DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FARHAD MOBASSERY, an individual, and FARSHAD MOBASSERI, an individual,	No. 1 CA-CV 10-0150
	DEPARTMENT C
Plaintiffs/Counterdefendants/ Appellees,	**MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
v.	
AREAD, INC, an Arizona corporation,	
Defendant/Counterclaimant/ Appellant,	
and	
NARIMAN AFKHAMI and KIMBERLY AFKHAMI, husband and wife,	
Defendants/Appellants.	

Appeal from the Superior Court in Maricopa County

Cause No. CV2006-018743

The Honorable Richard J. Trujillo, Judge (Retired)

AFFIRMED IN PART; VACATED IN PART

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D O W N I E, Judge

¶1 Aread, Inc. and Nariman and Kimberly Afkhami (collectively, "defendants" or "appellants") appeal from a jury verdict in favor of Farhad Mobassery and Farshad Mobasseri (collectively, "plaintiffs" or "appellees"). With the exception of the attorneys' fee award against the Afkhamis personally, we affirm the judgment of the superior court.

FACTS AND PROCEDURAL HISTORY

¶2 Mobassery loaned Nariman Afkhami $80,000 in 1989, receiving a promissory note secured by a deed of trust. In 1991, Afkhami formed Aread, Inc., which was involved in developing property in Mohave County known as Cimarron Lake. In 1992, Mobassery, his brother Farshad Mobasseri, and Mobasseri's business partners in a company called United Auctions, Bijan Sharifi and Mike Bassiri, formed a group (the "Mobassery Shareholders") to invest in Aread.

¶3 In May 1992, the Mobassery Shareholders signed an agreement with Afkhami titled "Agreement Among the Shareholders of Aread, Inc." (the "Agreement"). The Agreement stated that, at the time of execution, Mobassery had contributed $200,000 to the Cimarron Lake project. A handwritten interlineation in

another section of the Agreement stated that $100,000 of this contribution would apply to the purchase price. The Agreement further provided that the Mobassery Shareholders would pay $100,000 on April 7, 1992, May 18, 1992, and June 18, 1992, and then make minimum monthly payments of $10,000 until the $750,000 purchase price was paid in full. The Agreement also said they were to execute a voting trust and provide a $1,000,000 line of credit. An escrow agent was to hold the stock until payment in full was made. Until that time, the voting trustee would have a vote proportional to the percentage shares of stock purchased. "At any time," the escrow agent was to release certificates representing shares fully paid for upon written request. The Agreement stated that each dollar of the $750,000 purchase price represented a certain number of shares of stock.

¶4 The Agreement recited that Mobassery would be vice president, secretary, and a director of Aread, would serve as a liaison between the shareholders and management, and would supervise construction and report progress to Afkhami. Mobassery was to receive a salary of $2000 per home built, not to exceed $60,000 annually, and he would be reimbursed for reasonable business expenses.

¶5 Mobassery and Mobasseri signed the Agreement in July 1992. Mobasseri's partners signed it in September 1992, and the Afkhamis signed the Agreement in December 1992.

¶6 The Mobassery Shareholders made $100,000 payments in April, May, and June 1992. The money came from United Auctions and was paid to Aread. The Mobassery Shareholders stopped making payments after September 1992, before the Afkhamis signed the Agreement. They paid a total of $325,000. Afkhami sold the house for which Mobassery held a deed of trust and repaid Mobassery $80,000, without interest, in 1998 or 1999.

¶7 In August 2006, Mobassery's lawyer wrote to Aread and Afkhami, demanding to inspect Aread's records. Aread and Afkhami responded that Aread had no record of Mobassery holding shares of Aread stock. Mobassery's counsel sent a second demand letter with a copy of the Agreement; Aread and Afkhami again responded that Mobassery was not a shareholder.

¶8 On December 7, 2006, Mobassery and Mobasseri sued Aread and the Afkhamis. They set forth claims for: (1) declaratory judgment that plaintiffs owned 27.77 percent of Aread's stock and were entitled to inspect company records; (2) breach of contract because the company failed to issue shares of stock to plaintiffs in accordance with the Agreement; (3) fraud based on representations by Afkhami; (4) negligent misrepresentation by Afkhami; (5) breach of fiduciary duty; (6) fraud in the sale of securities, participant liability, control person liability, and aiding and abetting fraud in the sale of securities; and (7) constructive trust and unjust enrichment.

