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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CC PARTNERS, LLC, an Arizona limited liability company dba
COLLIERS INTERNATIONAL, *Plaintiff/Appellant*,

v.

CAPITAL ASSET MANAGEMENT, LLC, an Arizona limited liability
company; KIT STROLE, an individual; AARON STROLE and RACHELLE
STROLE, husband and wife, *Defendants/Appellees*.

No. 1 CA-CV 15-0717
FILED 3-23-2017

Appeal from the Superior Court in Maricopa County
No. CV2013-015364
The Honorable Mark H. Brain, Judge

AFFIRMED

COUNSEL

Wilenchik & Bartness, P.C., Phoenix
By Dennis I. Wilenchik, Tyler Q. Swensen
Counsel for Plaintiff/Appellant

Gust Rosenfeld P.L.C., Phoenix
By Christopher M. McNichol
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge Jon W. Thompson joined.

H O W E, Judge:

¶1 CC Partners, LLC (“Colliers”) appeals from the trial court’s grant of summary judgment in the individual defendants’ favor on its fraud claim against them and the amount of Colliers’s award of attorneys’ fees. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In 2012, the trial court appointed Rachelle Strole—a principal of Capital Asset Management, LLC (“CAM”)—to be the receiver of a Phoenix medical building. During her receivership, CAM entered into a listing agreement with the property owner to potentially lease out the property. At that time, Colliers, the broker for a medical services company called UHS, approached CAM with UHS’s interest in leasing the property. The parties then began negotiations for their clients.

¶3 In February 2013, Colliers and CAM entered into a commission agreement, stipulating that CAM would pay Colliers an enumerated commission if UHS leased the property. The commission agreement further stated that if UHS “decide[d] to purchase the property at anytime,” CAM would pay Colliers commission in the amount of 3% of the gross sales price upon close of escrow. Kit Strole, also a member of CAM, signed the agreement on CAM’s behalf as the designated broker, two brokers signed for Colliers, and Rachelle signed for the property owner as its appointed receiver, even though she may not have known that the trial court had terminated her receivership the week before.

¶4 Despite the property owner’s interest in only leasing out the property, UHS decided that it no longer wanted to just lease the property, but purchase it. After seven months of negotiating, UHS and the property owner agreed to a sale. The parties entered into a purchase and sale agreement and agreed to a purchase price of \$7,405,640. Although the brokers were not parties to the purchase and sale agreement, the agreement provided for the payment of their commissions. Specifically, the agreement

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stated that the property owner would pay CAM—through Rachelle, now acting as its designated broker—a commission consistent with a separate agreement between them. The agreement further stated that Colliers “will be paid a commission in accordance with a separate written agreement between [CAM] and [Colliers].”

¶5 One day before escrow was scheduled to close, the escrow agent provided an itemized closing statement reflecting a \$222,000 commission to be paid to CAM, but no commission to be paid to Colliers. Instead, the statement contained a note stating that Colliers’s commission would be paid “in accordance with a separate written agreement between [CAM] and [Colliers].” Colliers subsequently sent CAM an invoice for \$222,169.20—a sum equaling 3% of the purchase price. CAM refused to pay the invoice, arguing that Colliers was not entitled to it. Colliers then asked the escrow agent to hold CAM’s commission in escrow until the parties could settle the dispute, but the escrow agent disbursed the funds to CAM anyway.

¶6 After unsuccessful subsequent attempts to get its commission from CAM, Colliers sued for breach of contract based on the February 2013 commission agreement and the purchase and sale agreement. Colliers also alleged that CAM and the individual defendants acted in bad faith, were unjustly enriched, and committed fraud by representing to Colliers that it would receive the 3% commission despite knowing that they would refuse to pay it. Specifically, Colliers alleged that throughout their negotiations, the defendants consistently represented to it that CAM would pay Colliers a commission of 3% if UHS purchased the property, CAM had a valid listing agreement with the property owner, and Rachelle was a proper receiver and authorized representative of the property owner when she signed the commission agreement. Colliers alleged that the defendants nevertheless refused to pay the commission because they claimed that the commission agreement was intended to apply only if UHS leased the property—not purchased it—and that CAM’s listing agreement with the property owner expired three months before the close of escrow. Additionally, Colliers alleged that the trial court terminated Rachelle’s receivership almost two weeks before she signed the commission agreement in that capacity, meaning she did not have the authority to do so. For the fraud claim, Colliers sought compensatory and consequential damages to recover the commission as well as punitive damages.

