

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **KURT PRASSE,**

3 Plaintiff-Appellant,

4 v.

5 **CREATIVE PROPERTIES, LLC,**

6 Defendant-Appellee.

Court of Appeals of New Mexico

Filed 6/24/2024 8:33 AM



Ramon J. Maestas
Chief Clerk

No. A-1-CA-41094

7 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

8 **Kathleen McGarry Ellenwood, District Court Judge**

9 Gary W. Boyle

10 Santa Fe, NM

11 for Appellant

12 Jones, Snead, Wertheim & Clifford, P.A.

13 Carol A. Clifford

14 Jerry Todd Wertheim

15 Santa Fe, NM

16 for Appellee

17 **MEMORANDUM OPINION**

18 **Black, Pro Tem Judge.**

19 (1) Kurt Prasse (Lessee) appeals the district court's grant of the motion to dismiss
20 filed by Creative Properties, LLC (Lessor). We conclude that the lease contemplated
21 a use that was not permitted by the applicable zoning code and was therefore
22 unenforceable. We affirm.

1 **BACKGROUND**

2 {2} In 2021 Lessee leased a portion of a building (the Property) in Santa Fe, New
3 Mexico from Greg Eichman, for a period of two years to use for office space and
4 “dance based events and for Yoga type classes.” Eichman died in 2022, and Lessor
5 purchased the Property and remaining lease from Eichman’s estate.

6 {3} The City of Santa Fe (the City) red-tagged the Property in October 2022 due
7 to the lack of an occupancy permit, and Lessor denied Lessee further entry to the
8 property. Lessee filed, pro se, a proceeding seeking injunctive relief against Lessor
9 seeking to restore his access. The district court entered a temporary restraining order
10 and a preliminary injunction permitting Lessee access. Lessor filed an emergency
11 motion to dissolve the injunction and temporary restraining order. The district court
12 held a hearing and took evidence on October 28, 2022, and dissolved the injunction
13 and temporary restraining order. After that, Lessee filed a complaint for damages.

14 {4} Lessor then moved to dismiss the complaint. On March 29, 2023, the district
15 court conducted a hearing on the motion and dismissed the original complaint under
16 Rules 1-012(B)(6) and 1-019(A) NMRA. Lessee filed his amended complaint
17 seeking damages for breach of contract, breach of the covenant of good faith and
18 fair dealing and again seeking injunctive relief. On April 18, 2023, the district court
19 issued an order granting Lessor’s motion to dismiss the amended complaint under
20 Rule 1-012(B)(6) and dismissed the case with prejudice.

1 {5} Lessee’s docketing statement had the March 29 order attached but not the April
2 18 order. Nonetheless the April 18, 2023 order, is the primary focus of Lessee’s
3 docketing statement and brief in chief.

4 **DISCUSSION**

5 **I. Standard of Review**

6 {6} We review de novo a district court’s decision to dismiss a case for failure to
7 state a claim under Rule 1-012(B)(6). *See id.*; *Walsh v. Montes*, 2017-NMCA-015,
8 ¶ 6, 388 P.3d 262. “Dismissals under Rule 1-012(B)(6) are proper when the claim
9 asserted is legally deficient.” *Delfino v. Griffo*, 2011-NMSC-015, ¶ 9, 150 N.M. 97,
10 257 P.3d 917. The motion should be granted when the plaintiff cannot obtain relief
11 “under any set of facts provable under the claims.” *Shea v. H.S. Pickrell Co.*, 1987-
12 NMCA-149, ¶ 6, 106 N.M. 683, 748 P.2d 980.

13 **II. The District Court Properly Dismissed the Amended Complaint**

14 **A. Plaintiff Failed to Follow the Rules of Appellate Procedure**

15 {7} Under our Supreme Court’s appellate rules, *see* Rules 12-201(A) and Rule 12-
16 202(C) NMRA, the appellant must provide notice of the appeal from an order and
17 attach that order to the notice. Lessee attached the wrong order to his notice of appeal.
18 Lessee’s brief in chief repeatedly cites the dismissal of the original complaint against
19 Mr. Lewis, the owner of Lessor, but also cites the April 18, 2023 order, dismissing the
20 amended complaint against Lessor. However, the denomination of the notice of

1 appeal is not what is important but that the document substantially complied with
2 and gave information required by the rule governing the timely filing of a notice of
3 appeal. *See Johnson v. Johnson*, 1964-NMSC-233, ¶ 6, 74 N.M. 567, 396 P.2d 181.
4 The filing of a docketing statement specifically referring to the notice of appeal,
5 which substantially complied with the content provisions of the rule prescribing
6 what must be specified in the notice of appeal, was sufficient to vest appellate
7 jurisdiction in this Court. *See Marquez v. Gomez*, 1990-NMSC-101, ¶¶ 6-7, 111
8 N.M. 14, 801 P.2d 84.

