IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

KENNETH P. MUNDEE, *Plaintiff/Appellant*,

v.

STORE MASTER FUNDING II, LLC, *Defendant/Appellee*.

No. 1 CA-CV 21-0565
FILED 7-19-2022

Appeal from the Superior Court in Maricopa County
No. CV2018-012367
The Honorable Daniel G. Martin, Judge

AFFIRMED

COUNSEL

Greenberg Traurig LLP, Phoenix
By Adrianna Griego Gorton, E. Jeffrey Walsh, Dominic Emil Draye, Matthew McGinley
Counsel for Plaintiff/Appellant

Ballard Spahr LLP, Phoenix
By Craig Solomon Ganz, Michael A. Digiacomo, Mitchell Turbenson
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Cynthia J. Bailey and Judge D. Steven Williams joined.

S W A N N, Judge:

¶1 Appellant Kenneth P. Mundee, as Trustee of the Ken and Lynn Mundee Family Trust dated September 7, 2000, challenges the superior court's dismissal and summary judgment rulings on his claims against Store Master Funding II, LLC ("Store"). We affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 In March 2018, Mundee purchased an Evansville, Wyoming property from Store on which RMH Franchise Corporation ("RMH") operated an Applebee's restaurant. RMH's affiliate company was the second-largest Applebee's franchisee at that time, controlling approximately 160 locations.

¶3 Approximately eight months before Mundee's purchase, Hilco Real Estate, LLC ("Hilco") approached Store on RMH's behalf seeking rent reductions for several RMH locations including the Evansville location. In a series of emails, Hilco told Store that RMH was struggling financially and needed rent reductions. Hilco also stated that RMH could be "forced into a filing" if Store did not agree to rent reductions, suggesting that RMH might file for bankruptcy.

¶4 Store and RMH agreed to an approximately thirty percent rent reduction for the Evansville location in or around November 2017. On March 1, 2018, RMH signed a new 15-year lease for the Evansville location (the "2018 Lease").

¶5 Mundee and Store executed a Purchase and Sale Agreement ("PSA") for the Evansville property seven days later. During the PSA inspection period, Store's agent, Barry Silver, told Mundee that Store had agreed to a rent reduction on the Evansville location in exchange for RMH signing the 2018 Lease. Silver also told Mundee that the Evansville location had previously been part of a master lease, which made the 2018 Lease necessary once Store decided to make the property available to individual investors.

¶6 Mundee requested copies of earlier leases on the property dating back to 1999, when RMH first began operating the Evansville Applebee's restaurant. Silver relayed Mundee's request to Store, who told Silver that it did not have the original lease and that any other past leases would not be relevant because the 2018 Lease was a "complete restatement." Based on that information, Silver told Mundee's agent that

> [t]he subject property lease is a complete restatement, meaning it stands on its own. Following a portfolio sale leaseback between Tenant and Seller, all properties operated under a master lease. When properties are sold, a new individual lease must be originated.

The Evansville location had not, however, been part of a master lease.

¶7 On May 8, 2018, RMH filed for Chapter 11 bankruptcy protection ostensibly because its franchisor terminated its franchise rights for some of its Arizona and Texas locations. Approximately three months later, RMH rejected the 2018 Lease in the bankruptcy case.

¶8 Mundee sued RMH, Silver, and others, alleging negligent nondisclosure and fraudulent inducement.[1] On Store's motion, the superior court dismissed Mundee's negligent nondisclosure claim. Mundee amended his complaint to add claims for breach of the PSA, breach of warranty, and breach of the covenant of good faith and fair dealing. He relied in part on Store's "no litigation" representation in the PSA:

> Seller has not received any written notice of any pending, nor, to Seller's actual knowledge, without duty of investigation or inquiry, threatened litigation, condemnation proceedings or other governmental, municipal, administrative or judicial proceedings affecting the Property.

Mundee contended this representation was false because Store knew or reasonably should have known RMH intended to pursue bankruptcy.

¶9 Store prevailed on two summary judgment motions: one on the contract-based claims and one on the fraudulent inducement claim. Mundee timely appealed following the entry of final judgment. We have jurisdiction under A.R.S. § 12-2101(A)(1).

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[1] Mundee's claims against Silver and the other defendants are not at issue in this appeal.

