IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

AOR DIRECT, L.L.C., *Plaintiff/Appellant*,

v.

BUTEO, LLC, an Arizona limited liability company; SCOTT MILLER and JENNIFER MILLER, husband and wife, *Defendants/Appellees*.

No. 1 CA-CV 15-0799
FILED 3-28-2017

Appeal from the Superior Court in Maricopa County
No. CV2013-008508
CV2014-014470
CV2015-001091
(Consolidated)
The Honorable Lori Horn Bustamante, Judge

VACATED AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Judge Patricia K. Norris delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Paul J. McMurdie joined.

N O R R I S, Judge:

¶1 Plaintiff/Appellant AOR Direct, LLC ("AOR") appeals the superior court's entry of summary judgment in favor of Defendants/Appellees Buteo, LLC, Scott Miller, and Jennifer Miller (collectively "Buteo" unless otherwise specified). We agree with AOR that genuine disputes of material facts existed as to whether a promissory note executed by Buteo in favor of AOR containing the term "percentage interest" could mean "membership interest." Therefore, we vacate the superior court's judgment in favor of Buteo and remand for further proceedings.

BACKGROUND AND PROCEDURAL HISTORY

¶2 AOR is a media buying company that purchases media from media vendors and then sells that media to its clients, brokers, or other media agencies. Chris Dompier is the CEO of AOR. Buteo is a member and manager of Cable Shopping Network, LLC ("CSN"), a company that sells coins through television programming, and CSN 76th Street Partners, LLC ("CSN 76th Street"). Scott Miller is the sole member of Buteo.

¶3 In December 2011, Buteo held a minority interest of 48.5% in both CSN and CSN 76th Street. A third party and an entity called Arcapita owned the remaining percentages of CSN and CSN 76th Street. In January 2012, Buteo borrowed $400,000 from AOR as evidenced by a Convertible Promissory Note (the "Note"). Buteo used the loan proceeds to buy out Arcapita's interests in CSN and CSN 76th Street. The Note contained the following provision:

> This Convertible Note is convertible, in whole or in part, at any time prior to payment in full, at the option of Holder, into a percentage interest of Maker. The foregoing percentage interest, as calculated upon each conversion or in aggregate with respect to all conversions if more than one, as applicable together with any

> certificates or units evidencing such percentage interest(s), are referred to herein as the "Equity Interest." Holder may exercise its option by giving written notice to Maker of Holder's election to convert at any time or from time to time prior to payment in full of this Convertible Note.

¶4 Buteo did not make any payments on the Note, and AOR sued Buteo for breach of the Note in 2013 (the "2013 case").[1] As relevant here, AOR moved for summary judgment on its breach claim, which the superior court granted. The superior court, however, refused to enter a final judgment pursuant to Arizona Rule of Civil Procedure 54(b) on the breach claim because Buteo had asserted counterclaims against AOR and its counterclaims could potentially offset, in whole or in part, Buteo's liability on AOR's breach claim.

¶5 After the superior court granted AOR's motion for summary judgment on its breach claim in the 2013 case, but before the superior court entered final judgment against Buteo in September 2015, AOR sent Buteo a letter, through counsel, asserting that AOR was exercising its conversion right under the Note. In that letter, AOR asserted it was converting $22,857.14 of the debt owed to it to a 2% ownership interest in Buteo, and because of the conversion, it had become a voting member of Buteo.

¶6 In December 2014, AOR sued Buteo and asked the court to appoint a receiver for Buteo and to judicially dissolve it (the "2014 case"). It is this case that gives rise to this appeal. Shortly after AOR filed its complaint in the 2014 case, the superior court issued an order directing Buteo to appear and show cause why it should not grant AOR the relief it had requested.

¶7 In response to the superior court's order to show cause, and also in a subsequent motion to dismiss, Buteo argued, primarily, that the court should dismiss the 2014 case under the doctrine of election of remedies because, in the 2013 case, AOR had alleged a claim for breach of the Note and had been granted summary judgment on that claim and, thus, had received a remedy for Buteo's breach of the Note which prohibited AOR from exercising its conversion right. Buteo also argued that the Note

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[1]Additional background regarding the parties, AOR's breach claim, and other disputes between them and the 2013 case can be found in *AOR v. Buteo et al.*, 1 CA-CV 15-0754 (Ariz. App. March 28, 2017), filed simultaneously with this memorandum decision.

was clear and unambiguous and did not entitle AOR to a membership interest in it. Accordingly, it also argued that because AOR was not a member, it was not entitled to "force" an involuntary dissolution.

¶8 On Buteo's motion, the superior court consolidated the two cases. In its order granting Buteo's motion to consolidate, the superior court addressed and rejected Buteo's election of remedies argument, explaining, "Although summary judgment was granted in AOR's favor, there is still not a final judgment. AOR and Buteo's contract may permit AOR to hold and enforce a membership interest and a note claim; therefore, AOR is permitted to pursue both." The superior court later denied Buteo's motion to dismiss.

¶9 After the superior court denied Buteo's motion to dismiss, it held an April 9, 2015 evidentiary hearing on AOR's receivership application (the "receivership hearing").

¶10 At the receivership hearing, Dompier testified generally that he and Miller understood the Note as giving AOR a membership interest in Buteo. He stated that Miller approached him so that Miller could buy out Arcapita's interests in CSN and CSN 76th Street, but Miller could only give him an interest in Buteo as security for the Note because, through Buteo, he was then only a minority shareholder of CSN and CSN 76th Street. Dompier confirmed that Miller had offered him an "equity membership" in Buteo as security for the Note. Dompier added that having entered into various operating agreements over the years, he understood the term "percentage interests" to mean a "member's interest." Finally, Dompier stated that he and Miller had discussed "percentage interest" multiple times and they understood the term to mean membership interest. Counsel for Buteo asked Dompier, "Do you recall that you testified that in your mind, percentage interest equals equity member; correct?" Dompier responded, "Yes." Counsel for Buteo continued, "Okay. Was that something that Scott [Miller] ever said?" Dompier answered, "All the time."

¶11 At the receivership hearing, Miller acknowledged that he understood equity to mean an ownership interest in a company. Miller also testified, confirming his prior deposition testimony, that he understood Dompier "would eventually come in as a member" and that the two of them "would all be doing business together." In addition to his testimony at the receivership hearing, Miller filed a declaration in support of Buteo's response to AOR's application for the appointment of a receiver. In that declaration, Miller stated that at the time AOR issued Buteo the Note, "Chris Dompier and I expected to continue working together, *and we*

contemplated that the $400,000 loan would be commuted to an equity interest in CSN, replacing the other participant who was bought out." (Emphasis added).

¶12 The superior court denied AOR's receivership application, ("receivership ruling") explaining:

> The language of the Note, drafted by AOR, is clear and unambiguous. The Note provides no mention of AOR having the ability to obtain a membership interest in Buteo . . . . Equity interest and membership interests are not one in the same. Although AOR may have an equity interest in Buteo that would entitle AOR to share in the profits of Buteo, AOR does not have a membership interest with voting and management privileges because the Note does not provide for AOR to have a membership interest in Buteo.

¶13 After the receivership hearing, Buteo moved for summary judgment on AOR's complaint for the appointment of a receiver and for judicial dissolution. In support of its motion for summary judgment, Buteo argued the superior court's receivership ruling constituted the law of the case and, therefore, Buteo was entitled to summary judgment because the court had determined AOR did not have a membership interest in Buteo and, therefore, could not seek the appointment of a receiver or a judicial dissolution of Buteo.

¶14 The superior court granted Buteo's motion for summary judgment, explaining, "This court has already determined that the Note, drafted by AOR, is 'clear and unambiguous' and that the Note does not provide a membership interest to AOR."

DISCUSSION

I. The Doctrines of Election of Remedies and Claim Preclusion Do Not Apply

¶15 Relying on the doctrines of election of remedies and claim preclusion, Buteo argues we should dismiss this appeal because, by suing Buteo for breach of the Note in the 2013 case, and then obtaining a final judgment on its breach claim in that case, all of AOR's rights under the Note were extinguished. We reject these arguments.

¶16 The doctrine of election of remedies "prevents aggrieved parties from prevailing on logically inconsistent theories of the case and serves to guard against overcompensation." *Caruthers v. Underhill*, 235 Ariz. 1, 6, ¶ 20, 326 P.3d 268, 273 (App. 2014) (footnote omitted). For example, the doctrine "provides that a party who has been fraudulently induced to enter into a contract must choose to either disavow the contract and seek a return to the *status quo ante*, or affirm the contract and sue for damages for breach." *Id*. at 5-6, 326 P.3d at 272-73 (citing *Miller v. Ariz. Bank*, 45 Ariz. 297, 314-15, 43 P.2d 518, 525 (1935)).

¶17 Buteo argues that AOR elected its remedy by proceeding to a final judgment on its breach claim against Buteo in the 2013 litigation. The Note, however, allowed AOR "to convert at any time or from time to time prior to [Buteo's] payment [of the Note] in full." Thus, by the plain language of the Note, AOR was entitled to convert any of the monies owed to it by Buteo into a "percentage interest" in Buteo at any time before Buteo paid the Note in full. Furthermore, and of critical importance here, AOR could exercise its conversion right absent a breach of the Note. In other words, AOR's conversion right was not a remedy for breach of the Note—the Note gave AOR the right to convert all or part of the Note into a "percentage interest" of Buteo as long as Buteo had not paid off the Note. Because AOR could exercise its conversion right at any time before payment in full, and exercising that right was not contingent on Buteo breaching the Note, AOR was not pursuing "logically inconsistent theories" when it sued Buteo in the 2014 case and requested the appointment of a receiver and judicial dissolution. Although it would have been better practice for AOR to have brought these claims in the 2013 case, *see* Ariz. R. Civ. P. 15(d) (2014) ("Upon motion of a party the court may . . . permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented"), the election of remedies doctrine did not require AOR to do so.[2]

[2]Buteo repeatedly argued in the superior court that the election of remedies doctrine barred AOR from filing the 2014 case because the superior court in the 2013 case had previously entered summary judgment on AOR's breach of contract claim. The superior court, however, refused to certify its ruling under Rule 54(b) because of the pendency of Buteo's counterclaims against AOR. Therefore, when AOR filed the 2014 case, the superior court's ruling in the 2013 case was still subject to modification and not a "final" order. *See Hill v. City of Phoenix*, 193 Ariz. 570, 574, ¶ 16, 975 P.2d 700, 704 (1999) ("without the 54(b) certification, prior

¶18 Buteo also argues that, under the doctrine of claim preclusion, the entry of final judgment in the 2013 case precludes any claims of AOR based on the Note or predicated on AOR's exercise of its right to convert under the Note. To assert the defense of claim preclusion, a party must prove (1) an identity of claims in the suit in which a judgment was entered and the current litigation, (2) a final judgment on the merits in the previous litigation, and (3) identity or privity between the two parties in the two suits. *Peterson v. Newton*, 232 Ariz. 593, 595, ¶ 5, 307 P.3d 1020, 1022 (App. 2013) (citation omitted).

¶19 Relatedly, under the doctrine of merger, "When a valid and final judgment is rendered in favor of the plaintiff . . . [t]he plaintiff cannot thereafter maintain an action on the original claim or any part thereof, although he may be able to maintain an action upon the judgment . . . ." Restatement (Second) of Judgments § 18 (1982). *See also Midyett v. Rennat Properties, Inc.*, 171 Ariz. 492, 493, 831 P.2d 868, 869 (App. 1992) (breach of contract action merged into the judgment for damages caused by the breach). Furthermore:

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claims pursuant to the rules of merger[,] . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

Restatement (Second) of Judgments § 24 (1982).

¶20 Under these authorities, AOR would only be precluded from exercising its conversion right under the Note if, when it exercised its conversion right in November 2014, the superior court had entered "a final judgment on the merits" of AOR's breach claim. The superior court, however, did not enter judgment in the 2013 case until September 28, 2015—well after AOR had exercised its conversion right. Because AOR had exercised its conversion right before the superior court entered final judgment in its favor in the 2013 case, AOR's conversion right under the

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judgments which adjudicate some but not all claims in a given suit . . . become final upon entry of . . . the judgment which effectively terminates all issues remaining in the litigation").

Note never merged into the judgment in the 2013 case. Therefore, claim preclusion is inapplicable here.

II. Material Issues of Fact Precluded Summary Judgment in Favor of Buteo

¶21 On appeal, AOR argues, first, that the Note is not "clear and unambiguous," and, therefore, the superior court should not have granted Buteo's motion for summary judgment. Reviewing the superior court's interpretation of the Note under the governing standards of review, we agree the Note was reasonably susceptible to more than one interpretation, and genuine issues of material facts existed precluding summary judgment. *See ELM Retirement Center, LP v. Callaway*, 226 Ariz. 287, 290, ¶ 15, 246 P.3d 938, 941 (App. 2010) (appellate court reviews issues of contract interpretation de novo) (citation omitted); *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 116, ¶ 17, 180 P.3d 977, 981 (App. 2008) (appellate court views evidence in a light most favorable to non-moving party). Accordingly, we agree with AOR that the superior court should not have granted summary judgment in Buteo's favor.

¶22 In interpreting a contract, our purpose is to ascertain and enforce the parties' intent. *ELM Retirement Center, LP*, 226 Ariz. at 290, ¶ 15, 246 P.3d at 941. To determine the parties' intent, we look to the plain meaning of the words in the context of the contract as a whole. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593, ¶ 9, 218 P.3d 1045, 1050 (App. 2009). When a contract is clear and unambiguous, we give effect to the terms as written. *Town of Marana v. Pima Cty.*, 230 Ariz. 142, 147, ¶ 21, 281 P.3d 1010, 1015 (App. 2012). If a contract is reasonably susceptible to more than one interpretation, however, extrinsic evidence may be admitted to interpret the contract. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 158-59, 854 P.2d 1134, 1144-45 (1993). When parties offer different interpretations of a contract's meaning, the court should consider the offered evidence and, if the court finds the contract language to be reasonably susceptible to the interpretation asserted by its proponent, evidence of the proponent's interpretation is admissible to determine the meaning intended by the parties. *Town of Marana*, 230 Ariz. at 147, ¶ 21, 281 P.3d at 1015 (citing *Taylor*, 175 Ariz. at 154, 854 P.2d at 1140).

¶23 On its face, the Note states only that it is convertible "at the option of Holder, into a percentage interest of Maker." The Note does not define what "percentage interest" means. At the receivership hearing, AOR presented evidence that Dompier and Miller agreed or understood that if AOR exercised its right to convert under the Note, AOR would have a membership interest in Buteo. *See supra* ¶¶ 9-11. Given the evidence

produced by AOR, the Note is reasonably susceptible to the interpretation proposed by AOR. As there was a material factual dispute between the parties regarding the meaning of "percentage interest," the superior court should not have granted summary judgment in Buteo's favor. Thus, we remand this matter for further proceedings consistent with this decision.[3]

III. Additional Issues

¶24 Buteo also argues we may affirm summary judgment in its favor because the conversion formula was not specified in the Note when Miller signed it, but was written into the Note by an unidentified person at some later date. Thus, Buteo contends any claim based on the handwritten conversion formula is "groundless." The parties, however, presented conflicting testimony at the receivership hearing regarding the authenticity of the handwritten conversion formula. Although Miller disputed the authenticity of the handwritten conversion formula and denied he had written it, Dompier testified that after Miller signed the Note, he and Miller discussed and agreed to several handwritten changes to the Note—changes that included the conversion formula—and that Miller had explicitly agreed to those changes. Indeed, at the conclusion of the receivership hearing, Buteo argued that this factual dispute precluded the court from granting AOR's request for a receiver, asserting "discovery is still necessary to flesh out this issue . . . [s]o they [AOR] haven't even established that there is an interest in Buteo to protect." Therefore, material issues of fact preclude summary judgment on this ground.

¶25 In addition to arguing the superior court should not have granted summary judgment in favor of Buteo, AOR also argues the superior court should not have found the receivership ruling constituted law of the case, denied its Rule 56(f) motion, and denied its motion to amend. AOR also argues the superior court should not have awarded Buteo attorneys' fees under A.R.S. § 12-341.01 (2016) and sanctions. Because we have reversed the superior court's ruling granting Buteo's motion for summary judgment, we need not address these arguments.

[3]In the superior court, Buteo argued that even if the note allowed AOR a membership interest in Buteo, any conversion would be ineffective because the putative conversion would not have met the requirements of Arizona Revised Statutes ("A.R.S.") section 29-731(B)(1) (2016). Although Buteo raised this issue in its answering brief we have not addressed it given our remand.

IV. Attorneys' Fees and Costs On Appeal

¶26 Both parties request attorneys' fees on appeal. Buteo requests attorneys' fees under A.R.S. § 12-341.01(A), which allows the court to award attorneys' fees to the successful party. Because Buteo did not succeed on appeal, we deny Buteo's request. AOR requests attorneys' fees on appeal under Arizona Rule of Civil Appellate Procedure ("ARCAP") 21(a). ARCAP 21(a), however, does not provide an independent basis for an award of attorneys' fees. Nevertheless, the Note contains a unilateral fee provision, which provides: "Maker shall pay all costs and expenses, including reasonable attorneys' fees and court costs incurred in the collection or enforcement of all or any part of this Convertible Note."

¶27 Because fees are unknown in light of our remand, we deny AOR's request for attorneys' fees on appeal without prejudice. On remand, AOR may renew its request for attorneys' fees on appeal. We express no opinion as to whether the superior court should grant or deny such a request. As the successful party on appeal, pursuant to A.R.S. § 12-341 (2016), we award AOR its costs on appeal contingent upon its compliance with ARCAP 21(b).

CONCLUSION

¶28 For the foregoing reasons, we vacate the judgment in favor of Buteo and remand the case to the superior court for further proceedings consistent with this decision.

AMY M. WOOD • Clerk of the Court
FILED: AA