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



DIVISION ONE
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BY: JT

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

THOMAS ALLEN BENJAMIN,) 1 CA-CV 09-0290
)
Plaintiff/Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
)
SANDRA J HOPE,)
) Not for Publication -
Defendant/Appellant.) (Rule 28, Arizona Rules
) of Civil Appellate Procedure)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2005-013193

The Honorable J. Kenneth Mangum, Judge

AFFIRMED AS MODIFIED

Sandra J. Hope
Defendant/Appellant *in Propria Persona*

Fountain Hills

Richard N. Groves
Attorney for Plaintiff/Appellee

Phoenix

B A R K E R, Judge

¶1 Appellant Sandra J. Hope appeals the trial court's entry of judgment in favor of Appellee Thomas Allen Benjamin for breach of contract, fraud/negligent misrepresentation,

promissory estoppel, unjust enrichment, and quantum meruit/quantum valebat. For the foregoing reasons, we affirm as modified.

Facts and Procedural History

¶12 Hope is a licensed private investigator specializing in domestic relations matters. Benjamin is a retired and disabled airline pilot who sued his former fiancé, K.D., in 2002 for promise to marry. In May 2002, Benjamin hired Hope to perform four covert decoy operations on K.D.'s new fiancé in order to test his faithfulness to K.D. Benjamin paid Hope \$1,800 for her decoy services.

¶13 Benjamin and Hope offer conflicting accounts of what happened after the four decoy services. According to Benjamin, he issued personal loans of \$160,924.43 to Hope over a two-year period to help Hope with legal, medical, financial, and other problems. The loan money was used for medical bills, legal fees, car loans, and home improvements. Benjamin expected Hope to repay this money to him. Hope contends the \$160,924.43 was payment for additional private investigation services that she performed.

¶14 On August 17, 2005, Benjamin filed a lawsuit against Hope to recover the loan amounts. Following a bench trial, the trial court found Benjamin proved five causes of action against Hope: breach of contract, fraud/negligent misrepresentation,

promissory estoppel, unjust enrichment, and quantum meruit/quantum valebat. The trial court entered judgment in favor of Benjamin and against Hope for \$160,924.43. Hope filed a timely notice of appeal.

¶15 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), (B) (2003) and 12-2101(B) (2003).

Discussion

¶16 We view the facts in the light most favorable to upholding the trial court's judgment. See *Styles v. Ceranski*, 185 Ariz. 448, 450, 916 P.2d 1164, 1166 (App. 1996). "We defer to a trial court's factual findings, so long as they are supported by substantial evidence, but we review any issues of law de novo." *Sw. Soil Remediation, Inc. v. City of Tucson*, 201 Ariz. 438, 442, ¶ 12, 36 P.3d 1208, 1212 (App. 2001). Hope asserts a number of errors, which we address in turn.

1. Defective Complaint

¶17 Hope contends the complaint should have been dismissed because Benjamin knew she was a licensed professional and did not provide a certified written statement with the complaint as required by A.R.S. § 12-2602(A). Section 12-2602(A) states:

If a claim against a licensed professional is asserted in a civil action, the claimant or the claimant's attorney shall certify in a written statement that is filed and served with the claim whether or not expert opinion

testimony is necessary to prove the licensed professional's standard of care or liability for the claim.

A.R.S. § 12-2602(A) (2003). The term "claim" in § 12-2602(A) is defined in § 12-2601(1). It states that "[c]laim' means a legal cause of action . . . to which all of the following apply: . . . (C) Expert testimony is necessary to prove the licensed professional's standard of care or liability for the claim." A.R.S. § 12-2601(1)(2003).

¶18 Benjamin sued Hope for breach of contract and four other causes of action because she failed to repay personal loans issued to her by Benjamin. None of the claims were based on Hope's provision of professional private investigation services to Benjamin. Similarly, the claims did not require expert testimony to establish the standard of care expected of a private investigator. Therefore, A.R.S. § 12-2602(A) does not apply and the complaint was not defective in this regard.

2. Stipulation and Motion in Limine Regarding Expert Testimony

¶19 At trial, the parties stipulated to admission of the marked trial exhibits, which included a seventy-one page invoice of the services Hope allegedly performed for Benjamin. The parties also stipulated that Hope would "testify she performed all these services and Mr. Benjamin requested them." Hope contends the trial court erroneously ignored the parties' stipulation regarding the invoice.

