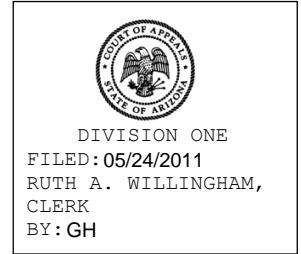


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



GLOBAL COLLECTIONS CORPORATION,) No. 1 CA-CV 10-0426
a foreign corporation,)
) DEPARTMENT D
Plaintiff/Appellee,)
) **MEMORANDUM DECISION**
v.)
) Not for Publication -
MAXIM LIMOUSINE SERVICES, LLC,) (Rule 28, Arizona Rules
an Arizona limited liability) of Civil Appellate Procedure)
company; HANDEL COMPANIES, LLC,)
an Arizona limited liability)
company dba AZ OUTCALL ESCORTS;)
and SHANE R. HANDEL, as personal)
guarantor,)
)
Defendants/Appellants.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-010512

The Honorable J. Kenneth Mangum, Judge

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

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Phoenix

G E M M I L L, Judge

¶1 Maxim Limousine Services, LLC ("Maxim"), Handel Companies, LLC ("Handel Companies"), and Shane Handel appeal the trial court's summary judgment ruling in favor of Global Collections Corporation ("Global"). Global concedes on appeal that there may be a genuine issue of material fact at issue in relation to Maxim's liability, and we reverse the summary judgment as to Maxim only and remand for further proceedings. We affirm the trial court's judgment regarding Shane Handel and Handel Companies because we find no genuine issue of material fact and Global is entitled to summary judgment against them.

BACKGROUND

¶2 In June 2007, Global Collections Corporation filed a complaint against Maxim, Shane Handel, and Handel Companies¹ claiming that they purchased advertising from Global's assignor, Dex Media, Inc., from July 2005 to February 2007 and failed to pay the appropriate charges when due. The complaint alleged that Shane Handel personally guaranteed the debt on behalf of Handel Companies. The complaint further asserted that Maxim and Handel owed them \$137,330.93, plus accruing interest at the contract rate of 18% per year.

¶3 In their answer, Handel and Maxim admitted that Shane Handel and Handel Companies entered into the contracts with

¹ For ease of reference, we will refer to Shane Handel and Handel Companies collectively and singularly as "Handel" unless the context requires otherwise.

Global but asserted that Maxim had never entered into the contracts. Handel alleged that they did not make the payments because "the original holder of the contracts made material misrepresentations regarding the effectiveness of the advertising and that they would generate substantial business." Handel also alleged numerous affirmative defenses including illegality.

¶4 Global moved for summary judgment in August 2008, but the court denied the motion without prejudice to allow Global to renew the motion after the conclusion of discovery.

¶5 Global again moved for summary judgment in December 2009, asserting that Handel refused to pay the balance owed on the contracts and that the amount due then totaled \$269,156.14.

¶6 Handel and Maxim responded and again argued that Maxim had never entered into a contract with Global. Handel also stated that Handel Companies was in compliance with local ordinances regulating escort companies at the time the contracts were originally signed in 2002. Shane Handel failed to renew the registration beyond the initial one-year registration with the City of Phoenix, thus resulting in Handel Companies becoming unauthorized to do business as an escort company. Handel argued that any advertising by Handel Companies after the registration expired "would in effect be an illegal contract advertising illegal businesses." Relying on case law, Handel asserted the

defense of illegality and maintained that the contracts were unenforceable because the terms of the contract were to advertise for illegal services. In addition, Handel alleged that Shane Handel continued his advertisements based upon the representations of a Dex agent who made statements about increases in revenue. Handel argued that the businesses had seen decreases in 2005, and Shane Handel "intended to not renew any of his contracts for 2006, but the agent advised Handel about the increase of fifty percent within three months which induced Handel into continuing the contract."

¶17 The trial court granted Global's motion and entered judgment for \$137,330.93, plus accruing interest on the principal at a rate of 18% per year, and awarded Global \$7393 in attorneys' fees and \$353 in costs.

¶18 Maxim and Handel timely appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶19 Maxim and Handel argue that the trial court erred in granting Global's motion for summary judgment. We review a grant of summary judgment *de novo*. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). Summary judgment may be granted when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Orme*

School v. Reeves, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); Ariz. R. Civ. P. 56(c)(1). Summary judgment is appropriate only "if the facts produced in support of the [other party's] 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 School*, 166 Ariz. at 309, 802 P.2d at 1008.

¶10 Maxim argues that, although Shane Handel owned both Maxim and Handel Companies, he personally signed the guaranty to Dex Media only for Handel Companies, and not for Maxim. Global concedes on appeal that "there may be an issue of fact regarding the liability of Maxim given that the guaranty references only Handel Companies." Global, however, maintains that "there are no issues of fact which would render the trial court's decision to grant summary judgment as to [Shane] Handel and Handel Companies." On this record and in light of Global's concession regarding Maxim, we conclude the trial court erred in granting summary judgment against Maxim.

