

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2003-017936

06/28/2010

HONORABLE JEANNE GARCIA

CLERK OF THE COURT  
M. Hovorka  
Deputy

F L RECEIVABLES TRUST 2002-A

JAMES E PADISH

v.

ARIZONA MILLS L L C, et al.

ANDREW M FEDERHAR

**RULING**

A bench trial was held on January 12 and 13, 2010. The parties subsequently submitted proposed findings of fact and conclusions of law as well as the trial transcript. Defendant filed a Motion to Strike Plaintiff's Findings of Fact which was fully briefed. The court now enters the following findings of fact, conclusions of law, and order.

**IT IS ORDERED** denying Defendant's Motion to Strike Plaintiff's Findings of Fact as moot. Plaintiff's Response to the Motion added references to the record to support its proffered findings of fact.

In a nutshell, this case involves the competing interests of a landowner who subordinated its security interest to that of the lender after the tenant/builder/borrower defaulted on rent and loans for a building and equipment used for a restaurant.

The issues for determination are:

1. Whether Defendant Mills (landowner) interfered with Plaintiff FL Trust (lender)'s collateral within the meaning of A.R.S. §47-9102(A)(64);

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2. Whether there is an implied covenant of good faith and fair dealing in the Consent (Subordination Agreement) and if so, whether Mills breached it; and
3. Whether FL Trust has been harmed by Mills' conduct, and if so, to what extent.

**I. STIPULATED FACTS<sup>1</sup>**

**A. The Lease and Related Financing**

1. On November 5, 1998, Mills, the owner and landlord of the Arizona Mills Mall, and its former tenant, CTM Restaurants, L.L.C. ("CTM"), entered into a fifteen year ground lease (the "Lease") concerning an outlying mall pad known as Lot 4.
2. The Lease provided that CTM would construct the subject building (the "Building") and operate it as a Bennigan's restaurant.
3. CTM constructed the Building. Later, in March 2000, Mills and CTM executed an amendment to the Lease (the "Lease Amendment") which permitted CTM to secure additional financing and refinance its construction loan.
4. The Lease Amendment provides, among other things, that:

Landlord hereby subordinates to the lien of the Leasehold Mortgage (including UCC-1 Financing Statements), any lien of Landlord in the Improvements and FF&E of Tenant (but not the land underlying the Premises) provided for in the Lease and any statutory or possessory liens including, without limitation, rights or levy or distraint for rent, Landlord may have or assert under this Lease against any of the assets of the Tenant under this Lease. (Lease Amendment ¶ 12.7(b)).
5. The lender is not a party to the Lease Amendment.
6. In March 2000, CTM assigned its interest under the Lease and Lease Amendment to ESAD, LLC, an entity owned and operated by CTM's principals.
7. As part of the restructuring effort, ESAD sought an additional \$1,825,000 in

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<sup>1</sup> This Section mirrors the Uncontested Facts Deemed Material from the Joint Pre-Trial Statement dated January 6, 2010.

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financing for the Bennigan's from Captec Financial Group, Inc. Captec funded two loans to ESAD (the "Loans"): a \$1,350,000 leasehold mortgage, with a maturity date of May 1, 2015, and a \$475,000 equipment loan, with a maturity date of April 1, 2007.

8. To secure the Loans, ESAD and Captec entered into, among other agreements, a Leasehold Deed of Trust, Assignment of Leases and Rents, Fixture Filing And Security Agreement (the "Deed of Trust").

9. The Deed of Trust provides that Captec is granted by ESAD a first priority security interest in the buildings, structures and other improvements of every kind, including all fixtures, located at the subject property. (Deed of Trust at §§1.1-1.15).