¶10 There is no evidence that the trial court ignored the stipulation of the parties. Pursuant to the stipulation, Hope's testimony was that she performed all the services in the invoice as requested by Benjamin. Benjamin testified that he did not request Hope's services after the four decoy operations. Benjamin also explained how his relationship with Hope transformed into a friendship and how he then made numerous loans to her. Benjamin's position was that he did not request additional services from Hope and that Hope did not bill him for the items in the invoice. Faced with conflicting testimony, the trial court determined Benjamin was more credible than Hope and sided with his testimony. *Premier Fin. Servs. v. Citibank (Ariz.)*, 185 Ariz. 80, 85, 912 P.2d 1309, 1314 (App. 1995) ("It is not our prerogative to weigh the evidence and determine the credibility of witnesses; that role belongs to the trial court.").

¶11 Hope also contends the trial court's factual findings were contrary to the motion in limine she filed. Hope's motion in limine sought to preclude testimony regarding Hope's professional conduct and whether the "charges on the invoice sent to [Benjamin] were excessive, improper or otherwise not reasonable and customary."

¶12 The record is devoid of any ruling on the motion in limine. To the extent there was testimony at trial regarding

the subject of the pending motion in limine, Hope proceeded at the risk of waiving the preclusion of such evidence. See *Golonka v. Gen. Motors Corp.*, 204 Ariz. 575, 585-86, ¶¶ 33-34, 65 P.3d 956, 966-67 (App. 2003) (denying motion in limine as waived by conduct at trial when party did not object to testimony regarding subject matter of pending motion despite court's warning to "proceed as it deems appropriate" and court's statement that it would allow party to recall witnesses after ruling on the motion); cf. *Laplace-Bayard v. Batlle*, 295 F.3d 157, 164 (1st Cir. 2002) (finding "plaintiffs proceeded at their peril" when they told the jury about the subject matter of their pending motion in limine during their opening statement).

¶13 Moreover, Hope misunderstands the trial court's factual findings. In its ruling, the trial court stated:

18. According to her testimony, using a standard word processor, Hope prepared statements of the tasks she performed, the time it took to perform them, and the costs she incurred. She said she kept a running balance which she sent to Benjamin from time to time. The invoice was admitted as Exhibit 39 and amounts to 72 pages. The Court finds the invoice to be suspicious at best. It was not in any standard format, it didn't reflect work on any grouped basis (such as monthly), and it didn't reflect that it was sent to Benjamin. Hope testified that her computer crashed and she couldn't reproduce the raw data leading to the printout. Nor could she produce the hard drive to an

expert who could try to retrieve her records.

19. Indeed, the Court concludes that the billing statements were produced after the lawsuit was initiated or threatened. Benjamin was not "billed" prior to the lawsuit being filed. The "billings" generally do not represent work performed for Benjamin nor the appropriate charges for such work had it been performed.

Although the trial court found Hope performed some services for Benjamin after the decoy work, it also found:

[T]hat all or most of the work done by Hope . . . was done voluntarily by Hope or not requested with the expectation of payment. She was receiving a great deal of assistance from Benjamin and it was in her interest to do some work that would or might benefit Benjamin. The Court also finds that the time or cost spent by Hope on these additional assignments was not significant.

¶14 The trial court's factual findings addressed whether Hope and Benjamin had a contract for performance of additional private investigation services and whether Hope actually performed those services. Use of the words "appropriate charges" reflects the trial court's finding that Hope did not appropriately send a bill to Benjamin because she did not perform the services. The trial court's characterization of Hope's time or cost in completing some tasks for Benjamin as "not significant" bears on the trial court's conclusion that Hope performed these services free of charge because of

gratitude for the money Benjamin had loaned her. Therefore, even if the court had granted the motion in limine, the trial court's findings were proper because they referred to the amount of services it believed Hope rendered to Benjamin and not the reasonableness of her fees for services (had they been requested).

¶15 To the extent that there were findings that could be said to be based upon the reasonableness of fees, for example, finding number twenty-five indicating that "some of the work for which Hope charged \$1500.00 was identical to work done by other private investigation companies for \$45.00," any error was harmless. As the court later noted in ruling on a motion for reconsideration, "Not all of the Findings of Fact were specific findings of the Court as much as some were a summary of the testimony of the parties. . . . Generally speaking, the decision of the Court was based on the credibility of the parties and their supporting documents" Thus, any such errors based on the need for expert testimony went to matters that were inconsequential in the eyes of the court and were harmless. The key issue here was whether the monies were paid for services or were loans. The court found in favor of Benjamin on this point even though Hope presented evidence to support her position.

