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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 10/02/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

In the Matter of the Estate of:) 1 CA-CV 11-0492
MARK SHIYA,) 1 CA-CV 11-0727
) (Consolidated)
Deceased.) DEPARTMENT A
_____))
) **MEMORANDUM DECISION**
THE SHIYA LIVING TRUST, VICKY) (Not for Publication -
SHIYA, as personal) (Rule 28, Arizona Rules of
representative of THE ESTATE OF) Civil Appellate Procedure)
MARK SHIYA; and as trustee of)
THE SHIYA LIVING TRUST,)
Plaintiff/Appellant,)
v.)
ROBERT STREPHANS,)
Defendant/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-023612 and PB2008-001032 (Consolidated)

The Honorable Barbara Hamner, Judge *Pro Tem*
The Honorable Cynthia L. Gialketsis, Judge *Pro Tem*
The Honorable Rod J. Coffey, Judge *Pro Tem*

AFFIRMED IN PART; VACATED AND REMANDED IN PART

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D O W N I E, Judge

¶1 The Estate of Mark Shiya ("Estate") and the Shiya Living Trust ("Trust") (collectively, "Shiya") appeal from the superior court's grant of partial summary judgment to Robert Strepans in an underlying probate proceeding and from the denial of a motion for new trial in that action.¹ Shiya also appeals the dismissal of a subsequently filed civil action against Strepans and the award of attorneys' fees against it in that case. With the exception of the attorneys' fees award, which we vacate and remand, we affirm the superior court's judgments.

FACTS AND PROCEDURAL BACKGROUND

¶2 Strepans and Mark Shiya ("Mark") were members of a limited liability company known as Rose Garden 9 Properties, LLC

¹ The motion was titled "Plaintiffs' Motion for Clarification/Amendment/Revision of the May 24, 2010 Order, or in the Alternative, Motion for New Trial and/or Reconsideration."

("RG9"). RG9 was governed by the Operating Agreement of Rose Garden 9 Properties, LLC ("Operating Agreement").

¶13 Mark died on February 11, 2007. Strephans filed a probate proceeding, seeking the appointment of a personal representative to consummate RG9's purchase of Mark's interest in the company pursuant to the Operating Agreement. The Trust, however, took the position that Mark had transferred his interest in RG9 to it before his death. The Trust also argued Strephans was equitably estopped from contending that no valid transfer had occurred.

¶14 Strephans filed a motion for partial summary judgment, arguing Mark's interest in RG9 passed to the Estate upon his death. After briefing and oral argument, the court granted Strephans' motion, explaining:

It appears uncontroverted that the requirements of the Operating Agreement were not met regarding a transfer of the asset. The Trust asks the Court to find that an oral statement of Mr. Strephans made at a meeting wherein many issues were discussed and his failure to object to documents that he did not sign estop him from requiring compliance with the operating agreement. The Court disagrees.

¶15 Shiya subsequently filed a civil complaint against Strephans. After the court consolidated the probate and civil cases, it granted Strephans' motion to dismiss the civil

complaint pursuant to Rule 12(b)(6), Arizona Rules of Civil Procedure ("Rule"). Shiya filed a motion for new trial, which the superior court denied. Shiya timely appealed. Thereafter, the superior court awarded attorneys' fees to Strepans in the civil action. Shiya again timely appealed, and the two appeals were consolidated. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-2101(A)(1), (5)(a), and (9).

DISCUSSION

I. Probate Proceeding

¶6 We review a grant of summary judgment *de novo*. *TWE Ret. Fund Trust v. Ream*, 198 Ariz. 268, 271, ¶ 11, 8 P.3d 1182, 1185 (App. 2000). Summary judgment is appropriate if there are no genuine issues as to any material fact. Rule 56(c)(1); *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). We review the evidence "in the light most favorable to the party against whom summary judgment was entered." *TWE*, 198 Ariz. at 271, ¶ 11, 8 P.3d at 1185.

¶7 Pursuant to section 6.1 of the Operating Agreement, the death of a member leads to dissolution of RG9 unless the company "elects to reform under Article 8." Article 8 states that if a majority of voting rights is cast in favor of reformation, the company must purchase the deceased member's

interest "in accordance with the provisions of this Article 8."

Article 8.3 reads:

Price of Sale Interest. The purchase price for the Sale Interest shall be the Book Value of the Sale Interest as of the date of the election to reform (the "Termination Date").

¶18 Based on these provisions, if Mark's interest in RG9 was not validly transferred to the Trust, then Strephans, as the sole remaining member of RG9, could vote to reform and exercise the company's right to purchase Mark's interest at book value.

