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

MOE TASSOUDJI, a single man; LINDA JOHNSON, a single woman; and GARY L. CRANDELL, Plaintiffs/Appellants, v. CLUB JENNA,INC., a Delaware corporation; CJI HOLDINGS, INC., a Delaware corporation; PLAYBOY ENTERTAINMENT GROUP, INC., a Delaware corporation, Defendants/Appellees.	1 CA-CV 10-0200 Department A **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause Nos. CV2008-051910
CV2008-053278
CV2009-053706
(Consolidated)

The Honorable Robert Budoff, Judge

AFFIRMED

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T H O M P S O N, Judge

¶1 Appellants appeal from the trial court's dismissal of their First Amended Complaint against the Playboy Entertainment Group, Inc., defendants (Playboy). We affirm.

FACTS AND PROCEDURAL HISTORY

¶2 This is a business contract case involving, essentially, three parties. From 1999 until mid-2006, appellants were minority stockholders who acquired interests in "Club Jenna" along with Jenna Massoli and her then husband John Grdina (collectively, Massoli). Club Jenna owned the exclusive rights and license to promote adult film star Jenna Jameson, including film production, product licensing and merchandising. In mid-2005, Playboy indicated interest in purchasing Club Jenna and related companies; discussions ensued.

¶3 According to appellants' complaint, in August 2005, Playboy presented Club Jenna with a

> non-binding offer to purchase 100% of the assets of Club Jenna. The listed purchase price was between $25-35,000,000. Playboy's offer was expressly contingent upon satisfactory completion of due diligence . . . and the total purchase price would "take the form of cash, include equity consideration, or include some form of profit sharing or earn-out arrangement."

A Club Jenna meeting was held where terms for the potential sale were discussed. Appellants authorized Grdina to act on their behalf consistent with their discussions at the meeting. In anticipation of the sale to Playboy, on or about June 2006, Massoli purchased appellants' minority interests in Club Jenna. Appellants were to be paid a pro-rata share of the sale price with the possibility of "earnouts" up to a certain specified amount after such earnouts were paid to Massoli by Playboy. An earnout was a payment for future sales of existing content and produced content. Shortly after appellants sold their shares, Playboy purchased Club Jenna from Massoli for $17,491,000 payable over five years plus certain quarterly earnout payments. Additionally, Massoli and Grdina each entered into five-year personal service agreements with Playboy with beginning introductory salaries of $400,000.

¶4 Playboy has made no earnout payments to Massoli and Massoli has not taken action to collect earnout payments from Playboy. In 2008, appellants filed suit against Massoli and Playboy. The original claims against Playboy were: intentional interference with contract, fraud and deceit, breach of implied covenant of good faith and fair dealing, aiding and abetting, negligent misrepresentation, and securities fraud. Playboy filed a motion to dismiss for failure to state a claim under Rule 12(b)(6), Arizona Rules of Civil Procedure, which the trial

court granted. The trial court then allowed appellants to amend their complaint. After the First Amended Complaint was filed, which amended the allegations against Playboy to intentional interference with contract, fraud and deceit, and aiding and abetting, Playboy again filed a motion to dismiss and the trial court again granted the dismissal. The trial court, using Rule 54(b) language, entered judgment for Playboy.[1] Appellants timely appealed.

DISCUSSION

¶5 Appellants raise four issues on appeal:

1. Whether the amended complaint against Playboy was sufficient under notice pleading standards;

2. Whether a waiver or release can shield Playboy from fraud and intentional torts;

3. Whether non-economic loss must be pled and proved in support of appellants' claim of fraud and intentional tort against Playboy; and

4. Whether appellants' fraud claim is sufficient under the pleading standards of Rule 9 of the Arizona Rules of Civil Procedure?

¶6 We review whether the trial court correctly dismissed appellants' complaint under an abuse of discretion standard. *See Toy v. Katz*, 192 Ariz. 73, 83, 961 P.2d 1021, 1031 (App. 1997). In our review of a trial court's dismissal pursuant to Rule 12(b)(6), Arizona Rule of Civil Procedure, we accept the

[1] Claims against Massoli continue in the trial courts.

complaint's allegations as true and resolve all inferences in appellants' favor. *Wallace v. Casa Grande Union High Sch. Dist. No. 82*, 184 Ariz. 419, 424, 909 P.2d 486, 491 (App. 1995). We review questions of law de novo. *Phoenix Newspapers, Inc. v. Dep't of Corrections*, 188 Ariz. 237, 244, 934 P.2d 801, 808 (App. 1997). We will uphold a dismissal when it is certain that an appellant could not prove any set of facts entitling him or her to relief. *See Wallace*, 184 Ariz. at 424, 909 P.2d at 491.