3. Due Process Violation

¶16 Hope argues her right to due process was violated because there is no record of (1) Benjamin's pretrial memorandum and list of witnesses and exhibits, (2) the trial court's ruling on Hope's motion in limine regarding testimony on professional conduct, and (3) the trial court's ruling on her motion in limine regarding Hope's divorce proceeding.

¶17 Arizona Rule of Civil Procedure 16(d) requires the parties to file a joint pretrial statement, which includes a list of each party's witnesses and exhibits, at least five days before the trial. Ariz. R. Civ. P. 16(d). The parties did not file a joint pretrial statement with the trial court. On appeal, Hope asserts for the first time that this violated her due process rights because she did not know what arguments Benjamin would make at trial. Arguments not asserted before the trial court are waived on appeal. *Maher v. Urman*, 211 Ariz. 543, 548, ¶ 13, 124 P.3d 770, 775 (App. 2005).

¶18 Moreover, Hope could have remedied the situation before trial by filing a motion for sanctions against Benjamin pursuant to Rule 16(f), but Hope failed to do so. Hope never objected to the lack of a joint pretrial statement and proceeded to trial without it. On these facts, Hope waived Benjamin's failure to file a joint pretrial statement and, accordingly,

there is no due process violation. See *Golonka*, 204 Ariz. at 585-86, ¶ 33, 65 P.3d at 966-67.

¶19 The record is devoid of any ruling on Hope's motions in limine. Hope contends in her opening brief that her attorney told her the motions were unopposed and granted in the judge's chambers before trial, yet there is no record to support this. Hope argues her due process rights were violated because she has no record of "what was specifically agreed upon or to what extent the motions were granted." Hope waived this argument on appeal because she proceeded to trial without first obtaining a ruling on the motions in limine on the record. See *id*; see also *Maher*, 211 Ariz. at 548, ¶ 13, 124 P.3d at 775.

¶20 In addition, the party asserting a claim for due process must show prejudice. *Brown v. Ariz. Dep't of Real Estate*, 181 Ariz. 320, 324, 890 P.2d 615, 619 (App. 1995). Hope seems to argue that the court's failure to grant the motion in limine regarding professional conduct allowed Benjamin to testify about information in A.R.S. § 12-2602. Hope was not prejudiced because, as set forth above, this case does not concern § 12-2602. See *supra* ¶ 8. Hope mentions there was an order to show cause hearing because Benjamin violated a protective order regarding documents from Hope's divorce. However, Hope does not contend that Benjamin violated the protective order with trial testimony or trial evidence that

otherwise would have been prohibited by the motion in limine. Therefore, there is also no due process violation because Hope fails to demonstrate any prejudice regarding the motions in limine.

4. Set Off

¶21 Hope asserts the trial court erred in not awarding her a set off for services she performed for Benjamin and for Benjamin's refusal to sign over a check Hope claims she was entitled to receive.

¶22 Hope misunderstands the trial court's findings. Although the trial court found Hope performed services for Benjamin by locating his judgment debtors and the daughter of his former fiancé, the trial court also found this work "was done voluntarily by Hope or not requested with the expectation of payment." Hope also requests a set off for all services regarding Benjamin's former fiancé. There was evidence introduced at trial that Hope performed additional services regarding the fiancé after the four decoy operations, but Benjamin testified that he did not agree to pay for additional services. The trial court believed Benjamin's testimony and found there was no contractual agreement for Hope to perform any services after the four decoy operations. Hope cannot receive a set off for services that Benjamin did not agree to pay for.

¶23 Hope points to evidence diminishing Benjamin's credibility and supporting her position. Absent an abuse of discretion, however, we will not substitute our discretion for that of the trial court in determining the credibility of witnesses and weighing conflicting evidence. See *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13, 972 P.2d 676, 680 (App. 1998). Substantial evidence supported the trial court's findings. There was no error.

