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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JAY DOUGLAS KUHN, an unmarried man, Plaintiff/Appellant/Counterdefendant, v. RICHARD M. SMALL, Trustee of the RICHARD M. SMALL FAMILY TRUST; GARY E. HAUPT and DEE A. HAUPT, husband and wife, Defendants/Appellees/Counterclaimants.	2 CA-CV 2008-0166 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV 2005-297

Honorable Stephen M. Desens, Judge

AFFIRMED IN PART; REVERSED IN PART

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E S P I N O S A, Presiding Judge.

¶1 In this contract action, Jay Kuhn challenges the trial court's grant of summary judgment in favor of appellee Richard M. Small, Trustee of the Richard M. Small Family Trust (Small), and its separate grant of summary judgment in favor of appellees Gary E. Haupt and Dee A. Haupt (the Haupts). For the reasons below, we affirm in part and reverse in part.

Factual Background and Procedural History

¶2 On appeal from a summary judgment, we view the facts in the light most favorable to the party against whom judgment was entered, *Ratliff v. Hardison*, 219 Ariz. 441, ¶ 2, 199 P.3d 696, 697 (App. 2008), and draw all justifiable inferences in its favor, *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, ¶ 17, 180 P.3d 977, 981 (App. 2008). In mid-December 2003, Kuhn and Small orally agreed Kuhn would purchase some of Small's real

property located in Cochise County. Thereafter, Small executed three standard form real estate agreements to sell three separate parcels of real estate. One parcel was forty acres, the second was 28.5 acres, and the third 160 acres. Small forwarded all three signed agreements to Kuhn.[1]

¶3 Several days later, Kuhn executed and returned the agreements to Small and enclosed three earnest money checks and a letter informing Small that Kuhn had made some changes to the agreements. All three agreements included several handwritten changes that Kuhn had initialed as well as handwritten additional terms on the blank lines provided in a section entitled, "Additional Terms and Conditions." One change was on the front page of the contract for the 160 acres; Kuhn had changed the amount of earnest money from $2,000 to $1,000 and had increased the amount due at closing by $1,000. Kuhn also had added a term stating he could immediately begin improvement and use of the 160 acres. Kuhn changed all three contracts to waive the need for a survey, eliminate the due-on-sale clause, indicate there would be no prepayment penalty, and provide the only remedy for default was foreclosure on the note or deed of trust. Kuhn also changed the payment schedule and payment amounts in the contracts for the two smaller parcels.

¶4 Shortly thereafter, in a letter to Small dated January 1, 2004, Kuhn explained he had changed the amount of earnest money on the 160-acre agreement pursuant to their

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[1]Kuhn originally had drafted handwritten contracts for the parcels, but these were rejected by the title company. In response, Small had a real estate broker fill in standard form vacant land contracts for the three parcels.

prior conversation and reaffirmed his commitment to purchase the property: "I have no problem with the $2,000[] earnest money as opposed to the $1,000[] on the 160 [acres]. I changed it on the contract as per our conversation when you had requested $1,000[]—up from the 100." He also explained he had already made financial commitments specific to that piece of property and stated, "I'm not walking away. What ever [sic] we need to do[] to make this work—let me know."

¶5 Small then placed the agreements and earnest money checks into escrow with a title security company without initialing any of Kuhn's handwritten changes. In February 2004, escrow closed on the contracts for the forty-acre parcel and 28.5-acre parcel, and the documents signed at closing incorporated some of Kuhn's handwritten changes, including those to the payment schedule and payment amounts.[2]

¶6 The agreement for the 160 acres contained a much longer escrow period but allowed Kuhn to take immediate possession of the property and begin making improvements and bring it into production. The transaction was scheduled to close over a year later, on July 1, 2005. In January 2004, with Small's knowledge, Kuhn began working on the parcel, spending an estimated $20,000 repairing and improving the irrigation system, preparing the property for planting, and subsequently planting crops.

[2]The documents signed at closing were both entitled "Note Secured By Deed of Trust."