10. In connection with the financing, Captec and Mills entered into a landlord's consent and waiver (the "Consent").

11. The Consent provides, among other things:

Lessor subordinates each and every right which Lessor now has, or may hereafter have, under the laws of the state in which the Premises are located, or by virtue of the Lease now in effect or hereafter executed by Lessor and Borrower, to levy or distrain upon the Leasehold Improvements or the Equipment for rent, in arrears, in advance or both, or to claim or assert title to, or any right or interest whatsoever in, the Leasehold Improvements or the Equipment for rent, in arrears, in advance or both. (Consent and Waiver ¶ 3).

12. The Consent also provides:

Lessor [Mills] agrees that the Lender [Trust] or its representatives may enter the Premises for the purpose of repossessing, removing or otherwise dealing with the Equipment and Leasehold Improvements, upon two (2) days prior written notice to Lessor and such license shall be irrevocable and shall continue from the date Lender enters the Premises for as long as Lender deems necessary but not to exceed a period of thirty (30) days and during any such period Lender shall pay or cause to be paid the rent and all other charges provided under the Lease relating to such Premises between the Lessor and Borrower, prorated on a per diem

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basis to be determined on a thirty (30) day month, without incurring any other obligations of Borrower. Any extensions of the foregoing period shall be with the prior written consent of Lessor. Notwithstanding anything contained herein to the contrary, Lender's obligation to pay rent and other charges shall be limited to the period of time the Lender has possession of the Premises as provide[d] for in this Section 6 and such obligation to pay rent and other charges shall not include any past due rent or other charges that Borrower may owe Lessor. (Consent at § 6.)

13. The Consent further provides:

Lessor consents to Borrower granting/conveying a security interest in Borrower's right, title and interest in, to an under the Lease and the Leasehold Improvements in favor of or for the benefit of Lender for the purpose of securing Borrower's payment of the Indebtedness (as defined in the Mortgage/Trust Deed) and performance of obligations in accordance with the Mortgage/Trust Deed. (Consent and Waiver ¶ 7).

14. The Consent provides as follows:

Lessor agrees to send notices of default which are sent by Lessor to Borrower pursuant to the provisions of the Lease simultaneously to Lender. Lender shall have the right, but not the obligation, to cure the default within the cure periods provided in the Lease, or, to commence the curing process if such default will take in the cure periods provided in the Lease. The Lessor further agrees not to invoke any of its remedies, either express or implied, under the Lease (except in the case of emergency repairs) until such cure period shall have elapsed; and also during any extended period, should Lender commence to cure such default and proceed with due diligence to cure such default. Lessor hereby consents to Lender's taking possession under the Lease and assigning the tenant's interest thereunder, in the event of any such default. Lessor hereby consents to Lender's taking possession under the Lease and assigning the tenant's interest thereunder to a

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third party that is not affiliated with Borrower, in the event of any such default. (Consent at § 9.)

15. Finally, the Consent provides the Trust with the option to enter a new lease with Mills in the event of a default by ESAD under the Lease:

If the Lease is rejected by a trustee or debtor-in-possession in any bankruptcy or insolvency proceeding or the Lease is terminated as a result of any incurable default, and within thirty (30) days after such rejection or termination Lender shall have arranged to the reasonable satisfaction of Lessor for the payment of all fees and other charges due and payable by Borrower as of the date of such rejection or termination, Lessor agrees that it will execute and deliver to Lender a new lease agreement for the Premises which (a) shall be for a term equal to the term of the terminated Lease before giving effect to such rejection or termination, and (b) shall contain the same covenants, agreement, terms, provisions, extension options and limitations as set forth in the Lease prior to the date of rejection or termination. (Consent at § 10.)

16. In signing the Consent, Mills did not subordinate its interest in the underlying land.

17. The Consent is the only document signed by both Mills and the Trust's predecessor in interest.

**B. ESAD's Default and the Parties' Disagreement**

18. In July of 2002, ESAD defaulted on its obligations to Captec and, in April 2003, on its obligations to Mills.

19. At the time of the lease default, ESAD's annual lease payment to Mills totaled: \$130,000, plus taxes, CAM and promotional charges. The Lease provided that a building of approximately 7,500 square feet would be constructed on the property. (Lease § 1.1) Therefore, the annual lease rate for the land was \$17.33 per square foot.

