ARIZONA LEASES

Construction and Interpretation of Leases in Arizona

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This outline reviews principles of Arizona law pertaining to commercial leases with emphasis on lease construction and interpretation.

I. Governing Law

The main sources of law governing commercial lease transactions in Arizona include:

(1) Arizona commercial lease statutes - A.R.S. § 33-301, *et seq.*
(2) Other Arizona statutes - e.g.
- Forcible entry and detainer statute A.R.S. § 12-1171
- Statute of frauds A.R.S. §44-101(6)

(3) Arizona court decisions
(4) Other common law
- A.R.S.§ 1-201
- *Restatement (Second) of Property Landlord & Tenant*
- *Restatement (Second) of Contracts*

(5) the terms of the applicable lease.

II. Arizona Commercial Lease Statutes

A. Tenant's obligations to maintain premises

Tenants are obligated to maintain premises in as good condition as when they take possession, ordinary wear and tear excepted. A.R.S. § 33-321.

Removing or intentionally damaging premises without a landlord's permission is a class 2 misdemeanor. A.R.S. § 33-322.

B. Tenant's obligation to pay rent

Tenants are liable for rent and landlords are entitled to other (unspecified) legal remedies for recovery of rent. A.R.S. § 33-323.

C. Holdover and Landlord's Title

A tenant in possession of premises cannot deny or claim title adverse to its landlord's title. A.R.S. § 33-324.

A landlord may terminate a month-to-month tenancy on at least ten days notice. No notice is required for nonpayment of rent. A.R.S. § 33-341.B.

A month-to-month tenant must give ten days notice of its intention to terminate possession, or be liable for rent for the ensuing ten days. A.R.S. § 33-341.C.

When the agreed-upon time period of a tenancy has expired, a tenant is obligated to surrender its premises. No notice or demand is required. A.R.S. § 33-341.D.

When a tenant holds over, it becomes a month-to-month tenant, not a tenant a sufferance. A.R.S. §§ 33-341.E & 342.

D. Untenantability

If through no fault of a tenant, its premises is rendered untenantable or unfit for occupancy, the tenant is not obligated to pay rent and may surrender possession unless otherwise agreed in writing. A.R.S. §§ 33-343.

E. Landlord's Remedies and Lien

If a tenant does not pay rent when due and it is in arrears for five days, or if a tenant violates any other provisions of a lease, a landlord may reenter and take possession or commence an action for recovery of possession. A.R.S. § 33-361.A.

The action is to be tried not less than five and not more than 30 days after it is commenced. The court is to determine the right to possession, and may assess damages, attorney's fees and costs. A.R.S. § 33-361.B.

If the landlord prevails, the tenant must post a bond in an amount determined by the court as a condition of filing an appeal and must prosecute the appeal diligently. A.R.S. § 33-361.C.

If a tenant refuses to pay rent, a landlord may seize its personal property on the premises and, after 60 days of nonpayment, sell it as provided in A.R.S. § 33-1023 and A.R.S. § 33-361.D.

The landlord's lien applies to the property of sublessees and assignees. A.R.S. § 33-361.E.

III. Principles of Interpretation

A. Lease as Contract

A lease is an interest in real property and is governed by principles of real property law as well as contract law. *Riggs v. Murdock*, 10 Ariz. App. 248, 458 P.2d 115 (1969).

A lease for a period greater than one year must comply with the Statute of Frauds. A.R.S. § 44-101(6).

B. Parties' Intent

The primary and ultimate purpose of interpretation of a contract is to discover the parties' intention and to make it effective. *Taylor v. State Farm Mut. Auto Ins. Co.,* 175 Ariz. 148, 854 P.2d 1134, on remand 182 Ariz. 39, 893 P. 2d 39, review
granted, vacated in part, 185 Ariz. 174, 913 P.2d 1092.

C. Canons of Construction

A contract must be construed so that every part of it is given effect. *New Pueblo Constructors, Inc. v. Lake Patagonia Recreation Ass'n,* 12 Ariz.App. 410, 467 P. 2d 88 (1969); *Cardon v. Cotton Lane Holdings, Inc.*, 173 Ariz. 203 (1976).

"When a contract is clear and unambiguous, a court must give effect to its terms." *Grubb & Ellis Mgmt. Servs. V. 407417 B.C., L.L.C.,* 213 Ariz. 83, 86, 138 P. 3d 1210, 1213 (App. 2006).

It is the duty of the court to adopt a construction which will harmonize all of its parts, and apparently conflicting parts must be reconciled, if possible, by any reasonable interpretation. *U.S. Insulation, Inc. v. Hilro Const. Co., Inc.*, 146 Ariz. 250, 705 P.2d 490 (App. 1985).

Only when it is impossible to give effect to all provisions of a contract should the court choose to apply one clause and ignore another. *Arizona Laborers, Teamsters and Cement Masons Local 395 Health and Welfare Trust Fund v. Conquer Cartage Co.,* 753 F. 2d 1512 (1985).

A contract should be interpreted if at all possible in a way which does not render any of its parts superfluous. *Taylor v. State Farm Mut. Auto Ins. Co., supra*.

Courts understand contract terms to have their plain and ordinary meanings, interpreting them as average ordinary persons would understand them. Ordinary meanings should be given to words where circumstances do not show that a different meaning is applicable. *Brady v. Black Mountain Inv. Co.*, 105 Ariz. 47, 459 P.2d 712 (1969); *Horton v. Mitchell*, 200 Ariz. 523, 29

P.3d 870 (App. 2001).

