DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

THEODORE J. ARUNSKI, Plaintiff/Appellant, v. PET POOL PRODUCTS, INC., an Arizona corporation; EDWARD TARTAGLIO; DINA TARTAGLIO; PETER WAKEFIELD; ROSIE WAKEFIELD, Defendants/Appellees.	)	1 CA-CV 08-0629 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2005-005185

The Honorable Peter B. Swann, Judge

AFFIRMED

Theodore J. Arunski, Plaintiff/Appellant — Mesa
In Propria Persona

Gregg Clarke Gibbons, P.C. — Scottsdale
by Gregg Clarke Gibbons
Attorneys for Defendants/Appellees

P O R T L E Y, Judge

¶1 Theodore J. Arunski ("Appellant") appeals the trial court's grant of summary judgment to PET Pool Products, Inc., Edward Tartaglio, Dina Tartaglio, Peter Wakefield, and Rosie

Wakefield (collectively "Appellees"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 During the summer of 2003, Appellant, Edward Tartaglio, and Peter Wakefield discussed developing a chlorinator line for pools. Based on those discussions, in September 2003, the parties formed PET Pools, Inc.[2] The three men each received a thirty-three and a third percent share in PET Pools, and were all appointed officers and directors of the company.

¶3 At a shareholders meeting on March 8, 2005, Wakefield and Tartaglio voted to remove Appellant as president and from his director position with PET Pools. Seventeen days later, Appellant and his wife filed a civil complaint seeking injunctive relief and economic damages arising out of the termination of Appellant. He filed an amended complaint on November 20, 2006, which contained six counts. Count I alleged Tartaglio and Wakefield breached a contract with Appellant when they removed him as president; Count II requested a preliminary injunction relating to the contract breach in Count I; Count III

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[1] We view the facts in the light most favorable to the party opposing the motion for summary judgment. *Ariz. Prop. & Cas. Ins. Guar. Fund v. Martin*, 210 Ariz. 478, 478-79, ¶ 2, 113 P.3d 701, 701-02 (App. 2005).

[2] PET is formed from the first initials of the three principals.

alleged Appellees breached an employment contract when they failed to pay wages to Appellant that were due and owing; Count IV alleged Appellees breached their duty of good faith and fair dealing in performing the two aforementioned contracts; Count V was a derivative suit that alleged Appellees breached their fiduciary duty to PET Pools; and Count VI alleged Appellees tortiously interfered with Appellant's business expectancies and destroyed existing and prospective business opportunities.

¶4 Appellees moved for summary judgment on the complaint.[3] The superior court granted summary judgment on Counts I through V on December 20, 2007.[4] Appellees then successfully moved for summary judgment on Count VI.

¶5 Appellant filed an unsuccessful motion for reconsideration, and then appealed.[5] We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21 (2003) and -2101(B) (2003).

DISCUSSION

¶6 Appellant argues that the trial court erred in granting summary judgment on his amended complaint.

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[3] Appellees also moved for summary judgment on their counterclaim and third party claim, but the motion was denied.

[4] Count II was dismissed because counsel had previously represented that the request was withdrawn.

[5] Appellant's wife did not sign the notice of appeal. Appellant appealed the court's unsigned minute entry. Because the court filed a signed judgment on October 29, 2008, we have jurisdiction. Although the appeal was stayed because Appellant filed bankruptcy, the stay was lifted on June 25, 2009.

Specifically, he argues that the court erred because: (1) the court did not read the entire record;[6] (2) "the Arizona Superior Court [should not] be allowed to overrule Arizona Statutes and allow grand theft by not following business law and allowing assets to be sold for a[] gross undervalue and not dispersing the money to the shareholders as the law provides"; (3) "the court . . . err[ed] when using the Business Judgment Rule as its decision for summary judgment while being biased towards the defendants"; and (4) "the court err[ed] in allowing the defendants to breach their fiduciary duty, allow Tortuous [sic] Interference to lose Prospective Economic Advantage, and cause shareholders, as well as employees to lose money without reviewing all the evidence provided[.]"

¶7 We review a grant of summary judgment de novo and view the facts in the light most favorable to the non-moving party. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). A court may grant summary judgment "if the pleadings, deposition, answers to interrogatories, and admissions on file,

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[6] Appellant characterizes the issue more broadly. His argument headnote reads: "Did the Court error in issuing a summary judgment where there were no facts presented to support this legally with so many outstanding issues yet to be determined?" The only argument he provides to support his claim, however, is that "it is wrong for the court to assume evidence and documents presented not to be a integral part of this case and not be read as was in the footnotes on IR # 95 when it states it would unreasonable for the court to review 700 pages of abstract accounting records."