20. At the time of the lease default, ESAD's monthly loan payments totaled: \$8,208.28 (equipment loan) and \$15,234.04 (leasehold mortgage). The total annual loan payments equal \$281,307.84.

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21. Combined, the annual lease and loan payments totaled \$411,307.84 (exclusive of taxes, CAM and promotional charges). The total lease rate, based on this figure, is \$54.84 per square foot (using the 7,500 square foot Lease parameter).

22. At the time, the loan payments equaled 68.4% of the total lease rate and the ground lease payments equaled 31.6% of the total lease rate.

23. On April 16, 2003, Mills notified ESAD and Captec of the default after ESAD fell into arrears on its obligations under the Lease.

24. Lease Section 15.1 establishes that the tenant had thirty days after receipt of a notice of default from Mills to cure the default. (Lease § 15.1(a))

25. Upon expiration of the cure period, Mills declared the lease terminated.

26. Mills locked ESAD out on May 5, 2003.

27. On May 8, 2003, Mills notified Captec of the lockout and commencement of the lender's cure period under the Consent.

28. In late May 2003, Mills learned that Captec assigned its interest to the Trust.

29. On June 6, 2003, Mills sent a notice of termination of the Lease to ESAD, Captec and the Trust.

30. On June 6, 2003, Mills' attorney, Philip Wooten, wrote to the Trust's counsel and reminded the Trust that the thirty day time period for the Trust to request a new lease with Mills would soon expire.

31. By July 6, 2003 (thirty days after Mills terminated the Lease), the Trust had not arranged for payment of the rent due to Mills or entered a new lease with Mills.

32. Thereafter, a dispute arose between the Trust and Mills as to what rights the Trust had, as the successor to Captec, with respect to the Building.

33. The Trust asserted that it had a security interest that was senior in priority to Mills' interest in the Building.

34. Mills, on the other hand, asserted that whatever rights the Trust had, those

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rights terminated or were waived by reason of the Trust's refusal to cure ESAD's defaults under the Lease and/or to enter into a new lease for the property as provided by the Consent and Waiver.

35. The Trust did not receive a letter of intent for the property during this period.

36. In the summer of 2003, Ray O'Sullivan discussed his interest in leasing the property with Mills.

37. Mr. O'Sullivan also had discussions with the Trust about his interest in leasing the property.

38. Mr. O'Sullivan did not submit a letter of intent or enter into a lease for the property.

39. The property was not formally marketed for lease by either party until August 2006.

40. The Trust's expert determined the building contains approximately 7,912 square feet.

41. In October 2006, The Trust's expert determined the annual market rental rate for the building and land, as of July, 2003, was \$32.50 per square foot, which amounts to an annual rent of \$257,140 (exclusive of taxes, CAM and promotional charges).

**C. Procedural History**

42. On September 19, 2003, the Trust commenced this action against Mills; on October 2, 2003, the Trust amended its Complaint.

43. The Amended Complaint identifies four causes of action against Mills, numbered as follows: (1) Declaratory Judgment; (2) Breach of the Covenant of Good Faith and Fair Dealing; (3) Injunctive Relief; and (4) Unjust Enrichment.

44. On October 9, 2003, Mills filed an Answer and Counterclaim. In its Counterclaim, Mills asserted the following claims against the Trust: (1) Breach of Contract; (2) Breach of the Duty of Good Faith and Fair Dealing; (3) Declaratory Judgment; (4) Trespass; (5) Injurious Falsehood [Slander of Title]; (6) Intentional Interference With Prospective Relations; (7) Injunction; (8) damages under the U.C.C.; and (9) Unjust Enrichment.

