IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

J.D. BALL, *Plaintiff/Appellant*,

v.

LISA SWANSEN, et al., *Defendants/Appellees*.

No. 1 CA-CV 21-0696
FILED 11-22-2022

Appeal from the Superior Court in Maricopa County
No. CV2021-050830
The Honorable Sara J. Agne, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

J.D. Ball, Scottsdale
Plaintiff/Appellant

Thomas A. Morton, PLLC, Phoenix
By Thomas A. Morton
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Angela K. Paton delivered the decision of the Court, in which Presiding Judge Maria Elena Cruz and Judge Peter B. Swann joined.

P A T O N, Judge:

¶1 J.D. Ball appeals the superior court's partial dismissal of his complaint with prejudice. For the following reasons, we affirm the dismissal in part and vacate it in part.

FACTS AND PROCEDURAL HISTORY

¶2 Beginning in 2012, Ball and his then-wife Lisa Swansen jointly owned a medical practice called Hybritech Medical Group. In November 2015, Ball and Swansen divorced and signed a contract agreeing to continue operating Hybritech together and to refrain from doing anything that would cause the company to lose value. The agreement contained a clause "forbidding each party from competing [with Hybritech] or creating a competitive business."

¶3 In 2021, Ball claimed Swansen opened a new medical business to compete with Hybritech. Ball sued Swansen and several co-defendants, including Mark Weis, Monica Lockert, Mobileonedocs LLC, Act Health Partners PLLC, and Athena Medical Consultants LLC. Specifically, Ball alleged that by opening a new medical business, Defendants: (1) breached the Hybritech contract between Ball and Swansen, (2) breached the covenant of good faith and fair dealing implied in that contract, (3) breached their fiduciary duties, (4) intentionally interfered with Ball's business expectancy, and (5) intentionally interfered with the Hybritech contract. Although Ball named other defendants in his complaint, he primarily directed his allegations against Swansen.

¶4 The superior court found that each of Ball's claims, except for breach of contract, were time-barred tort claims and dismissed them with prejudice. The court also dismissed with prejudice Ball's claims against all Defendants other than Swansen.

¶5 Ball timely appealed. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), -2101(A)(1).

DISCUSSION

I. The superior court erred by applying the two-year statute of limitations to Ball's breach of implied covenant of good faith and fair dealing claim because the claim sounded in contract, not tort.

¶6 Arizona law implies a covenant of good faith and fair dealing in every contract. *Rawlings v. Apodaca*, 151 Ariz. 149, 153 (1986). The implied covenant "arises by operation of law but exists by virtue of a contractual relationship" and is "as much a part of a contract as are the express terms." *Wells Fargo Bank v. Ariz. Laborers, Teamsters and Cement Masons Loc. No. 395 Pension Tr. Fund*, 201 Ariz. 474, 491, ¶ 59 (2002). Arizona courts have, in limited circumstances, permitted parties to bring actions in tort, rather than contract, for breach of the implied covenant of good faith. *Id.* at ¶ 60. But such claims are only permissible "where there is a special relationship between the parties arising from elements of public interest, adhesion, and fiduciary responsibility." *Id.* (citation and internal quotation marks omitted); *see also Burkons v. Ticor Title Ins. Co. of California*, 168 Ariz. 345, 355 (1991) ("Among the special relationships in which such tort damages for breach of contract may be available are those undertaken for something more than or other than commercial advantage.")

¶7 Here, Ball's implied covenant claim sounds in contract because he did not allege the "special relationship" necessary to support a tortious bad faith claim. *Wells Fargo*, 201 Ariz. at 491, ¶ 60 ("a 'special relationship' must exist in order to support a *tortious* breach of the implied covenant of good faith and fair dealing") (citation omitted). Instead, Ball argued that "every contract carries a covenant of good faith and fair dealing," and that Defendants violated that covenant by opening a competing business. Because Ball's implied covenant claim was pled and sounds in contract, the superior court erred by subjecting it to the two-year statute of limitations applicable to tortious bad faith claims rather than the six-year statute of limitations applicable to contractual bad faith claims. *Compare* A.R.S. § 12-542(3) *with* A.R.S. § 12-548; *see also Taylor v. State Farm Mut. Auto. Ins. Co.*, 185 Ariz. 174, 176 (1996) (two-year statute of limitations only applicable to tortious bad faith claims).