9 **B. District Court May Convert a Rule 1-012(B) Motion to a Summary**
10 **Judgment Motion**

11 (8) Lessee would have this Court reverse on the ground that the district court
12 should not have relied on the evidence presented at the October preliminary
13 injunction hearing and should have relied only on the sufficiency of the amended
14 complaint. Even though the motion before the district court was a Rule 1-012(B)(6)
15 motion to dismiss the complaint and the district court did not denominate its April
16 order as a summary judgment, it ruled based on the evidence presented at the October
17 28, 2022 hearing, thus converting the order to a summary judgment. *See Shriners*
18 *Hosps. for Crippled Child. v. Kirby Cattle Co.*, 1976-NMSC-013, ¶ 3, 89 N.M. 169,
19 548 P.2d 449; *Bisconte v. Sandia Nat'l Laboratories*, 554 F. Supp.3d 1158, 1163-64
20 (D.N.M 2021) (explaining that when matters outside the pleadings are presented and
21 not objected to, the motion should be treated as one for summary judgment). Lessee

1 participated in the evidentiary hearing in October without protest and even testified
2 extensively therein. Thereafter he had four months to protest or offer additional
3 evidence but failed to do so, even though in the motion to dismiss Lessor cited Rule
4 1-066(A)(2) NMRA and referred the district court to the evidence already offered.
5 *See id.* (“[A]ny evidence received upon an application for a preliminary injunction
6 which would be admissible upon the trial on the merits becomes part of the record
7 on the trial and need not be repeated upon the trial.”). Once such dispositive evidence
8 is in the record, Lessee cannot merely rely on his complaint. *See Santistevan v.*
9 *Centinel Bank of Taos*, 1981-NMSC-092, ¶¶ 6-11, 96 N.M. 730, 634 P.2d 1282
10 (concluding a motion to dismiss was properly converted to a motion for summary
11 judgment under the circumstances, including the submission of evidence at the
12 hearing without objection).

13 **C. The District Court’s Dismissal Was Proper Based on This Record**

14 (9) At that evidentiary hearing Mr. Lewis presented testimony and evidence to prove
15 that the Lessee’s past and proposed use of the warehouse for group assemblies was
16 illegal and the lease unenforceable because the prior owner had never obtained the
17 necessary permit or certificate of occupancy from the City. The lack of such a permit
18 and certificate resulted in the warehouse being red-tagged by the City. At the
19 conclusion of the October 28, 2022 hearing, the district court held that it did not have
20 “the authority to order use of a business that has been red-tagged, and no certificate of

1 occupancy has been granted.” Concluding, the district court stated, “The events that
2 have been conducted there [by Lessee] have been illegally conducted.”

3 {10} Based on the evidence presented at the October 28, 2022 hearing, the April 18,
4 2023 order, dismissing the case under Rule 1-012(B)(6), was an appropriate exercise of the
5 court’s power under Rule 1-012(B) (stating that “[i]f, on a motion asserting the
6 defense in Subparagraph (6) of this paragraph to dismiss for failure of the pleading
7 to state a claim upon which relief can be granted, matters outside the pleading are
8 presented to and not excluded by the court, the motion shall be treated as one for
9 summary judgment and disposed of as provided in Rule 1-056 NMRA, and all
10 parties shall be given reasonable opportunity to present all material made pertinent
11 to such a motion by Rule 1-056”).

12 {11} The lease clearly contemplated operation of the property in violation of the
13 2018 special use permit required by the City because required several conditions
14 were not met. *See Measday v. Sweazea*, 1968-NMCA-008, ¶¶ 10-11, 78 N.M. 781,
15 438 P.2d 525 (explaining that an illegal contract “require[s] the violation of any
16 law”). Lessee argues that the lease is nevertheless enforceable, and Lessor is in
17 breach, or has breached the covenant of good faith and fair dealing, because Lessor
18 has not sought the necessary City approvals. Essentially, Lessee contends that Lessor
19 should be estopped from invalidating the lease because Lessor did not satisfy the
20 City’s conditions after purchasing the property from Eichman. “It is well established

1 that a party cannot maintain an action if [they] must rely on a violation by
2 [themselves] of some statutory regulation in order to establish his cause of action.”
3 *Capo v. Century Life Ins. Co.*, 1980-NMSC-058, ¶ 11, 94 N.M. 373, 610 P.2d 1202;
4 *cf. Measday*, 1968-NMCA-008, ¶ 19 (declining to find a contract unenforceable
5 when, “[t]o establish th[e] claim, [the] plaintiff is not required to prove the statutory
6 violation”). Further, “it is generally held that validity cannot be given to an illegal
7 contract on the principle of estoppel.” *Capo*, 1980-NMSC-058, ¶ 21.

8 **CONCLUSION**


9 (12) For the above stated reasons, the judgment of the district court is affirmed.

10 (13) **IT IS SO ORDERED.**

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BRUCE D. BLACK, Judge Pro Tem

13 **WE CONCUR:**

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15 _____
ZACHARY A. IVES, Judge

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17 _____
KATHERINE A. WRAY, Judge