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MAR 16 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JOHN S. TRUITT and ASSOCIATED MEDICAL DEVELOPMENT, INC., an Arizona corporation,

Plaintiffs/Appellants,

v.

JESSE TRUITT and SIERRA VISTA MEDICAL CENTER PARTNERSHIP, a joint venture partnership,

Defendants/Appellees.

SIERRA VISTA MEDICAL CENTER PARTNERSHIP, a joint venture partnership,

Counterclaimant/Appellee,

v.

JOHN S. TRUITT and SHIREEN E. TRUITT, individually and as husband and wife,

Counterdefendants/Appellants.

SIERRA VISTA MEDICAL CENTER PARTNERSHIP, a joint venture partnership,

Cross-Claimant/Appellee,

2 CA-CV 2011-0119
DEPARTMENT A

MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil Appellate Procedure

v.	)
	)
JESSE TRUITT, an individual,	)
	)
Cross-Defendant/Appellee.	)
	)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20074380

Honorable Scott Rash, Judge

AFFIRMED

Munger Chadwick, P.L.C. By Mark E. Chadwick	Tucson Attorneys for Plaintiffs/Counterdefendants/ Appellants
Lewis & Roca LLP By John N. Iurino, Erin O. Simpson and Jeffrey L. Sklar	Tucson Attorneys for Defendant/Counterclaimant/ Cross-Claimant/Appellee
Gallagher & Kennedy, P.A. By Timothy W. Overton and Mark Deatherage	Phoenix Attorneys for Defendant/Cross-Defendant/ Appellee

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B R A M M E R, Judge.

¶1 Appellants John Truitt, Shireen Truitt, and Associated Medical Development, Inc. (AMD) (collectively "John") appeal from the trial court's grant of summary judgment in favor of appellee Sierra Vista Medical Center Partnership (Partnership). John argues the court erred in granting summary judgment in favor of the

Partnership because (1) there are genuine issues of material fact as to whether he is equitably estopped from arguing the disputed partnership interest had been transferred to AMD rather than Jesse Truitt, and (2) the transfer was ineffective because Jesse had failed to execute a power of attorney required as a condition of the transfer. He further contends the court erred in awarding attorney fees to the Partnership. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to the party against whom summary judgment was entered, drawing all justifiable inferences in its favor. *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 2, 212 P.3d 853, 855 (App. 2009). The Partnership was formed in 1989 and is governed by a partnership agreement. John became a partner in 1994, acquiring a thirty-one percent interest that later increased to 39.1885 percent. In June 2002 John entered into a Buy-Sell Agreement purporting to sell ninety-nine percent of his Partnership interest to AMD. Jesse Truitt was a fifty-one percent shareholder in AMD, and John became a forty-nine percent shareholder in 2005.

¶3 When the Partnership was informed John had transferred nearly all of his Partnership interest, the Partnership initially rejected the transfer. It did so because the Partnership agreement "required that partners discuss and review with other partners when a transfer is necessary," and further because John's attempted transfer had been undertaken without the Partnership's approval; thus the Partnership could reject it. The Partnership's meeting minutes reflect at that time the Partnership believed John had transferred his interest to Jesse. The Partnership agreed to John's transfer of his interest to Jesse if Jesse met several conditions. In 2003, the Partnership approved and memorialized John's

transfer to Jesse in the Sixth Amendment to the Joint Venture Partnership Agreement (Sixth Amendment). John and Jesse also signed a document titled "Certification of Jesse Truitt and John Truitt, M.D." (Certification), which outlined details of the transfer and was presented to the Partnership as further documentation of the approved transfer.

¶4 In 2007, John sent the Partnership a letter claiming his interest had been transferred to AMD rather than to Jesse. The Partnership refused his request to change its records to reflect that transfer. John filed a complaint against Jesse and the Partnership seeking a declaratory judgment that Jesse was not the assignee of John's Partnership interest, and asking the trial court to rescind the Buy-Sell Agreement to render John the current owner of the disputed interest. The Partnership moved for partial summary judgment on the grounds its records were correct based on representations John and Jesse had made to it. The court granted the Partnership's motion for summary judgment and request for attorney fees and costs pursuant to an indemnification clause in the Certification. This appeal followed.

Discussion

Summary Judgment

¶5 Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). A trial court should grant a motion for summary judgment "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." *Orme Sch. v. Reeves*, 166 Ariz. 301,

309, 802 P.2d 1000, 1008 (1990). "On appeal from a summary judgment, we must determine de novo whether there are any genuine issues of material fact and whether the trial court erred in applying the law." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 8, 965 P.2d 47, 50 (App. 1998).

Equitable Estoppel

¶6 John argues the trial court erred in granting the Partnership's motion for summary judgment. He first contends the court erred in determining he was equitably estopped from asserting the disputed partnership interest had been transferred to AMD rather than to Jesse. He maintains genuine issues of material fact exist as to each of the elements of estoppel.

¶7 The trial court applied the elements of equitable estoppel as set forth in *Heltzel v. Mecham Pontiac*, 152 Ariz. 58, 730 P.2d 235 (1986). Although John below asserted different tests for this doctrine, he appears to concede on appeal that *Heltzel* appropriately recites its elements. Those elements are: "1) conduct by which one induces another to believe in certain material facts; and 2) the inducement results in acts in justifiable reliance thereon; and 3) the resulting acts cause injury." *Id.* at 61, 730 P.2d at 238; *see also Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, ¶ 28, 156 P.3d 1149, 1155 (App. 2007). The party to be estopped "must induce reliance 'by his acts, representations or admissions intentionally or through culpable negligence.'" *Flying Diamond*, 215 Ariz. 44, ¶ 28, 156 P.3d at 1155, *quoting LaBombard v. Samaritan Health Sys.*, 195 Ariz. 543, ¶ 12, 991 P.2d 246, 249-50 (App. 1998). And the reliance must be justifiable. *Id.* Equitable estoppel is an affirmative defense, and the party asserting it

bears the burden of proving its elements. *See Lowe v. Pima Cnty.*, 217 Ariz. 642, ¶ 34, 177 P.3d 1214, 1222 (App. 2008).

¶8 John contends the trial court erroneously determined the Partnership had relied justifiably on John's actions to conclude the disputed partnership interest had been transferred to Jesse. He asserts there is "little if any evidence . . . that would or should have led the partnership to believe that [John] had consented to the conversion of the transaction contemplated by the Buy-Sell."[1] We disagree. The Sixth Amendment states explicitly that John "desire[d] to transfer to Jesse Truitt a portion of [his] interest in the Joint Venture." The Sixth Amendment does not mention AMD. The Certification also states explicitly that John agreed to transfer ninety-nine percent of his interest to Jesse, without mention of AMD. And John's contentions about the Buy-Sell Agreement are irrelevant because any prior agreement had been rejected by the Partnership, and thus it would have been illogical for the Partnership to rely on anything but the Sixth Amendment and Certification. John's belief he was transferring his interest to Jesse in his capacity as President of AMD is similarly irrelevant. *See McCutchin v. SCA Servs. of Ariz., Inc.*, 147 Ariz. 234, 235, 709 P.2d 591, 592 (App. 1985) ("Insofar as the subjective belief of a contracting party contradicts his manifested intent, that subjective belief is irrelevant."). The contents of the Sixth Amendment and Certification are undisputed and unambiguous,

[1]John also asserts any acts relied on must have been absolute and unequivocal. Only one of the controlling authorities he cites in support of that proposition actually contains that standard. *See Knight v. Rice*, 83 Ariz. 379, 381, 321 P.2d 1037, 1038 (1958). Nevertheless, the Sixth Amendment and Certification John signed, absolutely and unequivocally stated he had transferred most of his interest to Jesse.

and they support the court's finding that John induced the Partnership to believe most of his interest had been transferred to Jesse. *See Heltzel*, 152 Ariz. at 61, 730 P.2d at 238.

¶9 John further argues the trial court erred in finding the Partnership's reliance on the Sixth Amendment and Certification was justified, arguing that reliance is not justified "where knowledge to the contrary exists" or a party acts with "careless indifference" to information available. Again, John supports this argument with reference to the Buy-Sell Agreement. The Partnership rejected all prior agreements in approving the Sixth Amendment. Consequently, it was reasonable and justifiable for the Partnership to rely on statements in the Sixth Amendment rather than the ineffective prior Buy-Sell Agreement. And, although John also asserts the Partnership should not have relied on the Sixth Amendment because it had been rendered unenforceable by Jesse's failure to execute a required power of attorney, for the reasons discussed below, the absence of an executed power of attorney is irrelevant. Therefore, John has failed to establish a dispute of material fact as to whether the Partnership's reliance on the Sixth Amendment and Certification was justified.

¶10 John also contends there is insufficient evidence in the record to establish the Partnership changed its position or suffered damages as a result of representations he made. But John conceded the dispute over his partnership interest required "immediate resolution" so that the Partnership's affairs were not "hindered or impeded." In addition, an affidavit from one of the partners states the Partnership agreed to the transfer to Jesse because of representations made in the Certification and, as a result of the lawsuit, incurred significant legal fees and costs. And, although John asserts the Partnership was more

involved in the litigation than necessary, thereby incurring more legal fees than necessary, it is clear the Partnership necessarily incurred some legal fees and costs defending the action John had brought against it. John has cited no authority suggesting a certain threshold level of damages must be incurred before a court can find satisfied the elements of equitable estoppel. *See* Ariz. R. Civ. App. P. 13(a)(6) (appellate brief argument shall contain "citations to the authorities, statutes and parts of the record relied on"); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393-94 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal). Therefore, we agree with the trial court that the injury caused to the Partnership is clear from the record. Because each of the elements of equitable estoppel is satisfied by undisputed evidence in the record, the court did not err in determining John was estopped from denying he had transferred his interest to Jesse rather than AMD.

Power of Attorney

¶11 John further contends the trial court erred in determining the partnership interest was transferred to Jesse because he never had executed the required power of attorney. The Sixth Amendment was "expressly made contingent" on Jesse's execution of an irrevocable power of attorney appointing John as "attorney[] in fact with respect to voting of the transferred partnership interests." Because Jesse never executed such a power of attorney, John contends the transfer "did not and could not have become effective."

¶12 The trial court determined Jesse's failure to execute a power of attorney was irrelevant for several reasons. The only issue properly before us is whether the court erred

in granting the Partnership's motion for summary judgment. And the Partnership moved for summary judgment so that it could be dismissed from the lawsuit on the ground its records were correct based on the representations made by John and Jesse when it approved the transfer. As discussed further below, John's voting authority never has been questioned, and the Certification requires explicitly that he retain voting authority. Consequently, we agree with the court that Jesse's failure to execute a power of attorney is immaterial to whether the Partnership's records reflect its reasonable reliance on its approved transfer of John's partnership interest to Jesse.

¶13 Moreover, John retained his voting rights pursuant to A.R.S. § 29-1043(D). Section 29-1043(D) states that "[o]n transfer, the transferor retains the rights and duties of a partner other than the interest in distributions transferred." John argues this statute does not apply when the Partnership agreement provides otherwise. *See* A.R.S. § 29-1003(A) (relations among partners governed by partnership agreement; where it does not provide, Uniform Partnership Act governs with some exceptions). John has failed to establish the Partnership agreement provides something different than § 29-1043(D), as he asserts only that the Partnership agreement allows a transferee to be admitted into the Partnership and the transferee "presumably" would have the right to vote. And the trial court determined the Partnership had treated John as having retained his voting rights, and John had not alleged he had been denied those rights. John does not dispute this determination.

¶14 In addition, the trial court determined the power of attorney primarily was for the benefit of the Partnership. John contends this conclusion was erroneous because it also benefited him by ensuring he retained the right to vote. The court noted that under the

Sixth Amendment the Partnership retained the right to determine whether the power of attorney was acceptable before authorizing the transfer. The Certification provided that John "retain[ed] all voting rights with respect to both the Transferred Interest and the Retained Interest." Thus the Certification effected the same result as the power of attorney—retaining voting rights in John—and the Partnership had the discretion to determine it was acceptable under the Sixth Amendment. And, although John argues the court "exceeded its authority" by modifying the parties' express agreement, the parties' agreement allowed the Partnership to accept John and Jesse's Certification and John has provided no reason why the Certification cannot substitute for a power of attorney.

¶15 Moreover, the Certification protected John's interests, and an additional document would have been unnecessary. As stated in the Sixth Amendment, the Partnership required the power of attorney as a condition on transfer, but because John's voting rights otherwise were protected, the trial court did not err in concluding a power of attorney primarily was for the Partnership's benefit. Therefore, the Partnership could waive that requirement in the Sixth Amendment. *Cf. Pruitt v. Pavelin*, 141 Ariz. 195, 204, 685 P.2d 1347, 1356 (App. 1984) (party may waive right to insist on provision in contract if requirement only protects that party). For the reasons stated above, the court did not err in concluding the immaterial failure of Jesse to execute a power of attorney did not preclude summary judgment in favor of the Partnership.

Novation

¶16 John further argues the trial court erred in determining the Certification was a substituted contract or novation of the Buy-Sell Agreement. However, the issue arose

explicitly as part of Jesse's cross-motion for partial summary judgment seeking a determination that he was the owner of the disputed interest, which the court noted is an issue separate from that involving interpretation of the Partnership's records. The court's grant in part of Jesse's cross-motion for partial summary judgment was not made part of the appealable judgment at issue here. John has not asserted the novation issue has any relevance to the court's grant of summary judgment in favor of the Partnership, and we find none. Therefore, we lack jurisdiction over that portion of the court's ruling not memorialized in the final judgment. *See* A.R.S. § 12-2101(A)(1) (appeal may be taken only from final judgment).

Attorney Fee Award

¶17 John argues the trial court erred in awarding the Partnership attorney fees. The court granted attorney fees pursuant to the indemnification clause in the Certification, by which Jesse and John agreed to indemnify the Partnership "from and against any liability, loss, claim, action or demand, including attorneys' fees and related costs . . . connected with a breach of any covenant, representation, warranty or other term contained in [the] certification." "An award of attorney fees is left to the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." *Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, ¶ 18, 99 P.3d 1030, 1035 (App. 2004).

¶18 John first contends that, pursuant to the factors for determining whether attorney fees should be granted to the successful party from *Associated Indemnity Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985), the trial court should not have granted the Partnership attorney fees. But *Associated Indemnity* addressed the factors for

a court to consider in awarding discretionary attorney fees pursuant to A.R.S. § 12-341.01. *Id.* In contrast, the indemnification clause in the Certification is mandatory, thus the *Associated Indemnity* factors are irrelevant. *See Data Sales Co. v. Diamond Z Mfg.*, 205 Ariz. 594, ¶ 33, 74 P.3d 268, 275 (App. 2003) ("A contractual provision for attorneys' fees will be enforced according to its terms.").

¶19 John also challenges the trial court's statement that the Partnership "was an unnecessary party to [the] litigation." But there is no necessary correlation between this statement and the court's ultimate conclusion that the Partnership was entitled to recover fees, and John does not challenge the court's finding that "the indemnification clause is valid and enforceable" against John and Jesse. The court commented on the Partnership as a party to the litigation only in the context of whether the fees it sought were reasonable. Even were the court's observation in this regard erroneous, an issue we do not reach, it provides no reason for us to conclude there is no basis for the attorney fee award, and, where a reasonable basis exists, "we may not substitute our discretion for that of the trial court." *Orfaly*, 209 Ariz. 260, ¶ 21, 99 P.3d at 1036.

¶20 John last contends the amount of fees awarded was not reasonable and necessary. He asserts the amount was "clearly excessive" because litigation "had barely progressed beyond the initial pleading stage." And he further contends the fee request "reflected excessive billing," including one hundred hours of time for a summary judgment motion, and time spent on matters unrelated to the lawsuit. In addition, he argues the Partnership "chose to take an active role" in the litigation and thus incurred more attorney fees than necessary.

¶21 The Partnership submitted an application and affidavit pursuant to *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (App. 1983), outlining the basis for the award, explaining the fees incurred, and providing detailed time records. The trial court's award reflects a reduction from the amount of fees the Partnership requested. Therefore, because there is a reasonable basis for the amount awarded, we cannot say the court abused its discretion. *See Orfaly*, 209 Ariz. 260, ¶ 21, 99 P.3d at 1036.

Disposition

¶22 For the foregoing reasons, we affirm. The Partnership requests an award of attorney fees on appeal pursuant to the Certification and A.R.S. § 12-341.01. We grant the Partnership's request, pending its compliance with Rule 21, Ariz. R. Civ. App. P. Jesse also requests an award of attorney fees. In our discretion, we deny his request.

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

CONCURRING:

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

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