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45. At the parties' request, on October 30, 2003, the Court (Hon. Margaret H. Downie) held an evidentiary hearing and oral argument in this case (the "Evidentiary Hearing") on Counts One and Three of the Trust's Amended Complaint.<sup>2</sup>

46. On November 14, 2003, the parties submitted post-hearing memoranda.

47. Prior to the Evidentiary Hearing, by Stipulation dated October 30, 2003, the parties stipulated to the questions the Court should resolve in connection with Counts One and Three ("Hearing Stipulation").

48. Three of the five questions presented for consideration were:<sup>3</sup>

1. Whether any rights of the Trust that arose pursuant to the terms of the Landlord's Consent and Waiver, the Lease Amendment and/or the Ground Lease, in the Premises and Improvements, including the Building, terminated no later than July 6, 2003?;

2. Whether the Trust has any rights or claims to, including a lien against or security interest in, the Premises and the Improvements, including the Building?;

3. Whether the Trust has the right to remove the Building pursuant to the Landlord's Consent and Waiver?

49. On December 22, 2003, Judge Downie issued her ruling on the evidentiary hearing. In the trial court's December 22, 2003 Ruling, Judge Downie made the following findings of fact, among others:

- a. Mills is the owner of the real property at issue.
- b. Captec did not fund the construction of the restaurant building.

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<sup>2</sup> Count Three seeks an injunction prohibiting Mills from asserting that it has superior rights in the Building, and from interfering with the Trust's rights in and to the Building, including the Trust's right to enter into a lease of the Building with any qualified tenant. (Complaint ¶40).

<sup>3</sup> The other two questions pertained to the Trust's rights under its leasehold mortgage with ESAD, LLC – Mills' tenant and the Trust's borrower.



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c. The Trust did not cure ESAD's defaults or request additional time within which to do so prior to July 6, 2003.

50. The December 22, 2003 Ruling also included the following findings of law, among others:

a. Mills complied with applicable notice requirements under the Lease and Consent.

b. The Lease was effectively terminated as to the Trust.

c. Mills did not subordinate all of its rights to the Trust.

d. Mills consented to ESAD's grant of a lien on ESAD's interest in the Lease and leasehold improvements as well as a security interest in ESAD's fixtures and equipment located on the property.

e. Mills consented to subordinate its landlord's lien on ESAD's property on the premises securing payment of rent under the Lease.

f. Mills granted Captec certain rights to remove ESAD's personal property from the premises under specified circumstances.

g. There was no consideration for any purported subordination of Mills' ownership interests in the Building.

h. Upon termination of the Lease, Mills acquired fee simple title to the improvements, including the Building.

i. The Trust's interests in and rights to the premises terminated no later than July 6, 2003.

j. The Trust has no right to control, lease or collect rent from the Building. (See Ruling dated December 22, 2003.)

51. On February 10, 2004, the Court entered an Order Denying Plaintiff Declaratory and Injunctive Relief against the Trust on those Counts. There, the Court ordered "all declaratory and injunctive relief requested by [the Trust] in Counts One and Three of the Amended Complaint is denied."

52. On or about February 12, 2004, the Trust appealed.

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53. During the pendency of the Appeal, on January 4, 2005, the trial court granted Mills' Motion for Summary Judgment regarding the Trust's remaining claims for breach of the covenant of good faith and fair dealing (Amended Complaint Count Two) and unjust enrichment (Amended Complaint Count Four). (See Ruling dated January 4, 2005)

54. On May 12, 2005, the Court of Appeals issued an opinion ("Opinion") that reversed Judge Downie's Order. Specifically, the Court of Appeals held that "the U.C.C. upholds a security interest against an ownership interest when one of two conditions are met: the owner consents to the creation of the security interest, or the owner has given the right to remove the goods to the debtor." (Opinion at p. 5.).

55. The Court of Appeals determined that FL Trust's "security interest falls within these exceptions. The landlord both consented to the security interest and ceded to the debtor the right to remove the fixtures. It consented through the consent and waiver agreement." (Opinion at ¶ 15).