The doctrine of *expressio unis est exclusio alterius* provides that the expression of one or more things in a class implies the exclusion of things which are not expressed, although none would have been impliedly excluded had some not been specifically expressed. *Central Housing Inv. Corp. v. Federal Nat. Mortg. Ass'n.*, 74 Ariz. 308, 248 P.2d 866 (1952). The express mention of one thing excludes all others unless it is made clear that the list is illustrative and not exclusive.

When a list of specific things is followed by words of more general description, the broader meaning of the general words must be limited to things of the same kind, class or nature, as the specific words that precede them. "Under the rule of *ejusdem generic*, general language must be confined in its meaning by the specific enumeration which precedes it unless an intention to the contrary is clearly shown." *Arizona Biltmore Estates Ass'n v. Tezak, 177 Ariz. 447, 449, 868 P.2d 1030, 1032 (App. 1993).*

D. Independent Covenants

"The general rule is that covenants in a lease are independent, unless expressly made dependent, and that breach of one party gives rise only to a suit for damages and does not excuse performance on the part of the other party. *Restatement (Second) of Contracts § 290*." *Thompson v. Harris*, 9 Ariz.App. 341, 345, 452 P.2d 122, 126 (1969).

"Where the lease contains a covenant to repair and a covenant to leave in repair, the covenants are generally treated as independent covenants . . ." *Cote v. A. J. Bayless Markets, Inc.*, 128 Ariz. 438, 442 626 P. 2d 602, 608 (1981).

"The general rule is that the voluntary transfer of the reversion does not carry with it the right to sue the lessee for breaches of his covenants or agreements which occurred prior to the transfer. The main foundation for this rule seems to be that the party owning the real estate at the time of the breach is ordinarily the one injured thereby. Prima facie, he is the party to bring the action even though he has parted with the real estate, since the Statute of 32 Henry VIII ch. 34 and state statutes of a similar import, conferring upon a grantee of the reversion the right to enforce covenants " *A. J. Bayless Markets, Inc.,* 128 Ariz. at 441.

"[E]xcept to the extent the parties to a lease validly agree otherwise, if the landlord fails to perform a valid promise contained in the lease to do, or to refrain from doing, something on the leased property or elsewhere, and as a consequence thereof, the tenant is deprived of a significant inducement to the making of the lease, and if the landlord does not perform his promise within a reasonable period of time after being requested to do so, the tenant may: (1) terminate the lease . . . and recover damages . . ." *Terry v. Gaslight Square Associates, 182 Ariz. 365, 369, 897 P.2d 667 (App. 1995),* citing *Restatement (Second) of Property Landlord & Tenant § 7.1 (1977),* and distinquishing *Thompson, supra*:

"Thompson turned on the appellate court's ruling that the landlord did not breach any of the lease covenants, therefore the tenant was in breach of his covenant to pay rent "even if we were to conclude that the covenant to pay rent was dependent upon some covenant of the landlord under the terms of the lease. (citation omitted) The court never reached the dependency issue

because of the absence of a breach by the landlord in the case." *Id.* (The Landlord's breach in*Terry* as determined by jury had been to charge monies for operating costs not originally contemplated and to threaten eviction for non-payment, several years earlier, depriving tenant of significant inducement to know exactly what his monthly lease expenses would be.)

E. Questions of Law or Fact

Interpreting a contract is a question of law for the court. *Hadley v. Southwest Properties, Inc.*, 570 P.2d 190, 116 Ariz. 503 (1977).

Because it is a question of law, courts will review the interpretation of a contract *de novo*. *Grubb & Ellis Mgmt. Servs. V. 407417 B.C., L.L.C.*, 213 Ariz. 83, 86, 138 P. 3d 1210, 1213 (App. 2006).

Issues of reasonableness are usually questions of fact. *In re Estate of Jung,* 210 Ariz. 202, 207, 109 P.3d 97, 102 (App. 2005).

Appellate courts will respect superior court's findings of fact unless "clearly erroneous, giving due regard to the opportunity of the court to judge the credibility of witnesses." *In re Estate of Zaritsky,* 198 Ariz. 599, 601, 12 P.3d 1203, 1205 (App. 2000).

A finding of fact is not clearly erroneous even if substantial conflicting evidence exists. *Kocher v. Dep't of Revenue of State of Ariz.,* 206 Ariz. 480, 482, 80 P. 3d 287, 289 (App. 2003).

F. Summary Judgment

Summary judgment is appropriate only if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

The court views the evidence and reasonable inferences in the light most favorable to the party opposing the motion, and the inferences must be construed in favor of that party. *Thompson v. Better-Bilt Aluminum Prod. Co., Inc.* 171 Ariz. 550, 558, 832 P.2d 203, 211 (1992).

A motion for summary judgment should be granted only if the facts produced in support of the [movee's] claim "have so little probative value [given the quantum of evidence required] . . . that reasonable people could not agree with the conclusion advanced." *Baker v. Stewart Title & Trust of Phoenix, Inc.*, 197 Ariz. 535, 540, 5 P.3d 249, 254 (App. 2000) (quoting *Orme School,* 166 Ariz. 309).

IV. Ambiguities in the Lease

A finding of ambiguity requires that contract terms are susceptible to more than one reasonable interpretation, each of which is consistent with the language of the contract as a whole. *Central Arizona Water Conservation Dist. V. U.S.*, 32 F. Supp.2d 1117 (D.Ariz. 1998); *State ex rel. Goddard v. R.J. Reynolds Tobacco Co.,* 206 Ariz. 117 (App. 2003).