¶7 About a month after closing on the two smaller parcels, Small learned that part of the 28.5 acres he had sold to Kuhn was also part of a tract he had promised to sell to Sarah Purscell, a third party who had been leasing some of Small's property to the west of the 28.5-acre parcel. Small contacted Kuhn in July 2004 to inform him of the problem and asked Kuhn to meet with Purscell to determine which part of Kuhn's property Purscell had wanted to purchase. In August 2004, Small and Kuhn entered into an agreement (the August Agreement) under which Kuhn agreed to deed a portion of the 28.5-acre parcel back to Small so that Small could complete his agreement with Purscell. In return, Small agreed to provide clear title to Kuhn as to what remained of Kuhn's 28.5 acres and to provide clear title and deed to the remaining adjacent property to the south and west of the property to be sold to Purscell. The August Agreement also provided that "all due on sale clauses will be eliminated on all existing or pending land sale contracts and on notes secured by Deeds of Trust between Jay Douglas Kuhn and Richard M[.] Small Family Trust." At the time of this agreement, the only contract still pending between Kuhn and Small was the contract for the 160 acres.

¶8 In December 2004, Kuhn performed under the August Agreement by deeding the specified lands to Small. Small, however, refused to deed Kuhn the remaining adjacent property to the south and west of the Purscell property. Small felt that Kuhn had taken advantage of the Purscell situation and testified in his deposition that he "began to ask

questions of people who were in the real estate business about the method that you would go through to cancel a contract that was already in escrow."

> I was told that the only ways [sic] that an existing contract could be cancelled were if there were substantive changes made to the contract that were not agreed upon by both parties. And in my inquiry I asked, how are changes to a real estate contract accepted or witnessed by both parties that have been accepted, without creating an addendum to the contract, into the original contract. And they said that a change would be made by crossing out a proposed item, putting in the revision and initialing it, and then the other party would receive the contract, agree to that and initial it; and then that would become part of the new original contract.

¶9 Small then called the title company and requested a copy of the 160-acre contract. Small testified that when he reviewed it, he "found that specifically the earnest money deposit had been altered by Mr. Kuhn." Thereafter, in a January 2005 letter, Small instructed the escrow officer to cancel the escrow for the 160-acre agreement, explaining Kuhn's handwritten changes were "made without my knowledge or prior approval" and served to "void the purchase contract."[3]

¶10 About one week later, Small quitclaimed the 160 acres to the Haupts for no consideration. In a related signed agreement between Small and the Haupts, the Haupts

[3]In the letter, Small stated Kuhn was the party who had delivered the three agreements to the title agency in December 2003. Kuhn maintains they were delivered by Small. Because we construe the facts in the light most favorable to the party opposing summary judgment, *Ratliff*, 219 Ariz. 441, ¶ 2, 199 P.3d at 697, we assume Small delivered the agreements to the title agency.

acknowledged that Small had cancelled his contract with Kuhn for the property and that future litigation might ensue. The Haupts then recorded the deed for the property.

¶11 In February 2005, Gary Haupt (Haupt) told Kuhn that Small was not going to honor the agreement with Kuhn and had given the Haupts title to the property. Soon thereafter, Kuhn discovered his equipment on the 160 acres had been disabled and his cattle had been fenced out of the property. On March 8, 2005, Haupt told Kuhn to remove all of his equipment from the 160 acres because Haupt owned the property.

¶12 In May 2005, Kuhn filed the instant action against Small and the Haupts. In his First Amended Complaint, Kuhn alleged claims for specific performance, breach of contract, conspiracy to commit fraud, consumer fraud, negligent misrepresentation, breach of the covenant of good faith and fair dealing, and intentional interference with contract.[4] Both Small and the Haupts filed counterclaims against Kuhn.

¶13 In July 2006, Small filed a motion for partial summary judgment, which the trial court denied, finding disputed issues of material fact. About a year later, in October 2007, Small filed a second motion for summary judgment. That same month, the Haupts filed their own motion for summary judgment. The Haupts' motion related to Kuhn's claim of

[4]Kuhn's amended complaint included Sarah Purscell as a defendant. She was later dismissed from the litigation.

intentional interference with contract, which they contended was the only remaining claim independently asserted against them.[5]

¶14 In Small's second summary judgment motion, Small asserted that Kuhn's deposition testimony "confirm[ed] that no contract between the parties ever existed with respect to the subject property." In particular, Small relied on Kuhn's admission that the limitation on remedies Kuhn added to the contract "was never discussed between the parties under any circumstances."[6] Small also asserted that taking the three agreements to the title company to open escrow did "not constitute an act which ratifie[d] the contents of any of the documents."