56. Citing A.R.S. § 47-9334(G), the Court held that "[t]he priority of the security interest 'continues for a reasonable time if the debtor's right to remove the goods as against the encumbrancer or owner terminates.' A.R.S. § 47-9334(G)." (Opinion at pp. 6 and 11-12.).

57. The Court of Appeals found that Mills both consented to the creation of the security interest and gave the debtor the right to remove the collateral. (Opinion at p. 7.)

58. The Court of Appeals found that the lender's security interest took priority over Mills' ownership interest.

59. The Court of Appeals also directed the trial court to enter judgment in the Trust's favor.

60. On May 27, 2005, Mills filed a Motion for Reconsideration.

61. On August 26, 2005, the Court of Appeals modified the Opinion by deleting the reference to entering judgment in the Trust's favor and substituted "[a]ccordingly, we reverse the superior court's judgment and remand for further proceedings consistent with this opinion." The Court of Appeals also de-published their Opinion into a Memorandum Decision.

62. On or about September 9, 2005, Mills filed a Petition for Review to the Supreme Court, which the Trust opposed. On February 6, 2006, the Supreme Court denied Mills' Petition for Review. The mandate from the Court of Appeals to this Court was issued on

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March 14, 2006.

63. Following the entry of judgment in FL Trust's favor, and FL Trust's giving of notice that it intended to proceed with its claim for breach of the covenant of good faith and fair dealing, Mills made a second motion for summary judgment seeking dismissal of the claim. That motion, however, was denied by Judge Aceto's March 2009 ruling in this case.

64. On April 7, 2006, FL Trust filed a motion requesting that the Court enter a declaratory judgment in favor of the Trust.

65. This Court, by decision dated July 31, 2006, granted FL Trust's motion and entered judgment in the Trust's favor.

66. The July 31, 2006 decision:

held that pursuant to both Article 9 and the Consent and Waiver, the Trust's interest in the building and equipment was superior to any interest held by Mills;

held that the revised, not former version of AZ UCC Article 9 applied, which expressly permits the Trust to lease the building to recover its debt;

dismissed all of Mills' counterclaims; and

entered judgment in FL Trust's favor on Count One of its Complaint.

67. On August 23, 2006, Judge Baca ordered the parties to immediately begin jointly marketing the subject property.

68. In a September 17, 2007 Minute Entry, Judge Aceto ruled that, in the event the parties located a tenant for the property, rental income would be divided 62.43% for the Trust and 37.57% for Mills.

69. In September 2007, Mills presented two, signed letters of intent ("LOIs") from prospective tenants (a Bennigan's franchisee prospect and a local Japanese restaurant operator).

70. The potential Bennigan's franchisee offered an initial lease rate of \$140,000

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per year and was willing to purchase the fixtures and equipment for \$25,000.

71. The local operator offered an initial lease rate of \$185,000 per year (with six months free rent) but did not offer to pay any money for the fixtures and equipment.

72. The Trust rejected the terms of both LOIs.

73. On March 3, 2008, Judge Aceto ruled on the Trust's Motion for Summary Judgment regarding damages and Mills' Cross Motion for Summary Judgment. (Minute Entry dated March 3, 2008.) The trial court denied both motions. In the Minute Entry, however, Judge Aceto identified specific factual and legal questions remaining for trial, including:

- - "Plaintiff has not established under what circumstances interference with use of collateral is actionable."
- - "Plaintiff has not established what legal standard applies to its interference with collateral claim."
- - "Plaintiff will have the burden of establishing a causal connection between the alleged interference and the claimed damages."
- - "Plaintiff has not established that, but for interference by the Defendant, the subject property would have at all times been rented."
- - "Plaintiff has not established that a reasonable fact finder could reach only the same conclusion as Plaintiff's expert regarding rental value."
- - "Plaintiff assumes that it would have no expenses and that gross rental receipts would also be net rental receipts."

