

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MICHAEL BARRETT CONWAY, *Plaintiff/Appellant*,

v.

CIRCLE K STORES INC, *Defendant/Appellee*.

No. 1 CA-CV 17-0057
FILED 2-1-2018

Appeal from the Superior Court in Maricopa County
No. CV2016-004125
The Honorable Lori Horn Bustamante, Judge

AFFIRMED

COUNSEL

C. Kenneth Ray II, P.L.L.C., Prescott
By C. Kenneth Ray II
Counsel for Plaintiff/Appellant

Fennemore Craig, P.C., Phoenix
By John J. Balitis, Theresa Dwyer, Jennifer L. Blasko
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge James B. Morse Jr. delivered the decision of the Court, in which
Presiding Judge Randall M. Howe and Judge Kenton D. Jones joined.

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M O R S E, Judge:

¶1 Appellant Michael Barrett Conway challenges the trial court's dismissal of his complaint under Arizona Rule of Civil Procedure ("Rule") 12(b)(6). We affirm for the reasons set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Conway visited a Circle K store on October 24, 2015, to purchase lottery tickets. Conway requested \$10 in "quick pick" numbers for the Powerball lottery.¹ Circle K issued Conway a \$4 ticket with "quick pick" numbers and a \$6 ticket with numbers that had been issued to another customer the day before. Circle K did not tell Conway that the numbers on the \$6 ticket were not "quick pick" numbers.

¶3 Conway sued Circle K for fraud, "breach of the statutory and administrative (regulatory) duties," and negligence per se, claiming entitlement to the \$100 million Powerball jackpot for October 24, 2015, plus the cost of the \$6 ticket. Circle K moved to dismiss the complaint, arguing that Conway's damages claim was speculative and that he did not lose any opportunities to win the jackpot by not receiving "quick pick" numbers. Circle K also contended Conway's claims sounded in contract because "[a] lottery ticket transaction is contractual in nature."

¶4 The trial court dismissed Conway's complaint with prejudice and awarded Circle K attorney fees pursuant to Arizona Revised Statutes ("A.R.S.") section 12-341.01(A). Conway timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

DISCUSSION

I. The Trial Court Did Not Err in Dismissing Conway's Complaint

¶5 We review the dismissal of a complaint under Rule 12(b)(6) de novo. *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7 (2012). We accept all well-pleaded facts as true and give Conway the benefit of all inferences arising therefrom. *Botma v. Huser*, 202 Ariz. 14, 15, ¶ 2 (App. 2002). We will affirm the dismissal only if Conway would not have been entitled to relief

¹ The applicable regulation defines "quick pick" to mean "the random selection by a terminal of one or more play symbols from the defined game matrix." Ariz. Admin. Code ("A.A.C.") R19-3-401(19).

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under any facts susceptible of proof in his complaint. *Coleman*, 230 Ariz. at 356, ¶ 8.

¶6 Conway's claims hinge upon the assumption that a lottery ticket, while clearly establishing his right to claim a payout if the numbers are picked, is invalid if it contains numbers selected by a prior customer. But he alleged no facts to support this assumption. See *Aldabbagh v. Ariz. Dep't of Liquor Licenses & Control*, 162 Ariz. 415, 417 (App. 1989) ("[W]ell-pleaded material allegations of the complaint are taken as admitted, but conclusions of law or unwarranted deductions of fact are not."). Indeed, one of the regulations Conway cites in support of his "breach of statutory duties" claim suggests the opposite:

All on-line ticket sales are final. If a retailer holding a full product license accepts a returned on-line ticket from a player or generates an on-line ticket refused by the player *and the retailer does not resell the ticket*, the Lottery shall deem the on-line ticket to be owned by the retailer.

