IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

AOR DIRECT L.L.C., *Plaintiff/Appellee*,

v.

BUTEO, LLC, an Arizona limited liability company; SCOTT G. MILLER, an individual, *Defendants/Appellants*.

No. 1 CA-CV 15-0754
FILED 3-28-2017

Appeal from the Superior Court in Maricopa County
No. CV2013-008508
CV2014-014470
CV2015-001091
(Consolidated)
The Honorable Lori Horn Bustamante, Judge

VACATED AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Judge Patricia K. Norris delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Paul J. McMurdie joined.

N O R R I S, Judge:

¶1 Defendants/Appellants Buteo, LLC and Scott G. Miller (collectively "Buteo" unless otherwise specified) appeal from summary judgment in favor of Plaintiff/Appellee AOR Direct, L.L.C. ("AOR") arguing genuine disputes of material facts existed precluding summary judgment for AOR on its breach of contract and unjust enrichment counterclaims. And, although Buteo does not challenge the superior court's decision finding that it had breached the payment terms of a promissory note that evidenced a loan made to it by AOR, it argues that a genuine dispute of material fact existed as to the date of its default under the note. We agree with both arguments, and vacate the superior court's judgment in AOR's favor and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 AOR is a media buying company that purchases media from vendors, such as television stations, brokers, and station representatives. Buteo is a member and manager of Cable Shopping Network, LLC ("CSN"), and Miller is Buteo's sole member. CSN's business consists of television, internet, catalogue, and other forms of sales and marketing of coins and other collectibles. CSN purchases coins and other collectibles from various sources, packages them, and resells them. CSN does not purchase television time (media) directly. Instead, CSN uses a broker to purchase media.

¶3 Beginning in 2002, CSN purchased media through a company called Apex Media, LLC ("Apex") owned by Dennis Hartunian. Chris Dompier worked for Apex as CSN's account manager. Between 2002 and 2004, CSN and Apex entered into three different agreements whereby CSN purchased media through Apex. One of these written agreements, the 2003 agreement, contained a provision whereby Apex agreed to pay Miller and one other CSN member a "Regional Rep Commission." Although the other

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[1]Additional background regarding the parties and a related dispute can be found in *AOR v. Buteo et al.*, 1 CA-CV 15-0799 (Ariz. App. March 28, 2017), filed simultaneously with this memorandum decision.

two written agreements did not contain any commission provisions and none of the agreements had provisions for the payment of commissions on media purchased by third parties referred to Apex by CSN, Dennis Hartunian testified that, notwithstanding the written agreements, Apex offered and did in fact pay commissions to Buteo on both CSN media purchases and media purchases made by third parties referred to Apex by CSN. He also testified the commissions arrangement was part of Apex's regular course of dealing with CSN. According to Hartunian, Dompier, who had "primary responsibility for managing the CSN account," was "well aware" of this arrangement. The agreements between Apex and CSN also contained termination provisions which allowed either party to terminate the agreement by providing written notice.

¶4 In 2008, Dompier left Apex and started his own media purchasing company, AOR. CSN began purchasing media from AOR in 2008. CSN and AOR did not have a formal written agreement memorializing the terms of the purchasing agreement. Nevertheless, as discussed in more detail below, according to Buteo, Miller started thinking about moving CSN's business to AOR based on Dompier's promise, "that Buteo would continue to receive commissions in a form substantially modeled after the Apex Agreements." Thus, according to Miller, AOR agreed it would pay 5% of the gross media purchase or 33 1/3% of the net commission generated on all media purchased by CSN and all media purchased by third parties referred to AOR by Buteo and Miller ("Oral Commission Agreement").

¶5 On January 5, 2012, Buteo borrowed $400,000 from AOR as evidenced by a Convertible Promissory Note (the "Note") which Miller guaranteed. Buteo used the loan proceeds to buy out one of the other members of CSN. Buteo did not make any of the payments required under the Note.

