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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 11-30-2010
RUTH WILLINGHAM,
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CAMELBACK AUTOGLASS, L.L.C., an) 1 CA-CV 09-0771
Arizona limited liability)
company,) DEPARTMENT C
)
Plaintiff/Counterdefendant/) **MEMORANDUM DECISION**
Appellant,) (Not for Publication -
) Rule 28, Arizona Rules of
and) Civil Appellate Procedure)
)
MICHAEL B. O'CONNELL and JANE)
DOE O'CONNELL, husband and wife,)
)
Counterdefendant/Appellant,)
)
v.)
)
ANMK INVESTMENTS, INC., an)
Arizona limited liability)
company,)
)
Defendant/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2006-018073

The Honorable John Rea, Judge

AFFIRMED

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P O R T L E Y, Judge

¶1 Camelback Autoglass, L.L.C. ("CAG") appeals the denial of its request for attorneys' fees.

FACTS AND PROCEDURAL BACKGROUND

¶2 Theodore Lang, III ("Lang") was CAG's Director of Marketing and Sales. During a six-month period in 2006, Lang cashed forty-six checks payable to CAG at ANMK Investments, Inc. ("ANMK").¹ CAG fired Lang, and sued ANMK, alleging that it was damaged because ANMK was negligent and acted in a commercially unreasonable manner.

¶3 A jury subsequently found that CAG had been damaged but that ANMK was only sixty percent liable, and CAG bore the remaining liability. Before judgment was entered, CAG unsuccessfully requested attorneys' fees pursuant to Arizona Revised Statutes ("A.R.S.") section 12-341.01(A) (2003). CAG timely appealed, and we have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

¹ ANMK is a convenience store that, as a part of its business, cashes checks for customers.

DISCUSSION

¶14 The sole issue on appeal is whether the trial court erred when it refused to award CAG attorneys' fees pursuant to § 12-341.01(A). Although we review the decision to deny fees for an abuse of discretion, *Maleki v. Desert Palms Prof'l Props., L.L.C.*, 222 Ariz. 327, 334, ¶ 32, 214 P.3d 415, 422 (App. 2009), we review the application of the fee statute de novo. *Phx. Newspapers, Inc. v. Ariz. Dep't of Corr.*, 188 Ariz. 237, 244, 934 P.2d 801, 808 (App. 1997).

¶15 Section 12-341.01(A) allows a successful party in any contested action arising out of a contract, whether express or implied, to recover its attorneys' fees. A successful tort claimant cannot recover attorneys' fees. See *Hoffman v. Greenberg*, 159 Ariz. 377, 380, 767 P.2d 725, 728 (App. 1988).

¶16 Here, the trial court denied CAG's fee request after reviewing the pleadings and cogently detailing its analysis. CAG argues that the court improperly relied on *Sparks v. Republic National Life Insurance Co.*, 132 Ariz. 529, 647 P.2d 1127 (1982). The court, however, did not address *Sparks* even though CAG had discussed *Sparks* in its reply.

¶17 CAG also asserts that there is a contract to support fees pursuant to § 12-341.01(A); namely that Lang, who had an employment contract with CAG, created forty-six separate unilateral contracts when he cashed the checks. CAG did not,

however, allege a breach of contract. Instead, and as the trial court found, CAG sued ANMK for the tort of negligence and a statutory violation of the Arizona Uniform Commercial Code. The mere fact that there may have been a contract somewhere in the fraudulent transaction chain of events will not support a fee award. See *Ramsey Air Meds., L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 14, ¶ 21, 6 P.3d 315, 319 (App. 2000) (citing *Marcus v. Fox*, 150 Ariz. 333, 335, 723 P.2d 682, 684 (1986)).

¶18 Although CAG argues that the trial court erred by relying on *Barmat v. John & Jane Doe Partners A-D*, 155 Ariz. 519, 747 P.2d 1218 (1987), CAG ignores the fact that *Barmat* is the lodestar for the analysis on the issue. There, the Arizona Supreme Court analyzed whether a successful client could recover statutory attorneys' fees in a legal malpractice action. *Id.* at 520-21, 747 P.2d at 1219-20. After finding that the law implies a contract between an attorney and client, the court held that contracts that are implied in law are not encompassed under § 12-341.01 and denied the fee award. *Id.* at 521, 524, 747 P.2d at 1220, 1223.

¶19 In reaching the decision, the supreme court examined *Sparks* and found that one cannot bring a bad faith lawsuit without an insurance contract. *Id.* at 522, 747 P.2d at 1221. Here, unlike *Sparks*, any employment contract between CAG and Lang was not the basis of the lawsuit but a mere incidental

fact. If, for example, Lang had not been an employee but a thief who stole checks from the office, CAG still had a cause of action against ANMK that did not require, or arise out of, a contract. See *Forged Checks: An Analysis of Civil Liability Under the Uniform Commercial Code*, 28 Ariz. St. L.J. 927, 945 (1996) (citing Uniform Commercial Code § 3-406 (1990) (amended 2002); A.R.S § 47-3406(B) (1996)). Consequently, the trial court did not err in following established case law.

¶10 Finally, CAG argues that the trial court misconstrued *San Tan Irr. Dist. v. Wells Fargo Bank*, 197 Ariz. 193, 3 P.3d 1113 (App. 2000). We disagree.

¶11 In *San Tan*, we reviewed whether the grant of summary judgment was appropriate, but found that there were genuine issues of material fact and remanded the case. *Id.* at 198, ¶ 18, 3 P.3d at 1118. In examining the attorneys' fees issue, we found that it had not been properly pled and noted, as an aside, that the issue could be raised once the case was remanded. *Id.*

¶12 Here, the case was tried, and the jury issued a verdict that has been reduced to a judgment. Although it requested fees pursuant to § 12-341.01, CAG did not allege that there was a contract or that it had been breached before trial. CAG has not challenged the verdict. Because we agree with the trial court's determination, there is no reason to remand this case.

¶13 Additionally, CAG requests attorneys' fees and costs on appeal. Because CAG was not the prevailing party, it is not entitled to fees.

CONCLUSION

¶14 Based on the foregoing, we affirm the denial of attorneys' fees.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Judge

/s/

PATRICIA A. OROZCO, Judge