¶9 The complaint alleged that Sharifi and Bassiri had assigned their interests in Aread to Mobasseri. Plaintiffs claimed that after the Mobassery Shareholders ceased making payments, Afkhami affirmed that the group owned a roughly thirty percent interest in Aread, and the parties communicated regularly about the business. The complaint alleged that Afkhami agreed to provide accountings, but never did, and that he advised Mobassery that Aread had lost its investment in Cimarron Lake through foreclosure, but assured the Mobassery Shareholders they would recover their investment through other projects. Plaintiffs alleged that they relied on Afkhami's representations and that, without further information, continued to believe Aread was struggling financially. The complaint contended that in 2005, plaintiffs learned for the first time that Aread had achieved financial success, contrary to Afkhami's representations.

¶10 The court denied a motion to dismiss based on the statute of limitations. In their answer to the complaint, defendants admitted signing the Agreement, but asserted plaintiffs failed to satisfy the terms of the Agreement. Defendants denied concealing information. Defendants also filed a counterclaim for breach of contract.

¶11 Plaintiffs moved for summary judgment on the counterclaim based on the statute of limitations. They argued

defendants knew in 1992 that the Mobassery Shareholders had not paid $750,000, yet failed to file suit within six years. Defendants filed several motions for partial summary judgment and also moved for summary judgment based on the statute of limitations. According to defendants, the longest possible limitations period was six years, and plaintiffs had information that should have alerted them they were not shareholders or should have caused them to inquire further more than six years before they filed suit. Plaintiffs responded that they did not learn until 2006 that Aread did not recognize them as shareholders.

¶12 The court dismissed the counterclaim on statute of limitations grounds, but denied defendants' motion for summary judgment based on the statute of limitations. The court granted partial summary judgment to defendants on the fraud and negligent misrepresentation claims. The case proceeded to a jury trial on the remaining counts.

¶13 Mobassery testified that he and Afkhami had been best friends since they were teenagers. He explained that he took a second mortgage on his home to loan Afkhami $80,000 when Afkhami's business was in trouble and that Afkhami agreed to repay him in six months with interest. To secure the loan, Afkhami gave Mobassery a deed of trust on his home.

¶14 Mobassery testified that in 1991, Afkhami told him Aread needed $300,000 for a business opportunity. Mobassery, his brother, and his brother's partners in United Auctions agreed with Afkhami that they would bring a minimum of $300,000 to the business and that Mobassery's $80,000 loan would be credited at $200,000 so he would be a partner. Mobassery said he believed the investors would receive shares in proportion to the money invested. He testified they paid a total of $325,000, not including the credit for the earlier loan. He also testified he made handwritten interlineations to the Agreement, reducing his loan credit from $200,000 to $100,000, and stating that if the Mobassery Shareholders could not provide the line of credit, the company would obtain private financing. Mobassery testified he spoke with Afkhami about the changes and Afkhami did not object. He then signed the Agreement with the changes, the others in his group signed it, and they sent it to Afkhami. Mobassery testified he reduced the credit for his $80,000 loan because he felt it was more fair to take only $100,000 because he had the deed of trust to cover the $80,000.

¶15 Mobassery testified that after signing the Agreement, he received a business card identifying himself as Senior Vice President of Aread. He stated that, in that capacity, he traveled to the building site several times to supervise activities. He testified that he talked with Afkhami many times

about the status of the Cimarron Lake project and that "things were slow, not selling." Mobassery testified that Afkhami never said he was not a shareholder, and that early on, Afkhami told him the Mobassery Shareholders had bought roughly thirty percent of Aread, though Afkhami was upset they had not paid the entire $750,000. Mobassery testified that on one occasion, Afkhami was angry and told him he had defaulted and was out of the business, but that Afkhami then laughingly said the Mobassery Shareholders owned about thirty percent of the company. In 1998, Afkhami repaid Mobassery $80,000 without interest, and Mobassery was upset because he felt he was owed more money. Mobassery admitted he did not request company tax returns or stock certificates, saying he believed Aread was inactive, that Afkhami was diligently trying to "make it work," and that he had an agreement and hoped the company would "make it."

¶16 Mobassery testified he requested financial records from Aread in 2000, but did not receive them. He admitted being concerned about the failure to produce the records, and it contributed to a feeling of bitterness toward Afkhami, which also arose from Afkhami's failure to return Mobassery's phone calls. Mobassery testified that in 2005, he received information from an acquaintance that Aread was doing well. He engaged a lawyer to contact Aread, which denied knowledge of the Mobassery Shareholders.

¶17 Farshad Mobasseri testified he met with Afkhami a few times after the Agreement was signed. After he expressed concern that the project was not going as well as expected, Afkhami said not to worry and that if Cimarron Lake did not work out, he had other projects in Phoenix.

