

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
FILED: 11-23-2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

COBIZ FINANCIAL, a Colorado) No. 1 CA-CV 09-0711
corporation, d/b/a ARIZONA)
BUSINESS BANK,)
) DEPARTMENT B
Plaintiff/Counterdefendant/)
Appellee,)
)
v.)
) (Not for Publication -
CF HOMES, L.L.C., an Arizona) Rule 28, Arizona Rules of
limited liability company; WALTER) Civil Appellate Procedure)
L. CAMPING and JUDY L. CAMPING,)
husband and wife; individually and)
as trustees of the CAMPING FAMILY)
TRUST,)
)
Defendants/Counterclaimants/)
Appellants.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-014948

The Honorable Robert Oberbillig, Judge

AFFIRMED IN PART; REVERSED IN PART; REMANDED

Quarles & Brady, LLP
By James A. Ryan
C. Bradley Vynalek
David E. Funkhouser, III
Attorneys for Appellee

Phoenix

Walker & Peskind, PLLC
By Richard K. Walker

Scottsdale

and

Gregg Clarke Gibbons, PC
By Gregg Clarke Gibbons
Attorneys for Appellants

Scottsdale

J O H N S E N, Judge

¶1 CF Homes, L.L.C., and Walter and Judy Camping, individually and as trustees of the Camping Family Trust (together, "Defendants"), appeal from the superior court's grant of summary judgment in favor of CoBiz Financial, d/b/a Arizona Business Bank ("ABB"), denial of Defendants' motion for summary judgment and grant of ABB's motion to strike Defendants' counterclaims. For the reasons set forth below, we affirm in part, reverse in part and remand.

FACTS AND PROCEDURAL HISTORY

¶2 CF Homes, a real estate development company, borrowed \$1,690,000 from ABB to develop some unimproved land. The loan was secured by a deed of trust on the land and guaranteed by the Campings, individually and as trustees. After CF Homes defaulted and the guarantors failed to pay the amount due, ABB filed suit, alleging breach of contract. On September 11, 2008, three months after filing its complaint, ABB took title to the property at a trustee's sale. Not long thereafter, ABB filed a motion for summary judgment, seeking entry of judgment for the amount of the deficiency. Defendants filed a response pursuant

to Arizona Rule of Civil Procedure 56(f), seeking additional discovery, and the court did not rule on ABB's motion.

¶13 At some point thereafter, ABB issued a federal tax Form 1099-C that indicated that in 2008 it had cancelled the debt remaining after the trustee's sale. It sent copies of the form to the Internal Revenue Service ("IRS") and to CF Homes. On May 4, 2009, Defendants moved for summary judgment. The motion argued the Form 1099-C proved ABB had discharged CF Homes' liability on the debt. Defendants further argued ABB's cancellation of the debt necessarily discharged the guarantors from liability.

¶14 One week after Defendants filed their motion, ABB issued a corrected Form 1099-C that stated no debt had been cancelled. It mailed copies to CF Homes and the IRS. In its response to Defendants' motion for summary judgment, ABB argued it had issued the original Form 1099-C by mistake. The superior court denied Defendants' motion for summary judgment and then granted ABB's motion for summary judgment on ABB's claim for breach of contract.

¶15 Prior to the ruling on their motion for summary judgment, Defendants filed an amended answer and counterclaim. ABB moved to strike the counterclaim or for a more definite statement, pursuant to Arizona Rules of Civil Procedure 12(e) and (f). The court granted ABB's motion for a more definite

statement. After Defendants filed a statement, the court granted ABB's request to strike the counterclaim.

¶6 Defendants timely appealed. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

A. Summary Judgment in Favor of ABB.

1. Standard of review.

¶7 Summary judgment is proper when "the pleadings, deposition, 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." Ariz. R. Civ. P. 56(c). We review a grant of summary judgment *de novo*. *Wilson v. U.S. Elevator Corp.*, 193 Ariz. 251, 253, ¶ 5, 972 P.2d 235, 237 (App. 1998). We view the facts and the inferences drawn from those facts in the light most favorable to the party against which judgment was entered, considering only the evidence before the trial court when it addressed the motion. *Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, 55, ¶ 8, 156 P.3d 1157, 1160 (App. 2007).

