IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 03/25/2010
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BY: GH

KATHLEEN A. TITTLE, a woman filing individually, Plaintiff/Appellant, v. NAZCARE, INC., an Arizona corporation; ROBERTA HOWARD, Defendants/Appellees.	)	1 CA-CV 08-0832 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Yavapai County

Cause No. P-1300-CV-0020060837

The Honorable Howard D. Hinson, Jr., Judge

AFFIRMED

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T H O M P S O N, Judge

¶1 Kathleen A. Tittle appeals from the superior court's grant of summary judgment to NAZCARE, Inc. (NAZCARE or Company) and

Roberta Howard (NAZCARE and Howard collectively, Defendants). Tittle contends summary judgment was improper because factual issues exist regarding her wrongful termination and tortious interference with contract claims. Tittle also argues the superior court abused its discretion in denying her motion for leave to amend the complaint. For the reasons that follow, we affirm.

BACKGROUND

¶2 NAZCARE is a non-profit corporation that provides various services throughout northern Arizona to people suffering from mental illness. In 2003, Tittle was hired to serve as NAZCARE's Chief Operating Officer (COO). Sometime in August 2005, NAZCARE's Chief Executive Officer (CEO) was put on administrative leave, and Fred Trost, a member of NAZCARE's Board of Directors (Board), began serving as the interim CEO in October 2005. Trost was actively involved in conducting a nation-wide search for a permanent CEO.

¶3 Both Tittle and Howard applied for the CEO position.[1] In February 2006, the Board extended an offer to Howard, and she started as NAZCARE's CEO on Monday, February 27, 2006. Tittle was upset that she did not get the CEO job, and Howard was warned by Trost and others that Tittle was going to be uncooperative but to not "take it personally."

¶4 Unfortunately, the warnings to Howard proved to be correct. For example, Howard expressed concern to Tittle regarding

[1] At the time of her application, Howard was the programs director at Native American Connections.

Tittle's failure to provide Howard with requested budgets and other information Howard needed to prepare a management assessment plan. Also, when Tittle was home ill, Howard and Trost called her to inquire about improprieties they discovered pertaining to NAZCARE's checking account. When confronted with the fact that a previous CEO and others no longer associated with NAZCARE were still signers on the account, Tittle responded that she "didn't have a problem with that; no one was going to get ahold of a check." This response from the Company's COO concerned Howard.[2]

¶5 Sometime during the week of March 20, 2006, Howard went to NAZCARE's bank without Tittle's knowledge to rectify various issues related to the Company's accounts. Specifically, Howard sought to have herself named as a signer on the checking account, to delete the various signers who were no longer associated with NAZCARE, to close various credit card accounts, and to correct the Company's employer identification number that improperly reflected a previous CEO's social security number. To successfully complete these actions, Trost and members of the Board were also present at the bank. One of the Board members was S.L., who was a NAZCARE

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[2] Further, two weeks after Howard started as CEO, Tittle told her she was going on vacation the following week. Another top administrator, Joan Crosby, also informed Howard that she was going to be on vacation during the same time. Crosby's vacation request was in writing and approved by Trost a month before Howard became CEO. Howard was concerned that Tittle's "request" was not done according to proper procedures. Trost, who assisted Howard for her first two weeks, was concerned that he, Crosby, and Tittle would

employee before joining the Board. When hired by NAZCARE, S.L. disclosed prior convictions arising from her embezzlement of a prior employer's funds.

¶6 The tension between Howard and Tittle ultimately manifested itself in an exchange of e-mails between the two during the end of March 2006. In the first e-mail, sent at 7:56 a.m. on March 29, 2006 (7:56 E-mail), Tittle referred to Howard's trip to the bank and stated: "I have some serious concerns about your doing anything regarding NAZCARE's finances without talking to me first. As well, involving a convicted felon (embezzlement!) in anything financial is worrisome." By letter dated March 31, 2006, Howard informed Tittle that "NAZCARE is exercising its right to dismiss at will effective immediately" and thereby terminated Tittle's employment.

¶7 On July 19, 2006, Tittle commenced this action in superior court raising two claims related to her termination of employment from NAZCARE.[3] In count one, Tittle alleged NAZCARE violated the Arizona Employment Protection Act (Act) by terminating Tittle in retaliation for accusing Howard and S.L. in the 7:56 E-mail "of setting up the organization for embezzlement[.]" Count two raised a tortious interference with contract claim alleging Howard

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all be gone during Howard's third week, and he conveyed to Howard his belief that Tittle was "manipulat[ing]" or "maneuvering."