¶18 After plaintiffs rested, the court denied a defense motion for directed verdict based on the statute of limitations. The court noted it was a ”close call,” but believed the jury should make the decision.

¶19 Afkhami testified that, in 1992, he was not looking for $300,000 but needed $2,000,000, and that to acquire shares in Aread the Mobassery Shareholders had to invest the full $750,000 and provide the $1,000,000 line of credit. He stated they never came up with the money, other documents related to the Agreement were never signed, escrow was never opened, and the deal was never consummated. Afkhami agreed that the Mobassery Shareholders may have told him in October 1992, before he signed the Agreement, that they would make no additional payments. He said he would still have proceeded with the Agreement if they had changed their minds, so signing it was a way of giving them a second chance. Afkhami noted that the Mobassery Shareholders were not issued shareholder certificates, were not invited to shareholders meetings, and were never sent annual reports or financial records. He also testified that the

$80,000 loan from Mobassery was to have been cancelled and turned into stock, but it was not cancelled and was ultimately repaid. He explained that, if the stock purchase deal had occurred, he would not have owed the $80,000.

¶20 Afkhami asserted that the parties entered two agreements and that under the first, which was between Aread and United Auctions, Mobasseri and his partners would pay $300,000 for an option to purchase stock for an additional $450,000. Consequently, when they walked away from the deal, Afkhami believed they had the right to do so, but forfeited the money paid. He testified that when it became clear the Mobassery Shareholders would not honor their obligations under the Agreement, he told Mobassery they were in default and were "out." He believed he told them in writing they had defaulted, but did not have the document. He further testified that he showed his 1992 and 1993 tax returns to Mobassery so that he could see that Afkhami had lost money and not benefited from the Cimarron Lake project.

¶21 In closing argument, plaintiffs argued the statute of limitations did not bar their claims because they had been "strung along for years" and did not know they had been injured until 2006, when their lawyer wrote Aread and was advised plaintiffs were not shareholders. Defendants, on the other hand, argued that by 1993, plaintiffs knew Mobassery was not

receiving his salary and had not had expenses reimbursed; that by 1995, plaintiffs knew they had not been invited to a shareholders meeting, had not received financial records, and the Cimarron Lake project had been lost; that by 1998, Afkhami repaid the $80,000 loan, which would not have occurred if Mobassery had been a shareholder and that in 2000, Mobassery was bitter about how the deal worked out and about not receiving financial records. Defendants argued plaintiffs should have known at these earlier points in time that they were not considered shareholders of Aread, triggering the limitations period.

¶22 After the case was submitted to the jury, jurors submitted several questions to the court, including one asking whether they were required to award interest. The court responded that, if an award was made pursuant to the Agreement, interest was to be awarded at twelve percent. If an award was made for unjust enrichment or under other theories, the court stated that interest was discretionary. The jury returned a verdict for plaintiffs and against all defendants and found "the full amount of damages to be $325,000 w/no interest."

¶23 Plaintiffs sought attorneys' fees pursuant to the Agreement and Arizona Revised Statutes ("A.R.S.") section 12-341.01. Defendants objected, arguing the jury obviously found the Agreement unenforceable because it did not award

interest in accordance with the instruction that interest was mandatory if the jury found the Agreement enforceable. Defendants further argued that the verdict against the Afkhamis did not arise out of contract. Defendants further argued that Aread, not the Afkhamis, received the proceeds. Defendants noted that at trial, plaintiffs argued the individual defendants were liable because of duties imposed on them as directors of Aread. Therefore, defendants contended, the claims against the Afkhamis did not arise from contract. Defendants conceded that the court had discretion to award fees against Aread.

¶24 The court entered judgment for plaintiffs in the sum of $325,000 and awarded $250,000 in attorneys' fees against all defendants. Defendants timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B).

DISCUSSION

¶25 Defendants contend there was insufficient evidence from which the jury could conclude that plaintiffs' claims were filed within the statute of limitations. In reviewing a verdict, we view the facts and all reasonable inferences in the light most favorable to sustaining the verdict and ensuing judgment. *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 123, 907 P.2d 506, 509 (App. 1995). When sufficiency of the evidence is questioned, we examine the record only to determine if there was substantial evidence to support

the judgment. *State ex rel. Herman v. Schaffer,* 110 Ariz. 91, 96, 515 P.2d 593, 598 (1973). To set aside a verdict due to insufficient evidence, it must clearly appear that "upon no hypothesis whatever is there sufficient evidence" to support the conclusion reached by the trier of fact. *State v. Arredondo,* 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶26 Defendants argue that because jurors awarded no interest, they clearly found the Agreement to be unenforceable. Plaintiffs do not dispute this assumption. Accordingly, the verdict was based on either unjust enrichment, which carries a three-year statute of limitations, or securities violations, which are subject to a two-year statute of limitations. A.R.S. §§ 12-543, 44-2004(B).