2. The Form 1099 was *prima facie* evidence that ABB had discharged the debt.

¶18 Federal law requires lenders that discharge a debt to report the discharge to the IRS by filing a Form 1099-C. 26 U.S.C. § 6050P(a) (2006); 26 C.F.R. § 1.6050P-1(a)(1) (2008). A lender that files a Form 1099-C with the IRS also must furnish the same information to the borrower. 26 U.S.C. 6050P(d)(1)-(2) (2006). The issuance of a 1099-C may have tax implications for the lender and the borrower. See 26 U.S.C. § 165(a) (2006); 26 U.S.C. § 61(a)(12) (2006). The lender may take a loss, thereby reducing its gross income and tax liability, while the borrower must include cancelled debt in its gross income, thereby increasing its tax liability. See 26 U.S.C. § 165(a); 26 U.S.C. § 61(a)(12).

¶19 A lender that acquires an interest in a secured property through foreclosure but does not cancel the borrower's remaining deficiency must file a different tax form, a Form 1099-A. See 26 U.S.C. § 6050J(a)(1), (c)(1) (2006); 26 C.F.R. § 301.6721-1(g)(3)(v) (2008). The lender also is required to provide a copy of Form 1099-A to the borrower. See 26 U.S.C. § 6050J(e). If one transaction triggers both a foreclosure and a discharge of indebtedness within a calendar year, the lender need only file a Form 1099-C and not a Form 1099-A. 26 C.F.R. § 1.6050P-1(e)(3).

¶10 In Arizona, whether a lender has discharged a debt is governed by A.R.S. § 47-3604 (2005), which reads in relevant part:

A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument:

1. By an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation or cancellation of the instrument, cancellation or striking out of the party's signature or the addition of words to the instrument indicating discharge; or

2. By agreeing not to sue or otherwise renouncing rights against the party by a signed writing.

A.R.S. § 47-3604(A)(1)-(2) (2005).

¶11 The initial Form 1099-C that ABB sent to CF Homes and filed with the IRS was labeled "Cancellation of Debt" and stated that the "[a]mount of debt canceled" was \$584,172. The stated date of the debt cancellation was September 29, 2008. Under Arizona law, that Form 1099-C was *prima facie* evidence that ABB had discharged the stated amount of CF Homes' debt. See *Amtrust Bank v. Fossett*, 223 Ariz. 438, 439-40, ¶¶ 8, 12, 224 P.3d 935, 936-37 (App. 2009).

3. Questions of material fact preclude entry of summary judgment in favor of ABB.

¶12 Although a lender may show it did not intend to forgive an obligation by issuing a Form 1099-C, a mere assertion

that it issued the Form 1099-C in error is insufficient by itself to overcome the presumption of a discharge of indebtedness. *Id.* at 440-41, ¶¶ 12-14, 224 P.3d at 937-38. In *Amtrust*, the lender created a genuine issue of material fact sufficient to preclude summary judgment against it by offering a bank officer's affidavit stating that it had not intended to cancel the debt when it issued a Form 1099-C. *Id.* at 440, ¶¶ 9, 12, 224 P.3d at 937. The affidavit contained specific facts showing how and why the lender issued the form. *Id.*¹ Despite the lender's explanation, however, this court concluded the evidence was insufficient to support entry of summary judgment in favor of the lender. *Id.* at ¶ 13.

¶13 In response to Defendants' motion for summary judgment, ABB relied on the declarations of Troy Dumlao, its chief accounting officer, and Kevin Kosan, its real estate group manager, to show it did not intend to cancel CF Homes' debt when it issued the initial Form 1099.

¶14 Dumlao's declaration stated, without explanation, that ABB had "mistakenly prepared" and issued the Form 1099-C. According to Dumlao, at some unspecified time, ABB also prepared "[a]n appropriate Form 1099-A" and sent it to the IRS but did

¹ The lender in *Amtrust* argued that under federal law it was required to issue a Form 1099-C under certain circumstances (not relevant here) regardless of whether it intended to cancel or forgive the debt. 223 Ariz. at 440, ¶¶ 10-11, 224 P.3d at 937.

not send it to CF Homes. Dumlao declared that after ABB "realiz[ed] that the Form 1099-C had been mistakenly completed and sent to the IRS, ABB corrected the Form 1099-C, as it is allowed to do, to indicate that no debt was canceled" The declaration stated, "ABB did not and has not canceled any of Borrower's remaining debt in this matter, nor otherwise discharged the Guarantors' obligations herein."

¶15 Kosan's declaration likewise offered no explanation for ABB's issuance of the initial Form 1099-C. Indeed, the Kosan declaration did not mention the Form 1099-C issued with respect to the CF Homes debt. The declaration stated in general fashion that in late 2008, Kosan prepared "several Form 1099-As" and that the "forms were then provided" to ABB's Loan Operations Center in Denver. It concluded, "ABB did not and has not canceled any of [CF Homes'] remaining debt in this matter, nor otherwise discharged the respective guarantors' obligations herein."

¶16 Neither declaration identified who at ABB decides whether to cancel debt, what criteria the company uses to make that decision or whether CF Homes' debt would qualify for cancellation under ABB's policies. Nor did either declaration explain how or why the initial Form 1099-C was issued with respect to the CF Homes debt. Although Dumlao's declaration asserted that ABB "corrected the Form 1099-C," it did not

explain how the corrected form proves that ABB did not intend to cancel CF Homes' debt at the time it issued the original Form 1099-C. See *Amtrust*, 223 Ariz. at 438, ¶ 1, 224 P.3d at 935.

¶17 Other evidence before the superior court on summary judgment included the deposition testimony of ABB's vice president, Mitchell Burda, who testified that ABB generated the initial Form 1099-C because it "took a loss" on the CF Homes loan.² Defendants argued Burda's testimony supports the conclusion that ABB intentionally adjusted its accounting of the debt to reflect an expectation that it would not be collected.³ Defendants also argued that ABB's contention that it issued the original Form 1099-C in error is undercut by the timing of the corrected form, which ABB did not issue until one week after

² Burda first testified he did not know why a Form 1099-C is generated. Then, as noted above, he testified ABB issued the Form 1099-C in this case because it had taken a loss in the specified amount. He also testified he believed ABB generates a Form 1099-C as its "standard order of procedure" whenever the bank takes a loss. On appeal from a grant of summary judgment, we view the facts in the light most favorable to the party against whom judgment was entered and draw all justifiable inferences in its favor. *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 116, ¶ 17, 180 P.3d 977, 981 (App. 2008).

³ Federal regulations provide the specific circumstances under which a Form 1099-C should be issued. See 26 C.F.R. § 1.6050P-1(b)(2)(i)(A)-(H). All such circumstances involve a "cancellation," "extinguishment" or "discharge" of indebtedness except for 26 C.F.R. § 1.6050P-1(b)(2)(i)(H), which presumes a discharge of indebtedness upon the expiration of a non-payment testing period. See 26 C.F.R. § 1.6050P-1(b)(2)(iv).

Defendants filed their motion for summary judgment in reliance on the original form.

¶18 Given the existence of the initial Form 1099-C and the Burda deposition testimony, along with the timing of ABB's issuance of the corrected Form 1099-C, we conclude the evidence before the superior court created a genuine issue of material fact that prevented entry of summary judgment in ABB's favor on its claim for breach of contract.

¶19 Relying on *In re Crosby*, 261 B.R. 470 (Bankr. D. Kan. 2001), ABB contends it conclusively remedied the mistaken Form 1099-C when it issued the corrected form. In *Crosby*, a lender issued Form 1099-Cs but continued to engage in collection efforts. *Id.* at 472-73. The court noted that a Form 1099-C filed in error could be corrected and held that a lender could not enforce its claim "so long as [a] 1099-C it sent to the IRS remain[ed] in effect." *Id.* at 473, 477. ABB argues it follows that once a lender issues a corrected Form 1099-C, it may sue to collect the debt.