DISCUSSION

¶10 The PSA states that it "shall be governed by, and construed with, the laws of the applicable state or states in which the Property is located, without giving effect to any state's conflict of laws principles." The property at issue is in Wyoming, and the parties agree that Wyoming substantive law applies to this dispute. We therefore apply Wyoming substantive law but apply Arizona law to procedural matters. *See Ciena Cap. Funding, LLC v. Krieg's, Inc.*, 242 Ariz. 212, 216, ¶ 11 (App. 2017).

I. THE SUPERIOR COURT PROPERLY DISMISSED MUNDEE'S NEGLIGENT NONDISCLOSURE CLAIM.

¶11 We begin with Mundee's challenge to the dismissal of his negligent nondisclosure claim. We review the partial dismissal of a complaint under Arizona Rule of Civil Procedure ("Rule") 12(b)(6) de novo. *Shepherd v. Costco Wholesale Corp.*, 250 Ariz. 511, 513, ¶ 11 (2021). We accept all well-pleaded facts as true and give Mundee the benefit of all inferences arising therefrom. *See Botma v. Huser*, 202 Ariz. 14, 15, ¶ 2 (App. 2002).

¶12 The superior court found that Store owed "no duty of disclosure independent of the PSA" and that Mundee's negligent nondisclosure claim therefore failed under Wyoming's economic loss rule. Generally, under Wyoming law, the economic loss rule bars tort claims that seek "purely economic damages unaccompanied by physical injury to persons or property." *Rissler & McMurry Co. v. Sheridan Area Water Supply Joint Powers Bd.*, 929 P.2d 1228, 1234 (Wyo. 1996). Mundee does not allege physical injury of any kind; he instead seeks to recover "the value of the rental income that [Mundee] will not realize under the [2018] Lease, carrying costs related to the Property, and the reduced market value of the Property."

¶13 He contends, however, that "fraudulent inducement is an exception to the economic loss rule." Assuming without deciding that is true, the court did not dismiss Mundee's fraud claim. And no such exception exists for negligent nondisclosure or negligent misrepresentation. *See Excel Constr., Inc. v. HKM Eng'g, Inc.*, 228 P.3d 40, 49 (Wyo. 2010) ("[A] claim for negligent misrepresentation falls within the bar of the economic loss rule, as the parties can allocate the risks related to such misrepresentations by the terms of the contract itself.").[2]

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[2] We address only Wyoming law in this decision. Arizona's economic loss rule is not identical.

¶14 In *Snyder v. Lovercheck*, the Wyoming Supreme Court held that one cannot assert negligent misrepresentation after expressly disclaiming it in the relevant contract. 992 P.2d 1079, 1087–88 (Wyo. 1999). There, the parties' contract contained the following language:

> The Purchaser has examined the premises agreed to be sold and is familiar with the physical condition thereof. The Seller has not made and does not make any representations as to the physical condition, rents, leases, expenses, operation or any other matter or thing affecting or related to the aforesaid premises, except as herein specifically set forth, and the Purchaser hereby expressly acknowledges that no such representations have been made, and the Purchaser further acknowledges that it has inspected the premises and agrees to take the premises 'as is' * * *. It is understood and agreed that all understandings and agreements heretofore had between the parties hereto are merged in this contract, which alone fully and completely expresses their agreement, and that the same is entered into after full investigation, neither party relying upon any statement or representation, not embodied in this contract, made by the other. The Purchaser has inspected the buildings standing on said premises and is thoroughly acquainted with their condition.

Id. at 1084–85 (emphases omitted). The Wyoming Supreme Court affirmed summary judgment on negligent representation because

> [t]he contract clearly and unambiguously states that Snyder is not relying on any representations made by Ron or the Loverchecks. This clause validly allocates the risk of loss resulting from Snyder's reliance on the Lovercheck's representations. The parties were free to contract for whatever terms they wished, and they chose to allocate the risk of loss to Snyder.

Id. at 1089 (citation omitted).