¶6 In June 2013, AOR sued Buteo for breach of the Note and Miller for breach of the guarantee. Buteo counterclaimed, and alleged AOR had breached the Oral Commission Agreement by failing to pay commissions owed to Buteo on CSN's media purchases and on media purchased by third parties referred to AOR by Buteo. Buteo also asserted claims for unjust enrichment and an accounting.

¶7 After Buteo admitted it had not made any payments as required under the Note, the superior court entered partial summary judgment on AOR's breach claims. The court refused to certify its ruling under Arizona Rule of Civil Procedure 54(b) because of the pendency of Buteo's counterclaims**.**

¶8 After discovery, AOR moved for summary judgment on Buteo's counterclaims and for entry of a final judgment on its breach claims against Buteo and Miller. AOR argued it had never agreed to pay Buteo any commissions. It further argued Buteo had failed to produce any evidence or documents identifying the terms of the Oral Commission Agreement. It also argued Buteo could not enforce the Oral Commission Agreement, provided it existed at all, for additional reasons discussed below.

¶9 The superior court granted AOR's motion. The court reasoned that the evidence in the record and "Miller's vague testimony [were] not enough to sufficiently establish the material terms of the parties' alleged oral agreement." The superior court concluded the record lacked "sufficient evidence demonstrating mutual assent and a meeting of the minds as to the existence and validity of an oral agreement between Buteo and [AOR]." The superior court entered judgment for AOR in the principal sum of $400,000 and, as relevant here, specified February 6, 2012, as the date of Buteo's default in calculating prejudgment interest.

DISCUSSION

¶10 On appeal, Buteo argues the superior court should not have entered summary judgment in favor of AOR because genuine disputes of material facts existed regarding the existence of the Oral Commission Agreement and its terms. Viewing the evidence under the governing standards of review and the superior court's ruling de novo, we agree. *See AROK Const. Co. v. Indian Const. Servs.*, 174 Ariz. 291, 293, 848 P.2d 870, 872 (App. 1993) (appellate court views facts in a light most favorable to the non-moving party); *Schwab v. Ames Const.*, 207 Ariz. 56, 60, ¶ 17, 83 P.3d 56, 60 (App. 2004) (appellate court reviews summary judgment ruling de novo).

I. Buteo's Counterclaim for Breach of the Oral Commission Agreement

¶11 In opposing AOR's summary judgment motion, Buteo principally relied on Miller's testimony regarding the existence of the Oral Commission Agreement, *see supra* ¶ 4.[2] The terms of that alleged agreement

[2]In a single sentence in its answering brief, AOR argues the superior court should have struck Miller's declaration submitted in opposition to its motion for summary judgment which it contends conflicts with his deposition testimony. *Wright v. Hills,* 161 Ariz. 583, 587, 480 P.2d 416, 420 (App. 1989) (party's affidavit which contradicts his own prior testimony should be disregarded on motion for summary judgment). The superior court considered Miller's declaration when ruling on AOR's

as described by Miller are sufficiently certain to determine whether a breach occurred and to provide a remedy. *See AROK Const. Co.*, 174 Ariz. at 297, 848 P.3d at 876 (when terms provide "basis for determining the existence of a breach and for giving an appropriate remedy," a contract is enforceable and need not resolve all uncertain terms or anticipate every contingency) (citation omitted). Accordingly, the crux of the dispute between the parties in the superior court was whether they had ever entered into an agreement. On this point, Miller testified the Oral Commission Agreement with AOR was "fashioned after the Apex agreement," and, "*we would operate* exactly the same way we did with Apex." (Emphasis added).

¶12 Miller also testified he would not have moved his business from Apex—which was paying commissions—to AOR if AOR had not agreed to pay what Apex was paying: "there was a discussion that we're going to move from Apex that's paying us currently to you . . . I wouldn't move my business from somewhere that was paying me to somewhere that wasn't. So, yes, there was an understanding that there is an agreement."

¶13 AOR points out that Miller also testified the Oral Commission Agreement was to "mirror exactly what the Apex agreement was," and the terms "absolutely" could be found by "turn[ing] to the Apex agreement," yet two of the written agreements did not have any commission provisions and none had any provision for payment of commissions on media purchased by third party referrals. Miller went on to explain, however, that the agreement was to "mirror" the Apex agreement because, in his discussions with Dompier, "there was an understanding that there is an agreement. It's the Apex agreement. It works for you; it works for us."