¶20 We do not agree that under Arizona law, a corrected Form 1099-C conclusively demonstrates that debt was not discharged. Although issuance of a corrected Form 1099-C may suggest a lender did not intend to discharge a borrower's debt, it is not conclusive. See *Amtrust*, 223 Ariz. at 440, ¶ 12, 224 P.3d at 937. To overcome the presumption that a Form 1099-C

evidences a discharge of indebtedness, a lender must prove that "when it issued the form it did not intend to forgive the obligation." *Id.* at 438, ¶ 1, 224 P.3d at 935 (emphasis added). Under circumstances such as these, a lender cannot rely alone on a corrected Form 1099-C, but also must produce evidence to prove it issued the original form by mistake. *See id.*

¶21 ABB also argues a Form 1099-C does not constitute a "signed writing" within the meaning of A.R.S. § 47-3604(A)(2).⁴ We need not reach this argument because we conclude there are genuine issues of material fact as to whether the original Form 1099-C constituted a voluntary discharge of debt pursuant to A.R.S. § 47-3604(A)(1).⁵

⁴ At oral argument, ABB asserted Defendants relied solely on A.R.S. § 47-3604(A)(2) and did not argue the Form 1099-C constituted a discharge pursuant to § 47-3604(A)(1). The record does not support such a narrow construction of Defendants' argument.

⁵ On appeal, ABB argues that although Defendants relied on the initial Form 1099-C in their own motion for summary judgment, Defendants did not cite the Form 1099-C in their response to ABB's motion for summary judgment. Under the circumstances, ABB's argument is not well taken. According to the record, after the superior court announced in open court that it would deny Defendants' motion for summary judgment, discussion turned to ABB's summary judgment motion, which had been pending for months but had not been set for oral argument. Defendants' counsel noted that they would need to file a supplemental response to the motion to address the Form 1099-C (which, as noted, ABB had not issued until after it filed its motion for summary judgment). The court responded, "I'm just not looking for you to rewrite your whole motion in response. . . . I'm comfortable with the fact that there isn't a fact issue on [the Form 1099-C]. And if you decide you need to take this

B. Defendants' Motion for Summary Judgment.

¶22 Defendants also challenge the denial of their cross-motion for summary judgment. Generally, denial of a motion for summary judgment is not subject to review on appeal. *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, 316, ¶ 7, 965 P.2d 47, 50 (App. 1998). Once an order granting summary judgment is properly before this court, however, we may review the denial of the cross-motion for summary judgment. *Id.*

¶23 Defendants argue they are entitled to summary judgment on ABB's claims because the Dumlao and Kosan declarations on which ABB relied were not based on personal knowledge. In support, Defendants cite *Aida Renta Trust v. Maricopa County*, 221 Ariz. 603, 611, ¶¶ 18-20, 212 P.3d 941, 949 (App. 2009). In *Aida Renta Trust*, a county employee offered an affidavit based solely on her assumptions and speculation. 221 Ariz. at 611, ¶ 20, 212 P.3d at 949. Because the witness admitted she did not have personal knowledge of the events in question and she was unable to locate anyone who did have personal knowledge, the court held her speculative statements could not be used as evidence. *Id.*

¶24 If the only issue were the circumstances under which ABB issued the initial Form 1099-C, *Aida Renta Trust* might

case up, that'll be your decision." The court then ruled on ABB's motion based on the evidence before it at the time, without supplemental briefing.

apply, given that neither Dumlao nor Kosan offered any explanation for what ABB asserts was a mistake in issuing the form. But the declarants, both of whom are senior employees of ABB, stated that based on their personal knowledge and/or their review of ABB records, ABB did not cancel the CF Homes debt or otherwise discharge the obligation. Those statements were sufficient to create a genuine issue of material fact as to Defendants' assertion that ABB had discharged the debt.

¶125 We conclude genuine issues of material fact prevent entry of summary judgment in Defendants' favor on ABB's claims. Although the original Form 1099-C constitutes *prima facie* evidence that ABB intended to discharge the debt, the record contains evidence on which the trier of fact could conclude that ABB did not intend to cancel or discharge the obligation.

