Trust. Barron is a member and the general manager of JMA. Under the deed, JMA also acquired "a drainage and utility easement" on Parcel B. The sewer improvements are located within JMA's easement.

¶4 Puchi owns a parcel of property on the southeast corner of Parcel A. In 2005, Puchi connected his own sewer pipe to the sewer improvements, and JMA engaged in "self-help" and disconnected the pipe. JMA then filed a complaint in Santa Cruz County Superior Court, seeking injunctive relief prohibiting Puchi from connecting to the sewer improvements; damages for conversion, trespass, and damage to the improvements; and punitive damages. Puchi filed a counterclaim alleging that he had a right-of-way by necessity over JMA's easement and that JMA committed tortious interference with a business expectancy by removing Puchi's sewer pipes, thereby preventing Puchi from opening his business five days later as scheduled.

¶5 After conducting discovery, JMA moved for summary judgment on its claims and Puchi's counterclaims. The trial court denied the motion, finding a material issue of fact existed as to whether the City of Nogales owned the sewer improvements. JMA filed a second motion for summary judgment, which included as an exhibit an order of the mayor

and city council of the City of Nogales, disclaiming any ownership in the improvements. Puchi filed a cross-motion for summary judgment on its claim of tortious interference. The court denied both motions, finding a question of fact still existed regarding Nogales's ownership of the improvements.

¶6 JMA then filed a third motion for summary judgment on its claims and Puchi's counterclaims, alleging the Nogales City Council had recorded a second order purporting to disclaim ownership of improvements. Puchi filed a cross-motion for summary judgment, arguing JMA had failed to state a claim entitling it to relief and asserting the affidavit Barron had filed in support of JMA's motion was a sham. The trial court agreed with Puchi and granted summary judgment against JMA, concluding JMA had failed to present any evidence establishing that it owned the sewer improvements. The court also found that, based on JMA's failure to establish ownership, Puchi was entitled to judgment as a matter of law on his tortious interference claim. The trial court denied JMA's motion for reconsideration. On the issue of summary judgment on JMA's claims, the court found "no just reason for delay," pursuant to Rule 54(b), Ariz. R. Civ. P., and entered final judgment in Puchi's favor. It also determined JMA's liability on Puchi's counterclaim but reserved judgment until the amount of damages was determined. This timely appeal followed.

Standard of Review

¶7 Whether summary judgment is appropriate is a question of law we review de novo. *Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188, 191, 888 P.2d 1375, 1378 (App.

1994). We will affirm a grant of summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c); *see also Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990).

Discussion

A. Summary Judgment on JMA's Complaint

¶8 JMA first argues the trial court erred by granting summary judgment against it on its claims against Puchi. It contends the court incorrectly disregarded Barron's affidavit under the "sham affidavit rule," because the rule only applies to affidavits submitted to defeat summary judgment. It further argues that, in any event, the affidavit can be read in harmony with Barron's deposition testimony and, to the extent there is a conflict, the conflict created an issue of credibility that should have been submitted to a jury.

¶9 The sham affidavit rule is designed to protect "'the utility of summary judgment as a procedure for screening out genuine issues of fact.'" *Allstate Indem. Co. v. Ridgely*, 214 Ariz. 440, ¶ 9, 153 P.3d 1069, 1071 (App. 2007), *quoting Wright v. Hills*, 161 Ariz. 583, 587, 780 P.2d 416, 420 (App. 1989), *abrogated in part on other grounds by James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Prot.*, 177 Ariz. 316, 868 P.2d 329 (App. 1993). "The rule states that when a party's affidavit is submitted to defeat summary judgment and contradicts the party's own deposition testimony, it should be disregarded in deciding the motion." *Id.* However, this case presents the converse situation,

where an affidavit that apparently conflicts with the affiant's deposition testimony is offered in support of a party's own motion for summary judgment and is thus aimed at negating, rather than creating, an issue of fact. This issue has not been addressed by any of the Arizona or out-of-state cases from which the sham affidavit rule is derived. Nonetheless, we need not decide it because, even assuming the trial court erred in disregarding Barron's affidavit, the affidavit was insufficient, considering the quantum of evidence required, to establish a disputed issue of material fact as to JMA's ownership of the sewer improvements and, therefore, its entitlement to relief. *See City of Tempe v. Outdoor Sys., Inc.*, 201 Ariz. 106, ¶ 14, 32 P.3d 31, 36 (App. 2001) (appellate court may affirm entry of summary judgment if correct for any reason).

¶10 On appeal, JMA does not dispute that, at the time the Panousopoulos Trust bought the Western Property in Barron's bankruptcy sale, the sewer improvements were "fixtures[,] integrated with the Western Property." JMA's claim that it owns the sewer improvements rests entirely on its "understanding that it acquired the Sewer Improvements as personal property in 1999 when JMA purchased Parcel A and the JMA Easement and thereafter exercised dominion and control over the Sewer Improvements." But an easement merely grants the easement-holder the right "to use the land of another for a specific purpose." *Etz v. Mamerow*, 72 Ariz. 228, 231, 233 P.2d 442, 444 (1951); *Clark v. New Magma Irrig. & Drainage Dist.*, 208 Ariz. 246, ¶ 12, 92 P.3d 876, 879 (App. 2004). And neither the language in the deed conveying title of Parcel A to JMA nor its language creating

the drainage and utility easement on Parcel B transferred or granted a right to exclusive possession and control of the sewer improvements.

¶11 In its motion for summary judgment, JMA nonetheless argued that it owned the sewer improvements because "[i]t was responsible for the construction of the sewer line . . . and is responsible for the maintenance and repair of the sewer line." It also argued that its exclusive possession of the improvements was prima facie evidence of ownership. The court found neither of these contentions was true for two reasons. First, documentation confirmed that JMA did not yet exist when the improvements were constructed. And second, Barron's sale to the Panousopoulos Trust of the property where the sewer improvements were located, with "no reservation of any ownership interest in the sewer line," likewise did not establish that JMA had been granted sole and exclusive possession. Although the court rejected Barron's affidavit under the sham affidavit rule, in its ruling on the motion for reconsideration, it specifically noted that "the evidence of proof of ownership of the sewer line submitted by [JMA] has so little probative value that a reasonable jury could not" conclude it owned the improvements. We agree.

¶12 Although Barron states in his affidavit, "The drainage and sewer pipeline . . . is solely and exclusively owned by JMA Investments," his affidavit is devoid of facts to support JMA's claim of ownership.[1] There is no dispute on appeal that, in accordance with

[1]In fact, Barron's affidavit conflicts with JMA's position on appeal to the extent it states that, since the construction of the improvements, JMA had been solely responsible for maintenance and repair.

Barron's deposition testimony, the improvements were fixtures on the property when Barron sold it to the Panousopoulos Trust. JMA has produced no deed or any other evidence tending to show the character of those improvements had changed before JMA acquired Parcel A and the easement. Furthermore, the deed transferring Parcel A and the easement to JMA makes no reference to the sewer improvements, and JMA has provided no additional evidence showing that it acquired ownership of the improvements in this transaction.

¶13 Additionally, JMA's claim to exclusive ownership is substantially undercut by other documents dated around the time of the original construction, that JMA has not challenged. When the Barrons and Ponces bought the land from Pioneer National Trust, the sale contract provided that they and Pioneer would jointly construct the improvements and provide the necessary easements "so that the sewer may be constructed and *maintained* by the appropriate public entities." (Emphasis added.) And, in the documents conferring the necessary permission from the Arizona Department of Environmental Quality and right-of-way across the state highway, only the City of Nogales was listed as the project owner. Although JMA claims to be entitled to exclusive possession of the improvements and solely responsible for their maintenance, it has not pointed us to any evidence that, before initiating litigation, JMA actually undertook to perform maintenance on the improvements. And its

only evidence of exclusive possession was its removal of Puchi's pipe, which is the very conduct at issue in this case.[2]