¶15 The trial court again denied Small's motion, finding a disputed issue of material fact continued to exist, but granted the Haupt's summary judgment motion. All three parties filed motions for reconsideration. After the court considered the parties' motions, it granted Small's motion for summary judgment and affirmed its grant of summary judgment in favor of the Haupts. In its final judgment, issued in May 2008, the court noted that Kuhn "never state[d] that he discussed with Defendant Small the handwritten change within the document relating to the non-recourse note requiring the Defendant to look only to the property in the event of default." The court also stated that Kuhn's handwritten changes and additions to the

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[5]The Haupts also sought summary judgment on their counterclaim, which related to a lis pendens Kuhn had recorded against the 160 acres.

[6]As noted above, one of Kuhn's handwritten additions to the 160-acre contract provided, "The only remedy in event of default is to foreclose [on the] note or deed of trust." This provision was added to both of the other two contracts as well.

contract constituted a counteroffer and Small's subsequent delivery of the contracts to the title company and opening of escrow was "not an act which constitute[d] legal ratification of the terms of those documents . . . nor [wa]s it an act of assent." In addition to granting both Small's and the Haupts' summary judgment motions and dismissing Kuhn's complaint with prejudice, the court also awarded the Haupts attorney fees and costs in the amount of $21,674.71 and Small $22,589.80. This appeal followed. This court has jurisdiction over Kuhn's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(B).

Discussion

¶16 Kuhn contends disputed issues of material fact exist as to both Small's and the Haupts' motions, precluding summary judgment. "We review a superior court's 'grant of summary judgment on the basis of the record made in [that] court, but we determine *de novo* whether the entry of [summary] judgment was proper.'" *Nat'l Bank*, 218 Ariz. 112, n.3, 180 P.3d at 980 n.3, *quoting Schwab v. Ames Constr.*, 207 Ariz. 56, ¶ 17, 83 P.3d 56, 60 (App. 2004) (alterations in *Nat'l Bank*). In determining whether the trial court correctly granted summary judgment, we apply the same standard used by the trial court when ruling on the summary judgment motion. *Id.*

> Rule 56(c) directs a court to enter summary judgment in favor of the moving party "if the pleadings, deposition, answer 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."

Id. ¶ 14, *quoting* Ariz. R. Civ. P. 56(c)(1).

Was There a Question of Fact as to the 160-Acre Contract?

¶17 Kuhn first contends there is a disputed issue of material fact as to whether Small accepted his counteroffer and thus, whether a contract existed between the parties for the sale of the 160 acres.[7] As noted above, the trial court found that Small's delivery of the three contracts and escrow checks to the title company and his opening of escrow was "not an act which constitute[d] legal ratification of the terms of those documents . . . nor [wa]s it an act of assent." In reaching this conclusion, however, the trial court decided an issue of fact.

¶18 The "ultimate element of contract formation [is] the question whether the parties manifested assent or intent to be bound." *Schade v. Diethrich*, 158 Ariz. 1, 9, 760 P.2d 1050, 1058 (1988). "Decisions on the making . . . of contracts should hinge on the manifest intent of the parties," *id.* at 8 n.8, 760 P.2d at 1057 n.8, and the determination of intent to contract is a question of fact. *Tabler v. Indus. Comm'n*, 202 Ariz. 518, ¶ 12, 47 P.3d 1156, 1159 (App. 2002); *see also Empire Mach. Co. v. Litton Bus. Tel. Sys.*, 115 Ariz. 568, 573-74, 566 P.2d 1044, 1049-50 (App. 1977) (whether party had accepted offer was question of fact). Accordingly, the trial court should not grant summary judgment on a contract formation question where there is conduct sufficient to raise a triable issue of fact. *See Johnson Int'l, Inc. v. City of Phoenix*, 192 Ariz. 466, ¶ 20, 967 P.2d 607, 611 (App. 1998).

