DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

KARLA L. MELGAARD, Plaintiff/Appellant, v. ANNETTE DUNKEL; YAK YAK WIRELESS, L.L.C., an Arizona limited liability company; YUVAL YUVI SHMUL and KARI SHMUL; CDN PROPERTIES & INVESTMENTS, INC., an Arizona corporation dba AMERICAN REALTY BROKERS; JARED GUESS and JANE DOE GUESS, his wife; RICHARD EPSTEIN and JANE DOE EPSTEIN, his wife, Defendants/Appellees.	)	No. 1 CA-CV 10-0276 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-002422

The Honorable John R. Ditsworth, Judge

AFFIRMED

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S W A N N, Judge

¶1 After the failure of a business venture, Karla Melgaard asserted claims for breach of contract and fraud variously against the sellers of the business, Annette Dunkel and Yak Yak Wireless LLC (collectively "Dunkel"), Dunkel's broker, Yuval Yuvi Shmul, and her brokers, Jared Guess, Richard Epstein and CDN Properties and Investments, Inc. (collectively "American Realty").[1] The trial court entered summary judgment in favor of defendants on the ground that Melgaard had failed to proffer sufficient evidence in support of her claims. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In winter 2003, after many years as an accountant in Minnesota, Karla Melgaard began seeking opportunities to purchase and operate an existing small business in the Phoenix area. In her quest, Melgaard was introduced to Richard Epstein, a business broker with American Realty Brokers.

[1] Melgaard's claim against YSGE, LLC, and Edwin Lappi and his wife (collectively "YSGE Defendants") remains pending in the superior court.

¶3 At their first in-person meeting in late 2003, Epstein discussed the availability of a women's apparel store with Melgaard, an opportunity she declined after she, her father, and Epstein met with the store owners. Epstein and Melgaard met again in November or December 2004 after Melgaard's father again contacted Epstein about Melgaard's interest in purchasing a business. At this second meeting, Epstein presented to Melgaard three business opportunities: a florist business, a water and ice business and a cell-phone business comprising two stores. After learning that her first choice, the water and ice business, had been sold, Melgaard decided to pursue the cell-phone stores after learning from Epstein that he knew the seller's broker, Yuval Yuvi Shmul, and that he had done business with him in the past. Shortly thereafter, Melgaard, Melgaard's father, Epstein and Shmul met to discuss the cell-phone stores. At this meeting, Shmul provided Melgaard with spreadsheets representing financial information about the stores, including monthly profits.

¶4 At this meeting, Epstein stated that the stores made a monthly profit of $10,000.[2] Though Melgaard acknowledges that

[2] 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).

Shmul did not make any verbal representations as to the profitability of the stores, he provided her with spreadsheets indicating a monthly profit of approximately $10,000 and statements regarding his own experience operating the stores, which was that the stores were “very profitable.” Melgaard’s own review of the spreadsheets resulted in her determination that the stores were “very profitable” with profits in the neighborhood of $10,000 per month.

¶5 Following the meeting, the group travelled to the physical locations of the stores. At the second location, they met with Dunkel, owner of Yak Yak Wireless LLC, the entity that owned the two cell-phone stores. Dunkel gave Melgaard additional documents including bank statements, credit-card receipts, carrier-commission reports, monthly activation reports, and gross-sales information. Dunkel did not give Melgaard sales-tax returns, nor did she offer any additional financial information. The parties left the store with Melgaard understanding that she would follow up with Epstein if she wanted to pursue purchasing the stores. Between the meetings with Shmul and Dunkel and her ultimate purchase of the stores, Melgaard did not discuss Dunkel’s unwillingness to provide additional documentation regarding the stores’ financial status with Epstein.

¶6 After discussing the business with her father, Melgaard contacted Epstein at the end of December 2004 to inform him that she wanted to buy the stores. Melgaard and her father then met with Epstein and decided upon the terms of the offer. Epstein drafted a Purchase Agreement documenting a $225,000 purchase price, $110,000 of which was in the form of a promissory note. Melgaard signed the agreement and her father provided the funds for the $10,000 deposit. The Purchase Agreement, dated December 24, 2004, included a contingency that gave Melgaard the right to a complete examination of all financial records.

¶7 Through Shmul, Dunkel counter-offered for a total purchase price of $250,000, with $135,000 secured by a promissory note. Melgaard accepted the counteroffer, assumed the lease for one of the stores and agreed to pay $135,000 pursuant to a promissory note. The transaction closed on January 31, 2005.