[3] Tittle filed her complaint eleven days after a hearing conducted by the Arizona Department of Economic Security regarding NAZCARE's appeal from a determination dated May 19, 2006 that Tittle was eligible for unemployment insurance benefits.

interfered with Tittle's contractual relationship with NAZCARE by terminating Tittle's employment. Defendants sought summary judgment on both counts, and Tittle responded in opposition. Before the superior court ruled on the summary judgment motion, Tittle requested leave to file an amended complaint to assert an allegation of Howard's individual liability under count one based on our decision in *Higgins v. Assmann Elecs. Inc.*, 217 Ariz. 289, 294, ¶ 13, 173 P.3d 453, 458 (App. 2007) (holding individual supervisor who committed acts constituting wrongful termination can be individually liable under the Act).

¶8 In a written ruling, the court granted Defendants summary judgment on both counts, finding no genuine material factual issues existed, and "[n]o reasonable fact finder could conclude there was proof sufficient for [Tittle] to establish the elements of a claim [for wrongful termination] or her claim for tortious interference with a contract." Concluding Tittle's proposed amended complaint "would be subject to the same infirmities as noted above," the court also denied Tittle's motion for leave to amend her complaint.

Final judgment was entered on November 10, 2008, and Tittle timely appealed.

DISCUSSION

¶9 Summary judgment may be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P.

56(c). In reviewing a decision granting summary judgment, we review de novo whether any genuine issues of material fact exist. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). "A 'genuine' issue is one that a reasonable trier of fact could decide in favor of the party adverse to summary judgment on the available evidentiary record." *Martin v. Schroeder*, 209 Ariz. 531, 534, ¶ 12, 105 P.3d 577, 580 (App. 2005). Although we view the evidence and reasonable inferences in favor of the nonmoving party, summary judgment may nevertheless be granted where the facts produced in response to a summary judgment motion have "so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the [party opposing summary judgment]." *See Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). Consequently, speculation or evidence creating the "slightest doubt" about the facts may still be insufficient to withstand a motion for summary judgment. *Id.*; *Martin*, 209 Ariz. at 534, ¶ 12, 105 P.3d at 580.

I. Count One: Wrongful Termination

¶10 Arizona law recognizes claims for retaliatory termination of employment. Specifically, the Act provides an employee with a claim against his or her employer for termination of employment if the employer has terminated the employment relationship in retaliation for:

> The disclosure by the employee in a reasonable manner that the employee has information or a reasonable belief that the employer, or an employee of the employer, has violated, is violating or will violate the Constitution of Arizona or the statutes of the state to either the employer or a representative of the employer who the employee reasonably believes is in a managerial or supervisory position and has the authority to investigate the information provided by the employee and to take action to prevent further violations of the Constitution of Arizona or statutes of this state or an employee of a public body or political subdivision of this state or any agency of a public body or political subdivision.

A.R.S. § 23-1501(3)(c)(ii).

¶11 Thus, as a threshold matter, Tittle must have sufficient evidence to raise a genuine question of whether she disclosed a violation or potential violation of the constitution or Arizona law by NAZCARE or one of its employees. Tittle asserts her 7:56 E-mail constituted such evidence of whistle-blowing because she disclosed therein her belief that, by taking S.L. to the bank, Howard was facilitating theft and violating fiduciary duties owed to NAZCARE.

¶12 We cannot conclude that a reasonable fact finder would equate the 7:56 E-mail with a disclosure of illegal activity. *See supra* ¶ 6. At most, the e-mail conveys Tittle's general "serious concerns" from the perspective of the Company's COO about Howard's trip to the bank. Tittle was also clearly concerned about Howard involving S.L. in financial matters based on S.L.'s prior history of embezzlement. Nothing in the e-mail, however, can reasonably be interpreted as an expression of Tittle's subjective belief that Howard and S.L. were conspiring to embezzle NAZCARE funds by going

to the bank or that Howard was otherwise breaching her fiduciary duties to NAZCARE. Furthermore, the record indicates Tittle made no other attempt to disclose her belief regarding possible violations of law to NAZCARE or Howard. Indeed, at her deposition, Tittle testified that she never informed Howard prior to March 31, 2006 that she – Tittle – believed Howard "was trying to set up the organization for embezzlement[.]" Absent evidence of whistle-blowing, Tittle's retaliatory termination claim necessarily fails, and the superior court properly granted Defendants summary judgment on count one.[4] For this reason, amending the complaint to add

