IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ARDENT SOUND INC., *Plaintiff/Appellee*,

v.

ANGELA L. MELAND, *Defendant/Appellant*.

No. 1 CA-CV 16-0522
FILED 12-26-2017

Appeal from the Superior Court in Maricopa County
No. CV2014-000327
The Honorable Douglas Gerlach, Judge
The Honorable Michael Herrod, Judge
The Honorable Randall Warner, Judge

AFFIRMED

APPEARANCES

Lang & Klain PC, Scottsdale
By William G. Klain, George H. King
Counsel for Plaintiff/Appellee

Angela L. Meland, Mesa
Defendant/Appellant

MEMORANDUM DECISION

Retired Judge Patricia A. Orozco[1] delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Jon W. Thompson joined.

O R O Z C O, Judge:

¶1 Angela L. Meland appeals from the trial court's summary judgment in favor of Ardent Sound, Inc. (Ardent) compelling the sale of her shares of Ardent stock for $142,687, and the judgment setting off that amount by amounts Ms. Meland owed Ardent for damages, attorneys' fees, costs, and sanctions. For the reasons stated below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Ms. Meland was previously married to Mark Meland (Husband), who was employed by Ardent, a corporation that develops and manufactures healthcare products and technologies. Husband received 6,250 shares of Ardent stock through a Restricted Stock Agreement (Agreement), dated January 1, 2002. Ms. Meland was awarded fifty percent of Husband's shares in their divorce decree. Because she obtained her shares through divorce, the Restricted Stock Agreement required Ms. Meland to sell her shares back to Ardent at "Fair Market Value." The Agreement further stated, "the Fair Market Value of the Company shall be determined by the Company in good faith by the Company's Board of Directors."

¶3 Following the divorce, Ardent offered to pay Ms. Meland $147,687 for her 3,125 shares.[2] When Ms. Meland refused to accept this offer, Ardent filed a complaint to, inter alia, compel Ms. Meland to sell her shares pursuant to the Agreement.

---

[1] The Honorable Patricia A. Orozco, retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article 6, Section 3, of the Arizona Constitution.

[2] Ardent's October 16, 2013, letter offered Ms. Meland $147,687, which it claims is a typographical error; the purchase price approved by the Board was $142,687, the same amount offered to and accepted by Husband.

¶4 Ardent filed its first motion for partial summary judgment (MSJ #1) asking the trial court to compel Ms. Meland to sell her shares pursuant to the Agreement. Ms. Meland's response disputed the value of her shares and the Board's good faith valuation. The court granted summary judgment finding the Agreement obligated Ms. Meland to sell her shares to Ardent following the divorce.

¶5 Ardent filed a second motion for partial summary judgment regarding the purchase price of the shares (MSJ #2). Ardent explained that its Board contracted with Gorman Litigation Support Services (Gorman) to analyze the fair market value of Ms. Meland's and Husband's shares and, pursuant to Gorman's analysis, Ardent offered each $142,687 for their shares. Ardent maintained that because Ms. Meland had not produced any evidence of bad faith, it was entitled to summary judgment. Ms. Meland responded, arguing that several issues of fact precluded summary judgment. Ms. Meland disputed the number of shares she and Husband collectively owned, claiming they acquired additional shares through payroll deductions, and argued Ardent's valuation was not made in good faith.

¶6 Following oral argument on March 27, 2015, the trial court (Judge Warner) concluded it could not enter summary judgment because there were questions of fact as to: (1) whether the Board itself made a good faith determination of the fair market value, and (2) the number of shares Ms. Meland owned. The court determined there was no dispute that Ms. Meland was bound by the terms of the Agreement and that "Ardent bears the burden to prove that the Board made a determination of Fair Market Value, but Ms. Meland bears the burden to prove that the Board did not act in good faith."

¶7 Ardent filed a subsequent motion for partial summary judgment at the close of discovery (MSJ #4) arguing there were no disputed factual issues regarding the number of shares Ms. Meland owned or the Board's good faith determination of their fair market value.[3] Ms. Meland argued summary judgment was not appropriate because the parties did not agree on the reasonable value of the stock. She continued to dispute the number of shares owned and the value of those shares.

¶8 The trial court concluded that despite the evidence Ms. Meland offered in response to MSJ #4, a reasonable juror would be

[3] A third motion for partial summary judgment was filed concerning a different defendant and is not relevant to this appeal.

compelled to find in Ardent's favor as to the number of shares owned because Ms. Meland did not offer any "competent controverting evidence of either a different value [from that proposed by Ardent] or that the [B]oard's determination was not made in good faith."