The fact that parties to a contract disagree as to its meaning does not render it ambiguous. *Boudreau v. Borg-Warner Acceptance Corp.,* 616 F.2d 1077 (Ariz. 1980); *B.F. Goodrich Co. v. Vinyltech Corp.,* 711 F. Supp. 1513 (Ariz. 1989); *Chandler Medical Bldg. Partners v. Chandler Dental Group,* 175 Ariz. 273 (App. 1993), 855 P.2d 787 (1993).

The restrictive "plain meaning" view of the parol evidence rule is that evidence of prior negotiations may be used for interpretation only after a finding of ambiguity has been made. The view adopted by Professor Corbin and the Second Restatement is that a preliminary finding of ambiguity is not necessary for a court to consider extrinsic evidence. In *Smith v. Melson, Inc.*, 135 Ariz. 119, 659 P.2d 1264 (1983), Arizona adopted the Corbin view which, according to Corbin, has two steps:

> "First, a court *considers* the evidence that is alleged to determine the extent of integration, illuminate the meaning of the contract language, or demonstrate the parties' intent. *See* 3 Corbin § 542, at 100-01 (1992 Supp). The court's function at this stage is to eliminate the evidence that has no probative value in determining the parties' intent. *Id.* The second step involves "finalizing" the court's understanding of the contract. *Id.* At 100. Here, the parol evidence rule *precludes admission* of the extrinsic evidence that would vary or contradict the meaning of the written words." *Taylor v. State Farm Mut. Auto Ins. Co.*, 175 Ariz. at 148.

In *Taylor,* the Arizona Supreme Court discussed the rules applicable to consideration of extrinsic evidence:

> When interpreting a contract, nevertheless, it is fundamental that a court attempt to "ascertain and give effect to the intention of the

> parties at the time the contract was made if at all possible." [citations omitted] If, for example, parties use language that is mutually intended to have a special meaning, and that meaning is proved by credible evidence, a court is obligated to enforce the agreement according to the parties' intent, even if the language ordinarily might mean something different. *See Restatement* § 212 cmt.b. illus. 3 § 4. The judge, therefore, must avoid the often irresistible temptation to automatically interpret contract language as he or she would understand the words. The natural tendency is sometimes disguised in the judge's ruling that the contract language is "unambiguous". [citation omitted] Words, however, are seldom so clear that they "apply themselves to the subject matter". *See Restatement* § 214 cmt.b.
>
> [A] lthough relevant, contract ambiguity is not the only linchpin of a court's decision to admit parol evidence . . .
>
> The better rule is that the judge first considers the offered evidence and, if he or she finds that the contract language is "reasonably susceptible" to the interpretation asserted by its proponent, the evidence is admissible to determine the meaning intended by the parties."
>
> *Taylor v. State Farm Mut. Auto Ins. Co.,* 175 Ariz. at 152 – 154.

V. Implied Covenant of Good Faith and Fair Dealing

In Arizona, a covenant of good faith and fair dealing is implied in every contract. *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986).

"[I]mplied terms are as much a part of a contract as are the express terms." *Wells Fargo Bank v. Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund, et al.,* 201 Ariz. 474, 490, 38 P.3d 12, 28 (2002).

"The general rule is that an implied covenant of good faith and fair dealing cannot directly contradict an express contract term." *Bike Fashion Corp. v. Kramer, et al.,* 202 Ariz. 420, 423, 46 P.3d 431, 434 (Ariz. App. 2002).

"Arizona law recognizes that a party can breach the implied covenant of good faith and fair dealing both by exercising express discretion in a way inconsistent with a party's reasonable expectations and by acting in ways not expressly excluded by the contract's terms but which nevertheless bear adversely on the party's reasonably expected benefits of the bargain." *Bike Fashion Corp. v. Kramer, et al.,* 202 Ariz. at 424.

Breach of the implied covenant of good faith and fair dealing must be proven by a preponderance of the evidence. *Schwartz v. Farmers Ins. Co. of Ariz.,* 166 Ariz. 33, 36, 800 P.2d 20, 23 (App. 1990).

Landlord acted in bad faith by (1) bringing "contrived" and "improperly motivated" allegations based on its need for the space occupied by [the tenant], (2) giving [the tenant] only 30 days to pay four years of back (and previously uncharged) rent,

(3) failing to invoice [the tenant] for fees as contemplated in the lease, and
(4) threatening to lock tenant out of his space after refusing his tender of almost $10,000. *Maleki v. Desert Palms Professional Properties, LLC,* 222 Ariz. 327, 333, 214 P.3d 415, 421 (App. 2009).

VI. Equitable Intervention

"[A] material provision of a lease may be breached in such a trivial manner that to enforce forfeiture would be unconscionable and inequitable." *Foundation Dev. Corp. v. Loehmann's,* 163 Ariz. 438, 446, 788 P. 2d 1189, 97 (1990).

The Arizona Supreme Court adopted the following standards from the *Restatement (Second) of Contracts § 241* for determining the "triviality or immateriality" of a breach in the landlord-tenant context:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
> (b) the extent to which the injured party can be adequately compensated [by damages] for the part of that benefit of which he will be deprived;
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account if all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Foundation Dev. Corp. v. Loehmann's, 163 Ariz. at 438, 446 citing *Restatement (Second) of Contracts § 241*.

A time of the essence provision is only one factor to be considered when determining if a breach is material. *Foundation Dev. Corp. v. Loehmann's,* 163 Ariz. at 450.

A tenant was "in compliance" with its lease and entitled to exercise an option to renew where the tenant had paid rent on 1,418 square feet as invoiced for three years but the landlord made an adjustment to 1,474 square feet and demanded
$8,043.70 in back rent after the tenant rejected the landlord's request tomove out so the landlord could expand. *Maleki v. Desert Palms Professional Properties, L.L.C.*, 222 Ariz. 327, 332.

