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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 11-16-2010
RUTH WILLINGHAM,
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIGITAL SYSTEMS ENGINEERING,) 1 CA-CV 09-0574
INC., an Arizona corporation,)
) DEPARTMENT C
Plaintiff/Appellee-)
Cross Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
BERNADETTE BRUCE-MORENO and JOHN)
MORENO, wife and husband,)
)
Defendants/Appellants-)
Cross Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-005794

The Honorable Joseph C. Kreamer, Judge
The Honorable Edward O. Burke, Judge

**AFFIRMED IN PART; REVERSED IN PART
REMANDED**

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O R O Z C O, Judge

¶1 John Moreno (Mr. Moreno) appeals the trial court's grant of a motion for partial summary judgment in favor of Digital Systems Engineering, Inc. (DSE) for its claims of fraud and unjust enrichment and the admission of expert testimony at trial. DSE cross appeals asserting the trial court erred by not holding Mr. Moreno individually liable. For the reasons stated below, we affirm in part and reverse in part and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL HISTORY

¶2 Bernadette Bruce-Moreno (Ms. Bruce-Moreno), Mr. Moreno's wife, (jointly the Morenos) was employed by DSE from 2001 to 2005 as a controller. She was responsible for the company's financial affairs and accounting.

¶3 In November 2005, DSE hired Warren Schultz to replace Ms. Bruce-Moreno as its controller. Soon after Schultz began, he discovered discrepancies in two bank accounts and began an investigation into the company's finances. His investigation revealed unauthorized transfers and payments from DSE's accounts to Ms. Bruce-Moreno that did not have a proper business purpose. Eventually, DSE found evidence of 188 fraudulent transactions by Ms. Bruce-Moreno.

¶4 DSE brought seven claims against Ms. Bruce-Moreno, Mr. Moreno and their marital community. The amended complaint

alleged the following claims: (1) Declaratory Judgment and Disgorgement of Monies; (2) Unlawful Acts or Racketeering; (3) Fraud; (4) Unjust Enrichment; (5) Restitution; (6) Declaratory Judgment and Imposition of Constructive Trusts; and (7) Conversion. All the claims sought relief against Ms. Bruce-Moreno and the Moreno marital community. Only the unlawful acts and conversion claims named Mr. Moreno individually.

¶15 DSE filed a motion for partial summary judgment on the fraud and unjust enrichment claims. The motion included an initial disclosure statement, an affidavit from DSE's then-controller, Greg Zipperer (Zipperer), which also included a letter from expert witness, Patrick O'Connell (O'Connell), a Certified Public Accountant (CPA) and excerpts from Mr. Moreno's deposition. DSE's motion alleged Ms. Bruce-Moreno wrote checks to herself, electronically transferred funds into her personal accounts, paid herself unauthorized amounts from DSE's accounts, paid her personal expenses to unjustly benefit herself and Mr. Moreno without DSE's authorization and created false invoices and journal entries to conceal these activities. DSE claimed damages of almost \$300,000. Further, DSE claimed Mr. Moreno was in a position to know that these funds were being transferred into community accounts he had access to, that he did not stop or correct the transfers and that he benefitted from the transfer of

funds. DSE alleged Ms. Bruce-Moreno was paid an annual salary ranging from \$28,257.84 to \$37,620.72.

¶16 The Morenos filed a response and moved to strike DSE's allegations arguing they were not based on admissible evidence. They also presented evidence disputing the amount of damages, claiming Ms. Bruce-Moreno's wages were approximately \$50,000 her first year of employment at DSE. The Morenos then filed a motion to strike Zipperer's affidavit claiming his statements were not based on personal knowledge. The trial court accepted Zipperer's affidavit and granted DSE partial summary judgment on the fraud and unjust enrichment claims, and awarded DSE \$299,948.44 in damages.