¶8 In January 2008, Melgaard commenced this action asserting claims for fraud against Dunkel and Shmul based on allegedly false information relating to the profitability of the stores and a claim for breach of contract against American Realty for failure to exercise reasonable skill and care in representing her in the purchase. Dunkel asserted counterclaims for breach of contract relating to the Purchase Agreement,

unpaid amounts on the promissory note and unpaid rents related to Melgaard's obligations under the lease for one of the two store locations.

¶9 In April 2009, American Realty filed a motion for summary judgment arguing that neither the terms of any purported oral agreement nor those of the parties' Real Estate Agency and Disclosure and Election formed a valid basis for a breach of contract. According to American Realty, the parties' contract only required Epstein to "render services." In the absence of a specific duty on which Melgaard could present evidence of a breach, it reasoned, there could be no contract liability. American Realty further argued that Melgaard's claim was in substance one for "negligent performance," a claim sounding in tort that she had neither asserted nor proved.

¶10 Later in April 2009, Dunkel filed a motion for summary judgment, seeking both dismissal of Melgaard's claims and judgment on her counterclaim for breach of contract. Dunkel argued that Melgaard failed to pay $89,651 owing on the promissory note and that Melgaard's breach exposed her to liability for $14,504.26 in unpaid rent on one of the two stores. As to Melgaard's fraud claim, Dunkel argued that Melgaard could not show that Dunkel had made any misrepresentations, intentionally or otherwise.

¶11 In June 2009, Shmul filed a motion for summary judgment on the fraud claim against him, arguing that Melgaard could not reasonably have relied on his representations because she signed four disclaimers acknowledging that Dunkel provided all financial information and that she should not rely on Shmul for investigation or opinion about the accuracy of any information.

¶12 The trial court held oral argument on the three motions. Based on the "written matters previously presented and the discussion and argument presented this date," the court granted American Realty's motion for summary judgment on Melgaard's breach of contract claims. The court later found that there did not exist any facts by which a jury could find by clear and convincing evidence that any fraudulent misrepresentations were made, and granted both Dunkel's and Shmul's motions for summary judgment.

¶13 Melgaard timely appealed the trial court's grant of summary judgment in favor of the moving defendants.[3] Melgaard did not raise Dunkel's breach of contract counterclaim in her

[3] The judgment dismissed fewer than all the claims against all the parties. We originally dismissed for lack of jurisdiction. The trial court entered an amended order containing Rule 54(b) language on February 7, 2011. A new appeal was filed and ultimately dismissed by stipulation of the parties following reinstatement of the original appeal on May 25, 2011.

opening brief, thus it is not addressed in this decision. We have jurisdiction pursuant to A.R.S. § 12-2101(B).

STANDARD OF REVIEW

¶14 Summary judgment should be granted "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." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). In reviewing a grant of summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We determine de novo whether there are genuine issues of material fact. *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990). Although any evidence sufficient to permit a reasonable jury to find the elements of plaintiff's claim by the requisite standard of proof will preclude summary judgment, "[m]ere speculation or insubstantial doubt as to the facts will not suffice." *Id.* at 195, 805 P.2d at 1016. Finally, we will affirm the entry of summary judgment if it is correct for any reason. *Hawkins v. State*, 183 Ariz. 100, 103, 900 P.2d 1236, 1239 (App. 1995).

DISCUSSION

I. MELGAARD FAILED TO PRESENT EVIDENCE OF THE EXISTENCE OF A MISREPRESENTATION OF FACT.

¶15 To prove common law fraud, a plaintiff must prove the following elements by clear and convincing evidence:

> (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," and 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)).

¶16 After a full opportunity for discovery, Melgaard has been unable to produce evidence -- even in the form of her own testimony -- that any defendant made a knowingly false representation concerning the stores or their profitability. At Melgaard's December 9, 2008 deposition, in response to direct questioning regarding her understanding of any inaccuracies on the spreadsheets prepared by Dunkel and provided by Shmul, Melgaard stated, "You'd have to see the documentation underneath it. I don't know. I don't know where those numbers come from."

And when asked how she knew the information that defendants supplied was inaccurate at all, she testified:

> *I don't.* It's just not consistent with my experience. I mean, Annette wrote me a letter that said the stores made money when she owned them, but I don't know that. All I know is I kept, you know, her same employees, used her same advertising, did everything else the same as she did, and it sucked for me.

(Emphasis added.) As to any alleged misrepresentations made specifically by Dunkel concerning the stores' performance, Melgaard stated "[i]t's mostly that I don't know what they represent," and as to anything she could point to that she knew was false, "I don't have enough information to know that."