A.A.C. R19-3-213(D)(1) (emphasis added). This regulation unambiguously contemplates that retailers can resell returned or refused tickets without rendering them invalid. See *Samaritan Health Servs. v. Ariz. Health Care Cost Containment Sys. Admin.*, 178 Ariz. 534, 537 (App. 1994) ("We . . . interpret regulations to result in a fair and sensible meaning."). Conway requested and received \$10 worth of valid opportunities to play and win the Powerball. Thus, his claim for damages requires an assumption that Conway would have fared better with other randomly-generated tickets. Such rank speculation about the fact of damages, as opposed to the amount, is fatal to Conway's claim. See *Univ. of Ariz. Health and Scis. Ctr. v. Superior Court*, 136 Ariz. 579, 586 (1983) ("We have recognized before in Arizona that the right to damages must be established without speculation, but that uncertainty as to the amount of those damages will not preclude recovery and is a question for the jury.").

¶7 Moreover, even if we assume the \$6 ticket was invalid, Conway alleged no facts to show he was entitled to the Powerball jackpot. He only alleged he did not win the Powerball jackpot "[a]s a direct and proximate result" of Circle K's alleged acts. Neither this court nor the trial court is obligated to accept as true either "unsupported conclusions . . . or legal conclusions alleged as facts." *Stauffer v. Premier Serv. Mortg., LLC*, 240 Ariz. 575, 578, ¶ 9 (App. 2016); cf. *Brown v. Cal. State Lottery Comm'n*, 232 Cal. App. 3d 1335, 1341 (1991) ("No store would participate in the . . . Lottery

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if to do so opened the door to crushing liability."). Conway's complaint thus failed to state a claim upon which relief could be granted.

II. Conway's Claims Arose Out of Contract

¶8 The trial court awarded Circle K attorney fees pursuant to A.R.S. § 12-341.01(A), which authorizes a reasonable fee award "[i]n any contested action, arising out of a contract...." An action arises out of contract if the allegedly breached duty was created by a contractual relationship and would not have existed but for the contract. *Assyia v. State Farm Mut. Auto. Ins. Co.*, 229 Ariz. 216, 220, ¶ 12 (App. 2012). Whether § 12-341.01(A) applies is a question of statutory interpretation we review de novo. *Chaurasia v. Gen. Motors Corp.*, 212 Ariz. 18, 26, ¶ 24 (App. 2006).

¶9 Conway contends § 12-341.01(A) does not apply because he did not enter into a contract with Circle K. Conway concedes, however, that he entered into a contract with the Lottery. That Circle K was not a party to that contract does not preclude Circle K from recovering attorney fees because a "defendant seeking attorneys' fees under A.R.S. § 12-341.01(A) need not be a party to the contract forming the basis for the award." *Id.* at 30, ¶ 47.

¶10 Moreover, assuming without deciding Circle K owed Conway a duty of care, no such duty would have arisen had Conway not decided to purchase lottery tickets and entered into a contract for their purchase. See *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 16, ¶ 27 (App. 2000) ("The test is whether the defendant would have a duty of care under the circumstances even in the absence of a contract."); see also *Brown*, 232 Cal. App. 3d at 1341 (finding retailer owed no legal duty to player in connection with its alleged failure to manually enter player's preferred lottery numbers). Conway's claims thus arose out of contract. See, e.g., *Struna v. Convenient Food Mart*, 828 N.E.2d 647, 650 (Ohio Ct. App. 2005) ("The sale and purchase of lottery tickets is governed by the general principles of contract law."); *Kinnard v. Circle K Stores Inc.*, 966 S.W.2d 613, 616-17 (Tex. Ct. App. 1998) (holding lottery contestant's claims against Circle K stemming from alleged ticket error sounded in contract). We therefore affirm the trial court's fee award. We need not decide whether Conway's purchase also formed a contract with Circle K.

III. Attorney Fees on Appeal

¶11 Circle K requests attorney fees and costs on appeal pursuant to A.R.S. §§ 12-341 and 12-341.01(A). Conway's claims arise out of contract, and Circle K is the successful party on appeal. We therefore will award

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Circle K reasonable attorney fees and taxable costs contingent upon its compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶12 We affirm the dismissal of Conway's complaint.



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