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[7]We assume without deciding that Kuhn's changes and modifications to the contract constituted a counteroffer and Kuhn does not argue otherwise. *See Hull v. DaimlerChrysler Corp.*, 209 Ariz. 256, n.1, 99 P.3d 1026, 1029 n.1 (App. 2004) (assuming without deciding uncontested issue).

¶19 The record, viewed in the light most favorable to Kuhn, *see Ratliff*, 219 Ariz. 441, ¶ 2, 199 P.3d at 697, establishes that the issue of Small's intent cannot be resolved on a motion for summary judgment. At the outset, we must assume Small received Kuhn's letters, both of which indicated Kuhn had made changes to the contracts. In addition, Kuhn's changes to the amount of earnest money were made on the front page of the 160-acre contract and the corresponding escrow check was for the revised amount. Small nevertheless deposited the contracts and checks with the title company and opened escrow. *See United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990) (summary judgment improper if evidence or inferences would allow jury to resolve material issue in favor of either party).

¶20 Small's actions subsequent to his opening of escrow also demonstrate there are disputed issues of fact concerning his intent to accept or ratify Kuhn's counteroffer. Small closed on two of the contracts he had placed in escrow, both of which included Kuhn's handwritten changes. Moreover, the documents Small signed at closing specifically included some of the handwritten terms, including Kuhn's changes to the frequency and amounts to be paid to Small. In addition, with Small's knowledge, Kuhn took possession of the 160 acres and began improving and farming the property in January 2004, consistent with Kuhn's handwritten addition to the 160-acre contract. *See Schade*, 158 Ariz. at 10, 760 P.2d at 1059 ("'The fact that one of [the parties], *with the knowledge and approval of the other*, has begun performance is nearly always evidence that they regard the contract as consummated and

intend to be bound thereby.'"), *quoting* 1 A. Corbin, *Corbin on Contracts* § 95 at 407 (1963) (emphasis and alterations in *Schade*).

¶21 There was evidence to support a fact-finder's conclusion that Small was aware of and accepted Kuhn's counteroffer even though he did not initial or otherwise acknowledge Kuhn's changes and additions. *See Johnson Int'l*, 192 Ariz. 466, ¶ 26, 967 P.2d at 611 ("A contract may be formed, even if not formally executed, if it is clear the parties intended to bind themselves to the terms.") This evidence raises a triable issue of material fact sufficient to withstand summary judgment.[8]

¶22 Small nevertheless maintains there was never a contract between the parties because Kuhn testified he and Small did not discuss his addition to the contract limiting Small's remedy in case of default. The trial court apparently relied on Kuhn's admission when it determined there was no contract between the parties, explaining "there [wa]s no meeting of the minds between [Kuhn] and [Small] concerning the specific and material term and condition relating to the remedy available to [Small] in the event of a breach by [Kuhn]" and "therefore[,] no contract was ever entered into by and between the parties as a matter of law." This conclusion, however, mistakenly presumes the parties must have had a discussion about each term in the contract in order for it to be binding. But that is not the law. *See Shapiro v. Bache & Co.*, 116 Ariz. 325, 328, 569 P.2d 267, 270 (App. 1977) (rejecting

[8]Kuhn also argues the August Agreement demonstrated Small had subsequently ratified Kuhn's counteroffer. Because we have already determined that an issue of fact exists as to Small's acceptance, we need not address this issue.

plaintiff's argument that contract term was not binding because parties had not discussed it; record did not suggest party "did not have the knowledge, capacity or opportunity to read the agreement and understand it"). Small readily could have accepted the counteroffer's revised terms without any discussion with Kuhn. *See* 17A Am. Jur. 2d *Contracts* § 88 (2004) ("An express assent to new terms and conditions attached to the acceptance of an offer is not necessary to make such terms and conditions a part of the contract; any language or conduct on the part of the original offeror showing assent to the new terms and conditions is sufficient.").