¶27 A cause of action accrues when the plaintiff knows or with reasonable diligence should know the facts giving rise to the claim and that he or she has been damaged. *CDT, Inc. v. Addison, Roberts & Ludwig, C.P.A., P.C.*, 198 Ariz. 173, 176, ¶ 7, 7 P.3d 979, 982 (App. 2000). "[W]hen discovery occurs and a cause of action accrues 'are usually and necessarily questions of fact for the jury.'" *Walk v. Ring,* 202 Ariz. 310, 316, ¶ 23, 44 P.3d 990, 996 (2002) (citation omitted).

¶28 A cause of action for statutory securities fraud accrues when the plaintiff suspects the fraud, regardless of the plaintiff's awareness of the extent of the damages. *Aaron v.*

Fromkin, 196 Ariz. 224, 228, ¶ 22, 994 P.2d 1039, 1043 (App. 2000). Defendants argue the Mobassery Shareholders should have known they were not considered shareholders and thus should have known of their claims before 2000 because they knew they had stopped making payments, knew they had not provided a line of credit, knew they had not helped obtain another lender, knew they had not signed a voting trust agreement, knew Mobassery had not been asked to approve capital expenditures, and knew Mobassery had not received any salary. Defendants also argue plaintiffs knew they had not been invited to a shareholder meeting and knew they had not received stock certificates or other documentation acknowledging a shareholder interest.

¶29 The jury was presented with conflicting evidence regarding issues relevant to the statute of limitations defense. Both Mobassery and Mobasseri testified that the Mobassery Shareholders were only required to invest $300,000, that the line of credit was not a condition of purchase, and that they were not concerned with the number of shares, but viewed the investment in terms of the percentage they purchased in the company. In addition, Afkhami admitted signing the Agreement after learning the Mobassery Shareholders would not make additional payments, from which the jury might infer that plaintiffs' interpretation of the Agreement was correct. Mobassery testified he did not want to draw a salary from a

company that needed money. The brothers further testified that, after the Agreement was signed, they continued talking with Afkhami about the project. Mobassery testified that Afkhami told him they had purchased thirty percent in Aread. Mobassery told the jury he did not ask for certificates or financial information because he thought the company was inactive, that Afkhami was trying to make it work, and he believed he had a signed agreement and was hoping Aread would become successful. Mobassery also testified that Afkhami did not tell him he had breached the Agreement and was not a shareholder until 2006.

¶30 Defendants also argue that Mobassery should have known he had a claim after Afkhami told him the Mobassery Shareholders had defaulted. Mobassery, however, offered conflicting testimony about that conversation. He said that, after making that statement, Afkhami laughed and said the Mobassery Shareholders owned thirty percent of Aread.

¶31 "No rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury." *State v. Clemons,* 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974). Based on the trial evidence, reasonable jurors could have concluded that plaintiffs did not have the requisite knowledge to trigger running of the limitations period until

they retained counsel and learned defendants denied they were shareholders of Aread.

¶32 Defendants further argue that because Mobasseri's partners assigned him any claims to payments United Auctions made to Aread, he must have known he had a claim in 1993. Mobasseri, however, testified that his partner, Sharifi, wanted to buy him out, so he gave him the company's interest in Aread as well as cash.

¶33 Defendants also contend Afkhami's repayment of the $80,000 loan should have placed Mobassery on notice that he was not a shareholder. Mobassery, however, testified he was not supposed to cancel the debt in exchange for the interest in Aread. He told the jury that by handwritten interlineation, he changed the credit toward the stock purchase from $200,000 to $100,000 and kept the debt secured by the deed of trust. Again, it was the jury's province to determine the credibility of witnesses and decide disputed facts. Jurors could have determined from the evidence presented that repayment of the debt did not affect Mobassery's rights under the Agreement.

¶34 Defendants further claim Mobassery had sufficient notice in 2000 based on his own testimony that he began to feel bitter toward Afkhami, in part because Mobassery had requested financial records that Afkhami had not provided. Although this evidence might support a determination that plaintiffs' claims

accrued much earlier, it did not compel such a finding. Again, it was for the jury to decide what weight to give this evidence.