¶11 Handel argues that the contracts were unenforceable because the advertisements were for illegal services. This argument fails for two reasons. First, although we recognize that a contract may be unenforceable if the acts to be performed under the contract are illegal or against public policy, Handel

admits that the companies were properly registered at the time of the original contracts and that Handel failed to renew the registrations, which then caused the companies to be out of compliance with city codes. See *White v. Mattox*, 127 Ariz. 181, 184, 619 P.2d 9, 12 (1980) (noting that recovery under a contract will be denied "if the acts to be performed under the contract are themselves illegal or contrary to public policy."). Handel cannot excuse its breach of contract by causing the advertised services, through Handel's own fault, to become illegal and then claim the contracts are unenforceable on the basis of illegality.

¶12 Second, even if the escort services provided by the advertised companies were "illegal" because of the absence of proper licenses or registration, it does not follow that performance under the contracts -- advertising by Dex Media for payment by Handel -- is illegal. Handel has not presented any statutory, case law, or other authority establishing that the advertising itself was illegal even assuming that the providing of the escort services was illegal. Accordingly, we do not find Handel's illegality argument to be persuasive. See *White*, 127 Ariz. at 184, 619 P.2d at 12 (finding that because the act of transferring a liquor license was not *per se* illegal, recovery of the purchase price for the license should not have been withheld).

¶13 In addition, Handel argues that a Dex Media representative made material misrepresentations that induced Shane Handel to enter into the contracts. Handel relies on Restatement of Contracts § 476(1) (1932), which states:

Where a party is induced to enter into a transaction with another party that he was under no duty to enter into by means of the latter's fraud or material misrepresentation, the transaction is voidable as against the latter and all who stand in no better position.

See also Horne v. Timbanard, 6 Ariz. App. 518, 520, 434 P.2d 520, 522 (1967) ("We have indicated in two prior decisions that we believe § 476 of the Restatement of Contracts . . . is part of the law of this jurisdiction.").

¶14 The only evidence Handel puts forth regarding the allegation of misrepresentation is contained within an affidavit by Shane Handel, in which he stated that he did not terminate the contracts

because I was promised by the account executive in charge of my accounts that if I continued with the advertisements he recommended I would see a substantial increase in revenues in the next three months after authorizing the advertisements.

¶15 We initially note that the "misrepresentation" described by Shane Handel may constitute sales puffery but does not constitute a representation of fact. Assuming the truth of Shane Handel's affidavit, the Dex Media account executive

"recommended" that Handel would see a substantial increase in revenues from the advertising. This is not a representation of fact but rather an expression of a salesman's opinion or estimate or prediction -- not the stuff upon which a misrepresentation claim can be built. See *Law v. Sidney*, 47 Ariz. 1, 5, 53 P.2d 64, 66 (1936) ("[S]tatements or representations as to the future value or profitableness or prospects of a business are mere expressions of opinion, and a representation that something will be done in the future . . . is at most a contract and not a fraudulent representation."); *Ahmed v. Collins*, 23 Ariz. App. 54, 56-57, 530 P.2d 900, 902-03 (App. 1975) (fraud claim cannot be based on unfulfilled statements about future events).

¶16 We further note that Handel's asserted facts do not satisfy the elements of fraudulent misrepresentation. A claim for fraudulent misrepresentation requires: 1) "a false material representation made with the speaker's knowledge of its falsity or ignorance of its truth and with the intent that it be acted upon by the listener"; 2) "the listener's ignorance of its falsity, reliance on its truth, and right to rely on its truth"; and, 3) a resulting and proximate injury. *Dillon v. Zeneca Corp.*, 202 Ariz. 167, 172, ¶ 13, 42 P.3d 598, 603 (App. 2002); see Restatement (Second) of Torts § 526 (1977) ("A misrepresentation is fraudulent if the maker[:] (a) knows or

believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies."). Handel has failed to provide evidence that the Dex Media agent knew the statement regarding increased revenue was false and intended that falsity to cause Shane Handel to sign the contract for advertisements.

¶17 On this record, we conclude that Handel does not provide controverting evidence to defeat Global's motion for summary judgment. Accordingly, Global's claims against Handel were properly resolved in Global's favor by summary judgment.

¶18 Global, Maxim, and Handel all request attorneys' fees be awarded to them on appeal. "In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." A.R.S. § 12-341.01(A) (2003). Global has prevailed on appeal against Handel. Maxim has prevailed on appeal against Global. In our discretion, we decline to award attorneys' fees to any party, without prejudice to a future award by the trial court upon resolution of all issues. We do determine, however, that Global is entitled to its taxable costs incurred on appeal, subject to its compliance with Arizona Rule of Civil Appellate Procedure 21. See A.R.S. § 12-341.

CONCLUSION

¶19 For the foregoing reasons, we affirm the summary judgment entered in favor of Global against Shane Handel and Handel Companies, but we reverse the summary judgment entered against Maxim and remand for further proceedings.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
PATRICK IRVINE, Presiding Judge

_____/s/_____
ANN A. SCOTT TIMMER, Chief Judge