Not Reported in Cal.Rptr.3d, 2011 WL 6062019 (Cal.App. 2 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2011 WL 6062019 (Cal.App. 2 Dist.))

Court of Appeal, Second District, Division 7, California.
Nancy **KAZAR**, Plaintiff and Appellant,
v.
SAN GABRIEL PLAZA, INC. et al., Defendants and Respondents.

No. B227081.
(Los Angeles County Super. Ct. No. BC389392).
Dec. 7, 2011.

APPEAL from a judgment of the Superior Court of Los Angeles County, Kevin C. Brazile, Judge. Affirmed.
Mesisca, Riley & Kreitenberg, Dennis P. Riley, Rena E. Kreitenberg and Steven C. De Vore for Plaintiff and Appellant.

Wong & Mak and Steven W. Hashimoto for Defendants and Respondents.

JACKSON, J.

INTRODUCTION

***1** Plaintiff Nancy Kazar appeals from a judgment entered in favor of defendants San Gabriel Plaza, Inc., Victor Van and William Fuh. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff's corporation, SUR Enterprises, Inc. (SUR), entered into a lease (Lease) with defendant San Gabriel Plaza, Inc. (Plaza) for commercial space (leased premises) at 3010 San Gabriel Boulevard in Rosemead to operate a Quiznos restaurant. Plaintiff signed the Lease on behalf of SUR, effective September 22, 2003; defendant Victor Van (Van) signed as the president of Plaza. The term of the Lease was from January 2004 through December 2013. Plaintiff and Van also signed The Quizno's Franchise Company Required Addendum (Quiznos addendum) which, by its terms, was attached to and made a part of the Lease.

In May 2006, plaintiff sold the franchise and SUR to her daughter, Zahida Jariullah (Jariullah), pursuant to the terms of their Asset Purchase Agreement. Of the $88,000 purchase price, Jariullah paid plaintiff $28,000 in cash. For the remaining $60,000, plaintiff entered into a security agreement with SUR that the debt would be payable at the interest rate of seven percent and payment would be secured by the restaurant appliances, furniture and equipment as collateral. The franchisor gave written consent to the franchise transfer. Plaintiff gave written notice to Plaza and Van of the transfer of the franchise, the Lease, equipment, furniture and fixtures to Jariullah.

Jariullah attempted to sell the restaurant business to an unidentified third party in January or February 2007. The sale was never finalized. In February 2007, plaintiff filed a Uniform Commercial Code Financing Statement (UCC–1 financing statement) listing the collateral and identifying the debtor as SUR. The third party operated the restaurant for a time. During that time, Jariullah was not present on the premises and was not operating the restaurant. Ultimately the third party left the premises without notice, having not paid rent, his employees, or the franchise fees. Jariullah returned to the premises and resumed operating the business. The rent remained unpaid. After Van noted that the rent was in arrears and discovered that the restaurant had been closed, Plaza served plaintiff with a notice to pay rent or quit dated August 31, 2007.

SUR filed for Chapter 7 bankruptcy protection in September 2007. In October, the bankruptcy court granted Plaza relief from the automatic stay in order to proceed in state court to file an unlawful detainer suit against SUR. A few weeks later, the bankruptcy court granted plaintiff relief from the automatic stay to pursue her remedies as to her security interest.[FN1]

> FN1. The stay order of the bankruptcy court did not include a determination that plaintiff was entitled to the collateral.

Plaintiff's counsel requested access to the premises in December. When Van and defendant William Fuh (Fuh), another Plaza officer, refused to allow access, plaintiff's counsel wrote to them again requesting access. Plaza's attorney wrote to plaintiff that Plaza refused to provide access to the collateral until plaintiff paid the past due rent.

***2** In November 2007, defendants entered into a

lease agreement with the owners of a new restaurant called North Shore Hawaiian Barbecue. The owners paid defendants $30,000 for some of the improvements SUR had made to the premises.

Plaintiff filed the instant action against defendants in April 2008. She alleged she had a security interest in personal property "belonging to" her, including, but not limited to, "a cash register, computer equipment, furniture and fixtures and restaurant equipment and appliances" (the collateral, as listed on plaintiff's UCC–1 financing statement), and defendants wrongfully claimed and exercised ownership over the property. Plaintiff alleged causes of action for conversion of the collateral (first), malicious impairment of security interest (second), and unjust enrichment (third).