¶7 Before CAM answered Colliers’s complaint, Colliers applied for an order to show cause regarding why the commission should not be disbursed to Colliers. CAM objected, arguing that Colliers was merely

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attempting to circumvent the litigation process by obtaining a pre-judgment provisional remedy or summary judgment before CAM could file its answer. CAM also stated that upon receiving Colliers's complaint, it placed the \$222,000 it received back in escrow until the case resolved. The trial court denied Colliers's application.

¶8 Two weeks later, Colliers moved for partial summary judgment on its breach of contract claim, arguing that the commission agreement's plain language entitled it to the 3% commission that CAM wrongfully refused to pay. CAM disputed Colliers's contention that no genuine issues of material fact existed regarding Colliers's entitlement to the commission, however, because of their competing understandings of the commission agreement. CAM argued that the parties understood that the commission agreement would only apply if UHS leased the property, not purchased it. CAM also argued that although early negotiations of the sale of the building provided that Colliers would be paid a commission pursuant to the commission agreement, the parties removed the reference to the agreement and instead agreed to pay commission consistent with a written agreement they would separately enter into. But CAM alleged that Colliers refused to negotiate a separate written agreement.

¶9 The individual defendants simultaneously cross-moved for summary judgment on all claims against them. CAM submitted that Colliers's claims failed to present any genuine factual basis for claiming that the individual defendants took any actions in their personal capacities. Instead, CAM argued, any actions defendants made were on CAM's behalf. Because members and managers are generally protected from liability from their company's actions, CAM argued that the claims against the individual defendants could not stand. At the subsequent oral argument, Colliers stated that the individual defendants were personally liable because they "signed this agreement and they intended to pay under that agreement If they're saying that CAM has no responsibility here notwithstanding that it entered into the agreement separately, that's fraud."

¶10 In a single order, the trial court denied Colliers's motion for partial summary judgment on the breach of contract claim and granted the individual defendants' cross-motion for summary judgment on all claims against them. In denying Colliers's motion, the court reasoned that the parties' contracts had more than one reasonable interpretation, thus creating a genuine issue of material fact for the jury to resolve. Regarding the cross-motion, the trial court stated simply that Colliers, "in fact, failed to demonstrate that it has a viable claim against the individual Defendants; accordingly, this Motion is well-taken."

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¶11 Colliers moved for reconsideration of the trial court’s denial of Colliers’s motion but granting the individual defendants’ cross-motion for summary judgment. As relevant to the cross-motion, Colliers argued that it presented sufficient evidence that the individual defendants represented to Colliers that CAM would pay it the commission if UHS purchased the property when the defendants actually had no intention of doing so. Colliers also argued that it presented sufficient evidence showing that the individual defendants never said that they intended the commission agreement to apply only for a lease, not sale. After inviting and receiving a response from the defendants, the trial court denied the motion for reconsideration.

¶12 Because the court denied Colliers’s motion for partial summary judgment, the breach of contract claim against CAM proceeded to discovery and a four-day trial. After deliberating, the jury found in Colliers’s favor and awarded them damages of \$222,169.20—the exact amount that it alleged that CAM owed it pursuant to the commission agreement.

¶13 One hour after the trial concluded, Colliers again moved for reconsideration of the trial court’s granting the individual defendants’ cross-motion for summary judgment. Colliers argued that newly discovered evidence—namely, statements made by a CAM broker, one of the property owner’s representatives, and Rachelle during their pre-trial depositions—established that they had committed fraud. In essence, Colliers claimed again that the individual defendants committed fraud because Rachelle knew or should have known that her receivership had ended before she signed the commission agreement as the property’s receiver, and that failing to inform Colliers that the receivership had ended or that CAM no longer had a valid listing agreement with the property owner caused the underlying dispute over its entitlement to the commission. Colliers repeated throughout its motion that “it must necessarily be deemed” that Rachelle committed fraud as long as she refused to admit that CAM was liable under the commission agreement if UHS purchased the property.

¶14 To support its motion, Colliers submitted excerpts from Rachelle’s pre-trial deposition in which she stated that she did not believe her receivership had ended at the time Colliers believed it did. Additionally, Colliers submitted excerpts from a pre-trial deposition of one of the property owner’s representatives, who testified that he was not aware of the February commission agreement between Colliers and CAM. The representative also testified that although CAM was working to find buyers

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for the property as the owner's agent when it negotiated the purchase deal with UHS, CAM and the property owner did not have an existing brokerage agreement at the time.

¶15 The trial court denied Colliers's second motion for reconsideration on the merits. In addition to its ruling, the trial court noted that if the motion had merit, it would warrant "a significant award of sanctions against plaintiff" because Colliers had its alleged newly discovered evidence before trial began but failed to request a continuance to bring the motion then and try the entire case at once. "Trying the new claims," the court continued, "would largely repeat that 4-day exercise, albeit with slightly different jury instructions. The court is hard-pressed to think of a clearer example of unreasonably expanding court proceedings in violation of A.R.S. § 12-349(A)(3)."