¶19 Shiya does not contend that the parties complied with section 7.1 of the Operating Agreement, which delineates the terms for selling, assigning, gifting, encumbering, or otherwise disposing of a member's interest in RG9. Instead, Shiya alleges Strephans is equitably estopped from requiring compliance with section 7.1. According to Shiya, Strephans made promises at a May 15, 2006 meeting ("the May meeting") that equitably estop him from asserting that no valid transfer occurred.

¶10 Before discussing the applicable legal principles, it is important to identify the statements attributed to Strephans. We consider only the evidence proffered by Shiya in opposing partial summary judgment. See *GM Dev. Corp. v. Cmty. Am. Mort. Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990) (appellate

court's review is limited to the record before the trial court).

According to Shiya:

- Strepshans attended the May meeting to discuss Mark's end-of-life planning and stated "that he supported whatever Mark needed to do to protect his interests and his desire to pass the membership interests on to his family."
- Those present at the May meeting "agreed that Rose Garden should be transferred to the trust. Bob Strepshans stated that he would do whatever was needed."

¶11 "Equitable estoppel involves, generally speaking, an affirmative misrepresentation of a present fact or state of facts and detrimental reliance by another thereon." *Tiffany Inc. v. W.M.K. Transit Mix, Inc.*, 16 Ariz. App. 415, 419, 493 P.2d 1220, 1224 (1972). Equitable estoppel differs from promissory estoppel in that the representation "must be of some present or past fact, while promissory estoppel rests upon a promise to do something in the future." *Trollope v. Koerner*, 106 Ariz. 10, 18, 470 P.2d 91, 99 (1970); see also *Waugh v. Lennard*, 69 Ariz. 214, 224, 211 P.2d 806, 812 (1949) ("Promissory estoppel . . . differs from equitable estoppel in that it rests on a promise to do something in the future, while the latter rests on a statement of present fact.").

¶12 At oral argument before this Court, Shiya's counsel argued the equitable estoppel defense could survive summary judgment if Strephans had no intention of keeping his "promise" when he made it. But even assuming equitable estoppel applies when a party promises to do something in the future but lacks the present intent to perform, nothing in this record supports that theory as to Strephans. If a party with the burden of proof cannot show "that there is evidence creating a genuine issue of fact on the element in question, then the motion for summary judgment should be granted." *Orme Sch.*, 166 Ariz. at 310, 802 P.2d at 1009; see also *GM Dev. Corp.*, 165 Ariz. at 5, 795 P.2d at 831 (citation omitted) (when a party moving for summary judgment makes a prima facie showing, the burden shifts to the opposing party to produce competent evidence to establish a genuine issue of material fact).

¶13 The failure to keep a promise does not prove that, when the commitment was made, the promisor had no intention of performing. *Cf. McAlister v. Citibank (Ariz.)*, 171 Ariz. 207, 214, 829 P.2d 1253, 1260 (App. 1992) (in the context of fraud, intent may be inferred, but "an intent not to perform or to deceive must be established independent of a showing of the defendant's failure to perform"). Moreover, as we discuss *infra*, the "promise" attributed to Strephans is simply too vague

to be enforced under an estoppel theory, and Shiya proffered no evidence of detrimental reliance in opposing Strephans' motion for partial summary judgment.

¶14 Based on the record before it, the superior court properly granted partial summary judgment to Strephans and appropriately denied Shiya's motion for new trial.

II. Civil Action

¶15 Shiya's civil complaint asserted claims for: (1) declaratory relief, seeking a determination that Mark's RG9 membership had been transferred to the Trust; (2) breach of fiduciary duty; (3) fraudulent concealment and misrepresentation ("fraud"); and, (4) promissory estoppel. The superior court dismissed the civil action in its entirety because "the basis for Plaintiffs' Complaint was resolved in the probate ruling: that Mr. Shiya's interest in Rose Garden 9 is an asset of his estate and that Mr. Strephans was not estopped from requiring compliance with the terms of the operating agreement."

¶16 At oral argument, counsel for Shiya conceded we must affirm dismissal of the declaratory relief and breach of fiduciary duty counts if we affirm the grant of partial summary judgment in the probate proceeding. In light of our decision to affirm that judgment, we do not address these two counts further.

