

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



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

JOSEPH COLEMAN dba SECURE) 1 CA-CV 09-0411
OPPORTUNITIES GROUP,)
) DEPARTMENT D
Plaintiff-Appellee,)
) **MEMORANDUM DECISION**
v.)
)
NEW YORK MERCHANTS PROTECTIVE) (Not for Publication -
COMPANY, INC., a New York) Rule 28, Arizona Rules
corporation,) of Civil Appellate Procedure)
)
Defendant-Appellant.)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-018698

The Honorable Joseph B. Heilman, Judge

AFFIRMED

Davis Limited
by Greg R. Davis
Attorneys for Appellant

Scottsdale

Bell Law PLC
by Emilie Bell
Attorneys for Appellee

Scottsdale

W E I S B E R G, Judge

¶1 New York Merchants Protective Company, Inc.

("Merchants") appeals from a judgment granted against it in

favor of Joseph Coleman dba Secure Opportunities Group ("Coleman"). For reasons that follow, we affirm.

BACKGROUND

¶2 On October 11, 2007, Coleman filed a complaint against Merchants. Coleman alleged that he was doing business as Secure Opportunities Group ("Secure"); that he entered into a contract with Merchants to act as a broker for alarm monitoring accounts; and that Merchants breached the contract by failing to pay half the commissions due him. The agreement for services dated January 25, 2007 between Secure and Merchants, was signed by Coleman as director of Secure, and by the president of Merchants. Coleman requested damages in the amount of \$44,727.66, pre-judgment and post-judgment interest, costs and attorney's fees.

¶3 On November 27, 2007, Merchants filed an answer denying that it owed Coleman any amount under the contract. It raised the affirmative defenses of accord and satisfaction, fraud in the inducement, and failure to state a claim upon which relief could be granted.

¶4 In a joint arbitration statement, dated May 20, 2008, Coleman and Merchants agreed as an undisputed fact that "Joseph Coleman does business as Secure Opportunities Group. Secure Opportunities Group was an Arizona corporation that was administratively dissolved last year." Merchants did not

allege, either in its answer or in the joint arbitration statement, that Coleman lacked capacity to sue. After an arbitration hearing, the arbitrator entered an award in favor of Coleman for \$44,727.66, plus pre-judgment interest of \$3,835.52, and attorney's fees and costs of \$18,384.07 for a total award of \$66,947.25.

¶15 Merchants sought a trial de novo in the superior court.¹ The parties filed a joint pre-trial statement. The parties agreed as an undisputed fact deemed material by both parties that "On January 25, 2007, Merchants and Secure Opportunities Group, Inc. . . . entered into an Agreement for Services" For the first time, Merchants alleged as an issue deemed material by it, but disputed by Coleman, that "[Coleman] does not have standing to bring this lawsuit because Joseph Coleman and Merchants have never had a Contractual relationship. The Contract is between Secure and Merchants."

¶16 After trial, the court found for Coleman and adopted his proposed findings of fact and conclusions of law, including that "Joseph Coleman is an Arizona resident and does business as Secure Opportunities Group." Coleman filed an application for attorney's fees in which he noted that Merchants retained new counsel who "developed and offered new defenses and theories."

¹Prior to trial, Merchant's counsel withdrew from further representation. New counsel appeared for Merchants with co-counsel, a New York attorney, appearing pro hac vice.

The court entered a final judgment in favor of Coleman dba Secure Opportunities Group and against Merchants in the amount of \$44,727.66, plus pre-judgment interest of \$7,425.94 and attorney's fees and costs of \$38,832.43 for a total judgment of \$90,986.03, plus post-judgment interest at the statutory rate of ten percent per annum. Merchants timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003) and 12-2101(B)(2003)

DISCUSSION

¶7 The sole argument Merchants makes on appeal is that Coleman did not have standing or capacity to sue and was not a proper party plaintiff. It alleges that the contract was entered into between "two" corporations and sometime between the execution of the contract and filing of the complaint, Secure ceased doing business, wound up its affairs and "without notifying Merchants," simply "morphed into Joseph Coleman d/b/a/ Secure Opportunities Group." Merchants argues that Coleman was not a party to the contract; there was no evidence of an assignment of the cause of action from the corporation to Coleman; no evidence as to the identity of the shareholders of the corporation; no evidence as to whether Coleman or the corporation suffered damages; and that the complaint was never amended to conform to the evidence. Merchants claims the trial

court erred by not dismissing the action. Coleman claims the evidence was sufficient to support the trial court's findings.