"Under *Loehmann's,* a tenant's right to possession may not be conditioned on perfect performance of a commercial lease . . ." Maleki v. Desert Palms Professional Properties, L.L.C., *supra*.

"[A] lessee's failure to strictly comply with the terms of a lease's option to renew or purchase may be equitably excused only when the failure is caused by incapacity, fraud, misrepresentation, duress, undue influence, mistake, estoppel, or the lessor's waiver of its right to receive notice. [A]n optionee's non-negligent failure to timely exercise an option to new a lease or purchase leased property may be excused only it the three prerequisites of the Corbin rule are met, namely: (1) the delay was short, (2) the delay did not prejudice the lessor/optionor, and (3) the lessee/optionee would suffer a forfeiture or other substantial hardship if equitable relief is not granted." *Andrews v. Blake*, 205 Ariz 236, 247, 69 P.3d 7, 18 (2003).

VII. Assignment

"The general rule is that, in the absence of an express restriction by contract or statute, each tenant has the unrestricted right to assign or sublet as he wills." *TMC v. Zoslow*, 147 Ariz. 612, 712 P.2d 459 (App. 1985).

"A restraint on alienation without the consent of the landlord of the tenant's interest in the leased property is valid, but the landlord's consent to alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent." *TMC v. Zoslow* at 614, citing §15.2(2) of the *Restatement (Second) of Property* (1977).

"There is a difference between acting for a reason, and acting reasonably. A reason for refusing consent, in order for it to be reasonable, must be objectively sensible and of some significance. *See Restatement (Second) of Property* §15.2 Comment g (1977)." *TMC v. Zoslow* at 615.

"Examples of good faith, reasonable objections would include: inability to fulfill the terms of the lease, financial irresponsibility or instability, unsuitability of the premises for the intended use, or intended unlawful or undesirable use of the premises." *TMC v. Zoslow* at 615.

A landlord's reason for withholding consent, that a change from a men's to a women's clothing store was unacceptable, was not reasonable where the evidence was that the landlord would have approved the assignment for more rent, and tenant never operated as a men's and women's clothing store as required by the lease. *Magna Inv. & Develop. Corp. v. Brooks Fash*. 137 Ariz. 247, 669 P. 2d 1024 (App. 1983).

The validity of a landlord's failure to grant consent to assign was an appropriate defense to a forcible entry and detainer action. *Magna Inv. & Develop. Corp. v. Brooks Fash., supra*.

The burden is on the tenant to provide sufficient information for a landlord to determine whether consent will be given. *D'Oca v. Delfakis*, 130 Ariz. 470, 636 P. 2d 1252 (App. 1981).

Assignment without landlord's consent in violation of the lease is a material breach. *Lemons v. Knox*, 72 Ariz. 177, 232 P. 2d 383 (1951).

A landlord may reject a tenant to protect legitimate interests such as assurance of payment, proper care of property, use in a manner consistent with that permitted to the original tenant, but not for purely financial reasons. Consent should not be withheld unless the prospective tenant was unacceptable using the same standard applied to the original tenant. Reasonableness is objective, not subjective. *Campbell v. Westdahl*, 148 Ariz. 432, 715 P. 2d 288 (App. 1985).

VIII. Breach and Termination

A. Quiet Enjoyment

"We know of no case in this jurisdiction dealing with the duty of a landlord to police the activities of other tenants. Cases from other jurisdictions clearly indicate, however, that the landlord's obligation under a covenant of quiet enjoyment (which is imposed upon the landlord even though not within the terms of the lease (citations omitted) does not extend to the acts of other tenants or third parties unless such acts are performed on behalf of the landlord or by one claiming paramount title." *Thompson v. Harris*, 9 Ariz.App. at 345.

It was not a breach of the covenant of quiet enjoyment where a tenant's decorative rock business expanded to the point that it drew complaints from neighbors and had to be discontinued after having been found to be out of compliance with zoning and where there was no express warranty in the lease that such a use was permitted. *Dillon-Malik, Inc. v. Wactor,* 151 Ariz. 452, 728 P.2d 671 (Ariz.App. 1986).

B. Other Defaults

Failure to operate a restaurant was a breach where the lease obligated the tenant to "use said premises for conducting and operating therein a restaurant business and for no other purposes without prior consent of the Lessor" and contained a percentage rent provision. The tenant continued paying minimum rent but discontinued payment of percentage rent upon closure of the business. *China Doll Restaurant, Inc. v. Schweiger,* 119 Ariz. 315; 580 P. 2d 776 (App. 1978).

C. Avoiding the Lease

A contract will not be set aside due to mutual mistake of fact, unless the mistake is "a basic assumption on which both parties made the contract." *Emmons v. Superior Court (Warner Lambert Co.),* 192 Ariz. 509, 512, 968 P.2d 582, 585 (App. 1998).

The doctrine will not apply if the party seeking relief bore the risk of the mistake, i.e. proceeded to enter into the contract despite being aware that it had insufficient information. *Estate of Nelson v. Rice*, 198 Ariz. 563, 566, 12 P.3d 238, 241 (App.2000) (quoting *Restatement (Second) of Contracts § 154(b)(1979)).*

The doctrine of impracticability applies when, after a contract is entered into, events occur which preclude performance by a party, such as "death or incapacity of a person necessary for performance, destruction or a specific thing necessary for performance, and prohibition or prevention by law." *7200 Scottsdale Rd. Gen. Partners v. Kuhn Farm Machinery, Inc.*, 184 Ariz. 341, 345 909 P. 2d 408, 411 (App. 1995)

Frustration of purpose arises when "a change in circumstances makes one party's performance virtually worthless to the other . . ." *Id.*

D. Holding Over

"When a tenant continues in possession after the lease term, the landlord may elect to either treat the tenant as a trespasser and evict him, or to hold him as a tenant." *Pima County v. Testin,* 173 Ariz. 117, 119, 840 P.2d 293, 295 (App. 1992).