5. Verdict and Weight of the Evidence

¶24 Hope argues substantial evidence did not support the trial court's finding that Benjamin proved the value elements under his claims for unjust enrichment and quantum meruit because there was no expert testimony regarding the fees of a private investigator. As discussed previously, Benjamin did not need expert testimony to prove this claim. See *supra* ¶ 8.¹

¶25 Hope also contends Benjamin did not prove there was a debtor-creditor relationship. The trial court received conflicting evidence from Hope and Benjamin. Benjamin testified that, after the four decoy services, he made numerous loans to

¹ Hope does not assert that the unjust enrichment or quantum meruit claims are barred because relief was sought (and awarded) on the breach of contract claim. See *Trustmark Ins. Co. v. Bank One, Ariz. NA*, 202 Ariz. 535, 541, ¶ 31, 48 P.3d 485, 491 (App. 2002) ("To establish a claim for unjust enrichment, a party must show . . . (5) the absence of a legal remedy."). Accordingly, any such argument is waived. *Maher*, 211 Ariz. at 548, ¶ 13, 124 P.3d at 775 (arguments not asserted at trial are waived).

Hope in the expectation of repayment. Hope testified that the money she received from Benjamin was payment for private investigation services. To the extent Hope argues the trial court should have given more weight to her testimony and evidence, we defer to the trial court's credibility determinations and weighing of the evidence. See *Gutierrez*, 193 Ariz. at 347, ¶ 13, 972 P.2d at 680. Based on the record, substantial evidence supported the trial court's judgment against Hope for unjust enrichment and quantum meruit as to the elements contested.

6. Unauthorized Loan-Making Defense

¶26 During cross-examination of Benjamin, the following exchange took place:

HOPE'S ATTORNEY: Do you have a banking [sic] or are you in any way licensed to make loans in Arizona?

BENJAMIN'S ATTORNEY: Objection, relevancy.

THE COURT: Sustained.

Hope's attorney then asked a different line of questioning. Hope contends the court, by sustaining the objection, erroneously prohibited her from making a defense under A.R.S. § 6-613(B), which voids consumer loans made by lenders without proper licensing.

¶27 A defense under A.R.S. § 6-613(B) applies only to a "loan of money in an amount of ten thousand dollars or less that

is subject to a finance charge." A.R.S. § 6-601(7) (Supp. 2009). Benjamin made loans to Hope with no interest or finance charge. We review rulings on the admission of evidence for an abuse of discretion. *Selby v. Savard*, 134 Ariz. 222, 227, 655 P.2d 342, 347 (1982) ("A trial court's rulings on the exclusion or admission of evidence will not be disturbed on appeal unless a clear abuse of discretion appears and prejudice results."). Even though Hope received money on several occasions over a two-year period from Benjamin, the trial court could have considered that the total amount loaned, \$160,924.43, was one loan and above the \$10,000.00 limit in A.R.S. § 6-601(7). Therefore, there was no error.

7. *Fraud/Negligent Misrepresentation Claim*

¶128 The court's judgment finds in Benjamin's favor on a "Fraud/Negligent Misrepresentation" claim. Under Arizona Rule of Civil Procedure 9(b), "the circumstances constituting fraud or mistake shall be stated with particularity" in pleadings alleging fraud or mistake. Ariz. R. Civ. P. 9(b). Hope contends the so-called "Fraud/Negligent Misrepresentation claim" was not pled in compliance with Rule 9(b). This argument is moot because, even if the pleading was defective, a pleading is amended to conform to subsequent evidence presented at trial. See *Elec. Advertising, Inc. v. Sakato*, 94 Ariz. 68, 71, 381 P.2d

755, 756-57 (1963) ("Failure to formally amend the pleadings will not affect a judgment based upon competent evidence.").

¶129 Hope also asks us to reverse the fraud/negligent misrepresentation judgment because Benjamin failed to prove this claim. We consider that the designation "Fraud/Negligent Misrepresentation" is a separate count of fraud and a separate count of negligent misrepresentation based on the same facts. The nine elements of common law 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) the speaker's intent that the information should be acted upon by the hearer and in a manner reasonably contemplated, (6) the hearer's ignorance of the information's falsity, (7) the hearer's reliance on its truth, (8) the hearer's right to rely thereon, and (9) the hearer's consequent and proximate injury.