[4] Tittle points to *Murcott v. Best Western Int'l*, 198 Ariz. 349, 9 P.3d 1088 (App. 2000) to support her argument that the 7:56 E-mail's expression of "serious concerns" was sufficient evidence of whistle-blowing for purposes of a retaliatory termination claim. We find *Murcott* unhelpful. That case stands for the proposition that an employee's characterization of a company's purported illegal activities is irrelevant for purposes of determining whether the employee engaged in whistle-blowing; rather, the relevant inquiry is whether the employee's complaints address an important public policy interest that stems from Arizona statutes. 198 Ariz. at 357, ¶¶ 41-42, 9 P.3d 1096. Here, Tittle's subjective belief regarding some unspecified improprieties relating to Howard's trip to the bank with S.L. does not implicate public policy concerns. Furthermore, in *Murcott*, unlike here, the employee specifically reported his belief that corporate activities could result in violations of law. *Id.* at 353-55 at ¶¶ 10, 16, 18, 29, 9 P.3d at 1092-94. Even if the 7:56 E-mail could properly be deemed whistle-blowing, Tittle's wrongful termination claim nonetheless fails because she did not report the alleged embezzlement conspiracy to someone she "reasonably believes is in a managerial or supervisory position and has the authority to investigate the information provided by the employee and to take action to prevent further violations . . . ." A.R.S. § 23-1501(3)(c)(ii). Any disclosure Tittle arguably made was only to Howard, the purported wrongdoer. Tittle could not reasonably believe Howard would "investigate" herself and "take action to prevent further violations . . . ." Under these circumstances, Tittle should have informed the Board or a law enforcement agency if she truly

Howard individually as a defendant to count one would have been futile; therefore, the superior court did not abuse its discretion in denying Tittle's motion for leave to amend her complaint. *See Bishop v. State Dep't of Corr.*, 172 Ariz. 472, 474-75, 837 P.2d 1207, 1209-10 (App. 1992) (noting trial court does not abuse its discretion in denying a motion to amend pleadings if amendment would be futile).

II. Count Two: Intentional Interference with Contract

¶13 The elements of a cause of action for intentional interference with contract are (1) the existence of a contract between the plaintiff and a third party; (2) the defendant's knowledge that the contract exists; (3) intentional interference by the defendant that causes the third party to breach the contract; (4) defendant's interference constituted improper conduct; and (5) damages. *Safeway Ins. Co., Inc. v. Guerrero*, 210 Ariz. 5, 9-10, ¶ 14 106 P.3d 1020, 1024-25 (2005); *Neonatology Assocs. v. Phoenix Perinatal Assocs.*, 216 Ariz. 185, 187, ¶ 7 164 P.3d 691, 693 (App. 2007); *Barrow v. Ariz. Bd. of Regents*, 158 Ariz. 71, 78, 761 P.2d 145, 152 (App. 1988) (citing *Wagenseller v. Scottsdale Mem'l Hosp.,* 147 Ariz. 370, 710 P.2d 1025 (1985)). In addition, Arizona "[c]ases addressing intentional interference with contract claims

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believed Howard was going to violate the law. The record is totally devoid of any evidence of such reporting. Moreover, the record *does* indicate Tittle was not shy about reporting to the Board her perceptions of misconduct by previous CEO's or Board members themselves.

have held that when an individual supervisor/defendant was acting within the scope of authority as a management representative, he or she was, in effect, the employer, and could not interfere with his or her own contract." *Higgins,* 217 Ariz. at 293, ¶ 9, 173 P.3d at 457 (citing *Barrow,* 158 Ariz. at 78, 761 P.2d at 152); *Lindsey v. Dempsey,* 153 Ariz. 230, 233, 735 P.2d 840, 843 (App. 1987)).

¶14 Here, it is undisputed that Howard, as NAZCARE's CEO, terminated Tittle, the Company's COO. The parties also do not dispute that the COO is subordinate to the CEO, and that the latter is responsible for overseeing all of NAZCARE's operations and supervising management staff. Thus, there is no genuine dispute that Howard was acting within the scope of her authority as a representative of NAZCARE when she terminated Tittle. Accordingly, Howard was effectively Tittle's employer and could not interfere with Tittle's employment contract. *See Campbell v. Westdahl*, 148 Ariz. 432, 438, 715 P.2d 288, 294 (App. 1985) ("A party cannot be held liable in tort for intentional interference with its own contract."). The superior court therefore properly granted summary judgment and dismissed count two.

CONCLUSION

¶15 The order granting Defendants summary judgment on both counts is affirmed. We also affirm the superior court's order

denying Tittle's motion for leave to amend her complaint. Because Tittle is not the prevailing party, we deny her request by separate motion for attorneys' fees.

/s/
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JON W. THOMPSON, Judge

CONCURRING:

/s/
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PATRICK IRVINE, Presiding Judge

/s/
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MARGARET H. DOWNIE, Judge