A holdover tenancy is month-to-month. ("When a lessee holds over and retains possession after expiration of the term of the lease without express contract with the owner, the holding over shall not operate to renew the lease for the term of the former lease, but thereafter the tenancy is from month-to-month." A.R.S.§ 33-342).

If tenant holds over with consent, the lease governs. *Testin,* 173 Ariz. at 119, 840 P.2d at 295.

E. Termination

A lease permitted the landlord to relet the premises without terminating the lease or to elect thereafter to terminate the lease and recover all damages. Division 2 Court of Appeals held that the tenant's options were to wait until end of term and recover amounts owing, or terminate and recover damages upon termination, and that filing a complaint to recover rent for the balance of term constituted election to terminate the lease. The landlord was entitled to recover rent through the date of termination, plus the difference, if any, between future rents due under the lease and the reasonable rental value of the premises. *Wingate v. Gin*, 148 Ariz. 289, 293, 714 P.2d 459, 263 (1986).

"[G]eneral principles of Arizona law [ ] provide that, if a lease is not terminated, the landlord may recover unpaid rent due prior to reletting the premises and future rent dues for the balance of the lease term, subject to landlord's duty to mitigation damages by reletting the premises." *Tempe Corporate Office v. Arizona Funding*, 167 Ariz. 394, 399, 807 P.2d 1130 (App. 1991).

Where lease provided that remedies were "in addition to all other legal remedies," landlord's remedies set forth in the lease were not exclusive. *Roosen v. Schaffer*, 127 Ariz. 346, 349, 621 P.2d 33, 36 (App. 1980).

F. Duty to Mitigate

The landlord's duty to mitigate damages requires "reasonable efforts to rent . . . at a fair rental." *Stewart Title & Trust of Tucson v. Pribbeno*, 129 Ariz. 15, 16, 628 P. 2d 52, 53 (App. 1981), quoting *Duschoff v. Phoenix Co.*, 22 Ariz.App. 445, 449, 528 P.2d 637, 641 (1974); *Tempe Corporate Office v. Arizona Funding*, 167 Ariz. 394, 807 P.2d 1130 (App. 1991).

The party claiming the benefit of the doctrine of avoidable consequences has the burden of proving that mitigation was probable. *Stewart Title & Trust of Tucson v. Pribbeno*, 129 Ariz. at 15 - 16.

Whether a landlord acts reasonably is determined based on the totality of the circumstances. *Duschoff v. Phoenix Co.*, 22 Ariz.App. 445, 449, 528 P.2d 637, 641 (1974).

Compliance with the duty is a question for the trier of fact. The key is reasonableness. *Fairway Builders, Inc. v. Malouf Towers Rental Co., Inc., 124 Ariz. 242, 603 P.2d 513 (App.1979).*

IX. Piercing the Corporate Veil

"The law regarding corporate entity and the piercing of the corporate veil is more easily stated than applied." *Dietel v. Day,* 16 Ariz.App. 206, 208, 492 P.2d 455, 457 (App. 1972).

"The corporate fiction will be disregarded when the corporation is the alter ego or business conduit of a person, and when to observe the corporation would work an injustice. The alter ego status is said to exist when there is such unity of interest and ownership that the separate personalities of the corporation and owners cease to exist." *Dietel v. Day,* 16 Ariz.App. at 208.

"But it must be noted that a legitimate purpose of incorporation is to avoid personal liability and if the corporate fiction is too easily ignored and personal liability imposed, then incorporation is discouraged." *Dietel v. Day,* 16 Ariz.App. at 208.

"Corporate status will not be lightly disregarded." *Chapman v. Field,* 124 Ariz. 100. 102, 602 P.2d 481, 483 (1979).

"The courts have conditioned recognition of corporateness on compliance with two requirements: (1) business must be conducted on a corporate and not a personal basis; (2) the enterprise must be established on an adequate financial basis." *Ize Nantan Bagowa, Ltd. v. Scalia,* 118 Ariz. 439, 442, 577 P.2d 725, 728 (App. 1978).

In order for undercapitalization to be a basis for piercing the corporate veil, a plaintiff must show that the corporation was undercapitalized at the time of its formation, not at the time of the claim. *Bischofshausen, etc v. D. W. Jaquays Min.,* 145 Ariz. 204, 209, 900 P.2d 902, 907 (1985), *Norris Chemical Company v. Ingram,* 139 Ariz. 544, 679 P.2d 567 (App. 1984).

Failure to follow corporate formalities "in the same informal manner as is usually seen in closely held corporations" may be insufficient without more to pierce the corporate veil. *Bischofshausen, etc v. D. W. Jaquays Min.,* 145 Ariz. at 208.

Evidence of failure to follow corporate formalities was insufficient to pierce the corporate veil where "there is not a showing of fraud on the part of [the defendants], nor is there any indication that the [plaintiffs] were misled." *Chapman v. Field,* 124 Ariz. at 102.