¶7 The pleadings reflect several key facts. Appellants and Playboy have no contractual relationship to one another. Appellants sold their minority interests in Club Jenna to Massoli. Appellants' contracts for the sale of their shares were for a pro-rata share of the consideration received from Playboy. Each share-sale contract[2] included language in Section 3 that Massoli "anticipate[s] (but [does] not guarantee[s])" certain consideration for the sale of Club Jenna; the consideration categories were broken down into closing payments, deferred payments and earnout payments. Section 25 of the contract provides, in part, that

> each party has had the opportunity to ask questions and receive answers from the other party and the Companies regarding their business, properties, prospects and financial condition and the Transaction . . . each party represents and warrants that it is not relying on any other representations, warranties,

[2] Appellants refer to these as "side deals" or "side agreements."

covenants or agreements, whether written or oral, in entering into this Agreement.

In sections 8(l) and (m) and section 17 of that contract, each appellant indicated that they were sophisticated investors capable of evaluating the risks and merits of the transaction, that the transaction was arms-length and each had the opportunity to consult with independent legal counsel and advisors. In section 8(k), each "relinquishe[d] any future claims against" the acquiring parties and their "successors or assigns."

¶8 It is undisputed that while appellants have not received earnouts, all earnouts had to flow from Playboy to Massoli and then from Massoli to appellants and Massoli has received no earnout payments. Also undisputed, is that the initial discussions between Playboy and Club Jenna were non-binding and subject to due diligence. Over nine months passed between Playboy's non-binding offer and the eventual sale by appellants of their shares to Massoli.

¶9 Appellants make three claims against Playboy:

1. Intentional Interference with Contract, specifically that Playboy intentionally and willfully induced Massoli to breach the share-sale contracts with appellants by failing to pay earnouts to Massoli or to entice Massoli not to object to such failure with lucrative personal service contracts. Appellants allege that Playboy intended such actions to benefit itself.

2. Aiding and Abetting, specifically that Playboy aided Massoli in their breach of fiduciary duties to their

minority shareholders in the sale of Club Jenna. Appellants assert that they were denied full compensation by Massoli because the purchase price was reliant on earnouts that Playboy never intended to pay out and purposefully subverted.

3. Fraud and Deceit, specifically that Playboy purchased Club Jenna, using misleading projections, intending not to make earnout payments that appellants relied upon in selling their Club Jenna shares. Appellants assert that Playboy engaged in a subterfuge with Massoli by entering into lucrative personal service agreements that were "used only to create the impression in the Plaintiffs' minds that Grdina and Massoli were required to provide their professional services in connection with the completion, production, promotion and sale of existing content and produced content. Neither Grdina nor Massoli ever performed . . . and Playboy took no action to enforce . . .." Appellants further allege that Playboys actions were undertaken in order to avoid SEC regulations and "to defraud the Plaintiffs rights to payment."

¶10 While Arizona is a notice pleading state, the Arizona Rules of Civil Procedure do require appellant to set forth a "short and plain statement of the claim showing that the pleader is entitled to relief." *See* Ariz. R. Civ. P. 8(a)(2). In order to show that one is entitled to relief, the complaint must contain facts sufficient to demonstrate the alleged wrong. In *City of Phoenix v. Mullen*, our supreme court stated that a cause of action consists of "the unlawful violation of a right which the facts show." 65 Ariz. 83, 88, 174 P.2d 422, 425 (1946)(quoting *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321 (1927)). The *Mullen* Court went on to say that "[t]he relief to which a party is entitled depends upon the facts pleaded." *Id.* (quoting *Keystone Copper Mining Co. v. Miller*, 63 Ariz. 544,

561, 164 P.2d 603, 611 (1945)). Yet, even Rule 8(f) which provides that pleadings should be construed liberally and "as to do substantial justice," does not provide sufficient leeway to save this complaint. We note that the essential contract is part of the pleadings for purposes of the motion to dismiss and only well pled facts are sufficient to withstand dismissal, not legal conclusions. *Cullen v. Koty-Leavitt Ins. Agency, Inc.*, 216 Ariz. 509, 168 P.3d 917 (App. 2007) (reversed on other grounds).

