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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MOBILITY INSURANCE COVERAGE, INC., an Arizona corporation, Plaintiff/Appellee, v. DEALER INSURANCE GROUP, LLC, an Arizona limited liability company, Defendant/Appellant.	2 CA-CV 2011-0066 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20096501

Honorable Stephen C. Villarreal, Judge

REVERSED AND REMANDED

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H O W A R D, Chief Judge.

¶1 Dealer Insurance Group (Dealer) appeals from the trial court's grant of partial summary judgment in favor of Mobility Insurance Coverage (Mobility). Dealer

argues the court erred by "disregard[ing] evidence of inconsistent and differing [contract] terms" and finding no issue of material fact as to the terms of an oral contract. For the following reasons, we reverse.

Factual and Procedural Background

¶2 We view the facts and reasonable inferences from those facts in the light most favorable to the party against whom summary judgment was granted. *See Andrews v. Blake*, 205 Ariz. 236, ¶ 12, 69 P.3d 7, 11 (2003). Mobility was affiliated with Beaudry Motor Company to provide vehicle insurance to Beaudry's customers. Mobility contracted with various insurance carriers, including American Modern Home Insurance Company (AMHI), to provide the insurance.

¶3 Richard Wiersma worked for Beaudry Motor Company until December 2008. Wiersma was a licensed insurance agent and also had an account in his name with AMHI. It is undisputed that Wiersma and Mobility had entered into an oral agreement assigning the commissions in Wiersma's name to Mobility at least for a time. Michael Murphy, an employee of Beaudry, and John Santora, an employee of Mobility, formed Dealer while still working for their respective employers. In March 2009, Wiersma signed a contract with Dealer and Santora stating Wiersma "makes no representations whether or not he may own any interest in the [insurance] Books, but nonetheless desires to sell, convey and transfer any interest he may have." The contract then provides that Wiersma sells whatever interest he may have in the book to Dealer.

¶4 AMHI filed a complaint in interpleader against Dealer and Mobility requesting they "be required to appear and interplead their claims" for the ownership of

the insurance book and commissions. Mobility answered and filed cross-claims against Dealer, Murphy, Santora, and others for breach of fiduciary duties, interference with contract, aiding and abetting breach of fiduciary duty, and unfair competition. Dealer, along with others, filed a counter-claim against Mobility for contractual interference. After motions for partial summary judgment were filed on various issues, the trial court granted Mobility's cross-motion for summary judgment on the AMHI interpleader action and denied Dealer's motion for summary judgment on the AMHI interpleader action. The court expressly determined pursuant to Rule 54(b), Ariz. R. Civ. P., that there was no just reason for delay of an appeal on the AMHI interpleader action. This appeal followed.

Discussion

¶5 Dealer argues the trial court erred by finding no genuine issue of material fact as to the terms of Mobility and Wiersma's agreement about ownership of the AMHI book commissions. It contends the court should have resolved all reasonable inferences in favor of Dealer, because it "presented evidence to the superior court that Wiersma told D[ealer] that he owned the [insurance] book." We review a grant of summary judgment de novo. *Valder Law Offices v. Keenan Law Firm*, 212 Ariz. 244, ¶ 14, 129 P.3d 966, 971 (App. 2006).

¶6 Summary judgment is required where there is "no genuine issue as to any material fact." Ariz. R. Civ. P. 56(c)(1). Our supreme court has interpreted this rule to mean that "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree

with the conclusion advanced by the proponent of the claim or defense," summary judgment should be granted. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). But summary judgment is only appropriate when the trial court "would not have been required to pass on the credibility of witnesses with differing versions of material facts, would not have been required to weigh the quality of documentary or other evidence, and was not required to choose among competing or conflicting inferences." *Id*. at 311, 802 P.2d at 1010. Trial by affidavits is not allowed. *Id.* at 309, 802 P.2d at 1008.

¶7 Dealer relies on the affidavits of Santora and Murphy. Santora asserts in his affidavit that he spoke with Wiersma and that Wiersma told him Wiersma's "employment with Beaudry was consideration for the continuing assignment of his interests in the renewal commissions" and that the termination meant that "Wiersma owned the book and agreed to transfer it to D[ealer]." And Murphy sets forth in his affidavit that Wiersma stated he owned several insurance books, including AMHI, and that "Mobility had no right to receive any commissions from his agency license after his termination from Beaudry." Dealer also points to various filings by Mobility stating that Wiersma's employment was consideration for the assignment. On the other hand, Wiersma states in his affidavit that he never had any right to the commissions or the insurance book even after the termination of his employment with Beaudry. Mobility also submitted other evidence supporting Wiersma's rendition of the agreement.

¶8 In order to resolve the discrepancies between the affidavits, the trial court would have been required to assess the credibility of the affiants and weigh their

affidavits in light of the other evidence. *See Orme Sch.*, 166 Ariz. at 311, 802 P.2d at 1010. Because trial by affidavits is not permitted and the affidavits differed on a genuine issue of material fact, summary judgment was not appropriate. *See* Ariz. R. Civ. P. 56(c)(1).

¶9 Mobility contends Santora's affidavit is inadmissible parol evidence because it contradicts the terms of the agreement between Wiersma and Dealer. The parol evidence rule prohibits extrinsic evidence that would contradict the meaning of a written contract. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 153, 854 P.2d 1134, 1139 (1993). Here, neither party disputes the terms of the written agreement between Wiersma and Dealer, but instead both agree that if Wiersma owned the insurance book at that time, he transferred it to Dealer through the written agreement. However, the affidavits provide evidence of a statement by Wiersma that would be admissible at trial concerning the terms of the prior oral agreement between Wiersma and Mobility. Because the terms of that agreement are not in writing and any statement by Wiersma goes to the parties' understanding of the terms of the oral agreement, the parol evidence rule is inapposite and the trial court improperly disregarded the affidavits. *See Merritt v. Walter Pocock Assocs. Brokers, Inc.*, 105 Ariz. 392, 393-94, 465 P.2d 585, 586-87 (1970) (when terms of prior oral agreement uncertain based on parties' statements, summary judgment improper). Moreover, Mobility does not argue that Murphy's affidavit contains improper parol evidence.

¶10 Mobility further argues that "[t]he record overwhelmingly proved Wiersma's assignment of the commissions to Mobility was without limitation" and that

Mobility "presented substantial evidence regarding Santora's credibility and veracity." Mobility has in fact produced substantial evidence favoring its interpretation of its agreement with Wiersma. But summary judgment is not permissible when the trial court would be required to weigh the evidence and choose between possible inferences. *See Orme Sch.*, 166 Ariz. at 311, 802 P.2d at 1010. And we cannot find that Mobility's evidence is so overwhelming that "reasonable people could not agree with the conclusion advanced by" Dealer. *Id.* at 309, 802 P.2d at 1008. To the extent Mobility argues Santora "created a sham affidavit," we note that the sham-affidavit rule prohibits parties from creating issues of fact by contradicting their own depositions with later affidavits. *See Allstate Indem. Co. v. Ridgely*, 214 Ariz. 440, ¶ 9, 153 P.3d 1069, 1071 (App. 2007). Mobility does not allege this occurred but seems to be implying Santora created a false affidavit. Thus, the sham affidavit rule does not apply. Accordingly, we reverse the trial court's grant of summary judgment in favor of Mobility.

Attorney Fees

¶11 Dealer requests attorney fees on appeal, but fails to cite any authority supporting its request. Because Dealer cites no basis for the award of attorney fees, we deny the request. *See Ezell v. Quon*, 224 Ariz. 532, ¶ 31, 233 P.3d 645, 652 (App. 2010); *see also* Ariz. R. Civ. App. P. 21(c)(1). Mobility requests attorney fees under A.R.S. § 12-341.01 for an action arising out of a contract and attorney fees and damages under A.R.S. § 12-349 for bringing an unjustified action. Because Mobility was not the successful party and because Dealer's appeal was justified, we deny Mobility's requests for attorney fees and damages.

Conclusion

¶12 For the foregoing reasons, we reverse the trial court's entry of summary judgment in favor of Mobility and remand for proceedings consistent with this decision.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge