DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

NEAL DUNCAN, as an individual,	)	1 CA-CV 12-0546
	)	
Plaintiff/Appellant,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
LIFELOCK, INC., a corporation,	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
Defendant/Appellee.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-001452

The Honorable Robert H. Oberbillig, Judge

AFFIRMED

Law Offices of Kevin Koelbel PC — Chandler
By Kevin Koelbel

and

Laufenberg Stombaugh & Jassak SC — Platteville, WI
By Christopher D. Stombaugh
Attorneys for Plaintiff/Appellant

Greenberg Traurig LLP — Phoenix
By Booker Travis Evans, Jr.
Attorneys for Defendant/Appellee

C A T T A N I, Judge

¶1 Neal Duncan appeals the summary judgment entered in favor of LifeLock, Inc. ("LifeLock") and the award of attorney's fees. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Duncan, Robert Maynard, and Todd Davis founded LifeLock. Maynard and Davis recruited Duncan because he had significant experience in setting up and running a call center. Duncan contends that at a meeting in March 2005, Maynard offered him 10% ownership in LifeLock in exchange for helping to start the company. Although Duncan admits he was to receive the stock in four installments -- one 2.5% installment at start up followed by three annual installments of the same percentage over the next three years -- Duncan claims the parties agreed that he would not have to first earn the LifeLock stock.

¶3 LifeLock agrees that Duncan was entitled to the first 2.5% installment at start up, but argues the three subsequent annual installments had to be earned by Duncan's efforts for the company over each of the next three years. LifeLock in fact issued the start-up installment on April 17, 2006 by distributing to Duncan 2.5% of the company's stock as of incorporation on April 16, 2005. LifeLock did not, however, issue the following three 2.5% installments, claiming Duncan did not complete even one year of service to earn a second or

subsequent installment. The central dispute between the parties is whether Duncan was required to continue working for LifeLock to earn the three additional installments.

¶4 Early in their relationship, the parties exchanged a number of e-mails discussing this particular issue. In a May 12, 2005 e-mail to Maynard, Duncan recalled that the stock agreement reached in March was as follows:

> my percentage went to 10% equity but you said I would have to earn it. . . . I am not as comfortable earning equity as just having it in place for participating which was the primary reason I got involved. Having said that, I am okay with a schedule to acquire equity through my efforts but I need to see your thoughts.

In the same e-mail, Duncan explained why he believed that he had earned $7,500 of "sweat equity" every month in April, May, and June.

¶5 Maynard responded later that day, in pertinent part:

> I'm fairly certain that the only number I ever discussed was 10%, earned equally over three years, 2.5 immediately and then 2.5 per year at the end of each of the three years.
>
> . . .
>
> I hear you on the value that you believe that you have put in as sweat equity. However, the dollar value of sweat is always less than that of actual cash.
>
> The numbers that I have quoted as far as % goes are the numbers. It makes no difference what any of us think that the value is of our contribution as each month

> passes. That's the deal we made and that's the one I'm willing to honor. If that's a problem, you need to tell me now.

¶6 In the next e-mail on May 19, Duncan states: "If the company is sold before I have an opportunity to earn my 10%, then my future options should vest at the full 10%. I should not be punished for our success." However, Duncan tries again to negotiate different terms, suggesting that "all earned stock should be earned and vested on a monthly basis (0.21% per month is 2.5% per year)." Apparently, Duncan and Maynard thereafter engaged in an oral discussion because Maynard responded a few hours later, "I presume that this email is moot after our most recent discussion, correct?"

¶7 By the end of 2005, LifeLock was dissatisfied with Duncan's availability and performance, and he was fired. LifeLock gave Duncan a "soft landing" and restructured his work for LifeLock as a commission-only position. Because Duncan earned no commissions during 2006 and therefore generated no revenue for LifeLock, LifeLock terminated him from the commission position in December 2006.

¶8 Shortly thereafter, in a January 15, 2007 e-mail, Duncan asked Maynard why LifeLock had not issued Duncan his 2.5% of stock for 2006. Maynard responded that Duncan had not earned the remaining stock because he had not completed his three-year

agreement, explaining that "You were not awarded 10% for showing up the first day."

¶9 In an e-mail two days later, Duncan questioned "how is the clock not still ticking." Duncan explained his position that in December 2005, he had agreed to forego a salary in light of the company's financial problems, but that Davis and Maynard had agreed the "stock agreement would not be affected or changed." Although Duncan admitted he was "earning a living away from the company," he claimed not to have been fired or to have resigned so questioned "why [LifeLock] feel[s] our agreement has ended." LifeLock maintained its position that Duncan had been "let go" and refused to issue any additional stock to Duncan.

¶10 In January 2010, Duncan filed a complaint against LifeLock for breach of contract seeking payment for 7.5% of LifeLock's stock. LifeLock moved for summary judgment, arguing first that the claim arose from an employment contract and was therefore barred by the applicable one-year statute of limitations and second that the parties had not entered an enforceable contract to support Duncan's contract claim.

¶11 After full briefing, the superior court heard oral argument on both motions on the same day and granted summary judgment on both grounds. The court also granted LifeLock's

request for attorney's fees, awarding $250,000 of the $334,883 LifeLock requested.

¶12 Duncan appealed the superior court's grant of both motions for summary judgment and the award of attorney's fees. We have jurisdiction under Arizona Revised Statutes ("A.R.S.") § 12-2101(A)(1).[1]

DISCUSSION

¶13 Duncan argues that the court should not have granted summary judgment on the issue of whether the parties had agreed on an enforceable contract because he provided evidence from which the factfinder could infer such an agreement. We review de novo the superior court's grant of summary judgment, viewing the facts in the light most favorable to the party against which judgment is entered. *United Bank of Arizona v. Allyn*, 167 Ariz. 191, 193, 195, 805 P.2d 1012, 1014, 1016 (App. 1990). Summary judgment is appropriate only if there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c); *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). We will affirm summary judgment only if the facts produced in support of the claim have so little probative value, given the quantum of evidence required, that no reasonable person could

[1] Absent material revisions after the relevant date, statutes cited refer to the current version unless otherwise indicated.

find for its proponent. *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.

¶14 "To bring an action for the breach of [a] contract, the plaintiff has the burden of proving the existence of the contract, its breach and the resulting damages." *Berthot v. Sec. Pac. Bank of Arizona*, 170 Ariz. 318, 324, 823 P.2d 1326, 1332 (App. 1991). Proof of an enforceable contract requires a showing of "an offer, an acceptance, consideration, and sufficient specification of terms so that the obligations involved can be ascertained." *Regal Homes, Inc. v. CNA Ins.*, 217 Ariz. 159, 166, ¶ 29, 171 P.3d 610, 617 (App. 2007) (citation and emphasis omitted). Acceptance must be unequivocal and on the same terms as the offer. *Clark v. Compania Ganadera de Cananea, S.A.*, 94 Ariz. 391, 400, 385 P.2d 691, 697 (1963), opinion supplemented, 95 Ariz. 90, 387 P.2d 235 (1963).

¶15 Duncan argues Maynard's May 12 e-mail represents the parties' agreement on the terms for distribution of the 10% of stock. Even assuming the parties reached an agreement on stock distribution -- and, indeed, it seems likely they came to some agreement in light of LifeLock's distribution of the initial 2.5% installment -- the record is insufficient to establish the "sufficient specification of terms so that the obligations involved can be ascertained" regarding the remaining 7.5% as necessary for an enforceable contract. *See Regal Homes*, 217

Ariz. at 166, ¶ 29, 171 P.3d 617 (citation and emphasis omitted).

¶16 Nothing in the record shows that Duncan ever unequivocally accepted the distribution terms specified in Maynard's May 12 e-mail. To the extent Duncan now argues this e-mail simply memorialized a prior agreement reached in March, Duncan's e-mail earlier that day belied any existing final agreement by attempting to negotiate the terms of a stock agreement, apparently seeking an additional ownership interest tied to his contribution of sweat equity. Maynard's May 12 e-mail unequivocally refused that offer.

¶17 Nor does Duncan's correspondence after May 12 show acceptance of the specified terms to form an enforceable contract, rather seeming more in line with additional negotiation of terms yet to be finalized. In Maynard's May 12 e-mail, Maynard specified that Duncan would earn the 10% interest in four stages: one 2.5% installment immediately and three 2.5% installments "earned equally over three years" to be distributed "at the end of each of the three years." In response, Duncan did not unequivocally accept these terms, but rather suggested that stock should be earned and distributed on a monthly, rather than yearly, basis.

¶18 Duncan argues the parties must have reached an agreement because (1) both parties partially performed -- Duncan

by working for LifeLock and LifeLock by distributing the initial 2.5% -- and (2) the parties' e-mails regarding terms of a stock agreement ended with Maynard's May 19 e-mail stating further discussion of terms "[was] moot after our most recent discussion," implying the parties had reached an understanding. Even accepting that Duncan came to some agreement with LifeLock, however, this evidence does not establish the terms of the agreement as necessary to prove the existence of an enforceable contract, and thus does not undermine the superior court's determination.[2]

¶19 Because the superior court did not err by granting summary judgment in favor of LifeLock on the contract issue, we

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[2] Even assuming that the stock distribution terms were as specified in Maynard's May 12 e-mail, LifeLock would still be entitled to judgment as a matter of law. Duncan's complaint sought damages for breach of contract "in an amount equivalent to the present value of a 7.5% share of the company's stock." Before the superior court, Duncan consistently maintained an entitlement to the full 7.5%, arguing the agreement did not require him to earn the additional annual installments through service to the company; Duncan did not claim, in the alternative, to have earned one or more of the annual installments.

Maynard's May 12 e-mail stated that Duncan's 10% ownership interest would be "earned equally over three years, 2.5[%] immediately and then 2.5[%] per year at the end of each of the three years." The parties do not dispute that LifeLock distributed and Duncan received the initial 2.5% installment to which he was entitled as of April 2005. At most, Duncan would have earned one additional installment for completing one year of service through April 2006; Duncan no longer worked for LifeLock as of December 2006. Thus, even under the terms as specified in Maynard's May 12 e-mail, Duncan would not be entitled to the relief he sought, so LifeLock would be entitled to judgment as a matter of law.

need not address whether Duncan's claim was barred by the one-year statute of limitations applicable to employment agreements.

ATTORNEY'S FEES

¶20 We review the superior court's decision to award attorney's fees in a contract case for abuse of discretion. *Radkowsky v. Provident Life & Accident Ins. Co.*, 196 Ariz. 110, 113, ¶ 18, 993 P.2d 1074, 1077 (App. 1999). We view the record in the light most favorable to sustaining the decision and will not disturb that decision if it is supported by any reasonable basis. *Rowland v. Great States Ins. Co.*, 199 Ariz. 577, 587, ¶ 31, 20 P.3d 1158, 1168 (App. 2001).

¶21 Among the factors to be considered in deciding whether to award discretionary attorney's fees are "the merits of the unsuccessful party's claim, whether the claim could have been avoided or settled, whether the successful party's efforts were completely superfluous in achieving the result, whether assessing fees . . . would cause an extreme hardship, whether the successful party did not prevail with respect to all of the relief sought, the novelty of the legal question presented, and whether an award . . . would discourage other parties with tenable claims from litigating legitimate contract issues . . . ." *Uyleman v. D.S. Rentco*, 194 Ariz. 300, 305, ¶ 27, 981 P.2d 1081, 1086 (App. 1999); *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985).

¶22 The only factor that militates against awarding fees in this case is the possibility that assessing fees would cause an extreme hardship, and Duncan's financial affidavit indicates it would. Notwithstanding this fact, no one factor is determinative in deciding whether to award fees. *Wilcox v. Waldman*, 154 Ariz. 532, 538, 744 P.2d 444, 450 (App. 1987). LifeLock was eligible for a fee award as the successful party, and only one factor weighed against an award. Under these circumstances, we cannot say that the superior court exceeded the bounds of reason by granting a partial award of attorney's fees ($250,000 out of $334,883 requested) in favor of LifeLock.

¶23 LifeLock requests attorney's fees on appeal, but provides no authority for the request. Request for fees on appeal will be denied where a party fails to state any substantive basis for the request. *Country Mut. Ins. Co. v. Fonk*, 198 Ariz. 167, 172, ¶ 25, 7 P.3d 973, 978 (App. 2000). Thus, we decline to award attorney's fees to LifeLock on appeal.

CONCLUSION

¶24 For the foregoing reasons, we affirm the superior court's grant of summary judgment and its award of attorney's fees in favor of LifeLock.

/S/
KENT E. CATTANI, Judge

CONCURRING:

/S/
JON W. THOMPSON, Presiding Judge

/S/
LAWRENCE F. WINTHROP, Judge