In May, Van served plaintiff with a notice of the right to reclaim property abandoned when SUR vacated the leased premises, provided that plaintiff take possession of the property within a specified period pursuant to Civil Code section 1988. Attached was a list of restaurant equipment and furnishings located at the leased premises. Defendants auctioned off some of the restaurant equipment in July. The bankruptcy case closed in March 2009.

The instant case then went to trial by jury. At the close of plaintiff's case in chief, defendants filed a motion for directed verdict, as did plaintiff. At the hearing on the motions, the trial court gave its tentative decision, with the supporting findings, to grant defendants' motion. The court subsequently adopted it as the final decision. The court found that plaintiff did not possess and had no ownership interest in the collateral as required to prevail on the causes of action for conversion and impairment of security interest. The court ruled that unjust enrichment was a remedy, not a cause of action, and, therefore, plaintiff could not prevail on her third cause of action. The court entered judgment in favor of defendants as to all causes of action.

DISCUSSION

Plaintiff contends that the trial court erred in finding that she did not have a right to possession or ownership of the collateral. Plaintiff also claims the court erred in ruling that her cause of action for unjust enrichment did not constitute a cause of action, but rather that unjust enrichment was a remedy. We disagree.

A. *Standard of Review*

A judgment based upon a directed verdict is subject to de novo review on appeal. (*Baker v. American Horticulture Supply, Inc.* (2010) 186 Cal.App.4th 1059, 1072.) If the trial court determines that, as a matter of law, the plaintiff's evidence is insufficient to permit a judgment in her favor, the defendant is entitled to a directed verdict. (*Ibid.*) Since a motion for a directed verdict " ' " 'is in the nature of a demurrer to the evidence,' " ' " the review of a directed verdict is governed by rules similar to those applicable to review of a demurrer. (*Ibid.*) In determining the sufficiency of the plaintiff's evidence, the court may not consider credibility or weigh the evidence. We interpret the evidence most favorably to the plaintiff, accepting the plaintiff's evidence as true, disregarding conflicting evidence, and resolving all inferences and doubts in the plaintiff's favor. (*Ibid.*)

B. *Conversion and Malicious Impairment of Security Interest*

***3** Plaintiff first contends that the trial court erred in finding that she had no superior rights of ownership or possession of the personal property and that, therefore, she could not prove an essential element of her causes of action for conversion and for malicious impairment of her security interest. Plaintiff is incorrect.

"To establish a conversion, plaintiff must establish an actual interference with [her] ownership or right of possession. [Citation .] Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, [s]he cannot maintain an action for conversion. [Citation.]" (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 610–611; accord, *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 136–137.) A plaintiff must prove either that she was the owner and had the immediate right to possession of the property when the alleged conversion took place, or that she had actual possession of it at that time. (*General Motors A. Corp. v. Dallas* (1926) 198 Cal. 365, 370.)

It is undisputed that plaintiff did not have possession of the collateral at issue. Plaintiff admitted she had transferred her ownership interest in the property to her daughter, Jariullah. Plaintiff stated that she sold

Not Reported in Cal.Rptr.3d, 2011 WL 6062019 (Cal.App. 2 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2011 WL 6062019 (Cal.App. 2 Dist.))

her corporation, SUR, as well as the Quiznos franchise and the associated equipment and furniture to Jariullah. By letter dated July 28, 2006, she informed defendants that she had "fully transferred" the franchise, equipment and furniture, *as well as the Lease*, to Jariullah.

Based on the foregoing, the trial court properly ruled that plaintiff had no ownership, immediate right to possession, or possession of the collateral. Accordingly, plaintiff could not maintain a cause of action for conversion of the collateral. (*Moore v. Regents of University of California, supra,* 51 Cal.3d at pp. 136–137; *General Motors A. Corp. v. Dallas, supra,* 198 Cal. at p. 370.)

Not only did plaintiff lack the requisite ownership or possession of the collateral to maintain a cause of action for conversion, but, as we discuss more fully below, plaintiff no longer held an enforceable security interest in the collateral that would support her cause of action for malicious impairment of security interest. A holder of a security interest in personal property, such as the collateral in this case, "may maintain an action for the impairment of a security by a third party tortfeasor." (*Baldwin v. Marina City Properties, Inc.* (1978) 79 Cal.App.3d 393, 403.) In order to prevail on the action, a plaintiff must prove not only that she is the holder of the security interest, but also that the value of the security has been impaired resulting in damages. (*Id.* at pp. 403–404.)