¶16 Because Colliers prevailed on the breach of contract claim, it requested attorneys' fees and taxable costs totaling \$173,387.94 for its litigation of that claim. Its application reflected that six attorneys, including one from another firm, and two paralegals worked on this case, with hourly rates ranging from \$150 to \$400. CAM argued that the requested amount was grossly disproportionate to the judgment amount and that the trial court should only award \$42,000 in fees. Additionally, the individual defendants requested their own attorneys' fees relating to their successful cross-motion for summary judgment. After considering both requests, the trial court granted Colliers an attorneys' fees award of \$45,000, stating that the lawsuit was based on a "simple breach of contract claim" that was "grossly over-litigated." The court specified that Colliers had no good reason to seek injunctive relief at the beginning of the case, to have more than one attorney to try the case, or to move for reconsideration after the underlying trial had concluded. Further, the court noted that during trial, it had admonished Colliers's counsel "on several occasions for a lack of professionalism" and had to remind counsel that the trial must be conducted in a courteous and dignified manner. Believing that the charged fees grew to more than they should have been, the trial court granted an award of \$45,000 in fees and \$4,266.30 in taxable costs. The trial court also in its discretion declined to award the defendants' attorneys' fees but awarded their taxable costs.

¶17 Colliers timely appealed from the trial court's granting the individual defendants' cross-motion for summary judgment, denying Colliers's subsequent motions for reconsideration, and award of attorneys' fees.

DISCUSSION

1. Cross-Motion for Summary Judgment

¶18 Colliers first argues that the trial court erred by granting the individual defendants' cross-motion for summary judgment on Colliers's fraud claims against them. Granting summary judgment is appropriate if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a); *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). In other words, summary judgment should be granted if "the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense. *Orme*, 166 Ariz. at 309, 802 P.2d at 1008. We review the grant of summary judgment de novo, viewing the facts in the light most favorable to the party against whom the trial court entered judgment. *Simon v. Safeway, Inc.*, 217 Ariz. 330, 336 ¶ 13, 173 P.3d 1031, 1037 (App. 2007). Because no genuine issues of fact regarding the individual defendants' liability for fraud exist, the trial court did not err by granting their cross-motion for summary judgment.

¶19 Generally, corporate officers cannot be held liable for a corporation's intentional torts unless they have personal involvement in the tortious act. *Warne Invs., Ltd. v. Higgins*, 219 Ariz. 186, 197 ¶ 51, 195 P.3d 645, 656 (App. 2008). To establish a viable fraud claim, a plaintiff must establish nine factors: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) the speaker's intent that it be acted upon by the recipient in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) the hearer's reliance on its truth, (8) the hearer's right to rely on it, and (9) the hearer's consequent and proximate injury. *Enyart v. Transamerica Ins. Co.*, 195 Ariz. 71, 77 ¶ 18, 985 P.2d 556, 562 (App. 1998). Clear and convincing evidence must establish each factor. *Id.*; see also *State v. Canez*, 202 Ariz. 133, 156 ¶ 76, 42 P.3d 564, 587 (2002) (providing that clear and convincing evidence is "proof that will produce in the mind of the trier of facts a firm belief or conviction as to the issue sought to be proved").

¶20 The trial court did not err. First, Colliers's argument that Rachele falsely represented that she was the valid receiver of the property and the property owner's authorized representative is irrelevant. Although the commission agreement stated that either the owner or CAM would have to pay Colliers the commission, Colliers elected to sue only CAM. Thus, because Colliers did not argue that the property owner was liable

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under the commission agreement, Rachele's capacity or authority relating to the property owner for purposes of the agreement does not matter.

¶21 Second, Colliers has failed to establish any genuine issues of material fact that the individual defendants otherwise committed fraud. None of the evidence that Colliers submitted establishes that the individual defendants had an intent to defraud or that they knew of the falsity of any representations made about the commission agreement. At most, the evidence shows only that upon entering the agreement and thereafter, CAM and the individual defendants understood – or misunderstood – that the agreement applied only in a limited situation. That the defendants personally intended the commission agreement to apply only if UHS leased the property does not show, as Colliers suggests, that they intentionally withheld any information from Colliers. Moreover, although Colliers argues that the intended limited application would necessarily imply an intent to defraud, a necessary implication is insufficient to establish a genuine issue of fact for a fraud claim. *See Enyart*, 195 Ariz. at 77 ¶ 18, 985 P.2d at 562 (stating vague, speculative, or inconclusive evidence may never establish fraud); *see also McAllister v. Citibank (Arizona)*, 171 Ariz. 207, 214, 829 P.2d 1253, 1260 (App. 1992) (stating that fraud cannot be based upon unfulfilled promises or expressions concerning future events unless those promises were made with a present intent not to perform). Thus, because Colliers's evidence failed to establish a genuine issue regarding the individual defendants' intent to defraud or present intent to not perform on the commission agreement, the trial court properly granted the individual defendants' cross-motion for summary judgment.