¶17 As to Shmul, Melgaard not only failed to present evidence of the existence of a misrepresentation, she also signed a Non-Disclosure Letter, a Purchase Agreement, a Removal of Contingencies and a Disclaimer, each of which acknowledged the *Seller's* sole responsibility for the financial information provided. In these documents, she further acknowledged that her reliance on any facts in connection with the transaction was based on her own independent investigation and due diligence. In view of these disclaimers, we perceive no basis upon which Melgaard could demonstrate that she reasonably relied on any purportedly false information that Shmul provided.

¶18 Because the record contains no evidence of any false statement of fact or reasonable reliance, we conclude that the court properly entered summary judgment on the fraud claims.

II. MELGAARD FAILED TO PRESENT ANY EVIDENCE OF BREACH OF CONTRACT SUFFICIENT TO WITHSTAND A MOTION FOR SUMMARY JUDGMENT.

¶19 The superior court granted American Realty's motion for summary judgment on its breach of contract claim, but did not state its reasons. American Realty contends that summary judgment was warranted because the contract contained no specific or express undertaking for Epstein to breach. Though we agree that Melgaard has failed to identify any express contractual term that could form the basis for her claim, our analysis does not end there. Even in the absence of an express contract, real estate brokers owe to their principals duties of good faith, loyalty and disclosure. *Haldiman v. Gosnell Dev. Corp.*, 155 Ariz. 585, 588, 748 P.2d 1209, 1212 (App. 1987) (citing *Vivian Arnold Realty Co. v. McCormick*, 19 Ariz. 289, 293, 506 P.2d 1074, 1078 (App. 1973); *Jennings v. Lee*, 105 Ariz. 167, 173, 461 P.2d 161, 167 (App. 1969)).

¶20 Neither statute nor regulation prescribes a precise quantum of advice that a broker must give to satisfy his implied duties to the client. The only circumstance in which the Arizona courts have specifically addressed the extent of advice, explanation and disclosure of relevant facts owed to a client

can be found in *Morley v. J. Pagel Realty & Ins.*, 27 Ariz. 62, 550 P.2d 1104 (App. 1976). In *Morley*, this court held that where a real estate agent showed sellers a purchase offer that would result in a substantial portion of the purchase price being satisfied by an unsecured promissory note, the broker had the duty to tell the sellers that they should require security for the buyer's performance. *Id.* at 63, 65, 550 P.2d at 1105, 1107. The court explicitly cautioned that this holding was narrow and limited to its facts. *Id.* at 65, 550 P.2d at 1107.

¶21 The facts of this case are readily distinguishable from *Morley*. Here, there were no material facts available to American Realty that were not disclosed -- Melgaard seems only to complain that American Realty did not present her with an accurate prognostic analysis. She points neither to facts nor law that could support a breach of contract case in these circumstances.

¶22 As to the general duties of a broker, the record contains no evidence that Epstein breached his duties of good faith, loyalty or disclosure. Melgaard has presented no facts to establish that any of Epstein's statements regarding the profitability of the business were false, nor has she presented any evidence that even if the statements were false, that Epstein knew or should have known they were false. Melgaard has not asserted, nor come forward with evidence to show that

Epstein engaged in any self-dealing or nondisclosure that would violate his duty of loyalty. Indeed, Epstein disclosed to Melgaard that he knew Shmul and had worked with him in the past. Melgaard presented no evidence that Epstein failed to disclose any other information pertaining to the transaction that would support her claim for breach of his duties to her. In the absence of any evidence of a breach of contract, we must affirm the entry of summary judgment.

ATTORNEY'S FEES ON APPEAL

¶23 All defendants have requested attorney's fees and costs on appeal. Dunkel requests fees under A.R.S. § 12-341.01(A), on the theory that the court granted summary judgment on her counterclaims for breach of contract. But Melgaard has not appealed those judgments, and the contract claims therefore do not create a basis for fees in this court. The fraud claims against Dunkel and Shmul do not "arise out of contract" as required for an award of attorney's fees pursuant to A.R.S. § 12-341.01(A). Fraud is a tort that can occur without a breach of any contract between the parties and "[t]he duty not to commit fraud is obviously not created by a contractual relationship and exists . . . even when there is no contractual relationship between the parties at all." *Morris v. Achen Constr. Co.*, 155 Ariz. 512, 514, 747 P.2d 1211, 1213 (1987). Accordingly, we conclude that the fraud case does not arise out

of contract, and an award of attorney's fees on appeal is not available. However, as the prevailing parties on appeal, both Dunkel and Shmul are entitled to their costs.

¶24 In our discretion, we award the American Realty defendants their attorney's fees and costs upon compliance with ARCAP 21(c).

CONCLUSION

¶25 For the foregoing reasons, we affirm the trial court's grant of summary judgment in favor of Dunkel, Shmul and American Realty.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
DONN KESSLER, Judge