As we previously noted, in connection with the sale of the business to Jariullah, plaintiff entered into a security agreement with SUR. SUR granted plaintiff a security interest in the collateral to ensure that she received the remaining $60,000 of the purchase price. In support of her claim of an ownership right in the collateral superior to that of defendants, plaintiff relies heavily upon the Quiznos addendum incorporated in the Lease at the time she signed the documents. Whether the Quiznos restaurant was operated by plaintiff or Jariullah, SUR remained the "Tenant" in the Lease. Paragraph 7, Tenant Financing, stated: "Tenant shall have the right ... to grant and assign a ... security interest in all of Tenant's personal property located within the Premises to its lenders ... and any lien of Landlord against Tenant's personal property (whether by statute or under the terms of this Lease) shall be subject and *subordinate to such security interest.* Landlord shall execute such documents as Tenant's lenders may reasonably request in connection with any such financing ." (Italics added.)

***4** To interpret the addendum provision, we employ basic principles of contract interpretation. "The mutual intention of the parties at the time the contract is formed governs interpretation. (Civ.Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (Civ.Code, § 1639.) The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' (Civ.Code, § 1644) will control judicial interpretation. (Civ.Code, § 1638.)" (*Nissel v. Certain Underwriters at Lloyd's of London* (1998) 62 Cal.App.4th 1103, 1110 .)

Giving the words in the addendum provision their ordinary meaning, we interpret the provision as giving a lender, such as plaintiff, to whom SUR granted a security interest, a right to enforce the security interest which was superior to the right of Plaza, to enforce any lien it held against SUR. In the instant action, defendants are not asserting a lien against SUR. There are no competing claims between plaintiff's security interest and any lien held by defendants. Thus, giving the addendum provision a literal interpretation, it does not apply under the facts presented in this action.

Even if we were to interpret the Quiznos addendum provision broadly to include defendants' competing claim of ownership of the collateral, the addendum provision would not supersede the provisions of the Lease as a whole. As defendants point out, the law of real estate supersedes Uniform Commercial Code security interest law for determining the ownership of improvements, alterations, and fixtures on leased premises. (*Goldie v. Bauchet Properties* (1975) 15 Cal.3d 307, 317–318.) One who lends to a tenant and secures the loan with the tenant's personal property on the leased premises can acquire no rights in the property greater than the tenant has. (See *Rinaldi v. Goller* (1957) 48 Cal.2d 276, 281 [chattel mortgagee can acquire no rights greater that the tenant who was the mortgagor].) The abandonment of leased premises by the tenant and re-entry by the landlord terminates the tenant's right to remove improvements and defeats the lien of a security interest holder. (*Id.* at pp. 280–281.)

Under real estate law, where there is a written lease, the rights of the tenant in personal property in relation to the rights of the landlord to the premises are determined by the intent of the parties as expressed in the terms of the lease. (*Goldie v. Bauchet Properties, supra*, 15 Cal.3d at p. 318; see *Rinaldi v. Goller, supra*, 48 Cal.2d at p. 280; *Wilmerton v. Morton* (1946) 74 Cal.App.2d 891, 894–895.) Accordingly, we look to the Lease provisions governing ownership of the collateral and apply the principles of contract interpretation we previously discussed.

Under the terms of the Lease, the tenant must continuously operate its business on the leased premises for at least 54 hours per week. If the tenant vacates the leased premises, the landlord may deem all remaining tenant's personal property, including the tenant's trade fixtures, to be abandoned. [FN2] Plaintiff testified that there was a period that the third-party prospective buyer did not continuously operate the restaurant but rather walked away from it and vacated the premises. It is undisputed that SUR did not operate the restaurant and vacated the premises prior to filing for bankruptcy. Under such circumstances, Plaza was entitled to deem SUR's personal property to be abandoned. As we previously noted, the abandonment of leased premises by the tenant and re-entry by the landlord terminates the tenant's right to remove improvements and defeats the lien of a security interest holder, such as plaintiff. (*Rinaldi v. Goller, supra*, 48 Cal.2d at pp. 280–281.)

> FN2. Paragraph 12 of the Lease states that "Tenant shall continuously use the demised premises ... no less than 54 hours per week. [¶] Tenant shall not vacate or abandon the demised premises at any time during the term of this Lease." The paragraph further provides that, if the tenant abandons, vacates or surrenders the leased premises or loses the right of possession by operation of law, "any of Tenant's personal property left on the demised premises shall be deemed to be abandoned, at the option of the Landlord." "Tenant's personal property" is defined in Paragraph 38 as "Tenant's equipment, furniture, merchandise, and movable property placed in the demised premises by Tenant, including Tenant's trade fixtures as defined here." The definition for "Tenant's trade fixtures" is "any property installed in or on the demised premises by Tenant for purposes of trade, manufacture, ornament, or related use."