¶23 Citing *Young v. Bishop*, 88 Ariz. 140, 353 P.2d 1017 (1960), Small argues his taking the contracts and earnest money to the title company and opening escrow cannot be considered his acceptance of Kuhn's counteroffer as a matter of law. *Young*, however, does not support this argument. In *Young*, the buyers and sellers negotiated an escrow agreement that included escrow instructions, a description of the property to be sold, the price and payment schedule, as well as a provision stating it was "subject to and conditioned upon Supplemental Trust Escrow Instructions." *Id.* at 142, 353 P.2d at 1019. After the parties were later unable to agree on the supplemental instructions, the buyers sued for specific performance and breach of contract. *Id.* at 142-43, 353 P.2d at 1019. The court explained that a contract to sell real estate and an escrow arrangement are "not interchangeable entities" and that a "binding contract of sale must exist with respect to the subject-matter of the escrow instrument to support an enforceable escrow." *Id.* at 146, 353 P.2d at 1021.

¶24 The *Young* court further stated "the general rule [is] that the conditions upon which an instrument is to be deposited in escrow may rest in, and be proved by parol, and an instrument placed in escrow may be enforced although the escrow agreement is not in writing," but this rule "does not permit enforcement of a contract for the sale of real estate unless there is a valid and binding obligation for such sale sufficient under the statute of frauds." *Id.* at 146, 353 P.2d at 1021 (citations omitted). Small relies on this language as supporting his argument that opening escrow cannot, as a matter of law, be considered an "act[] of ratification" or evidence of his acceptance. But *Young* does not say that. The cited language only provides that escrow agreements need not comply with the statute of frauds even though the underlying contracts for the sale of real estate must do so. *See id.*

¶25 We conclude questions of fact preclude summary judgment on the issue of whether Small accepted Kuhn's counteroffer. Thus, the court erred in granting Small's motion and, consequently, awarding Small attorney fees, denying Kuhn's request for specific performance, and dismissing Kuhn's complaint.

Is Kuhn's Action on the Contract Barred By the Statute of Frauds?

¶26 Even if a jury were to conclude that Small had accepted Kuhn's counteroffer, thus creating a contract for the sale of 160 acres, this is not the end of the inquiry because the contract must also be able to withstand the statute of frauds. "The statute of frauds precludes a party from bringing a court action to enforce an unwritten agreement for the transfer of an

interest in real property." *Long v. City of Glendale*, 208 Ariz. 319, ¶ 35, 93 P.3d 519, 529 (App. 2004).[9]

¶27 The Arizona statute of frauds provides that "[n]o action shall be brought in any court" for an agreement for the sale of real property "unless the promise or agreement upon which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged." A.R.S. § 44-101(6). Although the statute of frauds "is by its terms absolute," Arizona courts "have long recognized limited exceptions to the statute." *Owens v. M.E. Schepp Ltd. P'ship*, 218 Ariz. 222, ¶ 14, 182 P.3d 664, 667-68 (2008). These exceptions exist in order to prevent the statute of frauds from being used to perpetrate a fraud. *See id.*, *citing Trollope v. Koerner*, 106 Ariz. 10, 16, 470 P.2d 91, 97 (1970).

¶28 In arguing his action is not barred by the statute of frauds, Kuhn relies on the exception of part performance and language in the August Agreement. We need only address the first issue because we conclude the exception applies here. "The 'part performance' exception to the statute of frauds is grounded in the equitable principle of estoppel." *Owens*, 218 Ariz. 222, ¶ 15, 182 P.3d at 668. Acts of part performance serve to "excuse the writing required by the statute because they provide convincing proof that the contract exists" and will remove a contract from the statute of frauds "only if they cannot be explained in the absence

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[9]The contract here is not an unwritten contract but rather a written one that was unsigned, in that Small failed to initial Kuhn's changes and additions to the signed contract. However, the analysis is the same. *See T.D. Dennis Builder, Inc. v. Goff*, 101 Ariz. 211, 213-14, 418 P.2d 367, 369-70 (1966) (applying statute of frauds analysis to unsigned land sale contract that was incorporated into signed escrow instructions).

of the contract." *Id.* ¶ 16. "The sufficiency of the particular acts to constitute part performance can be decided as a matter of law." *Gene Hancock Constr. Co. v. Kempton & Snedigar Dairy*, 20 Ariz. App. 122, 125, 510 P.2d 752, 755 (1973), *disavowed on other grounds by Gibson v. Parker Trust*, 22 Ariz. App. 342, 345, 527 P.2d 301, 304 (1974).