¶17 We review the dismissal of the remaining counts *de novo*. See *Coleman v. City of Mesa*, 642 Ariz. Adv. Rep. 4, ¶ 7 (Sept. 7, 2012). Dismissal is appropriate only if “as a matter of law . . . plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof.” *Fid. Sec. Life Ins. Co. v. State Dep’t of Ins.*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580, 582 (1998). “In determining if a complaint states a claim on which relief can be granted, courts must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts” *Coleman*, at ¶ 9.

¶18 We will affirm the superior court’s judgment if it is correct for any reason. *Wertheim v. Pima County*, 211 Ariz. 422, 424, ¶ 10, 122 P.3d 1, 3 (App. 2005) (citation omitted). Although we disagree with the court’s stated rationale for dismissing the fraud and promissory estoppel claims, we nevertheless conclude those counts were properly dismissed.²

A. Fraud

¶19 We assume, without deciding, that Shiya either adequately alleged the elements of fraud or could do so if

² This conclusion obviates the need to consider whether the second commissioner presiding over the civil action should have revisited the substantive merits of the dismissal order entered by the first commissioner.

allowed to amend the complaint.³ See *Wigglesworth v. Mauldin*, 195 Ariz. 432, 439, ¶ 26, 990 P.2d 26, 33 (App. 1999) (before dismissing on Rule 12(b)(6) grounds, if requested, "the non-moving party should be given an opportunity to amend the complaint if such an amendment cures its defects"). The fraud claim is predicated on Strephans' allegedly false representation that he "would do anything necessary to effectuate Shiya's desire to have the RG9 membership shares transferred into the Shiya Living Trust."

¶20 Fraud may be based on "unfulfilled promises or expressions concerning future events only if statements regarding those events 'were made with the present intent not to perform.'" *McAlister*, 171 Ariz. at 214, 829 P.2d at 1260; see also *Staheli v. Kauffman*, 122 Ariz. 380, 383, 595 P.2d 172, 175 (1979) (fraud "cannot be predicated on unfulfilled promises, expressions of intention or statements concerning future events unless such were made with the present intention not to perform"). "Mere theory, however, or conjecture or imagination

³ The nine elements of fraud are: "(1) A representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) his consequent and proximate injury.'" *Carrel v. Lux*, 101 Ariz. 430, 434, 420 P.2d 564, 568 (1966).

cannot be employed to arrive at a conclusion that fraud has been committed." *Fridenmaker v. Valley Nat'l Bank of Ariz.*, 23 Ariz. App. 565, 569, 534 P.2d 1064, 1068 (1975).

¶21 Unlike the partial summary judgment ruling discussed *supra*, Shiya's fraud claim was dismissed under Rule 12(b)(6). It is therefore not susceptible to resolution on the same basis as the equitable estoppel defense -- i.e., that Shiya failed to proffer evidence of Strehans' present intention to not perform.

¶22 There is, however, a legal impediment to Shiya's fraud claim that justified dismissal under Rule 12(b)(6). An actionable fraud claim requires a "sufficiently definitive" promise. *Staheli*, 122 Ariz. at 383, 595 P.2d at 175.

¶23 In *Staheli*, the defendant solicited the plaintiff to become his ranch manager. *Id.* at 381, 595 P.2d at 173. Plaintiff advised he "did not want to work merely for wages," and "wanted to acquire a partnership interest in the ranch." *Id.* According to plaintiff, the parties agreed to "work out a limited partnership." *Id.* at 382, 595 P.2d at 174. In reliance on that promise, plaintiff moved to Arizona and began working for defendant. *Id.* There were further discussions about a partnership, but defendant ultimately refused to grant such an interest, and plaintiff filed suit. *Id.* at 382-83, 595 P.2d at 174-75. The trial court directed a verdict for defendant on

plaintiff's breach of contract claim. *Id.* at 381, 595 P.2d at 173. The fraud claim went to the jury, which returned a verdict for plaintiff, awarding both compensatory and punitive damages. *Id.* The trial judge, however, determined the evidence was insufficient to prove fraud and set aside the verdict. *Id.* The Arizona Supreme Court affirmed, stating:

Appellants' position is that once Kauffman made an unconditional promise to work out a partnership agreement, the failure to reach mutually agreeable terms is not a bar to a claim of fraud. *But we think appellants did not have the right to rely on the appellees' promise to work out a partnership because such a promise is not sufficiently definitive to determine what was being promised.*

Id. at 383, 595 P.2d at 175 (emphasis added).