***5** The Lease further provides that, upon termination of the Lease, all alterations and improvements, including fixtures (other than trade fixtures), become the property of the landlord.[FN3] Upon termination of the Lease, title vests in the landlord to all of the tenant's personal property and alterations that the tenant does not remove from the premises upon at least three days notice from the landlord.[FN4]

> FN3. Lease paragraphs 13 and 33 provide that, upon termination of the Lease, any alterations and improvements made by the tenant must remain on the premises and are surrendered to the landlord, except alterations which the tenant has the right or obligation to remove under other provisions of the Lease. Under the definitions given in paragraph 38, "alterations" and "improvements" each include fixtures other than "Tenant's trade fixtures." Paragraph 5 of the construction rider which is part of the Lease states: "Tenant hereby acknowledges that all fixed improvements to the leased premises shall be the property of the Landlord at the expiration of the lease whether paid for by the Tenant or the Landlord."

> FN4. Paragraph 33 of the Lease provides that, after expiration or termination of the Lease, if Landlord gives Tenant three days prior notice, title vests in Landlord to any of Tenant's personal property or alterations that are not removed at the end of the notice period.

Plaintiff claims that the foregoing Lease provisions do not apply, in that Plaza never terminated the Lease by obtaining an unlawful detainer judgment. Defendants assert that obtaining such a judgment was not required in order to terminate the Lease. Defendants' 10–day notice to pay or quit advised SUR to pay the rent in arrears or surrender the premises to Plaza.[FN5] In effect, the notice constituted notice that the Lease would terminate if the rent was not paid within the 10–day period. A reasonable inference from SUR's actions is that SUR chose to surrender the premises without requiring a court order to do so, and thereby

Not Reported in Cal.Rptr.3d, 2011 WL 6062019 (Cal.App. 2 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2011 WL 6062019 (Cal.App. 2 Dist.))

terminated the Lease. Lease paragraph 25, A., states that if the tenant vacates or abandons the premises or fails to pay rent when due, the tenant is in material default and has breached the Lease.

> FN5. Plaintiff argues the notice was not effective, in that defendants sent the notice to her, but she no longer owned SUR. We are not persuaded. There is no evidence that defendants ever received notice of a change in the name and address of the person designated to receive notices in the Lease or that plaintiff otherwise notified defendants that she would no longer accept notices on behalf of SUR. Lease paragraph 36 requires a party to notify the other party of any change in address for notices. Defendants reasonably relied upon the notice provision in the Lease.

Civil Code section 1951.2, subdivision (a), states that "if a lessee of real property breaches the lease and abandons the property before the end of the term ..., the lease terminates." It was not necessary to obtain an unlawful detainer judgment in order for Plaza lawfully to deem the Lease to be terminated and regain possession of the premises. Where a tenant has surrendered possession, the landlord need not obtain an unlawful detainer judgment to regain possession. (*Costello v. Martin Bros.* (1925) 74 Cal.App. 782, 786.) A surrender of possession by the tenant arises by operation of law " 'where a landlord resumes possession with the acquiescence of the tenant.' " (*Kulawitz v. Pacific etc. Paper Co.* (1944) 25 Cal.2d 664, 676; accord, *Dorich v. Time Oil Co.* (1951) 103 Cal.App.2d 677, 682–683.) " 'An acquiescence in the surrender ... of the premises is perhaps best evidenced by the [landlord's] taking possession of the property and assuming over it again all the authority of an owner in possession.' " (*Kulawitz, supra*, at p. 677.) That is what occurred here. After SUR breached the lease by not paying rent and ceased doing business at the premises, Plaza took possession of the premises, solicited a new tenant, and entered into a lease with the new tenant and SUR undertook no measures to regain possession of the property.

In any event, even if the Lease did not terminate earlier, the Lease terminated by operation of law upon the expiration of the period during which the bankruptcy court had authority to issue an order assuming the Lease in order to keep it in effect. Where a lessee/debtor files a voluntary bankruptcy petition, there is a statutory period during which the bankruptcy court may enter an order assuming the lease, rejecting it, or extending the deadline for making such an order. An order for assumption or rejection of a lease must occur "within 60 days after the order for relief." (11 U.S.C. § 365(d)(1).) Generally, the voluntary filing of a bankruptcy petition " 'constitutes an order for relief.' " (*In re Elm Inn, Inc.* (9th Cir.1991) 942 F.2d 630, 633.) If the court makes no order, "[b]y operation of law, the debtor's possessory interest in the lease terminate[s]" on the day the statutory period expires. (*Ibid.;* see also *George v. County of San Luis Obispo* (2000) 78 Cal.App.4th 1048, 1052 [citing 11 U.S.C. § 365(d)(4)].)