¶11 The elements of contractual interference are: the existence of a valid contractual relationship, the interferer's knowledge of the relationship, intentional interference inducing or causing a breach and resultant damage. *Wallace*, 184 Ariz. at 427, 909 P.2d at 494 (citation omitted). Importantly, the interference must be improper as to motive. *Id.* Liability must be applied with discrimination, particularly where the conduct in question takes place in the context of competitive business activities. *Bar J Bar Cattle Co., Inc., v. Pace*, 158 Ariz. 481, 485, 763 P.2d 545, 549 (App. 1988) ("One who interferes with the contractual rights of another for a legitimate competitive reason does not become a tort-feasor simply because he may also bear ill will toward his competitor. . .. Restatement (Second) of Torts § 768(1)(d) adopts the rule that a competitor does not act improperly if his purpose at least in part is to advance his

own economic interests. See comment g)." Issues of motive are mixed question of fact and law, but we may resolve the issue as a matter of law when there is no reasonable inference to the contrary in the record. *Woerth v. City of Flagstaff*, 167 Ariz. 412, 419, 808 P.2d 297, 304 (App. 1990). Appellants here were not deprived of any contract right because the earnouts were not guaranteed and it is clear that Playboy was acting in its own interests in an arms-length competitive business dealing where appellants were of nominal interest. This claim was properly dismissed for failure to state a claim upon which relief may be granted.

¶12 With regard to the aiding and abetting, this claim springs from what appellants allege is Massoli's breach of fiduciary duty. It is not sufficient to merely allege the legal conclusion that Massoli owed appellants a fiduciary duty. Legal conclusions do not support opposition to a motion to dismiss; only well pled facts may do so. Appellants were obliged to plead facts supporting a fiduciary duty. On appeal, they were obliged to provide legal authority to support their assertion of fiduciary duty. However, references were merely made back to the complaint. Playboy cites *Oldenburger v. Del E. Webb Development, Co.*, 159 Ariz. 129, 133, 765 P.2d 531, 535 (App. 1988), for the lack of fiduciary duty in an arms-length sales transaction. We do not assume, and are not convinced, that

there is a fiduciary duty in this situation. Fiduciary duty requires acting in best interests of the company. *See Atkinson v. Marquart*, 112 Ariz. 304, 306, 541 P.2d 556, 558 (1975).

¶13 Appellants do not explain how the obligations of majority shareholders either continue as to minority shareholders after the transfer of their shares or how, if majority shareholders were acting in the company's benefit, they breached their fiduciary duty. This claim was properly dismissed.

¶14 The elements of common law fraud are a material false representation, scienter, the tortfeasor's intent to induce reliance upon the misrepresentation, the victim's ignorance of its falsity, his actual, reasonable reliance, and his consequent and proximate injury. *Nielson v. Flashberg*, 101 Ariz. 335, 338-39, 419 P.2d 514, 517-18 (1966). As to the fraud claim against Playboy, this allegation lacked the particularity required by Ariz. R. Civ. P. 9(b). *See Parks v. Macro-Dynamics, Inc.*, 121 Ariz. 517, 520, 591 P.2d 1005, 1008 (App. 1979). Appellants must provide some factual materials indicating reasonable reliance on Playboy's earnout figures and that Playboy intended them to rely on such figures. *See Ness v. Western Sec. Life Ins. Co.*, 174 Ariz. 497, 502, 851 P.2d 122, 127 (App. 1992). This is particularly true when, as here, there is no indication of direct contact between Playboy and appellants, and appellants

signed contracts that indicated they were sophisticated investors who were *not* relying on other documents or representations. Merely providing documents to Massoli that were likely to be shared with appellants does not show Playboy's intent to defraud. The fraud claim was not pled with sufficient particularity and was properly dismissed.

CONCLUSION

¶15 For the above stated reasons, the judgment of the trial court is affirmed.

/s/

_____
JON W. THOMPSON, Judge

CONCURRING:

/s/
_____
PHILIP HALL, Presiding Judge

/s/
_____
LAWRENCE F. WINTHROP, Judge