Similarly, section 1.05 of the PSA places the risk of loss on Mundee:

> ***Purchaser affirmatively represents that it has performed or will perform, to Purchaser's satisfaction, a thorough and independent analysis of the Tenant's financial condition***, its ability to perform under the Lease and, if applicable, an

> analysis of the Tenant's franchisor . . . . Seller shall not, under any circumstances, be obligated to provide Purchaser with copies of Tenant's financial (except as specifically set forth in Section 2.02 of this Agreement) or other information or any such Seller analysis or be liable to Purchaser for Purchaser's failure to perform its own independent diligence, investigation and analysis regarding Tenant's financial information and Tenant's historical and pro forma performance. ***Purchaser acknowledges that neither Seller nor any representative or agent of Seller has made any representation or warranty other than those specifically set forth in this Agreement as to any of the following: . . . (c) the accuracy or completeness of any information provided by Seller with respect to the Property or the Tenant; . . . (f) the financial condition of the Tenant, the operation of the business conducted at the Property or the overall business performance of the Tenant;*** or (g) any matter or thing affecting or relating to the Property, the Lease, or this Agreement not expressly stated in this Agreement.

As relevant here, section 2.02 of the PSA obligated Store to provide a full and complete copy of the 2018 Lease and "the most recent financial statements of [RMH] delivered to [Store]" as required by the 2018 Lease. Mundee does not contend Store failed to provide these documents. He cannot circumvent section 1.05 by alleging Store owed a tort duty to disclose additional documents and information regarding "RMH's financial troubles." *See Rissler*, 929 P.2d at 1235 ("[W]hen the plaintiff has contracted to protect against economic liability caused by the negligence of the defendant, there is no claim . . . for purely economic loss."). The superior court did not err in dismissing the negligent nondisclosure claim.

II. THE SUPERIOR COURT PROPERLY GRANTED SUMMARY JUDGMENT ON MUNDEE'S CONTRACT-BASED CLAIMS.

¶15 We next consider Mundee's challenge to the entry of summary judgment on his contract-based claims: breach of contract, breach of warranty, and breach of the covenant of good faith and fair dealing. We review de novo whether summary judgment is warranted, including whether genuine issues of material fact exist and whether the trial court properly applied the law. *Am. Furniture Warehouse Co. v. Town of Gilbert*, 245 Ariz. 156, 159, ¶ 9 (App. 2018). We view the evidence in the light most favorable to the non-moving party. *Normandin v. Encanto Adventures, LLC*, 246 Ariz. 458, 460, ¶ 9 (2019). The court should grant summary judgment

only "if the facts produced in support of [a] claim . . . 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." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990).

¶16 The superior court found sections 6.02 and 6.04 of the PSA barred Mundee's contract claims. Section 6.02 outlines Mundee's contractual remedies:

> In the event of any Event of Default by Seller, Purchaser, as its sole and exclusive remedy, shall be entitled to exercise, at its option, any one of the following:
>
> > (a) Purchaser may terminate this Agreement by giving written notice to Seller in which case the Earnest Money Deposit shall be returned to Purchaser and neither party shall have any further obligation or liability, except for the obligations and provisions which are expressly stated to survive termination of this Agreement; or
> >
> > (b) Purchaser may proceed to Closing; or
> >
> > (c) Continue this Agreement and bring an action against Seller for specific performance of this Agreement.

The PSA defines "Event of Default" to include "if any representation or warranty of a party set forth in this Agreement or any other Transaction Document is false in any material respect or if a party renders any false statement." Section 6.04, in turn, provides that each party "waive[s] all other rights and remedies not expressly provided for herein, whether in law or in equity."

¶17 Mundee's breach of contract and breach of warranty claims are based on the "no litigation" provision quoted in paragraph 8 above, as Mundee contended Store had received written notice of RMH threatening bankruptcy via Hilco. Instead of seeking any of the remedies provided in section 6.02, Mundee sought to recover damages "equal to, at least, the value of the Property with RMH as the Tenant under the Lease, versus the value of the Property after [Mundee] mitigated his damages by finding a replacement tenant and entering into a new, albeit less valuable, lease." Remedies mentioned in a contract generally are not exclusive absent an "exclusive remedy" clause. *City of Gillette v. Hladky Constr., Inc.*, 196 P.3d

184, 200 (Wyo. 2008). But section 6.04's waiver of all unenumerated remedies makes the remedies listed in section 6.02 exclusive.