¶17 The trial court set a date in October 2008 to hear DSE's claims of racketeering, but the claims against Ms. Bruce-Moreno were stayed due to her bankruptcy. A bench trial proceeded with Mr. Moreno in December 2008. The trial only addressed whether Mr. Moreno was "individually liable for the acts of [Ms. Bruce-Moreno]" and whether there was a "pattern or multiple acts to establish a racketeering claim."

¶18 The trial court found that DSE had proven that Ms. "Bruce-Moreno's Schemes or Artifices to Defraud and Acts of Theft, and [Mr. Moreno's] continuous use of monies from those Schemes or Artifices to Defraud and Acts of Theft, constituted patterns under A.R.S. § 13-2314.04." However, the court did not

find that Mr. Moreno recklessly tolerated Ms. Bruce-Moreno's schemes or artifices to defraud DSE. DSE was awarded \$899,845.32 on the racketeering claim, including \$299,944.48 on the fraud and unjust enrichment claims, \$6,346.06 in taxable costs and \$285,382.59 in attorney fees, plus prejudgment and post judgment interest at the rate of ten percent per annum until paid in full. All sums were awarded against Mr. Moreno's undivided one-half interest in the marital community with Ms. Bruce-Moreno.

¶19 Mr. Moreno filed a timely notice of appeal and DSE filed a timely cross appeal. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101.B (2003).

DISCUSSION

¶10 On appeal, Mr. Moreno claims: (1) the trial court erred by admitting O'Connell's expert opinion for purposes of summary judgment; (2) Zipperer's affidavit should not have been considered because it was based on hearsay and not personal knowledge; (3) the trial court relied on inadmissible evidence when granting summary judgment on fraud; (4) the Morenos presented genuine issues of fact regarding the amount of damages; and (5) O'Connell's expert opinion should not have been admitted at trial.

Zipperer's Affidavit for Summary Judgment

¶11 Mr. Moreno contends the trial court erred in considering Zipperer's affidavit, which should have been

stricken. He argues that the Zipperer affidavit is hearsay, was not based on personal knowledge and does not show Mr. Zipperer was competent to testify to the matters. Mr. Moreno further alleges that Zipperer did not have "personal knowledge as to what Ms. Bruce-Moreno was doing . . . what was and was not 'authorized' . . . what was false . . . why Ms. Bruce-Moreno made certain accounting entries . . . [or] that Ms. Bruce-Moreno did something 'unlawfully' or 'improperly'"

¶12 We review a trial court's decision to admit an affidavit and its evidentiary decisions for an abuse of discretion. *Dowling v. Stapley*, 221 Ariz. 251, 266, ¶ 45, 211 P.3d 1235, 1250 (App. 2009); *John C. Lincoln Hosp. & Health Corp. v. Maricopa Cnty.*, 208 Ariz. 532, 543, ¶ 33, 96 P.3d 530, 541 (App. 2004). "An abuse of discretion occurs when there is no evidence to support a holding or the court commits an error of law when reaching a discretionary decision." *Dowling*, 221 Ariz. at 266, ¶ 45, 211 P.3d at 1250.

¶13 "[A]ffidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively the affiant is competent to testify to the matters stated therein." Ariz. R. Civ. P. 56(e). On summary judgment, to demonstrate an affidavit was made from personal knowledge, the affiant must review the documents, show that he is familiar with the person who prepared them, or the

manner in which they were prepared. *Villas at Hidden Lakes Condo. Ass'n v. Geupel Constr. Co.*, 174 Ariz. 72, 82, 847 P.2d 117, 127 (App. 1992) (finding that an association failed to establish a prima facie case entitling it to summary judgment because its supporting affidavit did not provide foundation for the affiant's personal knowledge and conclusion, nor did it demonstrate his familiarity with the person who prepared the affidavit exhibits or the manner in which they were prepared).

¶14 In his affidavit, Zipperer stated that he was a CPA, was employed as the controller for DSE, and that he "personally" reviewed the 188 allegedly fraudulent transactions, including DSE's checks, false invoices, journal entries, falsified ledgers, and the Moreno's bank account and credit card statements. Zipperer, as controller, "personally reviews DSE's business records" and had personal knowledge of DSE's methods for documenting past transactions. Thus, as a CPA and DSE's controller, Zipperer had the education, experience and personal knowledge to testify and form opinions about the transactions at issue.

¶15 Attached to the Zipperer affidavit was a letter by O'Connell. Mr. Moreno argues that the O'Connell letter is hearsay and not admissible pursuant to Arizona Rule of Evidence 802 and should have been disregarded. Mr. Moreno contends that the O'Connell letter recited several facts, which should not have

been considered as substantive evidence, provided a listing of amounts alleged to document embezzlement of funds by Ms. Bruce-Moreno, but that the listing of amounts alleged to have been embezzled was largely prepared by someone else.

¶16 Even if we were to find the O'Connell letter was improperly considered, the Zipperer affidavit contained sufficient evidence of the fraud claim. Because we reverse and remand the unjust enrichment and the damages claims, we need not address whether the O'Connell letter was improperly considered.

Summary Judgment was Not Error for DSE's Fraud Claim

¶17 "To obtain summary judgment [the moving party] must establish that all inferences which could rationally be drawn from the established facts are such as to exclude any genuine issue." *Mast v. Standard Oil Co. of California*, 140 Ariz. 1, 5, 680 P.2d 137, 141 (1984). A moving party is entitled to summary judgment only: "[I]f the pleadings, depositions, answers to interrogatories, and admissions on file, 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). "[A] motion for summary judgment should not be granted if there is evidence creating a genuine issue of material fact." *Gatecliff v. Great Republic Life Ins. Co.*, 170 Ariz. 34, 37, 821 P.2d 725, 728 (1991).

¶18 The U.S. Supreme Court said the inquiry the trial judge should make is to determine if "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "On appeal from a grant of summary judgment, this court views the facts in the light most favorable to the party against whom judgment was taken." *Gatecliff*, 170 Ariz. at 37, 821 P.2d at 728 (internal citations omitted).

¶19 Here, DSE requested summary judgment on a fraud claim against Ms. Bruce-Moreno and the Moreno's marital community. The elements of a fraud claim 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 it should be acted upon by the person and in a 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 thereon; and (9) consequent and proximate injury. *Green v. Lisa Frank, Inc.*, 221 Ariz. 138, 156, ¶ 34, 211 P.3d 16, 34 (App. 2009).

¶20 In its motion for summary judgment, DSE argued that Ms. Bruce-Moreno made false representations by creating false invoices for payment, made misleading journal entries and the amounts she misappropriated were material to the company's

finances. DSE maintains Ms. Bruce-Moreno knew the falsity of her actions and intended DSE to rely on them because she knowingly and intentionally used false accounts, invoices, and misleading journal entries to "cover up her improper behavior." DSE did not know of Ms. Bruce-Moreno's actions and as her employer, relied on her representations because of their right to trust the accuracy of their employee's work. Furthermore, DSE was able to prove that it was monetarily damaged by the fraud.

¶21 The Morenos did not submit any expert witness statements or present other controverting evidence in support of their position. If a party fails to present facts that controvert the moving party's claims, the facts alleged by the moving party may be considered as true. *GM Dev. Corp. v. Cmty. Am. Mortgage Corp.*, 165 Ariz. 1, 5, 795 P.2d 827, 932 (App. 1990). Therefore, the trial court did not err in granting summary judgment on the fraud claim.

Summary Judgment on Fraud Precludes Unjust Enrichment

¶22 To make a case for unjust enrichment, the moving party must prove: (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) absence of justification for the enrichment and the impoverishment; and (5) an absence of a remedy provided by law. *Cmty. Guardian Bank v. Hamlin*, 182 Ariz. 627, 630, 898 P.2d 1005, 1008 (App. 1995).