¶35 Next, the Afkhamis contend attorneys' fees should not have been awarded against them personally. The court awarded fees pursuant to a fee provision in the Agreement and A.R.S. § 12-341.01. As discussed *supra,* the parties appear to agree that the verdict was not based on breach of the Agreement. Plaintiffs, however, contend fees were nevertheless properly awarded under the statute. As to the Afkhamis personally, we disagree.[1]

¶36 Section 12-341.01 gives the court discretion to award reasonable attorneys' fees to the successful party in a contested action arising out of contract. Application of the fee statute presents a question of law that we consider *de novo*. *Phoenix Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 244, 934 P.2d 801, 808 (App. 1997).

¶37 The Afkhamis contend that, because plaintiffs' theories of liability against them were based on a breach of duties imposed by law or statute as directors of Aread, the claims did not arise out of contract. Plaintiffs, on the other hand, maintain that tort claims were intertwined with the

[1] Defendants concede that fees could properly be awarded against Aread under the statute.

contract claims, and thus, the claims against the Afkhamis fell within the purview of § 12-341.01.

¶38 For a claim to "arise out of contract" for purposes of § 12-341.01, the contract must have a causal connection with the claim. *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 14, ¶ 21, 6 P.3d 315, 319 (App. 2000). Where a contract creates a relationship that gives rise to duties imposed by law, breach of those legal duties does not present a claim arising out of contract. *Id*. at 15, ¶ 24, 6 P.3d at 320. Fees may be recovered under § 12-341.01 for tort claims intertwined with contract claims, but only where the cause of action in tort could not exist but for the breach of contract. *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 543, 647 P.2d 1127, 1141 (1982) (bad faith claim against insurer could not exist absent breach of the contract). Fees are not available under § 12-341.01 where the claim is based on a statutory obligation. *O'Keefe v. Grenke*, 170 Ariz. 460, 472, 825 P.2d 985, 997 (App. 1992).

¶39 Plaintiffs alleged the Afkhamis were personally liable for breaching fiduciary duties owed as directors of Aread and for fraud in the sale of securities in violation of A.R.S. §§ 44-1991, -1999, and -2003. These claims arose from duties imposed by law and statute and did not arise out of contract. Although the contract, if valid, would have established the

relationship of director and shareholder, the breach of fiduciary duty claim was a claim that could have existed absent a breach of the contract. Similarly, the statutory duties were not dependent on a breach of the contract. Attorneys' fees were thus inappropriate under § 12-341.01.[2]

¶40 Attorneys' fees are available on an unjust enrichment claim where the claim is based on a contract. *Schwab Sales, Inc. v. GN Constr. Co., Inc.*, 196 Ariz. 33, 37, ¶ 11, 992 P.2d 1128, 1132 (App. 1998). However, Mobassery specifically testified that the funds were paid to Aread, not the Afkhamis. The record does not establish a basis for personal liability by the Afkhamis on the unjust enrichment count.[3]

¶41 Both sides request an award of attorneys' fees on appeal. Defendants cite no authority, and plaintiffs cite only Rule 21, Arizona Rules of Civil Appellate Procedure, which is

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[2] Moreover, if the jury found the Agreement invalid, then plaintiffs were not shareholders of Aread, and the Afkhamis, as directors of a company in which plaintiffs had no interest, owed them no duties. In addition, with respect to the claims relating to the sale of securities, the court instructed the jury that if it found statutory violations, then the Afkhamis would be personally liable, and plaintiffs would be entitled to recover their payments with interest. The jury did not award interest, suggesting it did not find the Afkhamis personally liable on that claim.

[3] Although plaintiffs contend Afkhami acknowledged the payments were given to the "Afkhamis and Aread and spent by them," that Afkhami said he was indebted to the Mobassery Shareholders, and that the Afkhamis kept the $325,000, they cite no record support for these claims.

not a substantive basis for a fee award. *See Ezell v. Quon,* 224 Ariz. 532, 539, ¶ 31, 233 P.3d 645, 652 (App. 2010) (Rule 21 provides the procedure, but not the basis, for a fee award). We thus decline to award appellate fees to either party. *See Country Mut. Ins. Co. v. Fonk*, 198 Ariz. 167, 172, ¶ 25, 7 P.3d 973, 978 (App. 2000) (request for fees on appeal will be denied where party fails to state any substantive basis for the request).

CONCLUSION

¶42 We reverse the award of attorneys' fees against the Afkhamis personally, but affirm the judgment of the superior court in all other respects.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
PATRICIA A. OROZCO, Judge