¶14 Moreover, as noted, *see supra* ¶ 3, Hartunian testified that, regardless of the express terms of the written agreements between Apex and CSN, Apex nevertheless paid CSN commissions on the terms described by Miller, and that Dompier, having handled the CSN account while at Apex, was "well aware" of Apex's commission payments to CSN.

¶15 Finally, Buteo offered additional supporting evidence regarding the existence of the Oral Commission Agreement from two individuals, Mike Mezack and Keith Love, who had worked with CSN when Dompier was still working for Apex and remained in contact with Dompier after he left Apex to start AOR. Both individuals testified that, while at Apex, Dompier had offered to pay them commissions if they

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motion for summary judgment. Because AOR has failed to develop this argument on appeal, we will not address it. Therefore, we too have considered Miller's declaration for purposes of this appeal.

referred business to Apex, and both testified that Dompier had offered to pay them commissions after he started AOR. Of significance, Mezack testified that he regularly interacted with Dompier and Miller and, after Dompier "opened" AOR:

> Dompier regularly discussed that AOR would pay a commission or referral fee for any third party business referred to AOR at a rate of 5% of the total media purchase price. Dompier and Miller also regularly discussed the fact that AOR was paying commissions relating to the media purchased by CSN and would also pay CSN/Buteo referral fees for any business referred by CSN/Buteo to AOR. Based on my experience with Dompier and Miller, the payment of commissions, including third party commissions, was a common course of business between AOR and CSN/Buteo.

¶16 Love also testified that Dompier had told him AOR was paying commissions to Miller, through Buteo. Specifically, Love explained that on October 4, 2012, he had dinner with Dompier and Miller, and they discussed Silver Towne, a third party referred to AOR by Miller, which purchased media from AOR for its television program "The Coin Vault." Love testified:

> [W]e discussed the fact that Miller would get commissions relating to Silver Towne's ongoing purchases relating to The Coin Vault program. Dompier also made clear that AOR had been paying Miller, through his entity Buteo, a commission for media purchased by CSN and for other third party referrals similar to the deal Dompier offered to me (i.e. 1/3 of the commission AOR received or 5%). When Scott stepped away from our table, Dompier told me that he was excited for Scott. He specifically noted that under their commission agreement, based on the volume of business he anticipated doing with Silver Towne and The Coin Vault program, Miller would be making $350,000 - $450,000 per year in commissions.

¶17 On appeal, as it did in the superior court, AOR argues it was nevertheless entitled to summary judgment on Buteo's Oral Commission Agreement counterclaim because, as noted, Miller testified the Oral Commission Agreement was to "mirror exactly" the Apex agreement and, in fact, it did not. *See supra* ¶ 13. Any inconsistencies in Miller's testimony regarding the terms of the Oral Commission Agreement and, in particular, whether it was to "mirror" the exact terms of the written agreements between Buteo and Apex, or rather, the actual business dealings between Buteo and Apex go to Miller's credibility and present factual issues that must be weighed by a jury. *See Taser Intern., Inc. v. Ward*, 224 Ariz. 389, 393, ¶ 12, 231 P.3d 921, 925 (App. 2010) (summary judgment not intended to resolve factual disputes and inappropriate if court must determine credibility of witnesses, weigh quality of evidence, or choose among competing inferences) (citation omitted). Further, as discussed, Buteo presented additional evidence supporting Miller's testimony that AOR had agreed to the Oral Commission Agreement. The existence of a contract between the parties is determined by "whether the parties manifested assent or intent to be bound." *Schade v. Diethrich*, 158 Ariz. 1, 9, 760 P.2d 1050, 1058 (1988). Decisions on the making, meaning, and enforcement of contracts hinge on the manifest intent of the parties, not "on *rhetorical constructs* finding a meeting of the minds where none occurred or *disregarding one* which actually happened." *Id*. at 8 n.8, 760 P.2d at 1057 n.8 (emphasis added) (citation omitted).