***6** It is undisputed that when SUR vacated the premises, it left the collateral on the premises and never tried to retrieve it. Defendants claim that their 10–day notice to pay rent or quit satisfied the three-day notice requirement in paragraph 33 of the Lease and, therefore, title to the collateral vested in Plaza. We are inclined to agree.

In our view, the evidence supports the conclusions that Plaza was entitled to deem the collateral to be abandoned when SUR vacated the premises and/or deem that title to the collateral vested in Plaza after the notice period expired. The result is the same under either scenario. SUR no longer had ownership or possession of the collateral. As one who lent to a tenant and secured the loan with the tenant's personal property on the leased premises, plaintiff could have no rights in the property greater than the tenant, SUR, had. (See *Rinaldi v. Goller, supra*, 48 Cal.2d at p. 281.) Thus, plaintiff's security interest in the collateral became unenforceable. Plaintiff cannot maintain a cause of action for malicious impairment of a security interest when she has no enforceable security interest.

C. *Unjust Enrichment*

The trial court correctly ruled that unjust enrichment was not a cause of action. Division One of this court has held that unjust enrichment is not a cause of action. (*Jogani v. Superior Court* (2008) 165 Cal.App.4th 901, 911.) "[T]here is no cause of action in California for unjust enrichment." (*Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793; accord, *Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117, 1138.)

As plaintiff points out, in *Lectrodryer v. SeoulBank* (2000) 77 Cal.App.4th 723, another division of this court upheld a jury verdict in an action identified as being for unjust enrichment. The court noted that "the elements for a claim of unjust enrichment [are] receipt of a benefit and unjust retention of the benefit at the expense of another." (*Id.* at p. 726.) The evidence was that a bank had retained for itself the funds that the plaintiff's customer used to purchase a prepaid letter of credit for the purpose of paying plaintiff for goods that had been delivered to the customer. (*Ibid.*) In effect, the cause of action was for wrongful retention of funds and the principles of unjust enrichment provided the remedy. Although the terminology may differ, the principles are the same as plaintiff argues here. Plaintiff asserts that her claim for unjust enrichment was related to her claim for conversion and, therefore, was properly pled. We previously concluded that plaintiff cannot maintain her cause of action for conversion. Thus, plaintiff's argument fails. (See *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1595 [as to plaintiff's unjust enrichment claim, "we look beyond the claim's label," and focus on the gravamen of the complaint, "on its 'facts alleged' " (italics omitted)].)

D. *Issues to Be Tried by Jury*

***7** Plaintiff contends that the trial court erred in making the following findings of fact on matters that should have been submitted to the jury: (1) Plaza gave notice under paragraph 33 of the Lease, (2) SUR abandoned the collateral in which plaintiff held a security interest, and (3) Plaza gave notice of the auction of the property, to the extent required by law. We disagree.

It is well established that "[q]uestions of law are to be tried by the court, while questions of fact are to be decided by the jury." (*People v. Superior Court (Plascencia)* (2002) 103 Cal.App.4th 409, 425.) A question of law is one which "can be reached only by the application of legal principles," while a question of fact is which "can be reached by logical reasoning from the evidence." (*Board of Education v. Jack M.* (1977) 19 Cal.3d 691, 698, fn. 3.)

The facts relevant to making the findings were not disputed. Application of the facts to the law in order to make the findings was a question of law. The trial court did not err in determining the questions of law rather than submitting them to the jury.[FN6]

FN6. Defendants claim that plaintiff waived the right to a jury by certain statements unilaterally made by plaintiff's counsel in court. We disagree. Code of Civil Procedure section 631 identifies the exclusive means by which a party may waive the right to a jury in a civil matter. (*Cooks v. Superior Court* (1994) 224 Cal.App.3d 723, 727.) Counsel's statements were arguments for plaintiff's position and did not satisfy the requirements of section 631 for a valid waiver of the right to a jury.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

We concur: PERLUSS, P.J., and WOODS, J.

Cal.App. 2 Dist.,2011.
Kazar v. San Gabriel Plaza, Inc.
Not Reported in Cal.Rptr.3d, 2011 WL 6062019 (Cal.App. 2 Dist.)

END OF DOCUMENT