C. Order Striking Defendants' Counterclaims.

¶126 ABB moved to strike Defendants' counterclaims or for a more definite statement, pursuant to Arizona Rule of Civil Procedure 12(f) and (e). The superior court ordered Defendants to file a more definite statement of their counterclaims; after Defendants filed their "statement," ABB moved to strike the counterclaims pursuant to Rule 12(e). After receiving Defendants' response and ABB's reply, the court granted the motion to strike based on its conclusion that the counterclaims

"remain[] conclusory and fail[] to set forth well pleaded facts to support any of the counterclaims."

¶127 Rule 12(e) provides:

If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

Ariz. R. Civ. P. 12(e).

¶128 Defendants' counterclaim purported to set forth four claims for relief: Negligent misrepresentation, "failure to act in good faith," breach of fiduciary duty and tortious interference with a contract. We will address each in turn.

¶129 In support of their claim for negligent misrepresentation, Defendants alleged ABB "made material representations, which were intended to induce" Defendants to act, and that Defendants "justifiably, reasonably, and actually relied upon those material misrepresentations" to their detriment. Although Defendants' "more definite statement" asserted that ABB "agreed to continue financing the Madison Street Condo project for an additional 12 months," Defendants

did not specify any alleged misrepresentation by ABB. See Restatement (Second) of Torts § 552 (1977).⁶

¶130 Defendants' counterclaim for "failure to act in good faith" alleged only that ABB "failed to act in good faith on each" of four unspecified loan contracts with Defendants. In their "more definite statement," Defendants asserted ABB breached its duty of good faith and fair dealing when it "intentionally failed to follow through with the agreed upon refinancing." Missing, however, is any statement or allegation of the specifics of any "agreed upon financing" promise by ABB to Defendants, including the date of such a promise, the amount to be loaned and the terms of the loan.

¶131 Defendants' counterclaim for breach of fiduciary duty likewise failed to allege facts to support a special relationship or fiduciary duty between Defendants and ABB. In

⁶ Restatement (Second) of Torts § 552(1) describes negligent misrepresentation:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts) § 552(1) (1977).

Arizona, without a special agreement, a debtor-creditor relationship does not create a fiduciary duty. See *McAlister v. Citibank*, 171 Ariz. 207, 212, 829 P.2d 1253, 1258 (App. 1992) (bank owed no fiduciary duty to borrower); *cf. Stewart v. Phoenix Nat'l Bank*, 49 Ariz. 34, 44, 64 P.2d 101, 106 (1937) (special relationship between debtor and creditor existed only because bank officers and directors had been debtor's financial advisors for 23 years).

¶132 As best as we can understand, Defendants' counterclaim for tortious interference with contractual relations alleged that because ABB failed to continue to loan money to CF Homes, Defendants lost unspecified business opportunities. We read Defendants' counterclaim to allege that ABB interfered with Defendants' business expectancies when ABB failed to perform on four unspecified contracts with Defendants. These facts are insufficient to constitute a claim for tortious interference with contract. See *Hill v. Peterson*, 201 Ariz. 363, 366, ¶ 8, 35 P.3d 417, 420 (App. 2001); *Pasco Indus., Inc. v. Talco Recycling, Inc.*, 195 Ariz. 50, 62-63, ¶¶ 53-59, 985 P.2d 535, 547-48 (App. 1998) (one may not tortiously interfere with one's own contract).

¶133 We affirm the superior court's order striking Defendants' counterclaims because pursuant to Rule 12(e), even as set out in Defendants' "more definite statement," the claims

were "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." Ariz. R. Civ. P. 12(e).

CONCLUSION

¶134 For the foregoing reasons, we reverse the grant of summary judgment in favor of ABB, affirm the denial of Defendants' motion for summary judgment, affirm the dismissal of Defendants' counterclaims and remand for further proceedings consistent with this decision. Defendants request their attorney's fees on appeal pursuant to A.R.S. § 12-341.01(A) (2003). In our discretion, we deny Defendants' request for fees on appeal without prejudice to a request for award of those fees from the superior court at the conclusion of the matter. We award Defendants their costs of appeal subject to compliance with ARCAP 21.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Judge

/s/
PATRICIA A. OROZCO, Judge