¶24 Similarly, in the case at bar, the alleged promise to do "anything necessary" to effectuate Shiya's wishes is "not sufficiently definitive to determine what was being promised." See *id.* "Anything necessary" is vague and incapable of definition. Surely it did not obligate Strephans to do anything and everything Mark requested, regardless of his own interests. No documents or terms were discussed at the May meeting, and Shiya alleges no facts regarding the terms of the purported promise that could clarify exactly what the two RG9 members were agreeing to do by way of deviating from the terms of the

Operating Agreement and waiving their respective rights thereunder.

¶25 Finally, Shiya has not pled facts demonstrating reliance on Strephans' "promise" that led to "consequent and proximate injury." *Carrel*, 101 Ariz. at 434, 420 P.2d at 568. Conclusory statements without supporting factual allegations are not accepted as true under Rule 12(b)(6). *Coleman*, at ¶ 9; see also *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 466, ¶ 19, 160 P.3d 1216, 1224 (App. 2007) (citing *Aldabbagh v. Ariz. Dep't of Liquor Licenses & Control*, 162 Ariz. 415, 417, 783 P.2d 1207, 1209 (App. 1989)). The conclusory claim that "Shiya, Vicky Shiya and others relied on Strephans' oral promise to execute these documents and do whatever was necessary to effectuate the transfer of Shiya's membership interest" is insufficient.

¶26 Moreover, under the facts presented, the reliance described by Shiya in the superior court was insufficient as a matter of law. Assigning an interest in a limited liability company does not "entitle the assignee to participate in the management of the business and affairs of the limited liability company or to become or to exercise the rights of a member, unless the assignee is admitted as a member as provided in § 29-731." A.R.S. § 29-732(A). Section 29-731(B), in turn, enumerates the manner in which a person becomes a member of a

limited liability company once articles of organization are filed. Specifically, admission of a member occurs "on the terms provided in an operating agreement or, if an operating agreement does not so provide, on the approval or consent of all members." A.R.S. § 29-731(B)(2).

¶127 The Operating Agreement allowed Shiya to assign his economic interest in RG9 under certain circumstances, but he could not transfer his *membership* interest without Strepans' consent. Nor could he force Strepans to agree to the transfer. As a result, Mark could not have sold or otherwise transferred his membership interest had he realized Strepans did not intend to sign transfer documents.⁴ See *Heltzel v. Mecham Pontiac*, 152 Ariz. 58, 61, 730 P.2d 235, 237 (1986) (in reliance on promise, plaintiff must have changed his position for the worse).

¶128 Because Shiya did not allege a sufficiently definite promise by Strepans and did not plead facts demonstrating detrimental reliance causing damages, the fraud claim was properly dismissed.

⁴ At oral argument before this Court, Shiya argued for the first time that it incurred attorneys' fees in drafting transfer documents and that it perhaps could have borrowed against Mark's membership interest. We do not, however, generally consider arguments raised for the first time at oral argument. See *State v. Powers*, 200 Ariz. 123, 129, ¶ 21, 23 P.3d 668, 674 (App. 2001). Moreover, our review is limited to the record created in the superior court, which does not include these arguments.

B. Promissory Estoppel

¶129 "[T]he major distinction between equitable estoppel and promissory estoppel is that equitable estoppel is available only as a defense, while promissory estoppel can be used as a cause of action for damages." *Tiffany Inc.*, 16 Ariz. App. at 419, 493 P.2d at 1224. Promissory estoppel "generally does not involve a misrepresentation but a promise by one party upon which another relies to his detriment and which the promisor should reasonably have foreseen would cause the promisee to so rely." *Id.* "Promissory estoppel provides an equitable remedy that renders a promise enforceable" *Sholes v. Fernando*, 228 Ariz. 455, 460, ¶ 14, 268 P.3d 1112, 1117 (App. 2011). It "is not a theory of contract liability, but instead a replacement for a contract when parties are unable to reach a mutual agreement." *Johnson Int'l, Inc. v. City of Phoenix*, 192 Ariz. 466, 474, ¶ 49, 967 P.2d 607, 615 (App. 1998).

¶130 To establish promissory estoppel, Shiya must prove: (1) Strephans made a promise; (2) Strephans should have reasonably foreseen that Shiya would rely on that promise; and (3) Shiya relied to its detriment on the promise.⁵ See

⁵ A party asserting promissory estoppel must also demonstrate that injustice can be avoided only by enforcement of the promise. *Double AA Builders, Ltd. v. Grand State Constr. L.L.C.*, 210 Ariz. 503, 506, ¶ 13, 114 P.3d 835, 838 (App. 2005)

Higginbottom v. State, 203 Ariz. 139, 144, ¶ 18, 51 P.3d 972, 977 (App. 2002) (citation omitted).