¶9 Following this ruling, a bench trial was held on Ardent's remaining claims of breach of contract, intentional interference with contract, and defamation against Ms. Meland and her mother.[4] The trial court (Judge Gerlach) found in favor of Ardent on those claims and awarded Ardent its reasonable attorneys' fees pursuant to Arizona Revised Statutes (A.R.S.) section 12-341.01(A).[5] The court entered one final judgment setting off the amount Ardent owed Ms. Meland ($142,687) by the amount of damages, attorneys' fees, costs, and discovery sanctions Ms. Meland owed Ardent ($177,932.31). Ms. Meland filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

I. Whether Ardent's Offer Was Conditional

¶10 Ms. Meland contends the trial court erred in granting summary judgment because Ardent's offer to purchase her shares was conditional and, therefore, did not comply with the purchase provisions in the Agreement. Ms. Meland did not raise this argument in her response to MSJ #4 or in response to Ardent's first and second motions for partial summary judgment.

¶11 Ms. Meland raised the conditional nature of the offer for the first time in her amended answer/counterclaim filed after the trial court ruled on the prior summary judgment motions. In a telephonic status conference, the court concluded the counterclaim portion of Ms. Meland's amended answer/counterclaim was improper. Although the pleading was not expressly stricken, we conclude it was not raised in a timely manner, and arguments not timely raised in the trial court cannot be considered for the first time on appeal. *See Barkhurst v. Kingsmen of Route 66, Inc.*, 234 Ariz. 470, 476, ¶ 22 (App. 2014) (citing *Schoenfelder v. Ariz. Bank*, 165 Ariz. 79, 88

---

[4] Ms. Meland did not appeal from any of these other claims.

[5] Absent material changes from the relevant date, we cite a statute's current version.

(1990) (holding appellate courts generally will not address issues not raised in an answer or response to summary judgment motions).

II. Summary Judgment Rulings

A. Standard of Review

¶12 Ms. Meland contends the trial court improperly weighed evidence in determining that reasonable jurors would be compelled to find in favor of Ardent as to the number of shares Ms. Meland owned and that the Board's offer was made in good faith. We review the court's decision to grant summary judgment de novo, considering the facts and any inferences drawn from those facts in the light most favorable to the party opposing the motion. *Tierra Ranchos Homeowners Ass'n v. Kitchukov,* 216 Ariz. 195, 199, ¶ 15 (App. 2007).

¶13 A moving party is "required to 'point out' to the [trial] court, by reference to relevant evidentiary material, *see* Ariz. R. Civ. P. 56(c), that the [non-moving party] ha[s] no evidence to support their affirmative defenses," *Nat'l Bank of Ariz. v. Thruston,* 218 Ariz. 112, 119, ¶ 28 (App. 2008) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). "[T]he burden then shifts to the non-moving party to present sufficient evidence demonstrating the existence of a genuine factual dispute as to a material fact. . . . The non-moving party may not rest on its pleadings; it must go beyond simply cataloging its defenses." *Id.* at ¶ 26. "The evidence 'must be more than slight and may not border on conjecture.'" *Badia v. City of Casa Grande,* 195 Ariz. 349, 356, ¶ 27 (App. 1999) (citing *Walls v. Ariz. Dep't of Pub. Safety*, 170 Ariz. 591, 595 (App. 1991)).

B. Number of Shares

¶14 Ms. Meland disputes that she owned 3,125 shares of Ardent stock; therefore, she contends there was a question of fact that precluded entry of summary judgment. Ardent contends there were no disputed facts because Ms. Meland did not file a response to its statement of facts. However, the "trial court is required to consider those portions of the verified pleadings, depositions, answers to interrogatories and admissions on file which are brought to the court's attention by the parties." *Choisser v. State ex rel. Herman,* 12 Ariz. App. 259, 261 (1970). Therefore, we consider Ms. Meland's response to MSJ #4, which references "exhibits" she contends create a factual dispute.

¶15 Regarding the number of shares owned by the Melands, Ms. Meland cites Ardent's annual Arizona Corporation Commission (ACC)

reports from 2004 to 2011 listing Husband among the shareholders owning more than twenty percent of Ardent's shares. However, Ardent provided undisputed evidence that these reports *erroneously* listed Husband as owning more than twenty percent of the shares. Moreover, the most recent ACC reports from 2011 (as amended) and 2012 have been corrected to no longer list Husband as owning more than twenty percent of the total shares.

¶16 Ms. Meland contends the trial court improperly weighed this conflicting evidence. However, Ms. Meland did not provide any evidence to contradict the testimony from the authors of the 2004 to 2011 reports who stated the reports mistakenly listed Husband as owning more than twenty percent of Ardent's shares. Furthermore, none of the reports were from 2013, when the Melands were divorced and the Agreement forced the sale. Therefore, the 2004 to 2011 reports predating the applicable valuation period were not relevant. *See, e.g., Menendez v. Paddock Pool Constr. Co.,* 172 Ariz. 258, 269-70 (App. 1991) (holding expert affidavit failed to create issue of fact where opinion was immaterial to the causation issue).

¶17 Ms. Meland also cites statements Ardent representatives made during the divorce litigation that the Melands owned 16,136 shares. Ardent provided unrefuted evidence that the different numbers of shares represent an equivalent *percentage* of interest in Ardent. The 16,136 figure was based upon a reallocation of another shareholder's shares, which Ardent presumed it would do when it provided the statement in the divorce litigation. The lower 6,250 figure is a result of Ardent actually retiring rather than reallocating those shares.[6]

¶18 Ardent's position was never contradicted with competent evidence. Ms. Meland's disagreement with Ardent's explanation is not based on her personal knowledge that Ardent did not, in fact, retire the remaining shareholder's shares or that it was otherwise incorrect. Therefore, she did not establish a material question of fact. *See* Ariz. R. Civ. P. 56(c)(5) (2017) (formerly Rule 56(e)(1)) (stating affidavits must be based upon "personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated"); *Villas at Hidden Lakes Condos. Ass'n v. Geupel Constr. Co.*, 174 Ariz. 72, 82 (App. 1992) (holding affidavit that does not comply with Rule 56(c)(5)

---

[6] Ms. Meland also cites a June 27, 2013 letter from Susannah Sabnekar, her former expert witness, stating the Melands owned 16,136 shares. However, this letter was based upon the same statements from Ardent representatives.

does not preclude summary judgment). "Sheer speculation is insufficient . . . to defeat summary judgment." *Badia,* 195 Ariz. at 357, ¶ 29.

¶19 Ms. Meland next claims Husband's paystubs show he purchased additional shares during 2002 and 2003. Toward that end, Ms. Meland's affidavit[7] stated Husband purchased shares during 2002 and 2003, as shown by over $12,000 in payroll deductions. However, the paystubs do not show a total of $12,000 in payroll deductions. Beyond that, Ms. Meland testified she knew nothing of the number of shares Husband was given during his employment. Thus, Ms. Meland failed to establish that she had personal knowledge of any additional stock purchase and her affidavit did not create a question of fact. *See* Ariz. R. Civ. P. 56(c)(5); *Villas at Hidden Lakes,* 174 Ariz. at 82.

¶20 Moreover, Ardent's payroll service provider explained that "stock grant" entries reflect the taxable income to Husband from the stock grant and "capital stock" entries reflect the deduction withheld from his pay to satisfy the tax liability created by the stock grant. This explanation was not refuted. Therefore, no question of fact was established.

C. Good Faith Offer

¶21 Ms. Meland argues the trial court improperly usurped the jury's role by concluding that, even considering her evidence, "a reasonable jury would be compelled to find that the fair market value, as determined by Ardent's board in good faith, is $142,687." Ms. Meland contends Ardent: (1) did not provide minutes from the Board showing how it determined the fair market value of the stock, and (2) offered no additional evidence from its MSJ #2 that would permit summary judgment. To the contrary, Ardent offered a declaration from its president and Board member, Peter Barthe, detailing how the Board arrived at its valuation and the evidence relied on by the Board. Although there were no minutes from a Board meeting, Barthe explained that the Board signed documents titled "Unanimous Consent of Directors Pursuant to A.R.S. § 10-821 in Lieu of a Meeting of the Board of Directors of Ardent Sound, Inc." and included these in MSJ #4. This detail was not provided in MSJ #2. Ardent also relied on a valuation

---

[7] Appendix A to the opening brief is Ms. Meland's affidavit signed November 26, 2014. This affidavit was submitted as an exhibit to Ms. Meland's response to the motion for sanctions. It was not submitted in response to either MSJ #2 or #4. We will consider the affidavit as it is in the record on appeal. *See Choisser,* 12 Ariz. App. at 261.

by Ms. Meland's former expert, who opined that Ms. Meland's shares were worth $114,750.

¶22 Ardent contends it is entitled to a presumption of good faith. However, the case law it cites in support of this proposition applies to tort claims for breach of good faith and fair dealing. *See Barmat v. John & Jane Doe Partners A-D,* 165 Ariz. 205, 210 (App. 1990). We need not decide whether the presumption applied to the tort claim here, however, because Ardent's MSJ #4 set forth additional, sufficient evidence to establish a prima facie case of good faith, as detailed above.

¶23 The burden then shifted to Ms. Meland to establish a question of fact existed regarding her claim that the Board failed to act in good faith. *Thruston,* 218 Ariz. at 119, ¶ 26. She offered no evidence to controvert either Barthe's declaration or the Board's unanimous consent. Ms. Meland's assertions are not based on any firsthand knowledge, and she has not established that she was entitled to additional discovery that would lead to any controverting evidence. *See* Ariz. R. Civ. P. 56(c)(5); *see also Florez v. Sargeant,* 185 Ariz. 521, 526 (1996) (self-serving assertions not supported by factual record insufficient to defeat summary judgment); *Villas at Hidden Lakes,* 174 Ariz. at 82 (summary judgment affidavits must demonstrate the affiant's personal knowledge to show competency to testify to the statements in affidavit); *Badia,* 195 Ariz. at 356, ¶ 27 (holding opposing party must present more than slight evidence or conjecture to defeat summary judgment).