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). The determination of whether a genuine issue of material fact exists is based on the record made in the trial court. *Phoenix Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 179 Ariz. 289, 292, 877 P.2d 1345, 1348 (App. 1994).

I.

¶8 Appellant contends that summary judgment was inappropriate because "it is wrong for the court to assume evidence and documents presented not to be a integral part of this case and not be read." The argument is based on a footnote in the minute entry granting summary judgment on Counts I through V, which states that:

> [t]he court notes that the statement of facts submitted by plaintiffs is over 1,000 pages in length with its exhibits, and the vast majority of those pages are of no relevance. Absent a specific citation for a specific purpose, it is patently unreasonable to expect the court to review over 700 pages of abstract accounting records.

¶9 The court is required to review the record before granting summary judgment pursuant to Arizona Rule of Civil Procedure 56(c)(1). Here, the court specifically stated that it had "reviewed the parties' briefing, [and] the voluminous exhibits." It is also evident that the court reviewed the record because the court found that the evidence possibly

revealed an agreement between the shareholders that certain loans taken could be recharacterized as wages.[7] Consequently, it is clear that the court considered the evidence presented.

¶10 Moreover, the voluminous accounting records were provided in opposition to Appellees' unsuccessful motion for summary judgment on their counterclaim and third party claim. Accordingly, there is evidence that the court reviewed those records and the entire record. We find no error.

II.

¶11 Appellant argues that Appellees breached their fiduciary duties because they violated A.R.S. §§ 10-705, -1303, and -1202(A) (2004).[8] The court, however, found that Appellant lacked standing to bring a derivative claim, *see* Ariz. R. Civ. P. 23.1, because notice is statutorily required and the notice requirements were not satisfied.

¶12 Before a shareholder can bring a derivative claim, the shareholder must be able to demonstrate that both:

> 1. A written demand has been made on the corporation to take suitable action.
> 2. Ninety days have expired from the date the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the

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[7] The court dismissed Appellant's claim that alleged Appellees breached his employment contract because he provided no evidence of a prospective agreement that PET Pool would provide him with a salary.

[8] Appellant lists other statutes in his opening brief and his appendix. Because he does not argue the applicability of those statutes, we do not list them.

> corporation or unless the statute of limitations will expire within the ninety days or unless irreparable injury to the corporation would result by waiting for the expiration of the ninety day period.

A.R.S. § 10-742 (2004).

¶13 Appellant did not demonstrate compliance with § 10-742. Moreover, he did not appeal the finding that he did not demonstrate an exception to the notice requirement. As a result, we need not address his argument that the Appellees breached their statutory fiduciary duties because Appellant does not have standing to pursue his derivative claim. Thus, the court did not err by dismissing Appellant's breach of fiduciary duty claim.

III.

¶14 Appellant contends that application of the business judgment rule was improper,[9] and "the two remaining directors and corporate attorney made improper and horribly wrong decisions that would have benefitted shareholders and allow the company to

[9] Appellant repeatedly alleges in his opening brief that the court was biased against him because he was self-represented. We note, however, that Appellant was represented a majority of the time by different lawyers. Moreover, pro se litigants are "held to the same familiarity with required procedures and the same notice of statutes and local rules as would be attributed to a qualified member of the bar." *Copper State Bank v. Saggio*, 139 Ariz. 438, 441, 679 P.2d 84, 87 (App. 1983). Finally, our review of the record demonstrates no bias towards Appellant. A trial judge is presumed to be free of bias. *State v. Ramsey*, 211 Ariz. 529, 541, ¶ 38, 124 P.3d 756, 768 (App. 2005). A party must show by a preponderance of the evidence that the judge was, in fact, biased. *Id.* Appellant has not done so.

be profitable for years." Specifically, Appellant argues that the business would have been successful if "they had . . . sign[ed] the 'Pool Salt' trademark and . . . also [not] shut down the business one month before the season kicked off and sales would have been flowing."