¶14 Finally, contrary to JMA's argument, it is irrelevant whether the City of Nogales and Delta purportedly had disclaimed their ownership of the sewer improvements. Neither is a party to this litigation, in which the only issue is whether JMA established its ownership of the improvements. On this record, it has failed to do so. The only evidence supporting JMA's claim of ownership is Barron's affidavit, which is not only self-serving but contradicted by much of the evidence produced. Therefore, the trial court did not err in granting summary judgment against JMA and dismissing its complaint. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008 ("[A]ffidavits that . . . tend to contradict the affiant's sworn testimony at deposition, and similar items of evidence may provide a 'scintilla' or create the 'slightest doubt' and still be insufficient to withstand a motion for summary judgment."); *Dobson v. Grand Int'l Bhd. of Locomotive Eng'rs*, 101 Ariz. 501, 505, 421 P.2d 520, 524 (1966) (awarding summary judgment against party whose affidavit controverted by other evidence).

B. Tortious Interference Claim

¶15 Next, JMA argues the trial court erred in awarding summary judgment in favor of Puchi on his claim of tortious interference with a business expectancy. JMA contends

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[2]Since this litigation began, JMA has apparently permitted Mariposa Auto and Gas Services, L.L.C., to connect to and use the pipeline and has expanded the pipeline to service its own commercial retail establishment.

Puchi never moved for summary judgment on that claim and, therefore, JMA had no opportunity to defend against the claim before the court entered judgment in Puchi's favor. Puchi suggests this issue is not ripe for appeal because the "trial court did not issue a[n] A.R.S. § 12-2101(G) final appealable order as to tortious interference liability."

¶16 Section 12-2101(G) permits appeal from "an interlocutory judgment which determines the rights of the parties and directs an accounting or other proceeding to determine the amount of the recovery." However, before such a judgment is appealable, the trial court must "expressly direct[] that the only issue remaining is the amount of recovery." *Bilke v. State*, 206 Ariz. 462, ¶ 28, 80 P.3d 269, 275 (2003). A certification under Rule 54(b), Ariz. R. Civ. P., is sufficient, but not necessary, to meet this requirement. *Id.* ¶ 23.

¶17 The trial court's judgment includes Rule 54(b) language certifying the dismissal of JMA's complaint as a final, appealable order. In both its minute entry ruling and signed judgment, the court clearly stated that the liability of all parties had been determined. And it noted in the judgment that, although it was granting Puchi summary judgment on the tortious interference claim, "there remains one substantive issue to be determined with respect to that claim[,] which is the amount of damages for which JMA is liable to Puchi." The court thus delayed the entry of final judgment on that issue "until after a hearing on damages." This is a sufficient direction to render the court's determination of JMA's liability on Puchi's counterclaim appealable under § 12-2101(G).

¶18 JMA argues that, because Puchi never moved for summary judgment on his counterclaim, "it was not until the trial court issued its ruling that JMA knew that it was considering tortious interference," and JMA was therefore deprived of "an opportunity to present argument and evidence" before the court ruled. Although the minute entry ruling stated that Puchi's motion for summary judgment "urge[d] the Court to find . . . that Defendants, as a matter of law, are entitled to Judgment on their tortious interference Counter-Claim," we have been unable to find anything in the record to support this. Neither in Puchi's answer to JMA's third motion for summary judgment nor in his own second motion for summary judgment did he request that summary judgment be entered in his favor on this claim.[3]

¶19 However, in its third motion for summary judgment, JMA clearly "move[d that] the Court enter summary judgment in [its] favor on the complaint *and counterclaim* on file herein." (Emphasis added.) In its memorandum of points and authorities in support of the motion, JMA argued Puchi had not proven the elements necessary to show tortious interference with a business expectancy and concluded it was "entitled, as a matter of law, to summary judgment on . . . [Puchi's] counterclaim." Thus, JMA did have an opportunity to present evidence and argument on Puchi's claim because it raised the issue in its motion. Furthermore, it is well established that "a judgment on a motion for summary judgment may

[3]Although Puchi moved for summary judgment on the tortious interference claim in his first motion for summary judgment, that motion was denied and was not specifically reurged as part of his second motion.