¶23 The Morenos argue DSE has an adequate remedy by pursuing its fraud claim and that the trial court should not have granted summary judgment on the unjust enrichment claim by DSE. In *Loiselle v. Cosas Mgmt. Grp., LLC*, we explained that to bring a successful unjust enrichment claim, the party must show an absence of any remedy at law. 224 Ariz. 207, ____, ¶ 14, 228 P.3d 943, 947 (App. 2010). That “legal remedy, however, must be against the same person from whom relief in equity is sought.” *Id.* In this case, Ms. Bruce-Moreno, individually, and the Moreno’s marital community were named in the fraud and unjust enrichment claims. Therefore, DSE is precluded from obtaining a judgment on the unjust enrichment claim, because the parties are the same and substantive facts for each stem from the same actions.

¶24 We find the trial court erred in granting partial summary judgment on the unjust enrichment claim after ruling in favor of DSE on its fraud claim. On remand the trial court is directed to vacate the judgment on the unjust enrichment claim.

Damages on Unjust Enrichment and Fraud Claims

¶25 DSE alleged Ms. Bruce-Moreno’s actions resulted in an injury of \$299,948.44 during the time period of 2001 until 2005. In calculating the damages, the evidence presented included the amount paid to Ms. Bruce-Moreno or for her benefit, minus her wages, which DSE claimed was the total amount embezzled. DSE

argued Ms. Bruce-Moreno's wages ranged between \$28,257.84 and \$37,620.72 per year. The Morenos, however, presented evidence which disputed the amount claimed as Ms. Bruce-Moreno's wages. The president of DSE, Richard Ridley, was deposed and testified that Ms. Bruce-Moreno's initial salary was approximately \$50,000 per year. The Morenos presented evidence Ms. Bruce-Moreno's salary for 2001 as \$61,050 and in 2002 as \$46,750.¹ Ms. Bruce-Moreno's evidence of her yearly earnings was different than those stated by the O'Connell letter. Also, Ridley's statements were sufficient to create a genuine issue of material fact regarding the amount of wages Ms. Bruce-Moreno was paid between 2001 and 2005 and thus the actual amount of DSE's damages.

¶26 Finding Mr. Moreno presented sufficient evidence to create a genuine issue of material fact we reverse and remand the damages claim.²

O'Connell's Expert Opinion at Trial

¶27 This Court "will not disturb a trial court's ruling on the admissibility of evidence absent a clear abuse of discretion

¹ The 2002 salary information is based from January 1, 2002 until the date of the document, September 9, 2002.

² DSE has requested pursuant to Arizona Rule of Evidence 201 that we take judicial notice of Ms. Bruce-Moreno's criminal proceedings, bankruptcy proceedings and the Moreno's divorce proceedings. Because Ms. Bruce-Moreno is not a party to this appeal and the damages agreed to by Ms. Bruce-Moreno were based on the damages from this case, we decline to take judicial notice of these actions.

and resulting prejudice." *Fuentes v. Fuentes*, 209 Ariz. 51, 56, ¶ 24, 97 P.3d 876, 881 (App. 2004). When reviewing the admission of evidence at a bench trial, "we assume, unless it affirmatively appears to the contrary, that the trial judge only considered the competent evidence in arriving at its final judgment." *Id.* at 57, ¶ 29, 97 P.3d at 882. In *Fuentes*, we affirmed the trial court's decision even though during the bench trial the court admitted hearsay evidence in the form of a budget. *Id.* at ¶¶ 28-29. We found that the witness presenting the budget was subject to cross-examination and the numbers in the budget were similar to those in an affidavit she submitted to the court. *Id.* at ¶ 28.

¶128 Here, DSE provided the trial court notice of its intention to have the O'Connell letter admitted as an expert opinion. See Ariz. R. Evid. 702. The O'Connell letter contained findings, statistical analysis and opinions based on financial documents from 188 fraudulent transactions. The O'Connell letter was adopted by Zipperer after he had conducted his own investigation into each of the 188 transactions. Furthermore, Mr. Moreno stipulated to the admission of the documents which made up the basis for the O'Connell letter.

