

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: 05/15/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

RICHARD C. BROWN,) No. 1 CA-CV 11-0640
)
Plaintiff/Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
KENNETH D. TREECE and CARROL) Rule 28, Arizona Rules of
TREECE, husband and wife,) Civil Appellate Procedure)
)
Defendants/Appellants.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-022139

The Honorable J. Richard Gama, Judge

AFFIRMED

Mariscal Weeks McIntyre & Friedlander, P.A. Phoenix
By Robert A. Shull and Patrick S. Cunningham
Attorneys for Plaintiff/Appellee

Reynolds & Reynolds PLLC Phoenix
By Michael T. Reynolds
Attorneys for Defendants/Appellants

B R O W N, Judge

¶1 Kenneth and Carrol Treece (the "Treeces") appeal from the trial court's order granting summary judgment in favor of Richard Brown. For the following reasons, we affirm.

BACKGROUND

¶2 Richard Brown, a California resident, and Kenneth Treece, an Arizona resident, were business associates in a partnership for which they personally guaranteed approximately \$6 million in loans. After the partnership defaulted on the loan payments, the lenders filed a breach of contract action against Brown and Treece in California for the outstanding balance of the loans.

¶3 As part of the California litigation, the court there issued a prejudgment writ of attachment in the amount of \$1,150,000. To give the defendants greater flexibility in marshaling their resources to defend the litigation, the writ was secured by Brown's personal residence in the amount of \$980,000 and Treece's Charles Schwab stock account in the amount of \$170,000. Brown then entered into an agreement (the "Security Agreement") with the Treeces, whereby the Treeces promised to pay \$575,000 to Brown in the event that the lenders prevailed in their lawsuit and Brown paid at least \$1,150,000 to the lenders. In connection with the Security Agreement, the Treeces signed a promissory note (the "Note"), secured by a deed of trust on the Treeces' residence. The same California attorney represented both parties in the drafting and execution of the documents. The Note and Security Agreement provide that they are governed by California law.

¶14 In July 2006, the lenders obtained a judgment against Brown and Treece in excess of \$6,000,000. In November 2006, Brown and Treece each entered into separate settlement agreements with the lenders in which they each agreed to transfer certain personal assets to the lenders in satisfaction of the judgment. Further, Brown agreed to release the deed of trust on the Treeces' house and the Treeces agreed to work with the lenders "to remove the Brown Deed of Trust from the Treece Home." Brown subsequently released the deed of trust but no action was taken regarding the Note.

¶15 In May 2010, Brown's attorney sent a letter to the Treeces demanding payment of the amount due on the Note. The Treeces declined to pay and in July 2010 Brown sued the Treeces for breach of contract. Brown later moved for summary judgment, asserting he had been required to pay, and did pay, an amount in excess of \$1,150,000 to the lenders and therefore the Treeces were required to pay Brown the \$575,000, plus interest and fees, due under the Note.

¶16 In response, the Treeces argued that (1) they were not provided with a written disclosure of their attorney's conflict of interest; (2) Brown had allegedly signed an agreement subordinating his interest in the Note to the lenders; and (3) Brown had "breached his fiduciary duty" to the Treeces in relation to the handling of the California lawsuit.

¶17 The trial court granted the motion, finding there was no genuine issue as to any material fact and Brown was entitled to judgment as a matter of law, reasoning as follows:

It is undisputed that these parties lost their challenge to the California lawsuit and further that Brown was obligated to and did pay to the California Plaintiffs a sum in excess of \$1,150,000. . . . It is also undisputed that Brown is the owner and holder of the Note and Security Agreement and has made demands upon [the Treeces] for payment due under the terms of the Note. To date [the Treeces] have failed to make any such payment [and] are in default of the terms of the parties' contractual agreement[.]

. . . .

The Court also concurs with [Brown's] position that nothing in the terms of the Note, the Deed of Trust or the Security Agreement specifies that a release of the security constitutes a discharge of the underlying note. Although[] the Note becomes unsecured it remains valid and enforceable.

The trial court therefore found the Treeces liable for the amount of the Note, plus prejudgment interest and attorneys' fees. The Treeces timely appealed.

DISCUSSION

¶18 Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c)(1). We review a grant of summary judgment de novo to

determine whether any genuine issue of material fact exists and whether the trial court properly applied the law. *Chalpin v. Synder*, 220 Ariz. 413, 418, ¶ 17, 207 P.3d 666, 671 (App. 2008). We view the evidence and all reasonable inferences in favor of the nonmoving party. *Id.*

¶19 The Treeces first argue that a question of fact exists as to the validity of the Note and Security Agreement because they did not receive the written disclosure required under California Rule of Professional Conduct 3-310. Rule 3-310 states that an attorney may not represent multiple clients "in a matter in which the interests of the clients potentially conflict[,]" unless the clients give "informed written consent" following written disclosure of the "actual and reasonably foreseeable adverse consequences" of the joint representation. Cal. R. Prof. Conduct 3-310(C)(1), (A)(1)-(2). The Treeces assert that because they did not receive a written disclosure, they are entitled to further proceedings "to determine whether [they] would have entered into the contract in question had they understood the full extent of their liability in case of breach." The Treeces, however, signed both documents, expressly waived the attorney's conflict of interest, and warranted that the terms contained within the agreement were the product of their own negotiations with Brown. Moreover, the Treeces cite no authority suggesting that the absence of the written

disclosure would render the contract documents unenforceable. See ARCAP 13(a)(6) (stating appellate briefs must contain argument supported by "citations to relevant authority"). Thus, no material issue of fact exists regarding whether the attorney's alleged failure to provide written disclosure gives the Treeces with legal justification for nonpayment of the Note.

¶10 The Treeces also assert that Brown signed an agreement subordinating his interest in the Note to the lenders, suggesting that "is the only plausible explanation as to why the Judgment Creditors would let a major asset escape the Brown Settlement Agreement." However, the Treeces did not provide any evidence as to the existence of a subordination agreement nor have they made any effort to explain how such an agreement would eliminate the Treeces' obligation to Brown under the Note. We therefore reject their argument that an alleged subordination agreement relieves them from liability on the Note.

¶11 Finally, the Treeces argue that summary judgment was improper because Brown breached his fiduciary duty "to make reasonable business decisions as it pertained to the litigation." The Treeces cite no authority supporting their argument nor do they attempt to explain how, absent the filing of a counterclaim, breach of fiduciary duty would allow them to escape liability on the Note. Thus, we summarily reject this argument.

¶12 In sum, the trial court properly granted summary judgment on Brown's breach of contract claim. California law requires that a plaintiff establish "(1) the contract, (2) plaintiff's performance or excuse for non-performance, (3) defendant's breach, and (4) damage to plaintiff therefrom." *Acoustics, Inc. v. Trepte Constr. Co.*, 92 Cal. Rptr. 723, 740 (Cal. Ct. App. 1971). Here, the record contains undisputed evidence that Brown and the Treeces signed a contract requiring the Treeces to pay \$575,000 plus interest and fees in the event that Brown was required to pay at least \$1,150,000 to the lenders at the conclusion of the lawsuit. It is also undisputed that the lenders prevailed in the lawsuit, that Brown was required to pay more than \$1,150,000 to the lenders, and that the Treeces have not paid Brown the funds due under the Note.

CONCLUSION

¶13 For the foregoing reasons, we affirm the trial court's judgment in favor of Brown. As the prevailing party on appeal, we grant Brown's request for attorneys' fees under the terms of the Note upon compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/

MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Judge

/s/

ANDREW W. GOULD, Judge