Taeger v. Catholic Family & Cmty. Servs., 196 Ariz. 285, 294, ¶ 28, 995 P.2d 721, 730 (App. 1999). To prove negligent misrepresentation, Benjamin was required to establish: (1) Hope gave incorrect information to Benjamin; "(2) [Hope] intended, or could reasonably foresee, that [Benjamin] would rely on that information; (3) [Hope] failed to exercise reasonable care in obtaining or communicating that information; (4) [Benjamin] relied on that incorrect information; (5) [Benjamin's] reliance was justified; and (6) [Benjamin's] reliance was a cause of [his] damages." *Id.* at ¶ 29.

¶30 Contrary to Hope's assertion that expert testimony was needed to prove this claim, expert testimony was not necessary for Benjamin to prevail on any of his claims. See *supra* ¶ 8. The evidence supporting the judgment against Hope for fraud and negligent misrepresentation is as follows. Benjamin testified he purchased a home for Hope in 2003 under a lease/purchase agreement in which he held title to the house. By May 2005, Benjamin had loaned Hope about \$160,000.00. In July 2005, Hope qualified for her own mortgage but needed title to the house in order to complete the transaction. Because Hope owed Benjamin a substantial sum of money, he was reluctant to deed her title without an equitable lien on the property. Hope was concerned, however, that she would no longer qualify for the mortgage if there was an equitable lien on the property. Hope promised to execute a note and deed of trust in favor of Benjamin after her mortgage closed if Benjamin deeded her title. Hope did not intend to fulfill the promise. Benjamin trusted Hope and relied on her promise, without knowing it was a false promise.

¶31 Benjamin signed a warranty deed transferring title to Hope in July 2005 and, after her mortgage closed, requested that she execute a note and lien. At this point, Hope denied owing Benjamin any money and refused to execute the lien and note. Benjamin was injured because he did not receive the security

interest in the house to protect him when Hope refused to repay her loans.

¶132 Hope contends that a judgment for fraud cannot lie when it is based upon an agreement to do something in the future. This contention is only partially correct. Our cases hold:

In order that a representation constitute actionable fraud, it must relate to either a past or existing fact. It 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.

Staheli v. Kauffman, 122 Ariz. 380, 383, 595 P.2d 172, 175 (1979) (emphasis added); see also *Hall v. Romero*, 141 Ariz. 120, 123, 685 P.2d 757, 760 (App. 1984) (“[A]ctionable fraud cannot be predicated on unfulfilled promises, expressions of intention or statements concerning future events, unless such were made with the present intent not to perform.”). On the facts here, there was a basis for the trial judge to conclude that Hope’s promises were made with “the present intent not to perform.” Accordingly, there is no error as to the fraud portion of this claim.

¶133 As to the negligent misrepresentation portion of this claim, however, our case law is contrary to the judgment and supports the assertion made by Hope. We addressed the

relationship between fraud and negligent misrepresentation in *McAlister v. Citibank (Arizona)*, 171 Ariz. 207, 829 P.2d 1253 (App. 1992). We recognized that a claim of fraud could be based upon an unfulfilled future promise so long as there was a present intent to deceive. *Id.* at 214, 829 P.2d at 1260. However, we noted that "negligent misrepresentation is a separate tort from that of intentional fraud." *Id.* at 215, 829 P.2d at 1261. We noted that "[m]ost jurisdictions that recognize a cause of action for negligent misrepresentation do not apply it to promises of future conduct." *Id.* We elected to "adopt this general rule here." *Id.* Accordingly, as we held in *McAlister*, "no claim of relief for negligent misrepresentation can be premised upon a promise of future conduct." *Id.* Thus, the portion of the judgment entitled "Fraud/Negligent Misrepresentation" is modified simply to reflect "Fraud."

8. Motion for New Trial

¶34 Arizona Rule of Civil Procedure 59 allows an aggrieved party to file a motion for a new trial for "causes materially affecting that party's rights." Ariz. R. Civ. P. 59(a). The motion must be in writing and state the reasons why a new trial should be granted. Ariz. R. Civ. P. 59(c)(1). At an order to show cause hearing after the trial, Hope orally requested a new trial because "it really is unfair" and will "hurt [her] in the end with [her] company." The trial court did not err when it

failed to issue a ruling on this request because Hope's motion for new trial was not in writing and was not filed with the court as required by Rule 59.

Conclusion

¶135 For the reasons stated above, we affirm the trial court's entry of judgment against Hope except that we modify the count entitled "Fraud/Negligent Misrepresentation" to "Fraud."

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

PETER B. SWANN, Judge