¶129 Using the O'Connell letter and Zipperer's testimony, DSE established a pattern of fraudulent transactions by Ms. Bruce-Moreno. DSE did not provide a damages calculation, and

only used the calculation from the partial summary judgment. Thus, even if the O'Connell letter should not have been admitted at trial, the trial court had sufficient evidence to find a pattern of conduct that constituted racketeering. Therefore, we will not overturn the trial court's judgment based on the O'Connell letter.

CROSS APPEAL

Mr. Moreno is Not Individually Liable

¶30 DSE argues Mr. Moreno should be individually liable under the "ratified or recklessly tolerated" language of A.R.S. § 13-2314.04.L (2009). The statute states:

A natural person shall not be held liable in damages or for other relief pursuant to this section based on the conduct of another unless the fact finder finds by a preponderance of the evidence that the natural person authorized, requested, commanded, ratified or recklessly tolerated the unlawful conduct of the other.

A.R.S. § 13-2314.04.L. DSE also argues that Mr. Moreno should, at a minimum be individually liable for unjust enrichment stemming from the torts of his wife.

¶31 We accept a trial court's findings of fact unless they are clearly erroneous; questions of law are reviewed de novo. See *Ariz. Bd. of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 257, 806 P.2d 348, 351 (1991).

¶32 Our interpretation of "ratified or recklessly tolerated" in the context of A.R.S. § 13-2314.04 is a question

of law. "Recklessly" means "that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." A.R.S. § 13-105.10(c) (2009) (emphasis added). Black's Law Dictionary defines "ratification" as the "[c]onfirmation and acceptance of a previous act, thereby making the act valid from the moment it was done." BLACK'S LAW DICTIONARY 1289 (8th ed. 2004). Both "ratified" and "recklessly tolerated" call for a construction that imputes knowledge or conscious awareness. That is, one who ratifies or recklessly tolerates the conduct of another must necessarily have knowledge or conscious awareness that the conduct is of a criminal nature in order to be found liable.

¶33 The trial court's determination that Mr. Moreno was not "savvy" to the criminal nature of Ms. Bruce-Moreno's conduct is a finding of fact. The record on appeal illustrates that Mr. Moreno's awareness of Ms. Bruce-Moreno's conduct was limited; while he knew that she was employed at a particular salary, Ms. Bruce-Moreno acted as the family bookkeeper. There was sufficient evidence for the trial court to find that Mr. Moreno believed that Ms. Bruce-Moreno's income was legitimate compensation or reimbursement for her travel and other business-related expenses. Moreover, absent specific knowledge or awareness of a financial discrepancy, he had no legal duty to investigate or audit Ms. Bruce-Moreno's handling of the

community's finances. Thus, because the trial court's finding was not clearly erroneous, we defer to its findings in the matter.

¶34 Finally, because we have found that the trial court erred in granting summary judgment on the unjust enrichment claim, we need not decide whether Mr. Moreno is individually liable on that claim.

Attorney Fees

¶35 Because we hold that Mr. Moreno is not individually liable, we also hold that DSE is not entitled to attorney fees in connection with the cross-appeal, pursuant to A.R.S. § 13-2314.D.5 (2009). Additionally, the cross-appeal was not frivolous. As such, we deny Mr. Moreno's request for attorney fees.

CONCLUSION

¶36 For the above mention reasons, we affirm the trial court's grant of summary judgment on DSE's fraud claim and its reliance on the Zipperer affidavit. We also affirm the trial court's conclusion that Mr. Moreno is not individually liable and only Mr. Moreno's undivided one-half interest in the marital community is liable for the judgment in this matter. However, we vacate the trial court's grant of partial summary judgment as to the unjust enrichment claim and damage calculation. On

remand the trial court shall vacate the judgment for unjust enrichment and calculate the damages on the fraud claim.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

MAURICE PORTLEY, Presiding Judge

/S/

MARGARET H. DOWNIE, Judge