be either for or against the moving party, even though the opposing party has not filed such a motion." *Trimmer v. Ludtke*, 105 Ariz. 260, 263, 462 P.2d 809, 812 (1969); *see Martineau v. Maricopa County*, 207 Ariz. 332, n.2, 86 P.3d 912, 913 n.2 (App. 2004); *Westin Tucson Hotel Co. v. Ariz. Dep't of Revenue*, 188 Ariz. 360, 365, 936 P.2d 183, 188 (App. 1997). Thus, the trial court could properly enter summary judgment against JMA even though Puchi had not filed a separate motion urging it to do so.[4]

¶20 We turn now to the substantive issue of whether summary judgment was appropriate. To prevail on his claim of tortious interference with a business expectancy, Puchi had to prove "(1) the existence of a valid business expectancy; (2) the interferer's knowledge of the business expectancy; (3) the interferer intentionally induced or caused the termination of the business expectancy; and (4) damage suffered as a result of termination of the business expectancy." *Dube v. Likins*, 216 Ariz. 406, ¶ 14, 167 P.3d 93, 99-100 (App. 2007). The intentional interference must be predicated on improper conduct; it is not sufficient that the conduct merely resulted in interference with the business expectancy. *Id.*; *see also Miller v. Hehlen*, 209 Ariz. 462, ¶ 32, 104 P.3d 193, 202-03 (App. 2005). JMA contends questions of fact remain concerning three issues: (1) whether Puchi had a

[4]Additionally, JMA has failed to provide the transcript of what the trial court characterized as "extensive oral argument on the pending [m]otions." In the absence of that transcript, we must presume the court "properly exercised its discretion" in considering this issue. *Renner v. Kehl*, 150 Ariz. 94, 97 n.1, 722 P.2d 262, 265 n.1 (1985) ("The obligation for a complete record on appeal clearly lies with the appellant."). We also note the court stated explicitly that it had reviewed the previously filed motions for summary judgment and its rulings on them.

"protectable business expectancy," (2) whether its conduct caused a termination of that expectancy, and (3) whether its conduct was justified.[5]

¶21 First, JMA contends Puchi could not have had a valid business expectancy because, in order to reach the easement and connect his pipe to the sewer improvements, he was required to cross approximately twenty-nine feet of private property, owned by Delta, and he did not establish he "had a right to bridge the [g]ap over Delta's property." It also argues that, even if Delta gave Puchi permission to use its property, that could not support a business expectancy because it merely created a license to use property that Delta could "freely revo[k]e." *See Tanner Cos. v. Ariz. State Land Dep't*, 142 Ariz. 183, 193, 688 P.2d 1075, 1085 (App. 1984) (license is permission to use land of another without obtaining interest in land).

¶22 Puchi's affidavit states that he and Dino Panousopoulos, a principal owner of Delta, had "a long term relationship and course of conduct" and that Panousopoulos had consented to Puchi's use of his property to connect to the sewer improvements. JMA has not produced any evidence that contradicts these statements. Therefore, Puchi established his right to use Delta's property. *Cf. State ex rel. Herman v. Tucson Title Ins. Co.*, 101 Ariz.

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[5]Puchi contends JMA has waived these arguments by failing to raise them below. They appear to have been raised, in at least a limited fashion, in JMA's motion for summary judgment and motion for reconsideration. However, even assuming they were not fully developed below, due to the procedural posture of this case, we consider them in our discretion. *See Maricopa County v. State*, 187 Ariz. 275, 281, 928 P.2d 699, 705 (App. 1996) (although court generally does not consider issues not raised below, rule is procedural, not jurisdictional).

415, 417, 420 P.2d 286, 288 (1966) (uncontroverted affidavit sufficient to support summary judgment in affiant's favor). Further, that Puchi obtained a license that may be revocable is irrelevant in the absence of any evidence that Delta intended to revoke it. *See Ulan v. Vend-A-Coin, Inc.*, 27 Ariz. App. 713, 716-17, 558 P.2d 741, 744-45 (1976) (business expectancy existed based on revocable license, and expectancy continued as long as parties conducted business, despite arguable revocation of license). Thus, JMA's assertion that it could not have interfered with a valid business expectancy fails.