¶15 In Arizona, "[t]he business judgment rule 'precludes judicial inquiry into actions taken by a director in good faith and in the exercise of honest judgment in the legitimate and lawful furtherance of a corporate purpose.'" *Albers v. Edelson Tech. Partners L.P.*, 201 Ariz. 47, 54, ¶ 29, 31 P.3d 821, 828 (App. 2001) (quoting *Shoen v. Shoen*, 167 Ariz. 58, 65, 804 P.2d 787, 794 (App. 1990)). There is a presumption that a director acts in accordance with the business judgment rule, and the party challenging a director's action has to rebut the presumption with clear and convincing evidence. *See* A.R.S. § 10-830(D) (2004).

¶16 Appellant argued in Count III that Tartaglio and Wakefield individually breached a contract with Appellant when they terminated him as president of PET Pool. The trial court found that, under the business judgment rule, there was no evidence that Appellees could be liable as corporate officers

for their termination of Appellant.[10] The burden was then on Appellant to rebut the presumption. He proffered no such evidence. Accordingly, and after reviewing the record, we find no error.

IV.

¶17 Appellant words the last issue broadly, but only provides argument for his tortious interference claim. Specifically, he argues that there was sufficient evidence in the record to prove tortious interference with prospective economic advantage and that the court erred when it granted summary judgment.

¶18 To establish a viable tortious interference claim, Appellant had to show: (1) a valid contract or business expectancy existed; (2) the interferer had knowledge of such business contracts or expectancy; (3) there was intentional interference causing a breach of the contract or business expectancy; and (4) resultant damages. *Neonatology Assocs., LTD. v. Phoenix Perinatal Assocs., Inc.*, 216 Ariz. 185, 187, ¶ 7, 164 P.3d 691, 693 (App. 2007) (quoting *Wallace v. Casa Grande Union High Sch. Dist. No. 82 Bd. of Governors*, 184 Ariz. 419, 427, 909 P.2d 486, 494 (App. 1995)). Moreover, the interference

[10] Once Counts I and III, the breach of contract claims, were dismissed, there was no evidence that Appellees breached the covenant of good faith and fair dealing. Consequently, Count IV was dismissed.

must be intentional and "improper as to motive or means." *Neonatology*, 216 Ariz. at 188, ¶ 8, 164 P.3d at 694 (quoting *Safeway Ins. Co. v. Guerrero*, 210 Ariz. 5, 11, ¶ 20, 106 P.3d 1020, 1026 (2005)).

¶19 Summary judgment was granted after the trial court found no evidence of an improper motive. "Generally, the issue of motive or the propriety of an action is one of fact and not law, but [the court] may resolve the issue as a matter of law when there is no reasonable inference to the contrary in the record." *Neonatology,* 216 Ariz. at 188, ¶ 9, 164 P.3d at 694 (citing *Woerth v. City of Flagstaff*, 167 Ariz. 412, 419, 808 P.2d 297, 304 (App. 1990)). The court found the evidence demonstrated only that Appellees "stopped funding the parties' business to conserve their own resources."

¶20 The evidence demonstrated that the business was not financially successful and the parties had contributed funds in excess of their original agreements and understanding. Furthermore, because the parties were not contractually obligated to provide more capital, their decision to stop funding the business to save their resources was not improper. *Cf. Neonatology,* 216 Ariz. at 189, ¶ 15, 164 P.3d at 695 (stating that "a business 'competitor does not act improperly if its purpose at least in part is to advance its own economic interests'") (quoting *Miller v. Hehlen*, 209 Ariz. 462, 471, ¶

32, 104 P.3d 193, 202 (App. 2005)). Because "[a] question of fact as to a specific motive is only material if one of the possible motives supported by the record may be considered improper," and because Appellant has not provided evidence of an improper motive, we affirm the grant of summary judgment. *See Neonatology,* 216 Ariz. at 189, ¶ 15, 164 P.3d at 695.

¶21 Both parties have requested attorneys' fees on appeal. Because Appellant was representing himself, and has not prevailed, he is not entitled to an award of attorneys' fees. Appellees request fees and costs pursuant to A.R.S. § 12-341.01(A) (2003). Because Appellees have prevailed on the issues raised, in the exercise of our discretion, we grant their request for reasonable attorneys' fees on appeal and applicable costs subject to their compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶22 For the foregoing reasons, we affirm the grant of summary judgment dismissing Counts I through VI.

/s/_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/_____
LAWRENCE F. WINTHROP, Judge

/s/_____
MARGARET H. DOWNIE, Judge