74. In March 2008, the Court gave FL Trust the exclusive right to market the property.

75. FL Trust engaged a broker, well known in the restaurant industry for their handling of such restaurant properties, who has been marketing the property since that time.

76. The Trust and its broker never produced a tenant or a letter of intent.

77. Since the tenant's default, Mills paid the property taxes and other costs related to the property and collateral.

78. The Trust never contributed to or reimbursed Mills for the taxes or other costs related to the property and collateral.

79. The Trust has not paid rent or other expenses to Mills.

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**II. FINDINGS OF FACT**

1. FL Trust first learned of ESAD's default on the Lease when the Trust's representatives received a phone call from ESAD's principal in May 2003, when Mills locked ESAD out of the Building.

2. Over the following several days in May 2003, FL Trust's representative, Edward Schwartz, had four telephone conversations with Mills' representative, attorney Phillip Wooten.

3. During the fourth and final telephone conversation, Mr. Schwartz requested that FL Trust be granted access to the subject property (the "Property") and the Building in order to market them and attempt to find a tenant to replace ESAD and open the doors as soon as possible.

4. During the fourth telephone conversation, Mr. Wooten advised Mr. Schwartz that FL Trust would be denied access to the Property and/or the Building for marketing purposes because the Trust did not cure ESAD's defaults under the Lease.

5. In February, 2004, pursuant to FL Trust's request, Mills allowed Tri-Guild access to the property to analyze the possibility of reopening the restaurant as a Bennigan's.

6. On three occasions between May and August, 2003, Mills allowed FL Trust access to the property for the purpose of dealing with the collateral. Access was granted to FL's lawyers, Mr. Kaup and Mr. Daugherty, and a restaurant equipment auctioneer, George Cunningham. None of these men are real estate professionals whose purpose for accessing the building was to market it.

7. Despite Mr. Wooten's denial of access to the property for marketing purposes, FL Trust attempted during the summer of 2003 to find a replacement tenant for the Property.

8. FL Trust's representatives were involved in negotiations with at least four prospective tenants during this time period.

9. Two of these prospective tenants -- one from Minnesota and the other from San Diego -- were Bennigan's franchisees and discussed moving to the Phoenix area and opening a new Bennigan's restaurant at the Building.

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10. The other two prospective tenants, Ray O'Sullivan and Tim Coscarelli, discussed putting different types of restaurants in the Building.

11. In its discussions with each of these prospective replacement tenants, FL Trust informed the prospective tenants that they would have to compensate both Mills and FL Trust for any rental of the Property.

12. FL Trust was willing to accept less from these prospective tenants than it was to receive under its loan agreements with ESAD and attempted to ensure that Mills would receive the same rental income as it had received under the Lease.

13. Mills employees arranged to grant Mr. O'Sullivan access to the property.

14. On July 16, 2003, Mr. O'Sullivan formally expressed an interest in leasing the property to operate an Irish-themed pub and grill.

15. Mr. O'Sullivan requested, among other things in his initial discussion with FL Trust, that the loans be reduced, but the negotiations ended before that specific term was addressed.

16. In July, 2003, Mr. Coscarelli advised that the only deal he would be interested in was if the notes were forgiven and the rent lowered. No deal was made.

17. FL Trust did not obtain an appraisal in 2003 to determine a current fair market value.

18. In 2003, the annual per square foot charge for just the loans (not the land) was \$35.55 per square foot.

19. According to FL Trust's expert, Mr. Gregg, the value of the improved area (including the building and the equipment) was \$20.29 per foot and the value of the land was \$12.21 per square foot, for a total of \$32.50 per square foot.

20. The amount of rent and loan payments in 2003 was \$54.84 per square foot; the market rate was only \$32.50, resulting in a difference of \$22.34 per square foot.

21. On September 3, 2003, FL Trust intended to remove the restaurant equipment from the building, but since then, it has taken the position that it is not required to do so.