¶18 In short, Buteo presented evidence AOR had agreed to pay it commissions on media purchased by CSN and by third parties referred to AOR by Buteo. Therefore, the superior court should not have granted summary judgment in favor of AOR on Buteo's counterclaim for breach of the Oral Commission Agreement.

II. AOR's Additional Arguments for Affirming Summary Judgment on Buteo's Oral Commission Agreement

¶19 AOR argues we should affirm the superior court's summary judgment for other reasons it argued on the record in the superior court. *See* Arizona Rule of Civil Appellate Procedure ("ARCAP") 13(b) (appellate court may uphold judgment on any grounds presented to the superior court); *Bryce v. St. Paul Fire & Marine Ins. Co.*, 162 Ariz. 307, 308, 783 P.2d 246, 247 (App. 1989) (prevailing party may seek to uphold summary judgment for reasons argued on record but different from those relied on by superior court). We consider each in turn.

A. First Material Breach

¶20 First, AOR argues its performance of the Oral Commission Agreement was excused because CSN did not purchase media exclusively from AOR when, under the written Apex agreements, CSN had agreed to purchase media exclusively from Apex. *Zancanaro v. Cross*, 85 Ariz. 394, 400, 339 P.2d 746, 750 (1959) (victim of first material breach excused from further performance). Miller testified that, notwithstanding these exclusivity terms, CSN's agreement with Apex to purchase media was, in fact, not exclusive and the agreement with AOR to purchase media was similarly non-exclusive. Specifically, CSN was "no longer required to use Apex as its exclusive media agent" after some CSN debt to Apex had been "paid down." Given this evidence, AOR was not entitled to summary judgment on the Oral Commission Agreement claim based on CSN's alleged first material breach.

B. Termination

¶21 Next, AOR argues that any commission agreement between the parties terminated in late May or early June when Miller sent a May 29, 2013 email to AOR stating "I must ask AOR to please pull down any and all media booked on CSN's behalf," and this necessarily terminated AOR's obligation to pay commissions to Buteo on media Buteo purchased from AOR. In response, Buteo presented evidence that the email was not intended to terminate AOR's ongoing obligation to pay commissions on media it had already purchased and on media purchased by third parties referred to AOR by Buteo and instead only reflected CSN's decision to discontinue purchasing media from AOR on a going-forward basis. Resolution of the parties' factual dispute regarding the date of termination or whether CSN's winding up of media purchases from AOR also terminated the Oral Commission Agreement presented disputed issues of fact precluding summary judgment.

C. Statute of Frauds

¶22 AOR also argues the alleged Oral Commission Agreement violated the statute of frauds because it could not be terminated or performed within one year. *See* Ariz. Rev. Stat. ("A.R.S.") § 44-101(5) (2013) ("agreement which is not to be performed within one year from the making thereof" violates the statute of frauds); *see also Rudinsky v. Harris*, 231 Ariz. 95, 99, ¶ 18, 290 P.3d 1218, 1222 (App. 2012) ("An oral contract creating a permanent arrangement in which the defendant's liability necessarily extends beyond a one-year period, without any term that may end the

contractual relationship, is not capable of being performed within one year and falls within the statute of frauds.") (citation omitted).

¶23 Based on the record before us, Buteo presented evidence that the Oral Commission Agreement was terminable by either party upon notice, and thus capable of being performed within one year. During his deposition, counsel for AOR asked Miller: "Well, did you discuss in this agreement that—this oral agreement that you had with . . . Chris, did you discuss whether it could be terminated orally or in writing?" Miller responded, "What we discussed was—is that it would be just formatted exactly the way the Apex deal was, so I would—yes, that would be included in that."