¶18 Mundee contends summary judgment was premature on his contract-based claims because his fraud claim was still pending at the time. He did not raise this argument in response to Store's cross-motion and did not seek Rule 56(d) relief, having already filed his own summary judgment motion on his breach of contract and breach of warranty claims. Moreover, the case had been pending for more than 18 months when Store filed its cross-motion. The court did not err in granting summary judgment on his contract claims. *See McMurry Oil Co. v. Deucalion Rsch., Inc.*, 842 P.2d 584, 587 (Wyo. 1992) ("[I]n the absence of overreaching or unconscionability, the parties should be left within the framework of the terms of the agreement that they negotiate.").

III. THE SUPERIOR COURT PROPERLY GRANTED SUMMARY JUDGMENT ON MUNDEE'S FRAUDULENT INDUCEMENT CLAIM.

¶19 We next address Mundee's contention that the superior court erred in granting summary judgment on his fraudulent inducement claim. To prevail on this claim under Wyoming law, Mundee must show by clear and convincing evidence that

> (1) Store made a false representation intending to induce action by Mundee;
>
> (2) Mundee reasonably believed the representation to be true; and
>
> (3) Mundee suffered damages in relying on the false representation.

See Claman v. Popp, 279 P.3d 1003, 1016 (Wyo. 2012). "Clear and convincing evidence is the 'kind of proof which would persuade a trier of fact that the truth of the contention is highly probable.'" *Alexander v. Meduna*, 47 P.3d 206, 216 (Wyo. 2002) (citation omitted). We view the evidence at summary judgment through the lens of the clear and convincing standard. *See Comerica Bank v. Mahmoodi*, 224 Ariz. 289, 293 n.5, ¶ 20 (App. 2010); *Phillips v. Toner*, 133 P.3d 987, 996 (Wyo. 2006). Fraudulent inducement, if present, would vitiate the PSA. *See Fox v. Tanner*, 101 P.3d 939, 944 (Wyo. 2004).

¶20 Before addressing Mundee's specific arguments, we note that Mundee responded to 32 of the 72 paragraphs of Store's separate statement

of facts with a boilerplate objection that each paragraph states "argument, not fact." A party opposing summary judgment "must, by affidavits or as otherwise provided in [Rule 56], set forth specific facts showing a genuine issue for trial." Ariz. R. Civ. P. 56(e). As Mundee did not controvert Store's statements of facts with specific facts supported by competent evidence, we treat Store's facts as undisputed. *See Maricopa Cnty. v. Rovey*, 250 Ariz. 419, 423, ¶ 7 (App. 2020) ("When uncontroverted, 'facts alleged by affidavits attached to motions for summary judgment may be considered as true.'" (citation omitted)).

¶21 Mundee identifies three statements on appeal that he contends were false:

> (1) Store, through Silver, gave a false explanation for the 2018 Lease renegotiation;
>
> (2) Store's representation in the PSA's "no litigation" clause that it had not received written notice of any "threatened litigation . . . or judicial proceedings affecting the Property;" and
>
> (3) The representation in Silver's marketing materials that the property was "under a new lease that provided a 'New 15 year Primary Term.'"

We consider each statement below.

A. Mundee Failed to Prove Silver's Explanation for the 2018 Lease Renegotiation Was Fraudulent.

¶22 Mundee contends the superior court improperly weighed credibility in determining that Silver's master lease statements were "an innocent misunderstanding." As discussed above, Silver incorrectly told Mundee's agent that the Evansville location was previously part of a master lease. Silver testified that he believed his statement was true based on an "initial conversation" in which Store told him that it "owned a larger portfolio of these properties" that "typically are under a master lease."

¶23 Credibility typically is for the jury to resolve. *Thompson v. Better-Bilt Aluminum Prods. Co.*, 171 Ariz. 550, 558 (1992); *Brown v. Wyo. Butane Gas Co.*, 205 P.2d 116, 118 (Wyo. 1949). But the superior court made no credibility determinations here, as Mundee presented no evidence to show that Silver's statements were intended to deceive. He also presented

no evidence to challenge Store's contention that it did not know about Silver's statements until after Mundee sued.