Unity of control was found where five of seven factors - "stock ownership by the parent; common officers or directors; financing of subsidiary by the parent; payment of salaries and other expenses of subsidiary by the parent; failure of subsidiary to maintain formalities of separate corporate existence; similarity of logo; and plaintiff's lack of knowledge of subsidiary's separate corporate existence" - were present, and interrelationship between the two corporations may promote fraud and injustice. *Gatecliff v. Great Republic Life Ins.,* 170 Ariz. 34, 37, 821 P.2d 725, 726 (1991).

To be responsible for actions of its subsidiary, parent corporation must exercise substantially total control so that subsidiary becomes mere instrumentality. *Taeger v. Catholic Family and Community Servs.,* 196 Ariz. 285, 995 P.2d 721 (App. 285).

Attachment 1

ARIZONA COMMERCIAL LANDLORD TENANT STATUTES

Obligations and Liabilities of Tenants

33-321. Maintenance of premises

A tenant shall exercise diligence to maintain the premises in as good condition as when he took possession, ordinary wear and tear excepted.

33-322. Damage to premises; classification

Removal or intentional and material alteration or damage of any part of a building, the furnishings thereof, or any permanent fixture, by or at the instance of the tenant, without written permission of the landlord or his agent, is a class 2 misdemeanor.

33-323. Liability of person in possession of land for rent due thereon

Every person in possession of land out of which rent is due is liable for the amount or proportion of rent due from the lands in his possession, although it is only a part of the land originally demised, without depriving the landlord of other legal remedies for recovery of rent.

33-324. Denial of landlord's title by lessee in possession prohibited

When a person enters into possession of real property under a lease, he may not, while in possession, deny the title of his landlord in an action brought upon the lease by the landlord or a person claiming under him.

Termination of Tenancies

33-341. Termination of tenancies

A. A tenancy from year to year terminates at the end of each year unless written permission is given to remain for a longer period. The permission shall specify the time the tenant may remain, and upon termination of such time the tenancy expires.

B. A lease from month to month may be terminated by the landlord giving at least ten days notice thereof. In case of nonpayment of rent notice is not required.

C. A tenant from month to month shall give ten days notice, and a tenant on a semimonthly basis shall give five days notice, of his intention to terminate possession of the premises. Failure to give the notice renders the tenant liable for the rent for the ensuing ten days.

D. When a tenancy is for a certain period under verbal or written agreement, and the time expires, the tenant shall surrender possession. Notice to quit or demand of possession is not then necessary.

E. A tenant who holds possession of property against the will of the landlord, except as provided in this section, shall not be considered a tenant at sufferance or at will.

33-342. Effect of lessee holding over

When a lessee holds over and retains possession after expiration of the term of the lease without express contract with the owner, the holding over shall not operate to renew the lease for the term of the former lease, but thereafter the tenancy is from month to month.

33-343. Premises rendered untenantable without fault of lessee; nonliability of tenant for rent; right to quit premises

The lessee of a building which, without fault or neglect on the part of the lessee, is destroyed or so injured by the elements or any other cause as to be untenantable or unfit for occupancy, is not liable thereafter to pay rent to the lessor or owner unless expressly provided by written agreement, and the lessee may thereupon quit and surrender possession of the premises.

Remedies of Landlord

33-361. Violation of lease by tenant; right of landlord to reenter; summary action for recovery of premises; appeal; lien for unpaid rent; enforcement

A. When a tenant neglects or refuses to pay rent when due and in arrears for five days, or when a tenant violates any provision of the lease, the landlord or person to whom the rent is due, or the agent of the landlord or person to whom the rent is due, may reenter and take possession, or, without formal demand or reentry, commence an action for recovery of possession of the premises.

B. The action shall be commenced, conducted and governed as provided for actions for forcible entry or detainer and shall be tried not less than five nor more than thirty days after its commencement. In addition to determining the right to actual possession, the court may assess damages, attorney fees and costs pursuant to section 12-1178.

C. If judgment is given for the plaintiff, the defendant, in order to perfect an appeal, shall file a bond with the court in an amount fixed and approved by the court and payable to the clerk of the superior court, conditioned that the appellant will prosecute the appeal to effect and will pay the rental value of the premises pending the appeal and all damages, attorney fees, costs and rent adjudged against the appellant.

D. If the tenant refuses or fails to pay rent owing and due, the landlord shall have a lien upon and may seize as much personal property of the tenant located on the premises and not exempted by law as is necessary to secure payment of the rent. If the rent is not paid and satisfied within sixty days after seizure as provided for in this section, the landlord may sell the seized personal property in the manner provided by section 33-1023.

E. When premises are sublet or the lease is assigned, the landlord shall have a like lien against the sublessee or assignee as the landlord has against the tenant and may enforce it in the same manner.

33-362. Landlord's lien for rent

A. The landlord shall have a lien on all property of his tenant not exempt by law, placed upon or used on the leased premises, until the rent is paid. The lien shall not secure the payment of rent accruing after the death or bankruptcy of the lessee, or after an assignment for the benefit of the lessee's creditors.

B. The landlord may seize for rent any personal property of his tenant found on the premises, but the property of any other person, although found on the premises, shall not be liable therefor. If the tenant fails to allow the landlord to take possession of such property, the landlord may reduce the property to possession by an action to recover possession, and may hold or sell the property for the payment of the rent.

C. The landlord shall have a lien for rent upon crops grown or growing upon the leased premises, whether the rent is payable in money, articles of property or products of the premises, and also for the faithful performance of the terms of the lease, and the lien shall continue for a period of six months after expiration of the term of the lease.

D. When premises are sublet, or when the lease is assigned, the landlord shall have the same lien against the sublessee or assignee as he has against the tenant and may enforce the lien in like manner.

33-381. Limitation

This chapter shall apply to all landlord-tenant relationships except for landlord-tenant relationships arising out of the rental of dwelling units which shall be governed by chapter 10 or 11 of this title.

Forcible Entry and Detainer

12-1171. Acts which constitute forcible entry or detainer

A person is guilty of forcible entry and detainer, or of forcible detainer, as the case may be, if he:

1. Makes an entry into any lands, tenements or other real property, except in cases where entry is given by law.

2. Makes such an entry by force.

3. Willfully and without force holds over any lands, tenements or other real property after termination of the time for which such lands, tenements or other real property were let to him or to the person under whom he claims, after demand made in writing for the possession thereof by the person entitled to such possession.

12-1172. Definition of forcible entry

A "forcible entry," or entry where entry is not given by law within the meaning of this article, is:

1. An entry without the consent of the person having the actual possession.

2. As to a landlord, an entry upon the possession of his tenant at will or by sufferance, whether with or without the tenant's consent.

12-1173. Definition of forcible detainer; substitution of parties

There is a forcible detainer if:

1. A tenant at will or by sufferance or a tenant from month to month or a lesser period whose tenancy has been terminated retains possession after his tenancy has been terminated or after he receives written demand of possession by the landlord.

2. The tenant of a person who has made a forcible entry refuses for five days after written demand to give possession to the person upon whose possession the forcible entry was made.

3. A person who has made a forcible entry upon the possession of one who acquired such possession by forcible entry refuses for five days after written demand to give possession to the person upon whose possession the first forcible entry was made.

4. A person who has made a forcible entry upon the possession of a tenant for a term refuses to deliver possession to the landlord for five days after written demand, after the term expires. If the term expires while a writ of forcible entry applied for by the tenant is pending, the landlord may, at his own cost and for his own benefit, prosecute it in the name of the tenant.

12-1173.01. Additional definition of forcible detainer

A. In addition to other persons enumerated in this article, a person in any of the following cases who retains possession of any land, tenements or other real property after he receives written demand of possession may be removed through an action for forcible detainer filed with the clerk of the superior court in accordance with this article:

1. If the property has been sold through the foreclosure of a mortgage, deed of trust or contract for conveyance of real property pursuant to title 33, chapter 6, article 2.

2. If the property has been sold through a trustee's sale under a deed of trust pursuant to title 33, chapter 6.1.

3. If the property has been forfeited through a contract for conveyance of real property pursuant to title 33, chapter 6, article 3.

4. If the property has been sold by virtue of an execution and the title has been duly transferred.

5. If the property has been sold by the owner and the title has been duly transferred.

B. The remedies provided by this section do not affect the rights of persons in possession under a lease or other possessory right which is superior to the interest sold, forfeited or executed upon.

C. The remedies provided by this section are in addition to and do not preclude any other remedy granted by law.

12-1175. Complaint and answer; service and return

A. When a party aggrieved files a complaint of forcible entry or forcible detainer, in writing and under oath, with the clerk of the superior court or a justice of the peace, summons shall issue no later than the next judicial day.

B. The complaint shall contain a description of the premises of which possession is claimed in sufficient detail to identify them and shall also state the facts which entitle the plaintiff to possession and authorize the action.

C. The summons shall be served at least two days before the return day, and return made thereof on the day assigned for trial.

12-1176. Demand for jury; trial procedure

A. If a jury trial is requested by the plaintiff, the court shall grant the request. If the proceeding is in the superior court, the jury shall consist of eight persons, and if the proceeding is in the justice court, the jury shall consist of six persons. The trial date shall be no more than five judicial days after the aggrieved party files the complaint.

B. If the plaintiff does not request a jury, the defendant may do so on appearing and the request shall be granted.

C. The action shall be docketed and tried as other civil actions.

12-1177. Trial and issue; postponement of trial

A. On the trial of an action of forcible entry or forcible detainer, the only issue shall be the right of actual possession and the merits of title shall not be inquired into.

B. If a jury is demanded, it shall return a verdict of guilty or not guilty of the charge as stated in the complaint. If a jury is not demanded the action shall be tried by the court.

C. For good cause shown, supported by affidavit, the trial may be postponed for a time not to exceed three calendar days in a justice court or ten calendar days in the superior court.

12-1178. Judgment; writ of restitution; limitation on issuance; criminal violation; notice

A. If the defendant is found guilty of forcible entry and detainer or forcible detainer, the court shall give judgment for the plaintiff for restitution of the premises, for all charges stated in the rental agreement and for damages, attorney fees, court and other costs and, at the plaintiff's option, all rent found to be due and unpaid through the periodic rental period, as described in section 33-1314, subsection C, as provided for in the rental agreement, and shall grant a writ of restitution. The person designated by the judge to prepare the judgment shall ensure that the defendant's social security number is not contained on the judgment.

B. If the defendant is found not guilty of forcible entry and detainer or forcible detainer, judgment shall be given for the defendant against the plaintiff for damages, attorney fees and court and other costs, and if it appears that the plaintiff has acquired possession of the premises since commencement of the

action, a writ of restitution shall issue in favor of the defendant.

C. No writ of restitution shall issue until the expiration of five calendar days after the rendition of judgment. The writ of restitution shall be enforced as promptly and expeditiously as possible. The issuance or enforcement of a writ of restitution shall not be suspended, delayed or otherwise affected by the filing of a motion to set aside or vacate the judgment or similar motion unless a judge finds good cause.

D. A defendant who is lawfully served with a writ of restitution and who remains in or returns to the dwelling unit, as defined in section 33-1310, or remains on or returns to the mobile home space, as defined in section 33-1409, or the recreational vehicle space, as defined in section 33-2102, without the express permission of the owner of the property or the person with lawful control of the property commits criminal trespass in the third degree pursuant to section 13-1502.

E. If the defendant is found guilty of forcible entry and detainer or forcible detainer, the court shall give the defendant notice that a defendant who is lawfully served with a writ of restitution and who remains in or returns to the dwelling unit or remains on or returns to the mobile home space or the recreational vehicle space without the express permission of the owner of the property or the person with lawful control of the property commits criminal trespass in the third degree pursuant to section 13-1502.

12-1179. Appeal to superior court; notice; bond

A. Either party may appeal from a justice court to the superior court in the county in which the judgment is given by giving notice as in other civil actions within five calendar days after rendition of the judgment pursuant to this section. The appeal shall be filed in accordance with this section, and the time to appeal shall not be extended or otherwise affected by the filing of a motion to set aside or vacate the judgment or similar motion.

B. A party seeking to appeal a judgment shall file with the notice of appeal a bond for costs on appeal. The justice of the peace shall set the bond in an amount sufficient to cover the costs on appeal. The bond shall be payable to the clerk of the justice court. If a party is unable to file a bond for costs on appeal, the party shall file with the justice court a notice of appeal along with an affidavit stating that the party is unable to give bond for costs on appeal and the reasons therefor. Within five court days after the filing of the affidavit, any other party may file, in the justice court, objections to the affidavit. The justice of the peace shall hold a hearing on the affidavit and objections within five court days thereafter. If the justice court sustains the objections, the appellant shall file, within five court days thereafter, a bond for costs on appeal as provided for in this section or in such lesser amount as ordered by the justice court.

C. A party seeking to appeal a judgment may stay the execution of either the judgment for possession or any judgment for money damages by filing a supersedeas bond. The justice court shall hold a hearing on the motion within five court days after the parties advise the justice court of their failure to stipulate on the amount of the bond. The stay is effective when the supersedeas bond or bonds are filed.

D. The party seeking to stay the execution of the judgment for possession shall file a supersedeas bond in the amount of rent accruing from the date of the judgment until the next periodic rental date, together with costs and attorney fees, if any. The tenant shall pay to the clerk of the justice

court, on or before each periodic rental due date during the pendency of the appeal, the amount of rent due under the terms of the lease or rental agreement. Such amounts shall be made payable by the justice court to the owner, landlord or agent as they accrue to satisfy the amount of periodic rent due under the lease or rental agreement. In all cases where the rent due under the terms of the lease or rental agreement is paid through the justice court as set forth in this subsection, the order of the court may include a one-time handling fee in the amount of ten dollars to be paid by the party seeking to stay the execution of the judgment for possession. In no event shall the amounts paid per month exceed the amount of monthly rent charged by the owner for the premises. If the tenant raises habitability as provided for in sections 33-1324 and 33-1364 as an affirmative defense to the nonpayment of rent or the tenant has filed a counterclaim asserting a habitability issue, the justice court shall retain all money paid under this subsection pending a final judgment.

E. If during the pendency of the appeal the party seeking to stay the execution of the judgment for possession fails to pay the rent on the periodic rental due date, the party in whose favor a judgment for possession was issued may move the justice court to lift the stay of the execution of the judgment for possession. The justice court shall hear the motion to lift the stay of the execution of the judgment for possession and release accrued monies, if any, within five court days from the failure of the party to pay the periodic rent due under the terms of the lease or rental agreement. If the judgment appealed from involves a finding of a material and irreparable breach pursuant to section 33-1368 or section 33-1476, subsection D, paragraph 3 the justice court shall treat it as an emergency matter and conduct a hearing on a motion to lift the stay of execution of the writ of restitution within three days. If the third day is a Saturday, Sunday or other legal holiday, the hearing shall be held on the next day thereafter.

F. The party seeking to stay the execution of the judgment for money damages shall file a supersedeas bond in the amount of the judgment, together with costs and attorney fees, if any. The amount of the bond shall be fixed by the court and payable to the clerk of the justice court.

12-1180. Stay of proceedings on judgment; record on appeal

When the appeal bond is filed and approved, the justice of the peace shall stay further proceedings on the judgment and immediately prepare a list of all entries on the justice's docket in the action and transmit it, together with all the original papers, to the clerk of the superior court of the county in which the trial was had.

12-1181. Trial and judgment on appeal; writ of restitution

A. On trial of the action in the superior court, appellee, if out of possession and the right of possession is adjudged to him, shall be entitled to damages for withholding possession of the premises during pendency of the appeal and the court shall also render judgment in favor of appellee and against appellant and the sureties on his bond for damages proved and costs.

B. The writ of restitution or execution shall be issued by the clerk of the superior court and shall be executed by the sheriff or constable as in other actions.

12-1182. Appeal to supreme court; stay and bond

A. In a forcible entry or forcible detainer action originally commenced in the superior court, an appeal may be taken to the supreme court as in other civil actions.

B. The appeal, if taken by the party in possession of the premises, shall not stay execution of the judgment unless the superior court so orders, and appellant shall file a bond in an amount fixed and approved by the court, conditioned that appellant will prosecute the appeal to effect and will pay the rental value of the premises pending the appeal and all damages, costs, and rent adjudged against him by the superior court or the supreme court.

12-1183. Proceedings no bar to certain actions

The proceedings under a forcible entry or forcible detainer shall not bar an action for trespass, damages, waste, rent or mesne profits.