¶24 Finally, Ms. Meland's mere disagreement as to the value of her shares does not create a question of fact absent competent evidence supporting her position. Ms. Meland is not qualified to provide an opinion as to the value of the shares, and she failed to offer any other supportive valuation evidence. She likewise failed to provide admissible evidence to support her claims that transactions relating to other corporate entities resulted in the Board valuing her shares in bad faith. *See Modular Mining Sys., Inc. v. Jigsaw Tech., Inc.,* 221 Ariz. 515, 520, ¶ 19 (App. 2009) (holding speculation is not sufficient to preclude summary judgment); *Badia,* 195 Ariz. at 356, ¶ 27.

¶25 Ms. Meland failed to produce sufficient competent evidence to establish the existence of a genuine issue of material fact; therefore, summary judgment was appropriate. *See GM Dev. Corp. v. Cmty. Am. Mortg. Corp.,* 165 Ariz. 1, 5 (App. 1990). The trial court properly considered whether there was "evidence . . . such that a reasonable jury could return a verdict for the non-moving party." *Wells Fargo Bank v. Ariz. Laborers,*

Teamsters & Cement Masons Local No. 395 Pension Tr. Fund, 201 Ariz. 474, 499, ¶ 103 (2002) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). We affirm the grant of summary judgment in favor of Ardent.

III. Set Off Judgment

¶26 The trial court's order stated that, "the amount previously determined as the value of Meland's stock in Ardent ($142,687) w[ould] be reduced, dollar-for-dollar, by the amounts awarded in the final judgment to Ardent and against Meland." The final judgment awarded Ardent $14,290 for breach of contract damages, $150,000 in attorneys' fees, $8,762.31 in costs, and $4,880 for discovery sanctions. Ms. Meland argues the court erred in setting off the mutual obligations.

¶27 Ms. Meland first objected to this set off in a motion for judgment on the pleadings filed just before trial on the remaining claims. At a status conference on April 25, 2016, the court denied her motion as untimely, but without prejudice to reassert after trial. Ms. Meland, however, did not reassert this argument after trial. Having failed to timely raise this objection before trial and not having raised it following trial, Ms. Meland cannot now raise it on appeal. *See State v. Gonzales,* 181 Ariz. 502, 507-08 (1995) (holding untimely objection in trial court is waived on appeal); *Trantor v. Fredrikson*, 179 Ariz. 299, 300 (1994) (holding errors not raised in trial court cannot be raised on appeal).

¶28 In any event, "[t]he right of setoff is permissive, not mandatory; its application 'rests in the discretion of the court, which exercises such discretion under the general principles of equity.'" *Newbery Corp. v. Fireman's Fund Ins.*, 95 F.3d 1392, 1399 (9th Cir. 1996). The equitable doctrine of set off "is based on the principle that where two parties are mutually indebted, justice requires that the debts be set off and that only the balance is recoverable." 20 Am. Jur. 2d *Counterclaim, Recoupment, and Set Off* § 7 (1965); *see also Newbery*, 95 F.3d at 1398 ("The right of setoff (also called 'offset') allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owes A.'") (citing *Citizens Bank of Md. v. Strumpf,* 516 U.S. 16, 18 (1995)); *Langerman Law Offices, P.A. v. Glen Eagles at Princess Resort, L.L.C.*, 220 Ariz. 252, 257, ¶ 14 (App. 2009).

¶29 Ardent's claims for damages and its action for declaratory judgment were independent actions. We agree with Ardent, however, that the claims are sufficiently related to permit set off. Furthermore, this court has held that when a party is awarded sanctions, "those sanctions should

be applied to offset a verdict in favor of the [sanctioned] party." *Langerman,* 220 Ariz. at 257, ¶ 15. We conclude the trial court did not abuse its discretion in entering a single judgment.

CONCLUSION

¶30 We affirm the summary judgment in favor of Ardent and the entry of a judgment setting off the amount Ardent owes Ms. Meland against the amounts Ms. Meland owes Ardent. Pursuant to A.R.S. § 12-341.01(A), and the Restricted Stock Agreement, which states the prevailing party shall recover reasonable attorneys' fees, we grant Ardent's request for attorneys' fees and costs on appeal upon compliance with ARCAP 21(b). *See also* A.R.S. § 12-341 (mandating an award of costs on appeal to successful party on appeal).