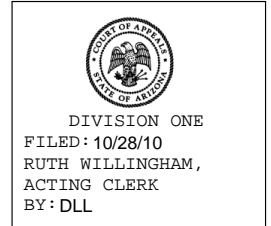


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



3 MAG GROUP, L.L.C., an Arizona) 1 CA-CV 10-0168
limited liability company,)
) DEPARTMENT E
Plaintiff-Counter-)
defendant-Appellant,) **MEMORANDUM DECISION**
)
v.)
) (Not for Publication -
LEWIS & WALRAVEN ENTERPRISES,) Rule 28, Arizona Rules
INC., an Arizona corporation,) of Civil Appellate Procedure)
)
Defendant-Counter-)
claimant-Appellee,)
)
ROARK LEWIS and JANICE LEWIS,)
husband and wife,)
)
Defendants-Appellees.)

Appeal from the Superior Court in Yavapai County

Cause No. P1300-CV20070299

The Honorable David L. Mackey, Judge

AFFIRMED

The Helms Law Firm, P.L.C.
by Michael G. Helms
Attorney for Appellant

Phoenix

Roberts & Carver, PLLC
by Paul L. Roberts
Attorneys for Appellees

Prescott

W E I S B E R G, Judge

¶1 This is an appeal by 3 Mag Group, L.L.C. ("3 Mag") from the trial court's order granting partial summary judgment in favor of Lewis & Walraven Enterprises, Inc. ("L & W") and Roark Lewis and Janice Lewis (collectively "Defendants"). 3 Mag asserts that a genuine issue of material fact exists on its claim of fraud and misrepresentation as alleged in count three of the complaint. It contends that when 3 Mag and L & W entered into an oral agreement, L & W did not intend to perform its obligations under the agreement. It alleges that a jury should determine L & W's intent at the time the agreement was made. For reasons that follow, we affirm the trial court's order.

BACKGROUND

¶2 For purposes of this appeal, the parties agree on the following facts. 3 Mag is a licensed contractor engaged in the business of residential home construction; L & W is a real estate developer, and Roark Lewis is the president of L & W. In 2003, L & W was engaged in the development of the Creekside subdivision in Prescott. In 2004, 3 Mag and L & W, through Roark Lewis, entered into an oral agreement in which 3 Mag was to complete construction of several homes on lots in Creekside and to build new homes on other lots. Under the agreement, after L & W sold the homes, 3 Mag was to receive from the proceeds of sale, reimbursement for its direct and indirect construction costs, plus the first \$10,000 of profit from each

home sale. L & W was to receive the next \$10,000 of profit from each sale, to the extent such sale generated such profit, and 3 Mag was to receive any remaining profit.

¶3 3 Mag performed its obligations under the agreement, but L & W only partially performed its obligations. In particular, L & W failed to reimburse Mag 3 for its direct and indirect construction costs for some of the homes and failed to pay 3 Mag any of its share of profits from the sales of all the homes it constructed.

¶4 3 Mag filed a complaint against Defendants alleging breach of contract (Count One); "money had and received" as to L & W only; (Count Two); and fraud and misrepresentation (Count Three). As to Count Three, 3 Mag alleged that L & W, through Roark Lewis, represented to it that it would pay 3 Mag pursuant to the terms of the agreement; that 3 Mag relied on the representations, that the representations were material, and that in reliance thereon, Mag 3 constructed the homes; that the representations were false when made, were known to be false, and were intended to induce and did induce 3 Mag to construct the homes; and that 3 Mag was entitled to rely and did rely on such representations to its detriment. Mag 3 sought \$557,479.14 in compensatory damages and punitive damages.¹

¹3 Mag alleged in its Rule 26.1 initial disclosure statement that L & W owed it \$663,752.16. Although 3 Mag has separately set forth the amounts L & W allegedly owes it on each home, for

¶15 Defendants filed a motion for partial summary judgment on Count Three. Although "vigorously disput[ing] 3 Mag's rendition of the facts," for purposes of this motion, they assumed the truth of the allegations in the complaint, the initial Rule 26.1 disclosure statement, and the deposition testimony of Maryam Schag, an agent of 3 Mag, who confirmed the terms of the agreement as interpreted by Mag 3. They argued, however, that 3 Mag had not stated a claim for fraud or misrepresentation because it had not offered sufficient evidence that L & W did not intend to perform its obligations under the agreement at the time it was entered into by the parties. They alleged that as a matter of law, its promise to pay in the future, without more, did not constitute actionable fraud, but rather breach of contract as set forth in count one of the complaint. They further alleged that 3 Mag was not entitled to either compensatory or punitive damages on this theory of recovery.

¶16 3 Mag filed its response to motion for partial summary judgment arguing that a promise to perform a future act may constitute actionable fraud if the promise was made with a present intent not to perform. 3 Mag also alleged that "[t]he failure of L & W to pay 3 Mag any portion of the profits from

purposes of the motion for partial summary judgment and this appeal, such details are immaterial.

the sale of the Creekside homes is clear evidence that L & W never intended to share any of the profits and that its representations that it would pay [profits] were false at the time the representations were made. . . . Such conclusion is further bolstered by L & W's failure to reimburse even a portion of the construction costs on at least five [] of the homes." 3 Mag further alleged that L & W's denial throughout the action that it had agreed to share in the profits from the sale of Creekside homes was further evidence of L & W's fraud and misrepresentation. 3 Mag did not offer any other evidence of fraudulent intent.²

¶7 Finding there was no genuine issue of material fact and that Defendants were entitled to judgment as a matter of law, the trial court granted the motion for partial summary judgment on Count Three. After denying 3 Mag's motion for reconsideration, the court entered a judgment pursuant to Rule 54(b), Arizona Rules of Civil Procedure. 3 Mag timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

²In its briefs, as additional evidence of fraudulent intent, 3 Mag asserts that L & W failed to provide an accounting of and concealed information about profits received from the sales of homes. These alleged facts were not, however, presented to the trial court with support in the record, and we do not consider them. *Hahn v. Pima Cnty*, 200 Ariz. 167, 172, ¶¶ 13-14, 24 P.3d 614, 619 (App. 2001) (when reviewing challenge to grant of summary judgment, failure to present facts or issues to trial court first constitutes waiver on appeal).

DISCUSSION

¶18 On appeal, 3 Mag asserts that there is a genuine issue of material fact as to whether L & W intended to perform its obligations under the agreement at the time it was entered into by the parties. It argues that although it did not offer facts directly supporting its claim in response to Defendants' motion, the necessary fraudulent intent can be can be inferred circumstantially from L & W's acts.

Standard of Review

¶19 Summary judgment is proper if no genuine issue of material fact exists and "the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56 (c). But "if the facts produced in support of the claim or defense 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 or defense," the court may resolve the issue. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We determine de novo whether there are genuine issues of material fact and apply the same standards as that used by the trial court in ruling on the motion. *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990). We view the evidence in the light most favorable to the party against whom summary judgment was entered and resolve all inferences from the evidence in that party's favor.

Prince v. City of Apache Junction, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). Although any evidence or reasonable inference contrary to the material facts will preclude summary judgment, "[m]ere speculation or insubstantial doubt as to the facts will not suffice." *United Bank of Ariz.*, 167 Ariz. at 195, 805 at 1016.

Evidence of Fraudulent Intent

¶10 The elements of common law fraud or fraudulent misrepresentation are:

(1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity . . . , (5) the speaker's intent that it be acted upon by the recipient in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) the hearer's reliance on its truth, (8) the right to rely on it, and (9) his consequent and proximate injury.

Enyart v. Transam. Ins. Co., 195 Ariz. 71, 77, ¶ 18, 985 P.2d 556, 562 (App. 1998). "Each element must be supported by sufficient evidence, *id.*, cannot be shown "by doubtful, vague, speculative or inconclusive evidence." *Id.* (quoting *Echols v. Beauty Built Homes, Inc.*, 132 Ariz. 498, 500, 647 P.2d 629, 631 (1982)).

¶11 An unfulfilled promise may form the basis for a cause of action for fraud "where made with the present intention not to perform." *Id.* (citations omitted). However, without evidence of such a present intent, a claim of fraud does not arise merely

from a promise to do something in the future. *MH Inv. Co. v. Transam. Title Ins. Co.*, 162 Ariz. 569, 574, 785 P.2d 89, 94 (App. 1989); see also *Trollope v. Koerner*, 106 Ariz. 10, 19, 470 P.2d 91, 100 (1970) (breach of contract is not fraud where no evidence of making promise without intent to perform). Further, although intent to defraud need not be explicit and may be inferred from conduct, "an intent not to perform or to deceive must be established independent of a showing of the defendant's failure to perform." *McAlister v. Citibank Ariz., a subsidiary of Citicorp*, 171 Ariz. 207, 214, 829 P.2d 1253, 1260 (App. 1992)(citations omitted).

¶12 Here, the only evidence 3 Mag offered of L & W's intent not to perform when the parties entered into the agreement was L & W's failure to pay according to the terms of the agreement and its denial in the action of its obligations to pay. It offered no independent evidence of a present intent to defraud. L & W's failure and/or refusal to perform, without more, is inadequate to establish an intent to deceive. *McAlister*, 171 Ariz. at 214, 829 P.2d at 1260. Further, any inference of such intent from these facts would be based on mere speculation. *United Bank of Ariz.*, 167 Ariz. at 195, 805 P.2d at 1016.

¶13 3 Mag cites *Southern Union Co. v. Southwest Gas Corp.*, 180 F. Supp. 2d 1021 (D. Ariz. 2002), which interpreted

California law, for the proposition that the subsequent conduct of a defendant, such as a failure to immediately carry out a promise, is evidence that the defendant made the promise without the intent to keep it. But that case does not help 3 Mag because the court there noted the well-established rule that an intent to defraud cannot be inferred from mere nonperformance of a promise. *Id.* at 1031. Because 3 Mag failed to provide sufficient evidence from which a reasonable jury could infer fraudulent intent, the trial court properly granted Defendants' motion for partial summary judgment on count three. *Enyart*, 195 Ariz. at 77, ¶ 18, 985 P.2d at 562.

CONCLUSION

¶14 For the foregoing reasons, the trial court's grant of partial summary judgment is affirmed. Neither party has requested attorneys' fees. We award Defendants their costs on appeal, subject to compliance with Rule 21(a), Arizona Rules of Civil Appellate Procedure.

/s/ _____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/ _____
PHILIP HALL, Presiding Judge

/s/ _____
PETER B. SWANN, Judge