¶18 In a trial to the court, we will not set aside findings of fact unless they are clearly erroneous; we are not bound by the court's conclusions of law or by findings that present mixed questions of fact and law. Ariz. R. Civ. P. 52(a); *Ariz. Bd. of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 257, 806 P.2d 348, 351 (1991). At trial, Coleman testified that Secure is "just a name I operate in the marketplace. It's me doing business as Secure Opportunities." He answered affirmatively when asked, "So when it [the contract] says Secure will perform, that means Joe Coleman?"

¶19 On cross-examination, counsel asked Coleman if the corporation was in existence at the time the parties entered the contract, and Coleman responded that he did not believe it was. When counsel asked, "what if I tell you that it wasn't dissolved until February 15, 2007," Coleman responded that "the process had already begun." He indicated that the corporation was not formally dissolved, but that "[he] just let it go." Coleman admitted that some money received from Merchants in August 2007 went into the corporation's bank account.

¶10 After Coleman rested, Merchants made an oral motion to dismiss, which was denied. Merchants argued that the corporation, not Coleman entered into the contract with

Merchants, and that the proper party was not before the court. Coleman responded that Secure was a corporation owned by Coleman, that at the time Merchants breached the contract, it had dissolved, and that Coleman was doing business as Secure. Merchants replied that a right to sue is not transferred from a corporation to its shareholders.

¶11 The judge stated that "purely as a matter of law, purely as the case exists now, it might be that [Merchants] has a valid claim with respect to who the proper . . . party plaintiff is." The judge noted however, that if he were to dismiss the matter, he would do so without prejudice to refileing the complaint and because the statute of limitations had not run, "we would be doing this all over again. Everybody would be starting again" Merchants' counsel indicated he had no objection to the complaint being dismissed without prejudice. The judge noted that Coleman could seek to amend the complaint to conform to the evidence, but defense counsel objected that Merchants would be prejudiced by such an amendment. In that regard, he remarked that "unfortunately, [Merchants] believes that the arbitration was ineffectually handled by its counsel."

¶12 Coleman's attorney pointed out that no one objected to Coleman's capacity to sue at the arbitration hearing. He also indicated that the contract was between Secure, "without any indication of its status," and Merchants. The court found that

"as a matter of law, the document presented as the contract between the parties simply doesn't reflect it was a corporation in the process." The court denied Merchants' motion "in the interest of judicial economy."

¶13 Under Arizona Rule of Civil Procedure 17(a) ("Rule"), "[e]very action shall be prosecuted in the name of the real party in interest." The Rule further provides that an action shall not be dismissed because it is not brought in the name of the real party in interest "until a reasonable time has been allowed *after objection* for ratification of commencement of the action by, or joinder or substitution of, the real party in interest[.]" (Emphasis added.) The Rule makes it clear that "an initial mistake in identifying the proper plaintiff will not be fatal to the action . . ." and that the Rule is "intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made." *Toy v. Katz*, 192 Ariz. 73, 87, 961 P.2d 1021, 1036 (App. 1997) (quoting State Bar Comm. Notes).

¶14 We note that although the parties frame the issue as one of standing, the concept of standing technically rests on whether there is a "justiciable controversy." *Citibank (Ariz.) v. Miller & Schroder Fin., Inc.*, 168 Ariz. 178, 181, 812 P.2d 996, 999 (App. 1990). Because the Arizona Constitution has "no counterpart to the 'case or controversy' requirement in the

federal constitution[,]" the issue of standing in Arizona is one of judicial restraint to insure that courts do not render mere advisory opinions or decide moot issues. *Id.* at 181-82, 812 P.2d at 999-1000 (quoting *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Serv.s in Ariz.*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985)). However, where as here, whether an action should be pursued in the name of a corporation, its shareholders, or another individual or entity, concerns who is the real party in interest under Rule 17(a), not a standing issue. See *Toy*, 192 Ariz. at 87, 961 P.2d at 1036.

¶15 Because the defense that a plaintiff is not the real party in interest and lacks capacity to sue is not jurisdictional, it can be waived if not asserted in a timely manner. See *Hurt v. Superior Court of Ariz.*, 124 Ariz. 45, 48-49, 601 P.2d 1329, 1132-33 (1979); *Safeway Ins. Co. v. Collins*, 192 Ariz. 262, 266, ¶ 21, 963 P.2d 1085, 1089 (App. 1998). Under Rule 9(a), as interpreted by our courts, the issue of whether a party is the real party in interest under Rule 17(a) must be raised either by motion before the answer is filed or by way of an affirmative defense in the answer, and if not then raised, any objection to capacity to sue is waived. *Ballard v. Lawyers Title of Ariz.*, 27 Ariz. App. 168, 169, 552 P.2d 455, 456 (1976).