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22. Up until the date of the trial, no tenant has been found by either party and the property has remained empty since 2003.

### III. CONCLUSIONS OF LAW

#### A. Interference

1. The Arizona Declaratory Judgment Act provides that “[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper.” The “further relief” described by the statute includes an award of money damages. Associated Aviation Underwriters v. Wood, 209 Ariz. 137, 177-178, 98 P.3d 572, 612-613 (App. Div. 2, 2004) (“In sum, therefore, a trial court may award supplemental relief in the form of a money judgment in a DRA (declaratory relief action) such as this, pursuant to § 12-1838”). The prevailing party is not required to commence a new action to obtain such further relief; instead, it may apply for such relief in the pending action in which the declaratory judgment was entered. *Id.*

2. FL Trust has obtained a declaratory judgment that its security interest in the Building and Equipment are superior to Mills’ interest in that property.

3. FL Trust’s Complaint encompasses a damages claim as “further relief” to its declaratory judgment.

4. FL Trust is also entitled to pursue damages from Mills under Count Two of its Complaint, for breach of the covenant of good faith and fair dealing.

5. Mills is the owner of the Property, Building, and Equipment. FL Trust has a security interest in the Collateral -- the Building and Equipment.

6. FL Trust’s security interest in the Collateral is superior to Mills’ interest in the Collateral.

7. FL Trust’s security interest in the Collateral attaches to any “proceeds” of the Collateral. A.R.S. §§ 47-9315(A)(2); 47-9102(A)(64)(d). See also, See In re Jim Lee Wiersma, 324 B.R. 92 (9th Cir. B.A.P. 2005).

8. The Uniform Commercial Code defines “proceeds” to include “to the extent of the value of the collateral, claims arising out of the loss, nonconformity or interference with the use of...the collateral.” A.R.S. § 47-9102(A)(64)(d). See also, 11 Anderson on the Uniform Commercial Code § 9-625:6 (party injured by reason of a failure to comply with the

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provisions of Revised Article 9 is “entitled to those damages reasonably calculated to put the injured party in the position that it would have occupied had there been no violation”).

9. Under the parties’ agreements -- the Consent, Waiver, and the Lease Amendment -- and applicable law, FL Trust had the right to use, lease, license or otherwise dispose of the Collateral in a commercially reasonable manner.

10. As part of its right to use, lease, license, or otherwise dispose of the collateral, FL Trust had the right to employ commercially reasonable marketing efforts to locate a replacement tenant for the Property.

11. The Collateral is income producing property. As a result, FL Trust’s security interest in the Collateral includes claims for lost income that FL Trust was unable to generate because of Mills’ improper conduct.

12. The U.C.C. does not expressly set forth a legal standard for interference with collateral. Therefore, principles of tort law may be used to supplement the U.C.C. to define interference. A.R.S. §47-9625, Comment 3.

13. To succeed on a claim for tortious interference with a contractual relationship or business expectancy, the plaintiff must prove:

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 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 Associates, Ltd. v. Phoenix Perinatal Associates, Inc.*, 216 Ariz. 185, 187, 164 P.3d 691, 693 (App. 2007) (citation omitted). See *Safeway Ins. Co. v. Guerrero*, 210 Ariz. 5, 10, 106 P.3d 1020, 1025 (2005).

14. The court finds that Plaintiff failed to establish that Mills’ actions interfered with any contract because FL Trust never produced a letter of intent to present to Mills for approval. Even if there was a business expectancy, Plaintiff failed to establish that Mills’ acts were improper as to motive or means. Mills was just as motivated as FL Trust obtain a new tenant and presented two letter of intent which FL Trust rejected.