¶24 Similarly, in his declaration, Miller explained:

> As with the Apex Agreement, the AOR commission agreement was, under certain circumstances, terminable. More specifically, either party would need to provide written notice of their intention to terminate. Any notice of termination could not be done in bad faith, solely in an attempt to escape pending performance of, for example, commissions owed. However, if AOR had come to me and indicated that it could no longer continue to pay commissions, the parties agreed that commissions could be modified or terminated.
>
> Defendants have never asserted that the parties' commission agreement was not terminable under any circumstances or that it would go on in perpetuity.
>
> Instead, Defendants stated that the agreement could be terminated under certain circumstances and no commissions would be due after termination. However, because the agreement was not terminated as to Buteo and AOR, commissions continued to be due and owing.
>
> AOR has never terminated the parties' commission agreement, either orally or in writing.

¶25 The written Apex agreements Miller referenced each contained a termination provision. These provisions allowed either party to terminate the agreement upon written notice, with some variation as to the required period for notice (30 days' or 60 days' in some instances or one day in the event of breach). The 2002 Apex agreement, for example, described the process for termination as follows:

> This Agreement shall be binding upon the parties until thirty (30) days after notice by certified mail is given by either party to the other that the Agreement is to be terminated. Termination date shall be the last calendar day of the broadcast month following the 30 day notice period. CSN shall have the right of immediate termination in the event of breach of this Agreement on [Apex]'s part.
>
> Both parties shall have the right to terminate the Agreement upon giving one (1) day written notice by certified mail of termination with cause in the event of breach of this Agreement.

¶26 Given Miller's testimony as discussed, both Buteo and AOR could terminate the Oral Commission Agreement within one year. Thus, the finder of fact could find the Oral Commission Agreement was not subject to the statute of frauds.

¶27 Buteo also argued in the superior court—and the superior court agreed—that the doctrine of part performance excluded the Oral Commission Agreement from the statute of frauds, and the doctrine is available to a party seeking an equitable remedy and not just a legal remedy, such as money damages. *See Rudinsky*, 231 Ariz. at 101, ¶ 25, 290 P.3d at 1224. Here, Buteo sought an equitable remedy, an accounting, and presented evidence supporting application of the doctrine of part performance. Accordingly, the finder of fact could find the Oral Commission Agreement was not subject to the statute of frauds for this reason.

III. Buteo's Alternative Counterclaim for Unjust Enrichment

¶28 The superior court granted summary judgment in favor of AOR on Buteo's unjust enrichment claim finding that, "because there [was] not a valid, enforceable contract between the parties . . . Buteo has not been impoverished." In Arizona, an equitable claim of unjust enrichment is

available only in the absence of a remedy at law. *Wang Elec., Inc., v. Smoke Tree Resort, LLC*, 230 Ariz. 314, 318, ¶ 10, 283 P.3d 45, 49 (App. 2012) (Unjust enrichment requires: "(1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and impoverishment, (4) the absence of justification for the enrichment and impoverishment, and (5) the *absence of a remedy provided by law*.") (emphasis added) (citation omitted). Such absence exists both when services are performed under an unenforceable contract and when "rendered in the absence of a contract." *W. Corr. Grp., Inc. v. Tierney*, 208 Ariz. 583, 590, ¶ 27, 96 P.3d 1070, 1077 (App. 2004) (citation omitted). Thus, the superior court should not have granted summary judgment on Buteo's unjust enrichment counterclaim based on the absence of an enforceable contract.

¶29 On appeal, Buteo argues it enriched AOR by having CSN buy media from AOR and by referring third party business to AOR. It further argues AOR's refusal to pay the commissions unjustly impoverished it because it could have taken its business and referrals to any other media broker who would have paid it commissions under well-established industry practice. *See supra* ¶ 12. Indeed, Buteo presented evidence, albeit disputed by AOR, that offering and paying commissions for media purchases and third party referrals is a widespread practice among media brokers. Michelle Green, who partnered with Dompier to form AOR, testified that commissions paid on direct media purchases and on purchases by third party referrals are common in the industry.

¶30 Unjust enrichment provides a remedy when a party has received a benefit at another's expense and, in good conscience, that party should compensate the other party for the benefit received. *Wang*, 30 Ariz. at 318, ¶ 10, 283 P.3d at 49. Under this standard, and given the foregoing evidence, Buteo presented triable issues of fact supporting its unjust enrichment counterclaim.

