DIVISION ONE
FILED: 04/24/2012
RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

KLEVER INVESTOR, LLC,	)	No. 1 CA-CV 11-0400
	)	
Plaintiff/Appellant,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
BUCHALTER NEMER, P.C.; SHAWN M. RICHTER; DONALD E. ANDERSON,	)	Rule 28, Arizona Rules of Civil Appellate Procedure)
	)	
Defendants/Appellees.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV 2010-098968

The Honorable John R. Ditsworth, Judge

AFFIRMED

Parrillo Weiss & O'Halloran — Tempe
By Ronald E. Huser
Attorneys for Plaintiff/Appellant

Fennemore Craig P.C. — Phoenix
By Timothy J. Burke
Theresa Dwyer-Federhar
Amy Abdo
Todd M. Allison
Attorneys for Defendants/Appellees

D O W N I E, Judge

¶1 Klever Investor, LLC ("Klever") appeals the dismissal of its complaint against attorneys Shawn Richter and Donald

Anderson and their law firm, Buchalter Nemer, P.C. (collectively "the Lawyers"). Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Klever is in the business of purchasing and reselling real property. In September 2008, Klever entered into a contract with the Paul and Josephine Rosenbaum Family Trust ("Trust") to purchase real property titled in the Trust's name. The title company advised that both trustees would be required to sign sales documents. Co-trustee Dennis Rosenbaum would not proceed unless an attorney reviewed the sales documents and prepared a release insulating him from personal liability. Rosenbaum, though, did not wish to pay for such legal services. Rosenbaum selected the Lawyers to serve as his attorneys, and Klever paid the Lawyers a $2000 "advance fee."

¶3 The Lawyers ultimately advised Rosenbaum not to sign the sales documents and did not prepare a release. Klever asked the Lawyers to return the full $2000 fee, but they refused.

¶4 Klever sued the Lawyers, alleging legal malpractice, conversion, and interference with contract.[1] The Lawyers moved to dismiss pursuant to Rule 12(b)(6), Arizona Rules of Civil Procedure. After briefing and oral argument, the court granted the Lawyers' motion and dismissed Klever's complaint.

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[1] Klever does not contend on appeal that the superior court erred in dismissing its interference with contract claim.

¶5 Klever timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B).

DISCUSSION

¶6 We review *de novo* the grant of a motion to dismiss for failure to state a claim. *Phelps Dodge Corp. v. El Paso Corp.*, 213 Ariz. 400, 402, ¶ 8, 142 P.3d 708, 710 (App. 2006) (citation omitted). We assume the truth of well-pled factual allegations, but we disregard conclusory statements. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008) (citations omitted). We "determine whether the complaint, construed in the light most favorable to the plaintiff, sufficiently sets forth a valid claim." *Aldabbagh v. Ariz. Dep't of Liquor Licenses & Control*, 162 Ariz. 415, 417-18, 783 P.2d 1207, 1209-10 (App. 1989) (citation omitted).

I. Legal Malpractice

¶7 A plaintiff claiming legal malpractice must establish the existence of a duty. *Glaze v. Larsen*, 207 Ariz. 26, 29, ¶ 12, 83 P.3d 26, 29 (2004) (citation omitted). Whether a duty exists is a question of law that we review *de novo*. *Stanley v. McCarver*, 208 Ariz. 219, 221, ¶ 5, 92 P.3d 849, 851 (2004) (citation omitted).

¶8 Klever concedes it was not a client of the Lawyers. In its complaint, it nevertheless alleged:

> The Lawyers breached the duty of care that

> was owed to [Klever] by engaging in an impermissible conflict of interest and by making false statements of material fact and/or law to [Klever], as well as other acts.

¶9 According to Klever, the Lawyers owed it a legal duty pursuant to Restatement (Third) of the Law Governing Lawyers ("Restatement") § 51. Section 51 states that a lawyer owes a duty to a non-client when:

> (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient;
>
> (b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and
>
> (c) the absence of such duty would make enforcement of those obligations to the client unlikely . . . .

All three of the stated elements must exist. *See Capitol Indem. Corp. v. Flemming*, 203 Ariz. 589, 592, ¶ 12, 58 P.3d 965, 968 (App. 2002) (the existence of only one element is insufficient to create a duty under Restatement § 51).

¶10 Klever has not alleged that Rosenbaum intended, as one of *his* "primary objectives," for the Lawyers' services to benefit Klever. On the contrary, its complaint alleged: (1) Rosenbaum "selected The Lawyers to serve as his attorneys to review the documents Rosenbaum needed to sign, and to prepare the release that would insulate Rosenbaum from liability[;]" and

(2) Klever paid the fee based on the "representation from The Lawyers that they would only be representing Rosenbaum in his individual capacity."

¶11 Klever attempts to satisfy the first prong of Restatement § 51 by arguing it was "[i]mplicit" that Rosenbaum hired the Lawyers to benefit both himself and Klever. Such a generalized claim is insufficient to give rise to a duty under Restatement § 51. *See Flemming*, 203 Ariz. at 592, ¶ 11, 58 P.3d at 968 (complaint must suggest client's intent and lawyer's knowledge of client's intent); *see also Aldabbagh*, 162 Ariz. at 417, 783 P.2d at 1209 (citations omitted) (courts are not required to accept "unwarranted deductions of fact" in a motion to dismiss).

¶12 Moreover, Klever has not explained how the remaining elements of Restatement § 51 are satisfied -– specifically, how a duty to Klever would "not significantly impair" the Lawyers' obligations to Rosenbaum, or how the absence of such a duty would make enforcement of the Lawyers' obligations to Rosenbaum "unlikely." *See* Restatement § 51(b), (c); *Flemming*, 203 Ariz. at 592, ¶ 12, 58 P.3d at 968.

¶13 Rosenbaum sought legal representation to limit his own personal liability. If the Lawyers' duty extended to Klever, their ability to competently advise and represent Rosenbaum would be compromised. Further, the absence of a duty to Klever

would only *enhance* the Lawyers' ability to competently and ethically represent Rosenbaum, not make such representation less likely. Klever's contention that the only "logical explanation" for its willingness to pay the fee was a belief the representation of Rosenbaum would benefit it is beside the point. Restatement § 51 focuses on the *client's* intent, not the non-client's belief.

¶14 To the extent Klever suggests the Lawyers' loyalty to Rosenbaum extended to it simply because Klever paid the retainer fee, we reject such a claim. A lawyer's professional judgment and loyalty to the client cannot be compromised by a non-client who pays the fee or directs the lawyer's activities. Restatement § 134 cmt c, d; *see also* Ariz. R. Sup. Ct. 42, Ethical Rule ("ER") 1.7 cmt 13 (a non-client may pay a lawyer's fees if "the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client"), 1.8(f) (a lawyer may accept compensation from a non-client if the lawyer's "independence of professional judgment" is not impaired).

¶15 Similarly untenable is Klever's suggestion the Lawyers should have "only" reviewed the documents Rosenbaum was asked to sign and drafted a release, irrespective of Rosenbaum's best interests. Although a third person may direct a lawyer's representation under some circumstances, that person may do so *only* if the directions do not compromise "effective

representation of the client." *See* Restatement § 134 cmt d; ER 5.4(c) ("A lawyer shall not permit a person who . . . pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."). In the case at bar, *pro forma* document review and drafting, without analysis of and counseling as to the client's best interests, would clearly compromise Rosenbaum's representation and his overarching objective of avoiding personal liability -– in whatever form that might take. *See* ER 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."), 1.3 cmt 1 ("A lawyer must . . . act with commitment and dedication to the interests of the client.").

¶16 Klever's reliance on ER 4.3 as a basis for liability is unavailing.[2] The Rules of Professional Conduct do not

[2] ER 4.3 reads:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if

establish legal duties:

> Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached . . . . The Rules . . . are not designed to be a basis for civil liability.

Ariz. R. Sup. Ct. 42, Preamble; *see also Stanley*, 208 Ariz. at 224 n.6, ¶ 17, 92 P.3d at 854 n.6 (noting the Arizona Supreme Court has "declined to use the court's own ethical standards as a basis upon which to impose legal malpractice liability;" though the ethical rules "may provide evidence of how a professional would act, they do not create a duty or establish a standard of care as a matter of law"). Moreover, ER 4.3 does not *require* a lawyer to advise an unrepresented person to obtain independent legal counsel, especially where, as here, the unrepresented party clearly understands the Lawyers' role.

II. Conversion

¶17 Arizona has adopted the definition of conversion contained in the Restatement (Second) of Torts. *Universal Mktg. and Entm't, Inc. v. Bank One of Ariz.*, 203 Ariz. 266, 268, ¶ 6, 53 P.3d 191, 193 (App. 2002). Section 222(A)(1) defines conversion as

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> the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

> an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.

See also Case Corp. v. Gehrke, 208 Ariz. 140, 143, ¶ 11, 91 P.3d 362, 365 (App. 2004) (citations omitted) (conversion is "an act of wrongful dominion or control over personal property in denial of or inconsistent with the rights of others"). "[M]oney can be the subject of a conversion provided that it can be described, identified or segregated, and an obligation to treat it in a specific manner is established." *Autoville, Inc. v. Friedman*, 20 Ariz. App. 89, 91, 510 P.2d 400, 402 (1973) (citation omitted).

¶18 Although Klever attempts to reframe its conversion claim in the reply brief, its opening brief argued the Lawyers were obliged "to treat the advanced fee in a specific manner; namely, to use it to draft a release for Rosenbaum in his individual capacity." Klever further contended that, upon learning the Lawyers had not used the fee "in the specific manner that had been agreed upon," it demanded the refund that was not forthcoming.

¶19 These arguments are based on the flawed premise that Klever had the right to dictate how the Lawyers represented Rosenbaum. As discussed *supra,* Klever had no such authority.

We agree with the Lawyers that "Klever had no right to demand that the advance be returned simply because it did not like the independent legal advice given to Rosenbaum." Moreover, Klever's own complaint makes clear that drafting a release was not the only task for which Rosenbaum retained the Lawyers. Klever itself alleged the Lawyers were hired "to serve as [Rosenbaum's] attorneys to *review the documents Rosenbaum needed to sign,* and to prepare the release that would insulate Rosenbaum from liability." (Emphasis added.)

¶20 Klever's reply brief presents a different argument, while at the same time castigating the Lawyers for addressing the contention clearly advanced in the opening brief. The reply brief focuses on the previously-undeveloped argument that the Lawyers performed work for the Trust, not Rosenbaum. We could rightfully treat this argument as waived. *See Anderson v. Country Life Ins. Co.*, 180 Ariz. 625, 636, 886 P.2d 1381, 1392 (App. 1994) (citation omitted) (arguments not presented until the reply brief will not be considered).

¶21 But even considering the claim on the merits, it is unavailing. Klever's complaint alleged the Lawyers used the fee "to pay for legal work done on behalf of the Trust" because they advised Rosenbaum the contract "between the Trust and Investor was not enforceable." Assuming the Lawyers indeed advised Rosenbaum that the contract was unenforceable, this "fact" does

not establish or even suggest representation of anyone other than Rosenbaum in his capacity as co-trustee. In order to protect Rosenbaum from personal liability, in all of its potential permutations, a competent lawyer with undivided loyalties would be expected to offer such advice. Based on the record before it, the superior court properly dismissed Klever's conversion count.

III. Motion to Amend

¶22 Finally, Klever argues the superior court erred in denying its request to amend the complaint. We review this ruling for an abuse of discretion. *Dube v. Likins*, 216 Ariz. 406, 415, ¶ 24, 167 P.3d 93, 102 (App. 2007) (citation omitted). Leave to amend should be liberally granted, *Owen v. Superior Court (Maroney)*, 133 Ariz. 75, 79, 649 P.2d 278, 282 (1982), unless the proposed amendments would not cure the defects, *Dube*, 216 Ariz. at 415, ¶ 26, 167 P.3d at 102.

¶23 Counsel for Klever stated during oral argument that pursuing an amended complaint was "an exercise that's [not] going to be fruitful" because the "facts have been pretty well hashed out." Denial of leave to amend is appropriate when "a party in an offer of proof indicates that his amendment would add nothing." *Wilson v. Byrd*, 79 Ariz. 302, 306, 288 P.2d 1079, 1083 (1955); *see also ELM Ret. Ctr. v. Callaway*, 226 Ariz. 287, 292 n.2, ¶ 26, 246 P.3d 938, 943 n.2 (App. 2010) (denial is

appropriate when proposed amendments do not include new theories of recovery or allege additional facts). On this record, and especially in light of counsel's avowals, we find no abuse of discretion in denying Klever leave to amend its complaint.

IV. Attorneys' Fees and Costs

¶24 The Lawyers request an award of attorneys' fees on appeal pursuant to ARCAP 21. ARCAP 21 does not provide a substantive basis for a fee award, so we deny that request. *See Ezell v. Quon*, 224 Ariz. 532, 539, ¶¶ 31-32, 233 P.3d 645, 652 (App. 2010). They also request fees pursuant to ARCAP 25, claiming Klever's appeal is frivolous. *See Johnson v. Brimlow*, 164 Ariz. 218, 222, 791 P.2d 1101, 1105 (App. 1990) (citation omitted) ("[A] frivolous appeal is one brought for an improper purpose or based on issues which are unsupported by any reasonable legal theory.").

¶25 We impose sanctions under ARCAP 25 with "great reservation." *Ariz. Tax Research Ass'n v. Dep't of Revenue*, 163 Ariz. 255, 258, 787 P.2d 1051, 1054 (1989) (citation omitted). Although we disagree with Klever's substantive claims, we cannot label them wholly frivolous. We therefore decline to award fees as a sanction. *Ariz. Dep't of Revenue v. Gen. Motors Acceptance Corp.*, 188 Ariz. 441, 446, 937 P.2d 363, 368 (App. 1996) (appellate court has discretion to award sanction pursuant to ARCAP 25). Because the Lawyers are the successful parties on

appeal, though, we grant their request for costs upon compliance with ARCAP 21.

CONCLUSION

¶26 The judgment of the superior court is affirmed.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Acting Presiding Judge

/s/
JON W. THOMPSON, Judge