¶16 We have previously held that because a "pretrial stipulation in the context of a joint pretrial statement has the effect of amending the pleadings," an issue regarding capacity to sue may properly come before the court even if a party may not have raised such issue in an answer or by motion prior to filing the answer. *Lake Havasu Cmty. Hosp. v. Ariz. Title Ins. & Trust*, 141 Ariz. 363, 370-71, 687 P.2d 371, 378-79 (App. 1984), *disapproved of on other grounds in Barmat v. John and Jane Doe Partners, A-D*, 155 Ariz. 519, 524, 747 P.2d 1218, 1223 (1987). There, the defendant claimed the plaintiff/hospital lacked capacity to bring the action because it had transferred its assets and had assigned all rights of recovery from the action to another entity. It did not, however, raise this defense in its answer or by motion prior to filing the answer, but raised it in a joint pretrial statement. *Id.* at 370, 687 P.2d at 378. This court noted, however, that the hospital did not stipulate to this as an issue of fact and law that was material; only the defendant deemed it material. Therefore, the answer was not amended, and defendant waived any objection to the hospital's capacity to bring the suit. *Id.* at 371, 687 P.2d at 379. We also noted that, even assuming there was a stipulation on this issue, the defendant's statement regarding lack of capacity to sue was inadequate under Rule 9(a) because

it did not contain a "specific negative averment" and "supporting particulars."

¶17 Similarly, Merchants did not raise the capacity to sue issue in its answer or by motion prior to filing its answer. The issue was raised for the first time in the joint pretrial statement. However, as in *Lake Havasu Community Hospital*, Coleman did not stipulate that this issue was material; only Merchants deemed it material. Further, Merchants failed to comply with the specificity requirements of Rule 9(a) and merely alleged that "Plaintiff does not have standing to bring this lawsuit because Joseph Coleman and Merchants never had a Contractual relationship. The Contract is between Secure and Merchants." It did not set forth particular circumstances regarding why Coleman dba Secure lacked capacity to sue. We conclude that this issue has been waived. Although the trial court denied Merchants' motion on its merits, we will affirm the trial court if it is correct for any reason. *City of Phoenix v. Geyler*, 144 Ariz. 323, 330, 697 P.2d 1073, 1080 (1985).

¶18 Waiver aside, the evidence presented at trial supported the trial court's findings and conclusion that Coleman had the capacity to sue. Although Coleman signed the contract as director of Secure and the parties agreed in the joint pretrial statement that Merchants entered into an agreement with Secure Opportunities Group, Inc., Secure was not designated in

the contract as an Arizona corporation. Coleman testified that the corporation was in the process of dissolving at the time Secure entered into the contract with Merchants. He further testified that Secure is Coleman doing business under that name and that when the contract states that Secure will perform, it means that Coleman will perform. Coleman's counsel also stated that the corporation was defunct when Merchants breached the contract with Coleman and when Coleman filed his complaint. There was sufficient evidence for the trier of fact to conclude that Coleman was a real party in interest under Rule 17(a). See A.R.S. § 10-1405(B)(5)(2004) ("Dissolution of a corporation does not . . . [p]revent commencement of a proceeding by or against the corporation in its corporate name or any officers, directors or shareholders"); *Thomas v. Harper*, 14 Ariz. App. 140, 142, 481 P.2d 510, 511 (1971) (holding that under former Arizona statute giving dissolved corporation right to sue, plaintiffs who were stockholders of a defunct corporation could bring an action to collect on a promissory note of the corporation because on dissolution, legal title to property of the corporation passes to stockholders). The trial court did not err in denying Merchants' request to dismiss the action.

¶19 Both parties have requested attorney's fees pursuant to A.R.S. § 12-341.01. As the prevailing party in this appeal, Coleman is entitled to his costs and his reasonable attorney's

fees upon compliance with Arizona Rule of Civil Appellate Practice 21(c).

CONCLUSION

¶20 For the foregoing reasons, we affirm the judgment of the trial court.

/s/
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Presiding Judge

/s/
JON W. THOMPSON, Judge