¶29 The trial court found the part performance exception did not apply because Kuhn's "planting, cultivating, and harvesting a crop of Sudan grass" were not permanent improvements to the property but rather were "only those necessary and appropriate in order to grow a successful crop." The court further noted Kuhn "paid no additional sums to use the land," "made a profit . . . when he harvested," and "suffered no damages as a matter of law from his permitted use of the land."

¶30 The trial court incorrectly applied the part performance exception. As discussed above, the relevant inquiry is whether "any alleged act of part performance [is] consistent only with the existence of a contract and inconsistent with other explanations such as ongoing negotiations or an existing relationship between the parties." *Owens*, 218 Ariz. 222, ¶ 18, 182 P.3d at 669 (citation omitted).[10] The undisputed facts here, which include Kuhn's taking possession of the property with Small's knowledge and consent, his improvements to the property and its irrigation system, and his earnest money payment toward the purchase price all are "consistent only with the existence of a contract" and "inconsistent with other

[10]The trial court likely did not have the benefit of the analysis in *Owens*, which was issued in the same month the court entered the judgment.

explanations such as ongoing negotiations or an existing relationship between the parties." *Id.* ¶ 18 (citation omitted).[11]

¶31 Small contends the part performance exception is inapplicable because Kuhn's actions "were equally consistent with a lease of the land as they were with a purchase of it."[12] This argument, however, ignores Kuhn's earnest money payment toward the purchase price and significant improvements to the property, which acts are inconsistent with a lease and consistent only with the existence of a contract for sale. *See Owens*, 218 Ariz. 222, ¶ 18, 182 P.3d at 669; *see also Gene Hancock Constr. Co.*, 20 Ariz. App. at 125, 510 P.2d at 755 (explaining acts of part performance may include "'valuable improvements on the land,'" "'tak[ing] possession thereof,'" and "'pay[ing] a portion or all of the purchase price'"), *quoting* Restatement of Contracts § 197. Moreover, Small never asserted the existence of a lease between Kuhn and himself, let alone what its terms were.[13] Accordingly, because

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[11]In addition to his repairs and upgrades to the irrigation system, Kuhn testified he improved the property by hauling in soil to fill in low areas, "deep ripped" the acreage twice, leveled the soil with a land plane, and "disced" the property twice in order to break the soil into small chunks. He then planted the farm with feed grass, aerated the soil, harvested the crop, and "ripped" and disced the land again before planting a crop of wheat. He was forced off the property after planting the wheat.

[12]Similarly, the Haupts argue Kuhn's actions were consistent with "leasing the land, working as hired help, or helping out a friend."

[13]Such a theory is also contradicted by Small's deposition testimony:

> Q: It was an understanding . . . that there would be a later closing but [Kuhn] would take possession of the property and start putting it in a position where it could be used for farming?

Kuhn's acts were "consistent only with the existence of a contract and inconsistent with other explanations," *Owens*, 218 Ariz. 222, ¶ 18, 182 P.3d at 669, we conclude the part performance exception to the statute of frauds applies as a matter of law.

Were the Haupts Entitled to Summary Judgment?

¶32 Kuhn also appeals the trial court's grant of summary judgment in favor of the Haupts. As noted above, the Haupts' motion was specifically limited to Kuhn's claim of intentional interference with contract, which they contended was the only independent cause of action alleged against them.[14]

¶33 The tort of intentional interference with contractual relations requires a plaintiff to show:

> "the existence of a valid contractual relationship or business expectancy; the interferer's knowledge of the relationship or expectancy; intentional interference inducing or causing a breach or termination of the relationship or expectancy; and resultant

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> A: Yes.
>
> Q: And understood and agreed that that was acceptable that he use the property in that manner prior to closing?
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> A: Yes.

[14]The Haupts also moved for summary judgment on their counterclaim concerning the lis pendens Kuhn had recorded against the 160 acres. After the trial court denied this portion of the Haupts' summary judgment motion, they subsequently filed a "Motion for Judgment as a Matter of Law" on their counterclaim. Although the court did not explicitly grant or deny this motion, we infer the court granted it because the judgment ordered that Kuhn's lis pendens be released from the property. Because this order necessarily was based on the court's determination as a matter of law that there was no contract between Kuhn and Small, we must vacate this portion of the judgment.