¶23 JMA also claims there is an issue of fact concerning the propriety of its conduct. It contends it was justified in removing Puchi's sewer pipe, even assuming it did not own the improvements, because "it held an honest belief that it owned the Sewer Improvements." JMA relies on *Snow v. Western Savings & Loan Ass'n*, 152 Ariz. 27, 34-35, 730 P.2d 204, 212-13 (1986), to support its claim that, as long as its belief was honest and the steps it took would have been proper had that belief been correct, its conduct was justified and not improper.

¶24 In *Snow*, the plaintiff had sought damages for a real estate sale that had not been completed because Western Savings, as the lender, had threatened to invoke a due-on-sale clause if the plaintiffs would not sell the land subject to certain loan conditions. 152 Ariz. at 28-29, 730 P.2d at 205-06. The trial court granted summary judgment in favor of Western Savings, and the appellate court affirmed in part, finding Western Savings could not be liable for damages because it reasonably could have believed the due-on-sale clause was

enforceable and, therefore, its actions could not be deemed improper. *Id.* at 29, 730 P.2d at 207.

¶25 The supreme court reversed on this issue and concluded an issue of fact remained concerning whether Western Savings's interference was improper. *Id.* at 34, 730 P.2d at 212. To justify its actions, Western Savings relied on Restatement (Second) of Torts § 773 (1979), which provides:

> One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a prospective contractual relation with another does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

And, as the court noted, "This rule protects the actor only when (1) he has or honestly believes he has a legally protected interest, (2) which he in good faith asserts or threatens to protect, and (3) he threatens to protect it by proper means." *Snow*, 152 Ariz. at 34-35, 730 P.2d at 212-13. However, the court rejected Western Savings's reliance on the Restatement because, although it had provided some evidence that its claimed belief was reasonable, an issue of fact still existed as to whether Western Savings actually held this belief and had asserted it in good faith. *Id.* at 35, 730 P.2d at 213. Thus, according to *Snow*, whether the actor's belief is asserted in good faith is dependent upon the facts of each case, which must show that the belief was both reasonable and honestly held by the actor. *Id.*

¶26 Here, JMA has failed to provide any factual basis for its assertion that it reasonably believed it had a protected interest. Throughout this litigation, JMA has proffered contradictory and unsupported theories of its ownership of the improvements, at times claiming it had always maintained "exclusive possession, control and use of the sewer line" and, at other times, claiming they were fixtures on Delta's land until JMA acquired them as part of its land purchase from Delta in 1999. And, as discussed above, JMA failed to produce any evidence of its ownership beyond Barron's affidavit, which was rife with inaccurate and inconsistent statements and did not explain how JMA allegedly came to own what previously had been a fixture on someone else's land. Thus, JMA failed to produce any evidence from which a jury could conclude it reasonably believed it owned the improvements. *See id.* As a result, its actions in removing Puchi's connection to the improvements were not protected under Restatement § 773.[6]

¶27 JMA has not demonstrated any issues of material fact exist regarding Puchi's claim for tortious interference with a business expectancy. We therefore cannot say the trial court erred in entering summary judgment against it on this claim.

Disposition

¶28 For the reasons stated above, we affirm. Although Puchi has requested attorney fees pursuant to A.R.S. § 12-341.01(C), we do not find that JMA's appeal

[6]JMA has not challenged the court's implicit finding that its actions were improper, apart from contending the actions were justified.

constitutes harassment, is groundless, or is made in bad faith. In our discretion, therefore, we deny his request. *See Fisher ex rel. Fisher v. Nat'l Gen. Ins. Co.*, 192 Ariz. 366, ¶ 14, 965 P.2d 100, 104 (App. 1998). However, as the prevailing party on appeal, Puchi is entitled to recover costs upon compliance with Rule 21, Ariz. R. Civ. App. P.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge