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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 09/25/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SHAWN FRANSEN,) 1 CA-CV 11-0602
)
Plaintiff/Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JOSH BIERMAN; BIERMAN GROUP,) Rule 28, Arizona Rules of
LLC,) Civil Appellate Procedure)
)
Defendants/Appellants.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-034072

The Honorable Eileen S. Willett, Judge

AFFIRMED IN PART, REVERSED AND VACATED IN PART

Michael J. Fuller, Attorney at Law Phoenix
Attorney for Plaintiff/Appellee

Richard N. Crenshaw, Attorney at Law Phoenix
Attorney for Defendants/Appellants

O R O Z C O, Judge

¶1 Josh Bierman and Bierman Group LLC appeal from the
trial court's judgment after a bench trial in favor of Shawn

Fransen. For the reasons explained below, we affirm in part, reverse in part and vacate the trial court's award of punitive damages.

FACTS AND PROCEDURAL BACKGROUND

¶12 In two separate transactions, Bierman borrowed a total of \$105,000 from Fransen to purchase two pieces of real property. Bierman signed a promissory note and deed of trust for each property. Instead of taking title in his own name, Bierman took title to the properties in the name of his limited liability company, Bierman Group.

¶13 The properties were located in Pinal County, but both deeds of trust were mistakenly recorded in Maricopa County. As a result, when Bierman sold the properties, the deeds of trust in favor of Fransen did not appear as recorded liens. Bierman falsely represented to the buyers and the title agencies handling the escrows that there were no loans or open deeds of trust related to the properties. Bierman did not inform Fransen of the sales until after escrow closed on both properties. Bierman instructed the title companies to wire the proceeds from both sales directly into Bierman Group's bank account and did not pay Fransen.

¶14 Fransen sued Bierman for breach of contract, breach of the duty of good faith and fair dealing, conversion,

constructive trust, and fraud. Fransen sued Bierman Group for aiding and abetting fraud, aiding and abetting conversion, constructive trust, and unjust enrichment. The trial court ruled in Fransen's favor on each claim, awarding Fransen compensatory damages of \$116,224.37 plus interest, punitive damages of \$350,000, and attorney fees and costs.

¶15 Bierman and Bierman Group filed a motion for new trial and motion to amend the judgment. The trial court denied the motions. Bierman and Bierman Group timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101.A.1 and 5(a) (Supp. 2011).

DISCUSSION

¶16 Bierman and Bierman Group raise several issues on appeal related to Fransen's tort claims, the economic loss doctrine, and the award of punitive damages. Because they do not raise any issues on appeal related to the entry of judgment in favor of Fransen on the claims of breach of contract, breach of the duty of good faith and fair dealing, constructive trust, and unjust enrichment, we affirm the trial court's judgment as to those claims, as well as the award of compensatory damages.

Standard of Review

¶7 "When reviewing issues decided following a bench trial, we view the facts in the light most favorable to upholding the court's ruling." *Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, 417, ¶ 2, 224 P.3d 230, 233 (App. 2010). We review questions of law de novo, but we accept the trial court's findings of fact unless they are clearly erroneous. *Spaulding v. Pouliot*, 218 Ariz. 196, 199, ¶ 8, 181 P.3d 243, 246 (App. 2008).

¶8 The trial court held that Fransen was entitled to tort damages, including punitive damages, against Bierman and Bierman Group under Fransen's fraud and conversion claims. The record, however, does not support a finding of either fraud or conversion. Fransen was therefore not entitled to punitive damages.

Fraud

¶9 The elements of fraud include: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that the representation be acted upon by the hearer in a manner reasonably contemplated; (6) the hearer's ignorance of the representation's falsity; (7) the hearer's reliance on its truth; (8) the right to rely on the

representation; and (9) the hearer's consequent and proximate injury. *Echols v. Beauty Built Homes, Inc.*, 132 Ariz. 498, 500, 647 P.2d 629, 631 (1982). "Each element must be supported by sufficient evidence." *Id.* Bierman alleges that his representations regarding ownership of the properties did not cause Fransen's injury because the injury resulted from Fransen's failure to properly record the deeds, not Fransen's lending of the money. We agree.

¶10 A person who makes a fraudulent misrepresentation is subject to liability if the hearer's justifiable reliance on the misrepresentation "is a substantial factor in determining the course of conduct that results in his loss." Restatement (Second) of Torts § 546 (1977); see *Wisener v. State*, 123 Ariz. 148, 150, 598 P.2d 511, 513 (1979) ("On the issue of causation, the plaintiff must introduce evidence that affords a reasonable basis for the conclusion that it is more likely than not that defendant's conduct was a substantial factor in bringing about the result."). The trial court found that Fransen relied on Bierman's representation that Bierman owned the properties in an individual capacity when in fact the properties were owned by Bierman Group and that Fransen suffered consequent and proximate injury as a result. The court did not make factual findings

linking this particular misrepresentation to Fransen's pecuniary loss, or any other findings on the issue of causation.

¶11 Although Fransen relied on Bierman's representation that he, individually, owned the properties, our review of the record shows that Fransen's reliance on that representation was not a substantial factor leading to Fransen's loss. That Bierman Group took title to the properties instead of Josh Bierman had no impact on Fransen's loss. Fransen did not receive any money when Bierman sold the properties because the deeds were recorded in the wrong county. If Fransen had properly recorded the deeds in Pinal County, a cloud on title would have been revealed through the title searches on the properties. Bierman took advantage of Fransen's recording mistake and signed documents indicating that the properties were to be treated as free and clear. Although we do not condone Bierman's conduct, the record before us does not support a finding that Bierman's representation regarding ownership of the properties caused Fransen's loss. Thus, Bierman cannot be liable for fraud.

Conversion

¶12 Conversion is an act of wrongful dominion or control over personal property that interferes with another's rights to the property. *Case Corp. v. Gehrke*, 208 Ariz. 140, 143, ¶ 11,

91 P.3d 362, 365 (App. 2004). "To maintain an action for conversion, a plaintiff must have had the right to immediate possession of the personal property at the time of the alleged conversion." *Id.* Failure to pay a debt, which may be satisfied by the payment of money generally, does not support a conversion claim. *Autoville, Inc. v. Friedman*, 20 Ariz. App. 89, 92, 510 P.2d 400, 403 (1973). However, if the money "can be described, identified or segregated, and an obligation to treat it in a specific manner is established," then it may be the subject of a conversion claim. *Id.* at 91, 510 P.2d at 402.

¶13 Fransen argues, and the trial court found, that the deeds of trust required Bierman to apply the sales proceeds to his obligation to Fransen first, above all other creditors. However, neither the promissory notes nor the deeds of trust contain any specific promise to pay Fransen first. Both deeds of trust state that Fransen *may* declare the entire debt immediately due and payable in full if Bierman sells the property without Fransen's written consent, but the right to accelerate the notes was not invoked. Although Fransen had a right to be paid, his right was not tied to a specific fund. Bierman failed to pay a debt that can be satisfied by the payment of money generally; thus, Fransen does not have a valid conversion claim.

Punitive Damages

¶14 Because we reverse on the tort claims, we must vacate the trial court's award of punitive damages. See *Rhue v. Dawson*, 173 Ariz. 220, 232, 841 P.2d 215, 227 (App. 1992) (stating that punitive damages are not appropriate in a contract action).¹

CONCLUSION

¶15 We affirm the trial court's judgment in favor of Fransen on the breach of contract claims and its award of compensatory damages, interest and attorney fees. We reverse the trial court's judgment in favor of Fransen on the tort claims and vacate the award of punitive damages.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

MARGARET H. DOWNIE, Presiding Judge

/S/

RANDALL M. HOWE, Judge

¹ Because we find that Bierman is not liable for the fraud or conversion claims, we need not address the economic loss rule.