> damage to the party whose relationship or expectancy has been disrupted . . . . In addition, the interference must be improper as to motive or means before liability will attach."

Neonatology Assocs., Ltd. v. Phoenix Perinatal Assocs. Inc., 216 Ariz. 185, ¶ 7, 164 P.3d 691, 693 (App. 2007), *quoting Wallace v. Casa Grande Union High Sch. Dist. No. 82 Bd. of Governors*, 184 Ariz. 419, 427, 909 P.2d 486, 494 (App. 1995) (alteration in *Neonatology Assocs.*).

¶34 At the outset, as Kuhn correctly notes, to the extent the trial court's grant of summary judgment in favor of the Haupts was based on its determination that there was no valid contract between Kuhn and Small, its decision cannot stand in light of our reversal of summary judgment on this matter. Accordingly, we must determine whether the court's decision can be upheld despite our reversal of the contract issue.

¶35 Kuhn argues the Haupts' actions demonstrate that the trial court incorrectly granted their summary judgment motion. Kuhn first points to the agreement between Small and the Haupts in which the Haupts acknowledged they "[we]re fully aware of the circumstances surrounding[] the cancellation of the previous purchase contract with [Kuhn], the fact that [Kuhn had] not accepted that cancellation of the contract, that [Kuhn] may contact his attorney and that further litigation may ensue from [Kuhn's] unauthorized alteration of that contract." Kuhn also points to Haupt's deposition testimony admitting he "knew that [Kuhn] would get mad about it" and "didn't say anything until [he] really knew that [Small] was going to do this." In addition, Haupt recorded the deed and then ordered

Kuhn off of the property. Kuhn maintains these acts show Haupt "knew that [Kuhn] claimed a prior interest in the property and that recording the deed would deprive [Kuhn] of the property[,] which was the culmination of the Agreement between [Kuhn] and [Small]."

¶36 The Haupts maintain the trial court correctly granted their summary judgment motion because "Small terminated any business expectancy when he canceled the escrow on the 160-acre parcel" and thus "there was no valid contractual relationship between Kuhn and Small for the Haupts to obstruct." In the same vein, they contend they did not have the requisite intent to interfere because they "could not have interfered with an already terminated contractual relationship." The Haupts also argue that "[t]he very fact that the validity of a contract is under current litigation is proof that the Haupts could not have known if there was a valid contract."

¶37 In granting the Haupts' motion, the trial court determined there was no evidence the Haupts "intentionally interfered with the purported contract" because they were not alleged to have "caused or induced the cancellation of the purported contract between [Kuhn] and [Small]." We agree. As discussed above, one element of this tort is "'intentional interference *inducing or causing* a breach or termination of the relationship or expectancy.'" *Neonatology Assocs.*, 216 Ariz. 185, ¶ 7, 164 P.3d at 693, *quoting Wallace*, 184 Ariz. at 427, 909 P.2d at 494 (emphasis added); *see also Snow v. W. Sav. & Loan Ass'n*, 152 Ariz. 27, 33, 730 P.2d 204, 211 (1986) ("Tort liability may be imposed upon a defendant who intentionally and improperly interferes with the plaintiff's rights under a contract with another if the interference causes the

plaintiff to lose a right under the contract."); *Middleton v. Wallichs Music & Entm't Co.*, 24 Ariz. App. 180, 184, 536 P.2d 1072, 1076 (1975) (liability may exist where defendant engages in "affirmative, unduly persuasive, initiating conduct" that results in breach).

¶38 The undisputed record demonstrates Small already had manifested his intent to no longer proceed with the contract with Kuhn before he discussed deeding the property to the Haupts.[15] Kuhn does not allege the Haupts induced or facilitated Small's decision. *Cf. Snow*, 152 Ariz. at 34, 730 P.2d at 212 (reversing grant of summary judgment where jury "could conclude that [defendant] acted with substantial certainty that its conduct would cause" third party to breach contract with plaintiff); *Middleton*, 24 Ariz. App. at 184, 536 P.2d at 1076 (affirming directed verdict in favor of defendant where defendant not responsible for "affirmative, initiating and inducing action" resulting in breach of contract). Accordingly, the trial court did not err in granting the Haupts' motion for summary judgment on Kuhn's claim for intentional interference with contract.[16]

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[15]Kuhn argued and the trial court found Small "cancell[ed]" the contract and the Haupts described the situation as an "already terminated contractual relationship." However, because closing was scheduled to occur in July 2005, the time for performance of the contract had not yet occurred. Thus, Small's actions in cancelling escrow and declaring his intent not to perform are properly considered an anticipatory repudiation. "A party anticipatorily repudiates a contract when he or she provides a 'positive and unequivocal manifestation' that the party will not perform when his or her duty to perform arises." *Ratliff*, 219 Ariz. 441, ¶ 9, 199 P.3d at 698, *quoting Diamos v. Hirsch*, 91 Ariz. 304, 307, 372 P.2d 76, 78 (1962). Because an anticipatory repudiation is considered a breach of contract, *see Tempe Corporate Office Bldg. v. Arizona Funding Servs., Inc.*, 167 Ariz. 394, 398 n.1, 807 P.2d 1130, 1134 n.1 (App. 1991), our analysis does not change.

[16]Although we affirm the trial court's grant of the Haupts' summary judgment motion, the Haupts will continue to be a party in the litigation due to Kuhn's claim for specific

Disposition

¶39 For the reasons set forth above, we reverse the trial court's grant of summary judgment in favor of Small and all related rulings, including its award of Small's attorney fees and costs, its dismissal of Kuhn's complaint, its determination that specific performance was unavailable, and its removal of the lis pendens, and remand for further proceedings consistent with this decision. We affirm the trial court's grant of summary judgment in favor of the Haupts on Kuhn's claim of intentional interference with contract. To the extent the court's

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performance. We agree with Kuhn that both Small and the Haupts must remain in order for the court to "ha[ve] before it all necessary parties to enter an appropriate equitable remedy." As Kuhn correctly points out, the Haupts did not pay for the property and recorded the deed with actual notice of the controversy as to its ownership and therefore are subject to specific performance. *See O'Hare v. Griesmer*, 132 Ariz. 30, 31-33, 643 P.2d 733, 734-36 (App. 1982) (finding quitclaim deed holder subject to specific performance arising from land sale contract between appellee and grantor and rejecting argument grantee could not be ordered to specifically perform because he was not a party to the contract; concluding grantee "knew that the appellee claimed that his interest in the lot was subject to the contract and that the court might enter an order substantially affecting his interest"); *see also* 71 Am. Jur. 2d *Specific Performance* § 188 (2001) (explaining "[o]ne who, with actual or constructive knowledge of a land contract, acquires the legal title under or through a deed . . . executed by the vendor subsequently to the contract, is in no better position than his or her grantor to defend a suit for specific performance of the contract" and thus "may be compelled to perform the contract in the same manner and to the same extent as his or her grantor would have been liable to do had he or she not transferred the legal title"); *cf. Grummel v. Hollenstein*, 90 Ariz. 356, 359, 367 P.2d 960, 962 (1962) (explaining specific performance not available if property had subsequently been conveyed "'to an innocent third person'"), *quoting* 49 Am. Jur. *Specific Performance* § 173 (1943); *Davis v. Kleindienst*, 64 Ariz. 251, 256, 169 P.2d 78, 81 (1946) (reformation of deed permissible if subsequent purchaser "was not an innocent purchaser for value and without notice"); *Canton v. Monaco P'ship*, 156 Ariz. 468, 470, 753 P.2d 158, 160 (App. 1987) ("[S]pecific performance will not be awarded against a seller in a land contract when the seller has no title to the land he contracted to convey.").

award of the Haupts' attorney fees may have been based on its determination that no contract ever existed between Kuhn and Small, this ruling is remanded to the trial court for reconsideration consistent with this decision. At this time, we deny all parties' requests for attorney fees on appeal. However, we grant leave to the trial court to award reasonable fees incurred on appeal to the prevailing party at the conclusion of this matter. *See Highland Village Partners, L.L.C. v. Bradbury & Stamm Constr. Co.*, 219 Ariz. 147, ¶ 20, 195 P.3d 184, 189 (App. 2008).

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

PETER J. ECKERSTROM, Judge