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15. While it is true that Mills initially refused access to the property for marketing purposes in 2003, access was granted for that purpose in 2004. FL Trust attempted to find new tenants without access. There is no evidence that lack of access was the reason the prospective tenants, O'Sullivan and other Bennigan's operators, failed to present a letter of intent. Rather, it appears that part of the reason some of the prospective tenants did not produce letters of intent was due to the sizeable loan and rent payments required. FL Trust bears some of the responsibility for the lack of a tenant given its refusal to accept offers made in 2007 to rent the property to a Bennigan's franchisee and a local Japanese restaurant operator.

16. The court disagrees with FL Trust's assertion that Mills' insistence on curing ESAD's default or entering into a new lease for the property constitutes interference. FL Trust initiated litigation to determine the parties' rights pursuant to the Consent and the trial court found in favor of Mills, but was later reversed by the Court of Appeals. Mills' initial success demonstrates that its position had some merit. Setting forth its position initially through its demands that FL Trust cure the default and/or pay rent and defending its position through litigation cannot form the basis for an interference claim.

17. Even assuming for purposes of argument that there was any interference, Plaintiff has failed to demonstrate that interference caused a lack of a new tenant. Mills had nothing to do with FL Trust's failure to accept the two letters of intent or continue its negotiations with Mr. O'Sullivan and Mr. Coscarelly.

**B. Breach of Good Faith and Fair Dealing**

18. The Consent is a valid, enforceable contract originally entered into by Mills and Captec, FL Trust's predecessor-in-interest.

19. The court finds that for the same reasons set forth above, Mills did not interfere with FL Trust's rights under the Consent and Lease Amendment and Mills did not breach the implied covenant of good faith and fair dealing by refusing to acknowledge its subordination of its interest.

20. On August 23, 2006, Judge Baca of this Court directed the parties to jointly market the Property. Although Mills began negotiations with two prospective tenants for the Property without informing FL Trust that the negotiations were taking place, letters of intent from these prospective tenants were presented to FL Trust. Given that the letters of intent were presented to FL Trust, Mills did not breach the implied covenant of good faith and fair dealing by initially negotiating with the two prospective tenants.

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21. Based on the foregoing, the court concludes that Plaintiff is not entitled to any damages based on interference or breach of good faith and fair dealing.

**C. Mills' Request for Reimbursement of Expenses**

22. As the owner of the Property, Mills is responsible for the payment of property taxes, maintenance and other charges, taxes, fees, and expenses associated with the Property.

**D. FL Trust Acted In a Commercially Reasonable Manner**

23. In attempting to dispose of the Collateral -- that is in enforcing its security interest -- FL Trust must act in a commercially reasonable manner. A.R.S. § 47-9610(b) provides that every aspect of the disposition of collateral must be commercially reasonable. The Court finds that FL Trust is acting in a commercially reasonable manner in attempting to dispose of the Collateral through sale or rental by its marketing of the Property through the DeRito Partners brokerage firm which was jointly selected and approved by FL Trust and Mills.

**E. Attorney's Fees**

24. The court concludes that Mr. Schultz' assessment that both parties should have "worked better together than we have"<sup>4</sup> is wholly appropriate. Both parties took the risk that the property would remain empty for as long as it has. Both parties' positions regarding their rights have proven to have merit in terms of the court's rulings. FL Trust has prevailed in some areas and Mills has prevailed in others. This litigation is not over. Accordingly, neither party is entitled to an award of attorney's fees as the prevailing party.

**IV. MILLS' RENEWED MOTION TO COMPEL DISPOSITION OF PROPERTY**

At the conclusion of the trial, the court inquired about the milestones referenced at footnote 1 of its ruling minute entry dated December 7, 2009. The court expected the parties to include their positions regarding a metric determinative of a reasonable amount of time for FL Trust's priority interest.<sup>5</sup> Given that they did not, the court will await the parties' request to address that issue further.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>

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<sup>4</sup> (Video Clip at Trial: Tr. 01/12/10 156:15)(Schwartz, 12/22/09 175:7-176:24)

<sup>5</sup> See Transcript of Proceedings, January 13, 2010, page 80 lines 10-12.