¶24 Mundee also failed to show that Silver's master lease statements induced him to act or that he suffered any resulting damages. He instead speculates that Store tried to conceal Hilco's threats and "run out the clock on [Mundee's] 60-day diligence period," citing Silver's statement in an email to Store that he would "explain this away." Silver made that statement regarding Mundee's request for past leases, and Mundee cites no evidence to show that Silver was aware of Hilco's statements or RMH's financial status at that time. Moreover, the undisputed record shows Store did not give Mundee copies of any earlier leases before closing because (1) it did not have the original lease and (2) the 2018 Lease was a "complete restatement" of the 2012 Lease. Indeed, Mundee conceded that the 2018 Lease and 2012 Lease did not substantially differ.

B. Mundee Failed to Prove the PSA "No Litigation" Clause Was Fraudulent.

¶25 Mundee next contends the PSA "no litigation" clause was fraudulent, again citing Hilco's threats that RMH would consider filing bankruptcy if Store did not agree to rent reductions. The PSA states, however, that all of Store's warranties, including the "no litigation" provision, "shall be true as of the date of this Agreement" and "at and as of the Closing Date." Store and RMH agreed to rent reductions before Store and Mundee executed the PSA. Mundee did not controvert Store's evidence that Hilco "essentially fled the scene" once that agreement was reached.

¶26 Mundee also presented no evidence to controvert Store's evidence that it considered Hilco's statements to be hyperbole. Indeed, he admitted in a deposition that he did not know whether Store considered Hilco's statements to be legitimate.

¶27 Store and RMH's rent reduction agreement also resulted in the 2018 Lease, in which RMH represented to Store that no such litigation threats existed. Mundee presented no evidence to show that Store could not or should not have relied on that representation. He instead contends on appeal that the 2018 Lease only requires disclosure of threatened litigation that "might reasonably result in any Material Adverse Effect." The 2018 Lease defines "Material Adverse Effect" to include a material adverse effect on "the contemplated business, condition, worth or

operations of any Lessee Entity" or "Lessee's ability to perform its obligations under this Lease," either of which would have encompassed an anticipated RMH bankruptcy filing.

C. Mundee Failed to Prove Silver's Marketing Materials Were Fraudulent.

¶28 Mundee also contends Silver's marketing materials were fraudulent because they advertised a "New 15 year Primary Term." The 2018 Lease, which RMH and Store signed seven days before Mundee signed the PSA, included an initial 15-year term through October 2032 with extension options to October 2052. Mundee correctly points out, however, that the 2012 Lease, which Store did not provide, "revealed both leases ended within two months of each other" in 2032.

¶29 But Mundee does not show how Store's decision not to give him the 2012 Lease before closing induced him to act or caused him to suffer damages; he only contends he "would have realized that the 2012 Lease was not part of a master lease arrangement" and "that the 15-year term of the 2018 Lease was virtually coextensive with the 2012 Lease." Mundee also cites no clear and convincing evidence for his contention that Store was "scrambling to throw [him] off the trail of RMH's threatened bankruptcy." *See Mueller v. Zimmer*, 124 P.3d 340, 350 (Wyo. 2005) (stating that "speculations on [the defendant's] motives" are "not sufficient to meet [the] burden to demonstrate that genuine issues of material fact existed by 'clear, unequivocal, and convincing evidence'" (citation omitted)). Indeed, the statement he contends Store "created" to "throw [him] off the trail"—that the 2018 Lease was a "complete restatement" that "stands on its own"—was true, as the 2018 Lease states that it "amends and restates in its entirety" the 2012 Lease.

¶30 In summary, Mundee did not "demonstrate the existence of genuine issues of material fact by clear, unequivocal and convincing evidence." *Bitker v. First Nat'l Bank in Evanston*, 98 P.3d 853, 856 (Wyo. 2004). We therefore affirm summary judgment on his fraudulent inducement claim.

CONCLUSION

¶31 We affirm. Both parties request their attorney's fees and costs incurred in this appeal under section 7.15 of the PSA. Under section 7.15, the prevailing party in a controversy arising under the PSA "shall be entitled to recover all of its reasonable attorneys' fees and other costs in addition to any other relief to which it may be entitled." Generally, we

enforce a contractual attorney's fees provision according to its terms. *Pi'Ikea, LLC v. Williamson*, 234 Ariz. 284, 289, ¶ 17 (App. 2014); *see also Cline v. Rocky Mountain, Inc.*, 998 P.2d 946, 952 (Wyo. 2000). Store is the prevailing party in this appeal and may recover reasonable attorney's fees and taxable costs upon compliance with ARCAP 21.

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