II. The superior court did not err in dismissing Ball's tort claims as time-barred.

¶8 Once a plaintiff "knows or, in the exercise of reasonable diligence, should know the facts underlying the cause [of action,]" the statute of limitations begins to run. *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 588 (1995) (citation omitted).

"[C]laims that are clearly brought outside the relevant limitations period are conclusively barred." *Montano v. Browning*, 202 Ariz. 544, 546, ¶ 4 (App. 2002). Having determined that Ball's implied covenant claim sounds in contract, not tort, we now turn to the court's disposition of his remaining claims.

¶9 Ball's complaint alleged Swansen and Weis conspired to open a competing medical business, and, in so doing, (1) breached their fiduciary duties, (2) intentionally interfered with Ball's business expectancy and (3) intentionally interfered with Ball's Hybritech contract. The statute of limitations for these specific tort claims is two years. *See, e.g.*, A.R.S. § 12-542(3) (injury done to the property of another); *Coulter v. Grant Thornton, LLP*, 241 Ariz. 440, 444, ¶ 9 (App. 2017) (breach of fiduciary duty); *Clark v. Airesearch Mfg. Co. of Ariz.*, 138 Ariz. 240, 243-44 (App. 1983) (intentional interference with a contract).

¶10 In a 2016 email that Ball attached to his complaint, Ball accused Swansen and Weis of interfering with Hybritech and "playing evil games" with the business that would leave Ball "homeless." Swansen replied that she was starting a new medical practice that was "separate from Hybritech." These emails show that Ball knew the facts underlying his tort claims in 2016—namely, that Swansen and Weis were starting a competing medical business. But Ball waited until 2021 to sue on those claims. Accordingly, the superior court did not err by dismissing Ball's tort claims as time-barred.

III. The superior court did not err in dismissing all Defendants except Swansen from the breach of contract claim.

¶11 To survive a motion to dismiss, a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Ariz. R. Civ. P. 8(a)(2). Ball failed to allege that any Defendant other than Swansen was a party to a contract with him. Indeed, in his opening brief, Ball admits "[t]here is nothing in Ball's complaint that would lead any reader to believe the dismissed parties were involved in a contract." Ball did not allege facts to support a cause of action for breach of contract against the dismissed Defendants. The superior court, therefore, did not err in dismissing them from the complaint.

¶12 Because Ball's implied covenant claim sounds in contract, not tort, the dismissed Defendants could not be parties to Ball's implied covenant claim because they were not parties to his underlying contract claim. *Wells Fargo*, 201 Ariz. at 490-91, ¶¶ 59-61.

IV. The superior court erred by awarding Swansen her attorneys' fees.

¶13 We review de novo the application of Section 12-341.01(A) to Ball's claims. *Schwab Sales, Inc. v. GN Constr., Co.*, 196 Ariz. 33, 35, ¶ 3 (App. 1998).

¶14 Section 12-341.01(A) provides that "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." Here, Swansen was the only defendant who requested and was awarded attorneys' fees. But Swansen was not the successful party to an "action arising out of a contract" because Ball's contract claims against her, including his implied covenant of good faith and fair dealing claim, are still pending. The superior court therefore erred by awarding her attorneys' fees under Section 12-341.01(A).

V. Costs on Appeal.

¶15 Because we reverse the dismissal of Ball's implied covenant claim and the award of attorney's fees against him, Ball is the successful party to this appeal and thus is entitled to his costs upon compliance with Arizona Rule of Civil Appellate Procedure 21. *See* A.R.S. § 12-341; *see also Henry v. Cook*, 189 Ariz. 42, 44 (App. 1996) ("[I]n the absence of a statute or rule authorizing apportionment, the party who obtains partial success is entitled to recover all taxable costs.").

CONCLUSION

¶16 We affirm the superior court's order dismissing Ball's tort claims as time-barred and dismissing all Defendants other than Swansen from the remaining contract claims. We vacate the superior court's orders dismissing Ball's breach of the implied covenant of good faith and fair dealing claim and awarding Swansen her attorneys' fees.

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