IV. Date of Buteo's Default Under the Note

¶31 Although Buteo does not dispute it breached the payment terms of the Note, it nevertheless argues that genuine issues of material fact existed as to the date of its default for purposes of calculating pre-judgment interest. Reviewing the superior court's ruling de novo, *see supra* ¶ 10, we agree with Buteo that a genuine dispute of material fact precluded the superior court from calculating interest due under the Note based on a default date of February 6, 2012.

¶32 After the superior court granted summary judgment in its favor, AOR moved for an entry of final judgment. In support of its motion,

AOR submitted a declaration from Dompier and a proposed form of judgment. Dompier stated in his declaration that the date of Buteo's default was February 6, 2012, the day after the first installment payment was due under the Note. Buteo objected to using February 6, 2012, as the date of its default under the Note, citing two conversations between Dompier and James Sando, CSN's Chief Financial Officer, where Dompier allegedly rejected any payment on the Note telling Sando CSN's "payments were unnecessary." Specifically, Sando testified that in the spring of 2012 he spoke to Dompier and

> offered, on behalf of CSN, to begin remitting payments under the terms of the promissory note . . . . Dompier told me that CSN did not need to worry about making payments relating to the promissory note, and that such payments were unnecessary, due to the parties' ongoing negotiations relating to equity and membership which would include resolving any and all outstanding amounts allegedly due and owing AOR by Buteo and CSN.

Sando also testified he had an additional conversation with Dompier and again offered, on CSN's behalf, to begin making payments on the Note, but Dompier again refused the offer.

¶33 AOR argues that even if these conversations occurred, they occurred after the date the payments were due under the Note, and thus, they were incapable of changing the undisputed fact that Buteo had failed to make the required payments under the Note and was in default as of February 6, 2012.

¶34 Although as a general rule, "the trial judge should calculate prejudgment interest from the date the claim becomes due," *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 508-09, 917 P.2d 222, 237-38 (1996) (citations omitted), a party can waive strict performance which waives prior defaults, *Ariz. Title Guarantee & Trust Co. v. Modern Homes, Inc.*, 84 Ariz. 399, 403, 330 P.2d 113, 115 (1958). At bottom, a factual dispute exists as to whether Dompier waived February 6, 2012, as the date of the default by allegedly assuring Buteo it did not need to make Note payments because of ongoing negotiations. Therefore, the superior court should not have calculated interest based on February 6, 2012, as the date of default.

V. Remand for Further Proceedings

¶35 For the forgoing reasons, the superior court should not have granted AOR summary judgment on Buteo's counterclaims. And, given the factual dispute concerning the date of Buteo's default under the Note, it should not have entered judgment on AOR's breach claims against Buteo and Miller. Accordingly, we vacate the judgment entered by the superior court, including its award of attorneys' fees and costs to AOR, and remand for further proceedings consistent with this decision.

VI. Attorneys' Fees

¶36 Buteo has requested an award of attorneys' fees on appeal pursuant to A.R.S. § 12-341.01 (2016). AOR has also requested an award of fees on appeal under A.R.S. § 12-341.01. Because neither party has yet prevailed, we deny Buteo's and AOR's fee requests without prejudice. Buteo and AOR may reassert their requests for fees on appeal under A.R.S. § 12-341.01 at the conclusion of the case. Nevertheless, as the successful party on appeal we award Buteo its costs on appeal contingent upon its compliance with ARCAP 21(a).

¶37 AOR has also requested an award of attorneys' fees on appeal under the terms of the Note. Although the Note contains a unilateral provision authorizing AOR to recover fees and costs in the collection or enforcement of the Note, the fees and costs incurred by AOR are not yet known in light of our remand. Therefore, we deny its request for contractual fees and costs, without prejudice, and on remand, it may renew its request for fees on appeal in the superior court. We express no opinion on whether the superior court should award fees and costs to AOR pursuant to the Note.

CONCLUSION

¶38 For the foregoing reasons, we vacate the judgment in favor of AOR and remand for further proceedings consistent with this decision.

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