¶31 Expressing an intention to do something is not a promise. *Johnson*, 192 Ariz. at 474, ¶ 51, 967 P.2d at 615 (citation omitted). Moreover, as with fraud, promissory estoppel requires a promise that is sufficiently definite in nature. See *Sch. Dist. No. 69 v. Altherr*, 10 Ariz. App. 333, 340, 458 P.2d 537, 544 (1969), *disapproved in part on other grounds by Bd. of Trs. v. Wildermuth*, 16 Ariz. App. 171, 492 P.2d 420 (1972); see also *Allied Vista, Inc. v. Holt*, 987 S.W.2d 138, 140, 142 (Tex. App. 1999) (alleged promise by defendant of "whatever equipment [plaintiff] needed" to start his own recycling business was too indefinite for reasonable or justifiable reliance giving rise to promissory estoppel); *Santoni v. Fed. Deposit Ins. Corp.*, 677 F.2d 174, 179 (1st Cir. 1982) (for promissory estoppel to apply, the promise "must be definite and certain;" "mere expression of future intention . . . does not constitute a sufficiently definite promise").

¶32 For the reasons discussed *supra* regarding the fraud claim, the statements attributed to Strephans are too indefinite

(citation omitted). Although this element is not susceptible to resolution under Rule 12(b)(6), "all elements of estoppel must be proved or the action fails." *Fridenmaker*, 23 Ariz. App. at 571, 534 P.2d at 1070.

to enforce under an estoppel theory. And our discussion of reliance in ¶¶ 25-27 applies equally to the requirement that Shiya detrimentally rely on a promise by Strephans in order to state a claim for promissory estoppel. See also *Knight v. Rice*, 83 Ariz. 379, 382, 321 P.2d 1037, 1039 (1958) ("It is, of course, elementary that [a party] cannot claim the benefit of estoppel without clear and satisfactory proof that he changed his position to his detriment as a direct result of the conduct of the adverse party."). For these reasons, the court properly dismissed Shiya's promissory estoppel claim.

III. Attorneys' Fees

¶33 The superior court awarded Strephans \$18,000 in attorneys' fees in the civil action based on A.R.S. § 12-341.01, concluding the declaratory relief, breach of fiduciary duty, and fraud claims arose out of contract.⁶ The court correctly awarded fees related to the declaratory relief count. Shiya conceded below that it arose out of contract. We disagree, though, that the breach of fiduciary duty and fraud claims arose out of contract for purposes of a fee award.

¶34 We determine *de novo* whether an award under A.R.S. § 12-341.01 is proper. *Keystone Floor & More v. Ariz. Registrar*

⁶ The parties agreed that the promissory estoppel claim was not eligible for a fee award under A.R.S. § 12-341.01.

of Contractors, 223 Ariz. 27, 29, ¶ 7, 219 P.3d 237, 239 (App. 2009) (citations omitted). “Fees may be recovered [pursuant to A.R.S. § 12-341.01] when a contract is the ‘cause or origin’ of the dispute.” *Id.* at 30, ¶ 10, 219 P.3d at 240. “Generally, the words ‘arising out of a contract’ describe an action in which a contract was the main factor causing the dispute.” *Id.*

¶35 The Operating Agreement was not the “main factor causing the dispute” vis-à-vis the breach of fiduciary duty and fraud claims. That document merely “put[] the parties within tortious striking range of each other.” *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 15, ¶ 27, 6 P.3d 315, 320 (App. 2000). The dispute regarding those claims centered on alleged representations by Strepans that were independent of any contract between the parties.

¶36 We cannot discern how the superior court would have ruled had the fraud and breach of fiduciary duty claims been excluded from its analysis. We therefore vacate the fee award and remand to the superior court for reconsideration of the attorneys’ fees issue.

¶37 Both sides request attorneys’ fees incurred on appeal pursuant to A.R.S. § 12-341.01. In the exercise of our discretion, we decline to award fees. As the prevailing party,

though, Strephans is entitled to recover his appellate costs upon compliance with ARCAP 21.

CONCLUSION⁷

¶138 We vacate and remand the attorneys' fees award in the civil action. We affirm the superior court's judgment in all other respects.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
ANN A. SCOTT TIMMER, Presiding Judge

/s/
JOHN C. GEMMILL, Judge

⁷ Because we conclude Strephans properly prevailed on the substantive merits, we need not reach his cross-issues on appeal relating to standing and aggrieved party status.