2. Trial Court's Award of Attorneys' Fees

¶22 Colliers next argues that the trial court erred by reducing the attorneys' fees award below its request because no reasonable basis supports the lower award. The trial court enjoys a broad discretion to award and determine the amount of attorneys' fees, *Vortex Corp. v. Denkewicz*, 235 Ariz. 551, 562 ¶ 39, 334 P.3d 734, 745 (App. 2014), and we will not reverse the court's ruling absent an abuse of that discretion, *Orfaly v. Tucson Symphony Society*, 209 Ariz. 260, 265 ¶ 18, 99 P.3d 1030, 1035 (App. 2004). We cannot substitute our discretion for the trial court's, *Assoc. Indem. Corp. v. Warner*, 143 Ariz. 567, 571, 694 P.2d 1181, 1185 (1985), and will affirm unless the evidence, viewed in the light most favorable to sustaining the trial court's decision, does not support the ruling, *Merkens v. Fed. Ins. Co.*, 237 Ariz. 274, 279 ¶ 22, 349 P.3d 1111, 1116 (App. 2015). Because a reasonable basis supports the trial court's award, it did not abuse its discretion.

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¶23 Arizona law provides that “[i]n any contested action arising out of a contract . . . the court may award the successful party reasonable attorneys’ fees.” A.R.S. § 12-341.01(A). This statute, however, neither entitles the prevailing party to attorneys’ fees, *Ader v. Estate of Felger*, 240 Ariz. 32, 45 ¶ 48, 375 P.3d 97, 110 (App. 2016), nor dictates that the award equal or relate to the amount of fees actually paid or requested, A.R.S. § 12-341.01(B). In exercising its discretion to award fees, the trial court may consider various factors, but is not required to make findings on the record. *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 569 ¶¶ 9-10, 155 P.3d 1090, 1093 (App. 2007). Among those factors the trial court should consider are whether the litigation could have been avoided, the superfluity of the successful party’s efforts in achieving the result, and the novelty of the legal question presented. *Assoc. Indem. Corp.*, 143 Ariz. at 570, 694 P.2d at 1184.

¶24 Here, the trial court made express findings that establish a reasonable basis to support a reduced award of attorneys’ fees. The case did not involve a novel legal question, but instead was a simple breach of contract dispute. Even though the matter was simple, Colliers engaged in superfluous actions, including seeking injunctive relief at the beginning of the case, assigning multiple attorneys—even from outside of its own firm—and paralegals to the case, and moving for multiple reconsiderations of the trial court’s ruling. One of those motions for reconsideration came after the four-day trial concluded, even though Colliers based it on deposition testimony that occurred before the trial began. Additionally, the trial court noted in its attorneys’ fees ruling that counsel acted unprofessionally during trial, requiring the court to admonish counsel on several occasions. Finally, the trial court noted that counsel’s behavior called into question his \$400 hourly rate.

¶25 Colliers counters that the reduced award was unjust because “ironically,” the trial court “created this situation.” Although it does not challenge the trial court’s denial of Colliers’s motion for partial summary judgment on appeal, Colliers submits that the trial court acted unreasonably in denying that motion and its subsequent motion for reconsideration, causing Colliers to conduct further litigation and incur additional attorneys’ fees. In other words, Colliers argues that the trial court’s “refusal to treat this as a simple breach of contract claim” is why the attorneys’ fees request was so high. However, the trial court’s conclusion that the commission agreement may be subject to more than one interpretation at the summary judgment stage did not force Colliers to commit the unprofessional and unnecessary actions that the trial court noted in its attorneys’ fees ruling. Thus, the record provides a reasonable

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basis to support the trial court's discretionary award of \$45,000 in attorneys' fees.

3. Attorneys' Fees on Appeal

¶26 Colliers requests its reasonable attorneys' fees and taxable costs on appeal pursuant to A.R.S. § 12-341.01(A) and A.R.S. § 12-341. Because Colliers is not the prevailing party on appeal, we deny its request. CAM also requests its reasonable attorneys' fees and taxable costs pursuant to A.R.S. § 12-341.01(A) and A.R.S. § 12-341. Because CAM is the prevailing party on appeal, in our discretion we grant its attorneys' fees in an amount to be determined upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶27 For the foregoing reasons, we affirm.



AMY M. WOOD • Clerk of the Court
FILED: AA